

The Cancer Council Australia submission to the Board of Taxation Consultation on the Definition of a Charity



Overview

The Cancer Council Australia welcomes the opportunity to comment on the draft Charities Bill 2003. While this bill broadens the legislative definition of a charity to include several worthy classes of organisations, and resolves some ambiguities within current common law interpretations, we believe that several provisions are badly drafted and may hinder rather than enhance the work of charities in Australia.

In particular, The Cancer Council Australia is concerned that the legislation might be used in future to impede or discourage our advocacy efforts to improve cancer control. We are concerned at the provision in the draft legislation that would disqualify a charity for "attempting to change the law or government policy". We are further concerned that the qualification "more than ancillary or incidental to the other purposes of the entity concerned" is inadequately defined and may, if included in the final Bill, be later susceptible to a very restrictive interpretation.

We recommend amending this section in order to accurately reflect the recommendations of the *Report of the Inquiry into the Definition of Charities and Related Organisations* (June 2001), ensuring charities are expressly permitted to engage in advocacy in pursuit of its charitable purposes and on behalf of those they seek to benefit.

The purpose and activities of The Cancer Council Australia

The Cancer Council Australia's goal is to prevent cancer and reduce the burden of illness, disability and death caused by cancer. We achieve this largely by the development and promotion of effective cancer control policy and programs in Australia. The Cancer Council acts nationally on behalf of its member organisations (appendix 1) to advise governments and other bodies on appropriate practice and policies for the prevention, detection and treatment of cancer and is an advocate for the rights of cancer patients to best treatment and supportive care.

The eight state and territory Cancer Councils work independently and together, through The Cancer Council Australia, to undertake and fund cancer research, prevent and control cancer (through effective policy, programs and education campaigns), and provide information and support for people affected by cancer. Thanks to community support, the Cancer Councils are both the leading non-government funders of cancer research in Australia and provide a comprehensive range of community support services for people affected by cancer.

The Cancer Council Australia advocates on behalf of cancer patients for improved treatment and access to services, and on behalf of all Australians to reduce cancer risks and secure government support for research and effective cancer prevention and early detection programs. Our goal is to ensure that issues related to cancer care and control get the attention, legislative action and funding they deserve. Many of the activities we undertake in order to achieve these goals are done with the objective of changing or accelerating change in the law or government policy. They are by any measure in the public interest.

Cancer Councils believe we have a responsibility to advocate for improvements in government policy, programs or legislation to reduce the incidence and impact of cancer. People with cancer, and the general community, expect the community-funded Cancer Councils to advocate on their behalf in this regard.

The direct contact state and territory Cancer Councils have with people affected by cancer, and with the health professionals who provide services and care to them, provides us with knowledge and understanding of the issues and problems faced by this large constituency.

The nature of our mission, and our ability to provide expert advice on all matters of cancer control, means governments traditionally have been open to our representations and in fact seek our contribution to the development of many cancer control policies, programs and reports through bodies such as the Cancer Strategies Group and the National Service Improvement Framework for Cancer.

However, from time to time there may arise contentious policy or legislative matters on which we have differing views and we believe it is important to the Australian community that we protect our right to represent the interests of people affected by cancer or lobby for change we believe will help reduce cancer incidence or impact.

The Cancer Council does not engage in partisan politics and has never endorsed a political party or individual candidate. Our advocacy objectives are informed by evidence and presented in a reasoned and responsible way.

Rather than providing greater clarity and transparency to charitable organisations, we believe the Charities Bill 2003 would jeopardise the capacity of charities to make representation to government to change or improve legislation, government policy and programs without fear of retribution. The wording of the draft bill limits the extent to which we could advocate in the interests of cancer control and people affected by cancer.

Attempts to prohibit or limit advocacy by charities

There are two provisions in the draft Charities Bill which apparently seek to limit the ability of charities to engage in advocacy:

1. Section 4 (1) (c) requires that to be a charity, an entity must “not engage in activities that do not further, or are not in aid of, its dominant purpose”. This may be especially relevant if changes are contemplated to Section 8 (2) (c) as described below.
2. Section 8 (2) (c) specifically requires that “attempting to change the law or government policy” is a disqualifying purpose unless it is no more than ancillary or incidental to the other purposes of the entity.

While The Cancer Council Australia understands that the intent of section 8 (2) (c) may be to disqualify only organisations that have as their principal purpose political lobbying without having a genuine charitable activity, an ordinary English reading of the text of the draft legislation remains open to the interpretation that any charity which engages in activities intended to attempt to change the law or government policy might be disqualified if an *unspecified* authority makes a judgement that the quantum of activity is more than some *undefined* “ancillary or incidental” amount. The resolution of the issue of whether a purpose is “more than ancillary or incidental to the other purpose of the entity concerned” is a question of degree. As such it is not an exact process and there is no accepted test for determining whether a purpose is a main purpose.

While section 8 (2) (c) apparently seeks to restrict a charity's advocacy (the "purpose" of political advocacy must be incidental to the "other purposes" of the organisation), section 4 (1) (c) provides that an entity cannot engage in an activity, which would include advocacy, that does not further or aid its "dominant purpose". So, depending how the "dominant purpose" is defined, any effort to change the law or government policy might be considered an activity to which section 4 (1) (c) is directed.

The intention of the Charities Bill 2003 is to legislate a definition of charities as part of the Government's response to the *Report of the Inquiry into the Definition of Charities and Related Organisations* (June 2001).

The *Report of the Inquiry into the Definition of Charities and Related Organisations* recommended that there need not be a distinction between advocacy or lobbying activities and other activities which are incidental or ancillary to the entity's charitable purpose:

"Non party-political purposes or activities such as advocating on behalf of their causes or needs, contributing to the development or implementation of public policy, entering into the public debate, or seeking to change a particular law or public policy, should be assessed against the same principles as other purposes and activities. The principles recommended by the Committee are that to be a charity an entity's dominant purposes must be charitable purposes or be incidental or ancillary to them."

The report clearly recommended a distinction between "purposes that advance a political party or a candidate for political office, which will deny charitable status, and non party-political purposes, that will not affect charitable status provided they further, or are in aid of, the charity's dominant charitable purpose".

The proposed section 8 expressly identifies advocacy as a disqualifying purpose, whereas the Inquiry clearly recommended that apart from restricting *partisan* political purposes, advocacy in support of an entity's charitable purposes should be permitted. Section 8 needs only to restrict *partisan* political advocacy, because according to section 4 (1) (c), all other activities of a charity, including advocacy, should further or aid a dominant charitable purpose. We agree that advocacy activities should further or aid the charitable purposes of the entity rather than be efforts to achieve political power or influence for other purposes, but disagree with attempts to prohibit or restrict appropriate advocacy.

We recommend that section 8 should be amended to be consistent with the recommendations of the *Report of the Inquiry into the Definition of Charities and Related Organisations*:

"Any non-party political activities of a charity should not affect its charitable status provided it acts in good faith and its activities are not illegal or against public policy."

And further, that:

"... charities should be permitted to engage in advocacy on behalf of those they benefit. Conduct of this kind should not deny them charitable status even if it involves advocating for a change in law or policy" [our emphasis].

Recommendations for amendment of the Charities Bill

Treasurer Peter Costello has stated that the draft bill simply codifies current common law. He stated that under current law to be a charity an entity needs a charitable purpose and that the “presence of lobbying does not prevent an entity being a charity if it is incidental to the charitable aim” (*Australian Financial Review*, 20/8/03). While we welcome the Treasurer’s reassurances that the provision will not be used to “gag” charities, we suggest the most appropriate way to ensure this is to amend these sections of the draft Bill to avoid the possibility of such an interpretation by explicitly permitting, rather than prohibiting or restricting, public advocacy by charities in pursuit of their main charitable purpose.

We recommend the deletion of 8 (2) (c) or an amendment to section 8 that does not require determination of whether advocacy activities are “more than ancillary or incidental” to other purposes. This provision seems intended to impose a restriction on the amount or kind of advocacy activities an entity could undertake, and could necessitate time- and resource-consuming regulation by charities of the advocacy activities they undertake (in case audited by the Taxation Office, for example).

Section 4: Core definition

We suggest that section 4 (1) (c) be expressed in the positive rather than a double-negative as at present, and make it clear (as in section 6) that a charity may have more than one dominant charitable purpose:

(1) A reference in any Act to a charity, to a charitable institution or to any other kind of charitable body, is a reference to an entity that:
(c) engages in activities that further, or are in aid of, its charitable purposes;

Section 8: Disqualifying purposes

Section 8 (2) (a) refers to the purpose of “advocating a political party or cause”. We assume this is intended to be read as “a political party or *political* cause”, but as drafted it could be interpreted as referring to advocating a “cause” of any nature.

We recommend amendment of section 8 (2) (a) to clarify that it is “advocating a political party or *political* cause” which is a disqualifying purpose.

We recommend that section 8 (2) (c) of the Bill be deleted. The recommendations of the *Report of the Inquiry into the Definition of Charities and Related Organisations* regarding party-political purposes are effectively enacted by sections 8 (2) (a) and (2) (b). Section 8 needs only to restrict *partisan* political advocacy, because according to section 4 (1) (c), all other activities of a charity, including advocacy, should further or aid the charitable purposes of the entity.

If it is felt necessary to include a reference to attempts to change the law or government policy in section 8, we recommend a provision along the following lines:

Engaging in advocacy activities, including attempting to change the law or government policy, is not a disqualifying purpose provided this is not the dominant purpose or activity of the organisation.

This would also necessitate deleting or redrafting the existing statement which makes this purpose a disqualifying purpose if it is “more than ancillary or incidental to the other purposes of the entity”.

Other issues of concern

There are several other provisions of the draft Bill that are unworkable or inappropriate, and these will have been considered in greater detail in submissions from other organisations.

However, we draw the Board's attention to the following matters:

1. There are presently different systems of regulating charitable organisations in each state and territory. Unless all adopt this proposed Commonwealth statutory definition, it will have no effect outside the area of Commonwealth law, and will create confusion and administrative difficulties for charities (particularly national bodies).
2. **Section 4 (1) (b)** states that a charity must have one dominant charitable purpose, in contradiction to section 6 which refers to "one or more purposes which are charitable". We suggest section 4 be reworded in line with section 6.
3. **Section 4 (1) (e)** of the Bill refers to "conduct that constitutes a serious offence". This provision is concerning for several reasons:
 - (a) it refers not to a conviction but merely conduct that might be indictable;
 - (b) it suggests a charity that engages in, or has in the past engaged in, unlawful activity would lose its charitable status permanently – there is no mention of limitation (ie the unlawful activity may have been committed under the governance of a previous board, 20 years ago), appeals mechanisms, or a process for regaining charitable status after rectification;
 - (c) the appropriate response to an organisation's unlawful activity is according to the law that has been breached, rather than within the definition of a charity.

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Appendix 1

The Cancer Council Australia member organisations

The Cancer Council ACT

The Cancer Council New South Wales

The Cancer Council Northern Territory

The Cancer Council South Australia

The Cancer Council Tasmania

The Cancer Council Victoria

Cancer Foundation of Western Australia

Queensland Cancer Fund