



Submission to the Board of Taxation Consultation On the Definition of a Charity

September 2003

Background on The Benevolent Society

The Benevolent Society welcomes the opportunity to provide a submission to the Board of Taxation's Consultation on the Definition of a Charity and notes the complexity of this area and the challenges before the Board.

The Benevolent Society was established in 1813 and as such is Australia's oldest charity. Our mission is to anticipate changing social needs and drive innovative and effective responses in communities. Our core programs focus on older people, children and families, women's health and social leadership. The Society is a public benevolent institution operating as a company limited by guarantee. We provide services to approximately 12,000 clients per annum, have over 600 staff and an annual operating budget of close to \$30 million.

Key areas and recommended changes

This submission will address the following key areas of concern to The Benevolent Society:

- The inclusion of the disqualifying Clause 8 (2) (c) with regards to advocacy.
- The absence of the establishment of an independent administrative body to oversee this area.
- The exclusion of partnerships from the core definition of charity.
- The failure of the new Bill to address Public Benevolent Institution status.
- The scope of the Bill to include social enterprises.
- The inclusion of 'a serious offence' in a Bill focussing on defining charities.
- The possible confusion which may arise from a very narrow definition of 'a Government body'.

Positive areas of change

The Benevolent Society welcomes the expansion of the definition of charities to include both child care services and open and non-discriminatory self-help

groups in the draft *Charities Bill 2003*. The former have become an integral part of an Australian system that aims to promote the health and wellbeing of children and families. The latter are key places of social capital creation and the empowerment and enhancement of individuals and groups who are often the most marginalised in our society.

Areas of concern

1. Delete Clause 8 (2) (c)

The Benevolent Society shares the concern of many in the community sector, academia and the broader community regarding *Section 8 – Disqualifying purposes* – of the Act. Whilst the Society has no difficulty with the proposal to disqualify ‘advocating a political party or cause’ (8 (2) (a)) or ‘supporting a candidate for political office’ (8 (2) (b)), we have serious concerns regarding Clause 8 (2) (c), which identifies ‘attempting to change the law or government policy’ as a disqualifying purpose ‘if it is either on its own or when taken together with one or both of the other of these purposes, more than ancillary or incidental to the other purposes of the entity concerned’.

At a practical level, the use of the terms ‘ancillary’ and ‘incidental’ is very unhelpful, given that they are not defined and thus do not provide the ‘greater clarity and transparency’ which is one of the goals of the new legislation. The subjective nature of such terms will obfuscate rather than clarify and in turn are likely to generate unnecessary and expensive legal costs, as charities and other relevant parties seek to test the meaning of these terms.

Of far greater concern to The Benevolent Society than this impact are the broader implications of clause 8 (2) (c). We note that the inclusion of this clause is at odds with the *Report of the Inquiry into the Definition of Charities and Related Organisations (2001)*.

The Benevolent Society is a major provider of services to the community but our *raison d’être* is ‘to initiate social change’. This has always been at the core of our mission. At times ‘attempting to change the law or government policy’ has been and will continue to be, a dominant activity. Our history is one where social policy changes we have recommended have emerged from a deep understanding of practice, examples of this include the old age pension and child maintenance. Equally we are members of a range of Peak Bodies whose dominant activities represent our views on policy to government.

The Society’s nearly two hundred year history of delivering services and deep engagement with communities has shown us that we need new ways, new approaches and new policies if we are to address the outstanding social issues confronting our communities. There is ample evidence that the needs of communities are increasing (see for example child abuse rates, indigenous incarceration rates and the concentration of disadvantage in communities) and unless we advocate for new ways to address them these needs will only worsen over time. Any hint that advocating to change laws or government policy where required, is not an integral and at times dominant and legitimate role for service provider organisations such as ours, strikes at the very heart

of our purpose. Whilst we do not believe that organisations such as ours are the potential targets of this clause, it is likely to have unanticipated (and highly undesirable) impacts on such organisations and therefore is a matter of considerable concern to us.

Further, in a nation such as Australia which values its strong democratic traditions, active debates on government policies and laws should be seen as an essential component of a healthy society. We would argue that advocacy should be seen as a legitimate and valuable part of an active civil democracy. Advocating for changes in government policies and laws should in themselves be seen as 'beneficial to the public', given the contribution such advocacy makes to the overall democratic fibre of the nation. At a time when there has been a collective concern from across all sectors of the community, including governments, of the need to enhance and promote civic participation in the democratic process, the inclusion of Clause 8 (2) (c) may only serve to question the legitimacy and value of such participation. The Benevolent Society therefore strongly urges that this clause be deleted from the draft Bill.

2. Establish an independent administrative body

The Benevolent Society, like many other organisations and individuals, endorsed the recommendation of the *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001) that an independent administrative body for the charitable sector be established. The current reality which sees the Australian Taxation Office (ATO) as the primary decision maker in regard to charitable status is inappropriate given the broad role and function of charitable organisations and the much narrower focus of the ATO. Of particular relevance is that "the ATO believes it is not necessary for it to retain its role in determining charitable status" (*Report of the Inquiry into the Definition of Charities and Related Organisations* (2001), page 290).

We therefore note with regret that the draft *Charities Bill 2003* does not allow for the establishment of a new independent administrative body to oversee the sector. Whilst the establishment of any new national agency should not be undertaken lightly, the current gaps identified by the 2001 Report and the significant expansion of the role of the sector in Australian society, warrant such an endeavour. To introduce the *Charities Bill 2003* without such an agency would result in the omission of a vital part of what is required in order to create both a legislative and administrative framework which is appropriate for the current and future operations of the charitable sector.

3. Acknowledge the role of partnerships

One of the major motivations for the introduction of the *Charities Bill 2003* (as The Benevolent Society understands it) is the desire to have the definitions of charities and related organisations which are relevant and appropriate to Australia's current and future social and economic environment. There has been a clear recognition by all stakeholders that whilst the current definitions have contributed to the development of a strong 'charity' sector in Australia, they belong to a period where organisations were more easily defined and

fitted into one rather limited 'category'; a time where the lines between different organisations were more absolute; and where the responsibility for 'the needy' was largely seen as the responsibility of 'welfare' organisations.

Today, organisations like The Benevolent Society are entering into partnerships with a range of diverse players, in recognition of the need to harness a diversity of skills, expertise and sources of funding if we are to seriously address the complex issues facing communities. Such partnerships are a critical component of bringing the essential new thinking and ways of working into the sector. Our experience as a founding partner of Social Ventures Australia (SVA) has confirmed for us the value of such partnerships. Further, a partnership approach has been endorsed by all levels of government with many funding programs now preferring proposals which are genuine partnerships between diverse organisations. The importance of community and business partnerships has been particularly stressed by the Commonwealth Government.

The Benevolent Society therefore notes with concern that the *Core definition* (Part 2 of the *Charities Bill 2003*) precludes 'a partnership' from being a charity. We would argue that it makes little sense to have some policies which actively support community-business partnerships for example and another range of policies (or legislative framework) which act as disincentives for such partnerships.

4. Address Public Benevolent Institution status

One of the most confusing definitional issues for organisations in the sector and members of the community at large has been the relationship between charitable status, Deductible Gift Recipient Status and Public Benevolent Institution (PBI) status. The *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001) recommended that in adopting a new definitional framework "the category of public benevolent institution be replaced..." (page 258). The *Charities Bill 2003* however does not mention PBI status, so the existing community confusion is likely to continue. This would appear to be at odds with the desire for 'greater clarity and transparency' in this area. The Benevolent Society would urge that the Government re-visit the recommendations made in the *Report of the Inquiry into the Definition of Charities and Related Organisations* regarding PBI status and have them reflected in the new *Charities Bill 2003*, given the importance of this issue for current and future activities in the sector.

5. Recognise and support social enterprises

The Benevolent Society is convinced of the need to drive innovation in the social sector. Many of the old ways of doing things are no longer effective in addressing the increasingly complex and interconnected issues facing society. Social entrepreneurs and social enterprises are in the Society's view key contributors to ensuring some innovation occurs. The Final Report of the Welfare Reform Group also noted the important role of social entrepreneurs and social enterprises.

Social enterprises do not sit easily within organisational definitions that were developed in a very different social and economic context. Conceptually these organisations sit outside of historical definitions of 'charity'. Historically social entrepreneurs have not been encouraged in Australia and the rate of innovation and entrepreneurship in the social sector has considerably lagged behind that of business. The Benevolent Society notes and welcomes Section 1.26 of the Explanatory Material which indicates that the term 'non-profit does not imply that a charitable entity will not generate a profit'. However, we would still urge the Taxation Board to give attention to whether the proposed *Charities Bill 2003* will adequately support and encourage the development of social enterprises given their vital role in addressing social need.

6. Inappropriateness of inclusion of 'A serious offence' clause in a Bill defining charities

The Benevolent Society notes that the *Core definition* of Charities defined under the draft *Charities Bill 2003* excludes organisations that engage in or have engaged in, "conduct that constitutes a serious offence", from being defined as charities. Whilst The Benevolent Society in no way condones illegal activity it is of the view that this clause is not appropriate to a Bill whose focus is on the definition of charities. Other legislation exists to define unlawful activity and to indicate the consequences of such activity.

Further as it currently stands, the "conduct that constitutes a serious offence" phrase has no specificity regarding the timeframe under which such an exclusion would operate. This could see the clause being imposed on organisations (and thereby excluding them from the definition of 'charity') retrospectively – that is, for behaviour undertaken in a previous time. Alternatively, it could lock out organisations in the future being defined as a 'charity' because of activities undertaken by current or previous staff or Boards. Both applications are highly undesirable and The Benevolent Society would argue a poor outcome if the legislation has fairness as one of its goals.

7. Clarification of what is meant by a government body

The Benevolent Society supports the Bill's common sense identification that charities should not be 'a government body' (Core definition (4 (1) (f))). It would however urge that there is a need to clarify what is meant by 'a government body' and in particular to ensure that organisations which receive public funding (no matter to what level of their total income) are not excluded from being defined as a 'charity' on this basis. We note from the Explanatory Material (Section 1.19) that it is not the intention of the Bill to exclude organisations from being defined as a charity purely on the basis of their source of funding. Recent developments in the Victorian Civil and Administrative Tribunal however have highlighted the importance of the *Charities Bill 2003* being very clear about what is meant by the term 'government body'.