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Consultation on the Definition of a Charity
Board of Taxation
C/- The Treasury
Langton Crescent
PARKES ACT 2600
charitydefinition@taxboard.gov.au

30 September 2003

Dear Sir / Madam,

The National Association of Community Legal Centres (NACLC) is the peak body of community legal centres in Australia. Our membership is made up of:

1. NSW Combined Community Legal Centres Group;
2. Victorian Federation of Community Legal Centres;
3. WA Association of Community Legal Centres
4. SA Association of Community Legal Centres
5. Tasmanian Association of Community Legal Centres
6. Queensland Association of Independent Legal Services
7. NT Association of Community Legal Centres
8. ACT Community Legal Centres.

We represent 207 community legal centres nationally.

Community legal centres are located throughout metropolitan, outer-metropolitan, regional, rural and remote Australia. We have a greater geographic coverage than any other service provider in the legal sector. We provide specialist assistance in many areas of law - disability discrimination, tenancy law, income support and social security matters, child support advice for liable and carer parents, credit and debt matters, domestic violence and neighbourhood disputes. We provide a unique service to disadvantaged communities as well as those with particular needs. Our centres include womens legal services, Indigenous women's legal services, youth legal services and older people's services.

We provide free legal services to over 350,000 clients per year, in all areas of law but particularly in areas of law where expertise is in short supply elsewhere within the legal sector. We provide more services to women than men and the majority of our clients have low incomes.

Community legal centres receive their funding from a variety of sources. 125 centres receive some funding from the Commonwealth Attorney General's Department. Many centres are entirely reliant on volunteers for the provision of

legal services. Many centres are reliant on donations. All centres rely on the direct and active support of their communities.

Importantly, for this consultation – all but four community legal centres have charitable status; all but four centres have deductible gift recipient status; all but twelve centres have public benevolent institution status; and all but twelve centres offer salary packaging to their staff utilizing the fringe benefit tax exempt status.

NACLC has a number of concerns in relation to the draft legislation. We have obtained pro bono legal assistance to advise us on the proposed legislation and the possible effects on community legal centres and state associations.

We have gratefully received this pro bono assistance from Arnold Bloch Leibler and from John Emerson at Freehills. Arnold Bloch Leibler's advice was provided to us together with advice to the Victorian Federation of Community Legal Centres. A submission based on this advice is attached. John Emerson has submitted to the Consultation individually at the request of a number of groups. We also attach and endorse his submission which was written in response to our questions.

The NSW Combined Community Legal Centres Group has also produced a detailed submission to this enquiry. This submission also addresses our concerns. NACLC endorses this submission and also attaches it for your consideration.

Finally, NACLC supports all submissions from community legal centres. The work of CLCs is a critical contribution to the community and assists those who otherwise would be unable to access legal services, often in times of crisis. We understand that the intention of the proposed legislation is not to interrupt or prevent this ongoing assistance to the Australian community. It is on that understanding, we make these submissions and ask that you adopt the recommendations contained within them to ensure the ongoing viability of community legal centres and to obviate any unintended adverse consequences for our clients or our centres.

Yours sincerely
Liz O'Brien
National Convenor

SUBMISSION

Draft Charities Bill 2003

**Board of Taxation Consultation
September 2003**

**Produced with the assistance of Arnold Bloch Leibler and in conjunction with the
Federation of Victorian Legal Centres**

B. Summary of Concerns with the Workability of the Charities Bill 2003

1 NACLCLC and the Federation broadly supports the codification of the definition of charity to the extent that it will modernise the law to recognise current social conditions in Australia and provide greater certainty and clarity to charities. NACLCLC and the Federation does, however, wish to raise a number of matters concerning the workability of the Charities Bill 2003 (**'the Draft Bill'**) in its present form. These matters may be summarised as follows:

- 1.1 the Draft Bill is not clear as to the relationship between an entity's 'purposes' and 'activities' for the purposes of determining its charitable status;
- 1.2 the definition of 'government body' is too broad, in particular in its inclusion of bodies 'controlled' by government;
- 1.3 the definitions of self-help groups and contemplative religious orders should be clarified;
- 1.4 the Draft Bill is not clear as to the scope of permissible advocacy by charities;
- 1.5 the Draft Bill needs to be further refined to recognise the role of peak bodies;
- 1.6 the Draft Bill needs to clarify further how an entity's charitable status may be affected by illegal activities;
- 1.7 the categories of charitable purpose should more particularly specify charitable purposes to recognise explicitly the protection of human rights;
- 1.8 the Draft Bill does not provide for who will apply the new definition of charities; and

1.9 the reform and codification of the definition of 'charity' may have unintended effects upon PBI status.

C. Summary of recommendations to improve the workability of the proposed definition of charity

2 Recommendation 1:

In providing a legislative codification of the definition of charity, the government should recognise that its powers to do so are arguably limited to defining charities rather than regulating their activities. Accordingly, NACLC and the Federation recommends that much of clause 8 in the Draft Bill be removed as this may amount to an unjustifiable limitation upon the charity's ability to advocate its members' concerns.

3 Recommendation 2:

NACLC and the Federation recommends that the definition of *government body* in clause 3 of the Draft Bill be modified to ensure that entities that receive some form of government funding or assistance are not treated as government bodies. Proposed amendments to the clause 3 definition are set out in the annexure.

4 Recommendation 3:

NACLC and the Federation has great concerns regarding the Draft Bill's treatment of an entity's purposes and activities in determining its charitable status. In particular, NACLC and the Federation is concerned that the Draft Bill does not make clear how and when an entity's activities may be used to infer its purposes. In the interests of certainty and clarity, NACLC and the Federation recommend that the purposes and activities of an entity be separately analysed to determine its charitable status.

5 Recommendation 4:

NACLC and the Federation is extremely concerned about the treatment of political purposes and activities in the Draft Bill. Again, the Draft Bill is unclear as to when an entity's activities may amount to political purposes. Further, the Draft Bill is unclear about what activities a charity may legitimately engage in to promote the concerns that they represent.

NACLC and the Federation recommends that clause 8 in the Draft Bill be amended to clearly distinguish between disqualifying political purposes and disqualifying political activities. NACLC and the Federation recommend that the purpose of supporting a political party or candidate for political office should be the only disqualifying political purposes under the proposed definition. NACLC and the Federation further recommends that disqualifying political activities should be limited to endorsing or otherwise supporting political parties or candidates for political office or else attempting to change the law or government policy where such an activity would not be further to or in aid of the entity's charitable purposes.

NACLC and the Federation recommend that the Draft Bill should make clear that charities are entitled to engage in activities that would advocate or raise public awareness of the concerns that they represent without fear of being stripped of their charitable status.

6 Recommendation 5:

NACLC and the Federation is concerned that clause 4(1)(c) is unworkable in its present form. This clause has potentially unintended consequences in that it may restrict a charity's ability to engage in administrative or fund raising activities. Again, the reference to not engage in any activities that do not further the entity's dominant purpose is problematic. This is because a charity may have more than one charitable purpose. Furthermore, the definition of dominant purpose in clause 6 of the Draft Bill compounds the problem in that it refers to dominant purposes as having public benefit. NACLC and the Federation recommends that the workability of the Draft Bill would be improved by assessing the entity's activities to determine whether it is truly serving its charitable purposes. NACLC and the Federation's recommended improvements to the definition are contained in clause 4(1)(c) and clause 8 in the annexure.

7 Recommendation 6:

NACLC and the Federation believes that there is a logical difficulty in the Draft Bill in that it asserts that an entity's purposes can have practical utility. NACLC and the Federation recommends that this definition will be more readily understood if the entity's *activities* are assessed for public benefit, rather than its *purposes*.

NACLC and the Federation further recommends that the definition of "sufficient section of the general community" in clause 7 may have potentially undesirable

consequences in that some charities provide relief to specific minority groups within the community. In order to ensure that specialist charities are not excluded from charitable status, NACLC and the Federation recommend the replacement of a criterion of numerical size with the concept of access to the benefits provided by the charity.

8 Recommendation 7:

NACLC and the Federation recommend that clause 4(1)(e) in the Draft Bill is unworkable on two grounds. First, it does not state who decides whether, or when, a serious offence has been committed by an entity for the purposes of the definition. Second, the potentially retrospective effect of the clause may create interpretive difficulties. NACLC and the Federation recommend that clause 4(1)(e) be replaced with a clause that would ensure that an entity ceases to be a charity only if it is *convicted* of a serious offence.

9 Recommendation 8:

NACLC and the Federation is concerned that the Draft Bill in its present form does not adequately recognise the role of peak bodies. NACLC and the Federation therefore recommend that the Draft Bill be amended to recognise that the activities of a peak body should include the activities of its members for the purposes of determining the peak body's charitable status.

10 Recommendation 9:

NACLC and the Federation recommend that the definition of charitable purposes in clause 10 of the Draft Bill be clarified to recognise explicitly the protection and advancement of human rights as a discrete head of charity, rather than inferring it from the present heads of charity contained in clause 10.

11 Recommendation 10:

In line with the recommendation of the Inquiry into the Definition of Charities and Related Organisations, NACLC and the Federation recommend that an independent body be established to administer any codification of the definition of charity.

12 **Recommendation 11:**

NACLC and the Federation is concerned that any reform and codification of the definition of charity may have unintended and adverse effects upon the present definition of PBI status. In accordance with the recommendations made by ACOSS in its submission to the Tax Board, NACLC and the Federation submit that the definition of PBI status be reformed and updated at the same time as any reform and codification of definition of charity.

D. Discussion of the Workability of the Proposed Definition

1. ***Introduction: Constitutional Limitations***

13 As explained in the Explanatory Material, the Draft Bill provides a legislative definition of what constitutes a charity. The Commonwealth Parliament does not have an explicit power under the *Commonwealth Constitution* to legislate with respect to charities or their activities.¹ However, the power to define charities for the purposes of another Commonwealth Act may be located in the head of power under which that Act is passed, and the Parliament's incidental power.² For example, a legislative definition of charity for the purposes of taxation law may be supported by the Parliament's taxation power and the incidental power.

14 In framing the Draft Bill, it must therefore be constantly borne in mind that its purpose is to define charities, and not to regulate their activities. Should the Draft Bill go beyond defining charities, it may be attacked on the ground that the Parliament has overstepped its constitutional powers.

2. ***Government Body***

15 Clause 3 of the Draft Bill states that *government body* includes a body controlled by the Commonwealth, a State or a Territory. NACLC and the Federation is concerned that the term 'controlled' may be given a wide interpretation, resulting in the loss of charitable status by bodies that are government funded or regulated.

16 This concern is illustrated by the recent decision of *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue*.³ In that case, the Supreme Court of Victoria found that an association of general medical practitioners

¹ See further Commonwealth of Australia Charities Definition Inquiry, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2000) 37 ('**the Report**').

² *Commonwealth Constitution* s 51(xxxix).

³ [2003] VSC 285.

was an arm of government. The court reached this conclusion on the basis that the entity's activities were 'funded and thereby controlled by the Commonwealth'.⁴ As the entity was found to be controlled by the Commonwealth, it was denied charitable status.

- 17 NACLC and the Federation is deeply concerned that where an entity receives some measure of funding from government, it may similarly be denied charitable status. NACLC and the Federation recommend that the definition of *government body* in clause 3 of the Draft Bill be amended to provide greater certainty as to when an entity is controlled by government. In particular, NACLC and the Federation recommend (see annexure) that the term *control* be further defined to mean:

the power to direct completely the entity's acts and omissions, where such acts and omissions are not reasonably required under any funding agreement.

3. **Purposes and Activities**

- 18 Under the scheme of the Draft Bill, an entity falls within the definition of charity if it satisfies a number of criteria. Those criteria can be classified as relating to either the entity's structure, purposes or activities as in the following table:

⁴ Ibid [33].

Table 1: Clause 4 Criteria

Structure	Purposes	Activities
The entity must be not-for-profit; ⁵	The entity must have a dominant purpose that is charitable; ⁶	The entity must not engage in activities that do not further, or are not in aid of, its dominant purpose; ⁷
The entity must not be an individual, a partnership, a political party, a super-annuation fund or a government body; ⁸ and	The entity must have a dominant purpose that is for the public benefit; ⁹ OR the entity must be (a) an open and non-discriminatory self-help group; or (b) a closed or contemplative religious order that regularly undertakes prayerful intervention at the request of members of the public; ¹⁰	The entity must not engage in, and must have not engaged in, conduct (or an omission to engage in conduct) that constitutes a serious offence; ¹¹
	The entity must not have a disqualifying purpose. ¹²	

19 NACLC and the Federation do not object to classifying charities according to these three qualities of a entity. NACLC and the Federation have great concern, however, that the workability of the Draft Bill is severely impaired by its conflation of the concepts of 'purpose' and 'activity'.

20 Academics in other common law jurisdictions have identified that

*there has been confusion in this area due in part to judges using the phrases 'charitable activities' and 'charitable purposes' interchangeably ...*¹³

⁵ Draft Bill cl 4(1)(a).

⁶ Draft Bill cl 4(1)(b)(i).

⁷ Draft Bill cl 4(1)(c).

⁸ Draft Bill cl 4(1)(f).

⁹ Draft Bill cl 4(1)(b)(ii).

¹⁰ Draft Bill cl 4(2).

¹¹ Draft Bill cl 4(1)(e).

¹² Draft Bill cl 4(1)(d).

- 21 This confusion was recognised in the *Report of the Inquiry into the Definition of Charities and Related Organisations* ('**the Report**'). The Report explored differing views on how an entity's purposes are to be determined.¹⁴ The 'orthodox' approach is to have regard only to the entity's stated aims and purposes, unless those stated purposes are ambiguous.¹⁵ In the latter case, the entity's activities may be considered in an attempt to infer the entity's purposes. However, some commentators, and the ATO, were of the view that an entity's activities should always be considered to determine the entity's true purpose(s).
- 22 NACLC and the Federation believe that, although an entity's activities should be assessed in determining whether it should receive *charitable status*, those activities should not be assessed in determining the entity's *purposes*. The purpose of an activity cannot be determined simply from the activity itself without reference to extant purposes. Without knowledge of such purposes, an entity's motivation for engaging in any given activity may only be guessed at.
- 23 The requirement should be that an entity's activities give effect to its purposes, rather than be used to infer them. It is circular to attempt to divine an entity's purposes from its activities and then question whether those activities are in line with those purposes. An entity should state its purposes and its activities should be assessed according to those purposes.
- 24 While a clearer delineation of purposes and activities may not appear to reflect the discussion of this issue by courts, it is, in our submission, *in substance* consistent with their treatment of activities as a necessary consideration in determining an entity's charitable status. This approach is also, in our submission, essential for the workability of the Draft Bill as it removes the uncertainty surrounding the determination of an entity's purpose.
- 25 NACLC and the Federation also believe that an entity's purposes should be determined from its constitution or other constituent documents. This is the simplest, clearest and most cost-effective way to determine those purposes. Further, the requirement that an entity's purposes be stated in its constitution or other constituent documents provides an important safeguard. An entity could not then rely on any conceivable charitable purpose to support a particular activity.

¹³ Deborah J Lewis, 'A Principled Approach to the Law of Charities in the Face of Analogies, Activities and the Advancement of Education' (2000) *Queens Law Journal* 679, 691.

¹⁴ Report, above n 1, 99–103.

¹⁵ Eg, *Public Trustee v A-G (NSW)* (1997) 42 NSWLR 600, 610 (Santow J).

Donors, volunteers and other supporters of the entity would also be assured of the aims of the organisation they are supporting.

- 26 Similarly, a distinction must be drawn between *disqualifying purposes* and *disqualifying activities*. The Draft Bill does not draw this distinction. As a result, the Draft Bill provides that an entity must not have a disqualifying purpose of engaging in certain activities, but does not provide that the entity must not engage in those activities per se.
- 27 The Draft Bill appears to assume that if an entity engages in certain *activities* those activities will be used to infer that a *purpose* of the entity is to engage in those activities. However, as discussed above, the Draft Bill does not provide how an entity's purpose is to be determined. A court or decision-maker would need to interpret the Draft Bill to conclude that an entity's activities can be used to infer an entity's purpose and would then need to make the additional step of determining whether an activity has been engaged in to the extent that engaging in that activity can be considered a purpose of the entity. These are difficult questions of circumstance and degree.
- 28 For example, under the Draft Bill an entity must not have the *purpose* of advocating a political party. However, an entity can advocate a political party as long as that advocacy is further to, or in aid of, the entity's dominant purpose¹⁶ or, *assuming* that activities can be used to infer an entity's purposes, the degree of support is insufficient to infer a purpose to do so.
- 29 As stated above, we are of the firm opinion that, in any case, activities should not be used to infer purpose. For these reasons, we propose that certain purposes *and* certain activities result in disqualification from being a charity.
- 30 The following table neatly summarises our proposed definition of a charity, taking into account the distinction between an entity's purposes and activities:

¹⁶ Draft Bill cl 4(1)(c).

Table 2: Proposed Charities Definition

Structure	Purposes	Activities
The entity must be not-for-profit; ¹⁷	The constituent documents of the entity must disclose that the entity has one or more charitable purposes; ¹⁸	The entity's predominant activities must be: ¹⁹ (a) further to, or in aid of, the entity's charitable purpose or purposes; and (b) for the public benefit; ²⁰
The entity must not be an individual, a partnership, a political party, a super-annuation fund or a government body; ²¹ and	The constituent documents of the entity must not disclose that the entity has a disqualifying purpose; ²²	An entity will cease to be a charity if it is convicted of a serious offence or engages in a disqualifying political activity; ²³

4. Political Purposes and Activities

31 In line with the distinction between purposes and activities, we recommend that an entity's charitable status be dependent upon separate analyses of whether it:

- (a) has a disqualifying purpose; or
- (b) engages in a disqualifying activity.

32 The Draft Bill states in clause 4(d) that charity cannot have a 'disqualifying purpose.' 'Disqualifying purpose' is further defined in clause 8(2)(c) as:

- the purpose of advocating a political party or cause;
- the purpose of supporting a candidate for political office;
- the purpose of attempting to change the law or government policy;

¹⁷ Draft Bill cl 4(1)(a).

¹⁸ Draft Bill cl 4(1)(b)(i).

¹⁹ Draft Bill cl 4(1)(c).

²⁰ Draft Bill cl 4(1)(b)(ii).

²¹ Draft Bill cl 4(1)(f).

²² Draft Bill cl 4(1)(d).

²³ Draft Bill cl 4(1)(e).

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.

- 33 An immediate problem with the workability of the Draft Bill is the prohibition in clause 8(2)(a) that a charity may not have a purpose of advocating a 'political cause'. The lack of definition of 'political cause' is extremely uncertain. The term 'political cause' does not appear to be limited to 'party politics' (as recommended in the Report²⁴) and is highly subjective. This may lead to the unacceptable result of an entity's charitable status being subject to changing political climates or subjective assessments of the term 'political' by a judge or decision maker.
- 34 A more fundamental problem with the Draft Bill's treatment of political activity is that it restricts an entity from having various political *purposes* that are more than ancillary or incidental to the entity's other purposes without providing any clear guidance or certainty as to the impact that an entity's political *activities* may have upon its charitable status. This must be considered in light of the requirement in clause 4(1)(c) that a charity does not engage in activities that do not further or are not in aid of, its dominant purpose.
- 35 The cumulative effect of these provisions is that an entity is apparently free to engage in political *activities* if:
- (a) they do not lead to an inferred *purpose* that is more than incidental or ancillary to the objects of the entity; and
 - (b) they are in furtherance of the entity's dominant purpose.
- 36 NACLC and the Federation believe that the scope of the Draft Bill's restrictions on political activities and purposes need clarification. Greater certainty would be imported into the definition if the concepts of activity and purpose were separated and the scope of permissible political activity that charities may engage in was specified.
- 37 NACLC and the Federation further believe that the only prohibited *purpose* should be to support a political party or candidate for political office. A charity's permissible purposes are already sufficiently defined in Part 3 of the Draft Bill and the further

²⁴ Report, above n 1, 218.

restriction on the purpose of advocating a 'political cause' introduces unnecessary uncertainty and subjectivity into the analysis.

- 38 The key area where charities are involved in the 'political' arena relates to their *activities* rather than their purposes. Charities frequently act as advocates and spokespersons for the causes they represent and this often involves making submissions to Government or raising public awareness. This is a universal problem facing charities in common law jurisdictions. Richard Bridge, from Canada's *Institute for Media, Policy and Civil Society*, provides a Canadian perspective:

*If, for example, their activities include attempting to influence public opinion, legislation or government policy in relation to [the causes they represent], they could violate the current charity rules and lose or be denied charitable status. Indeed, these problems exist for organisations in all areas of charitable activity.*²⁵

- 39 As the Report recognised, charities perform a vital function in assisting in the democratic process of law and policy development by raising public awareness of the causes they represent and representing those causes to the appropriate decision makers. In addition, charities provide expert advice and opinions, bringing their experience and community awareness to bear, and for this reason their advice is routinely sought by Government bodies. It must be clear under any proposed definition of charities that they may continue to perform this important role. Reasonable interpretations of the Draft Bill in its present form could lead to the curtailment of this vital role that charities play.

- 40 Further, given this important role, it could be considered that the Draft Bill, particularly if it does prohibit a charity from advocating a 'political cause', would impose an unjustifiable burden on freedom of political expression. This could lead to its invalidity under the *Commonwealth Constitution*.²⁶

- 41 NACLC and the Federation submit that the Draft Bill should be clarified as to the scope of 'political' activities that a charity may engage in pursuing its stated purposes. The Draft Bill should be amended to explicitly define the range and nature of political advocacy that charities may engage in.

²⁵ Richard Bridge, *The Law of Advocacy by Charitable Organisations: The Case for Change* (2000) 6

²⁶ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

42 NACLC and the Federation propose that the Draft Bill clearly state that an entity will not have charitable status if its predominant *activities* are of a political nature, unless those activities are further to or in aid of its charitable purposes. This is in line with the current position at, and the trend of, the common law.²⁷ We have provided a proposed clause 8 in the annexure to reflect more clearly this position.

43 The proposed clause also improves the workability of the definition by delineating the types of advocacy that charities may engage in without jeopardising their charitable status. This is in line with both the common law and the recommendations of the Report.

5. ***Dominant Purposes***

44 NACLC and the Federation have great concerns with the workability of clause 4(1)(c). This paragraph does not appear to cater for the situation where an entity has more than one charitable purpose. In that situation, it is not possible to speak of the entity's 'dominant purpose' (singular).

45 NACLC and the Federation also believe that this clause should be amended to impose on an entity a positive requirement that they carry out activities further, or in aid of, its charitable purposes.

46 Furthermore, statements of purpose in an entity's constitutive documents are an unreliable guide to whether the entity is actually carrying out activities in furtherance of those purposes. The actual activities are a better criterion to determine whether the entity is truly serving its charitable purpose(s). For this reason, we propose that the definition of dominant purpose be amended to a definition of dominant activities.

47 The workability of the Draft Bill would also be improved by explicitly recognising that a charity must of necessity engage in administrative and fund-raising activities to support its operation. Administrative or fund-raising activities, however, must not become the dominant activity of the organisation.

48 The annexure includes amended versions of clause 4(1)(c) and clause 8 to reflect our suggestions.

²⁷ See, eg, *Public Trustee v A-G (NSW)* (1997) 42 NSWLR 600, 610 (Santow J); *Australian Conservation Foundation Inc v Commissioner of State Revenue*, VCAT, No T34 of 2002, 17 October 2002, (Geoffrey Gibson); *Re Inman* [1965] VR 238.

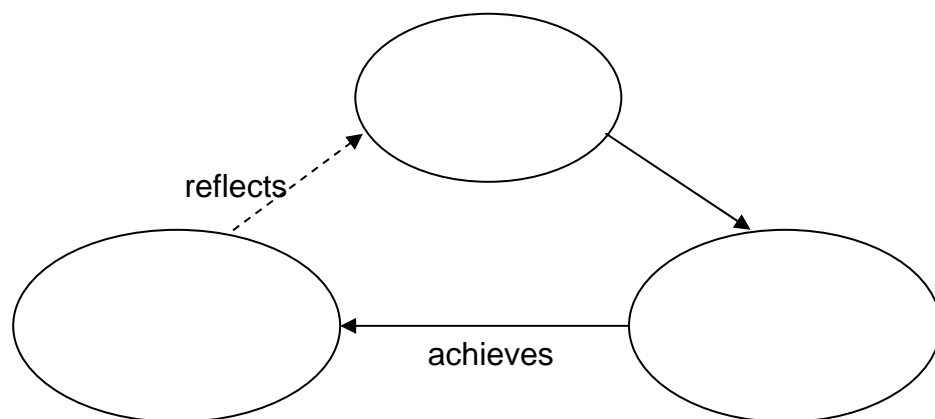
6. **Public Benefit Test**

49 The Draft Bill proposes that charity's must further have a dominant purpose that is for the public benefit (clause 4(b)(ii)). Clause 7 further states that a purpose will be for the public benefit if it:

- (a) is aimed at achieving a universal or common good; and
- (b) has practical utility; and
- (c) it is directed to the benefit of the general community or to a sufficient section of the general community ('sufficient section of the community' is clarified in subclause (2) to exclude a numerically negligible group).

50 The workability of this clause is hampered by the logical difficulty of asserting that a *purpose* can have a practical utility. Again, NACLC and the Federation submit that the definition will be more readily understood and applied if what is assessed is whether an entity's *activities* of public benefit.

51 The relationship between *purpose*, *activity* and *benefit* may be diagrammatically represented as follows:



52 A further problem with the Draft Bill is that the idea of a sufficient section of the general community is too vague. Furthermore, minority groups are often those

most in need of the assistance of charities. For example, CLCs operate that are devoted to assisting groups such as people suffering from HIV/AIDS.

53 To ensure that such specialist entities are not excluded, we have replaced the criterion of numerical size with the concept of access to the benefits of the entity's activities. NACLC and the Federation propose that an entity should only be allowed restrict access to the benefits of their activities where the group benefiting from the activity is affected by a particular disadvantage, discrimination or unmet need.

54 NACLC and the Federation is also concerned by the inference of the Draft Bill that self-help groups and closed and contemplative religious orders do not provide any public benefit. Rather than exempt such organisations from the requirement of providing a public benefit, we propose that the Draft Bill explicitly recognise that such organisations do provide a public benefit by their activities.

55 The description of 'a closed or contemplative religious order that regularly undertakes prayerful intervention at the request of members of the public' is also too wide and susceptible to exploitation. Such orders may provide a public benefit by leading an ethical life by way of example to the adherents of their religion, or the broader community. However, to prevent exploitation of the accompanying tax concessions, the definition should be limited to organisations whose members consciously avoid material wealth. In such circumstances, tax concessions may be appropriate, although such concession should perhaps be provided for in other legislation if such an order cannot properly be described as a charity.

56 The annexure includes a suggested alternative definition.

7. ***Criminal Activities***

57 NACLC and the Federation have grave concerns about the workability of the illegal activity exclusion in clause 4(e) of the Draft Bill. Under clause 4(e), an entity will not be a charity if it engages in, or has engaged in, conduct that constitutes a serious offence. NACLC and the Federation submit that there are two problems with the workability of this clause.

58 First, the clause does not specify the circumstances in which an entity is taken to have engaged in a serious offence. Is it, for example, sufficient that a government body is satisfied that an offence has been committed or must the offence be

established in the criminal courts before it becomes relevant to the entity's status? The definition of serious offence in clause 3 is of no assistance in this regard.

59 NACLC and the Federation submit that clause 4(e) should be amended to specify that the activities of an entity (including the activities of its members and employees) do not have an effect on the entity's status as a charity unless the entity is convicted of a serious offence. Such a conviction may result pursuant to Part 2.5A of the *Criminal Code Act 1995* (Cth) or the common law.

60 Secondly, the requirement in clause 4(e), that an entity 'has not engaged' in conduct that constitutes a serious offence, will create interpretive difficulties. The use of the phrase 'has engaged' creates ambiguities as to the time frame envisaged. For example, it is unclear whether conduct that occurs prior to the commencement of the legislation will affect an entity's entitlement to charity status. For this reason, NACLC and the Federation submit that clause 4 should be amended to make it clear that conduct engaged in prior to the commencement of the Act will not affect an entity's charity status.

61 For these reasons we propose that clause 4 be reworded to provide that an entity will cease to be a charity if it is convicted of a serious offence or engages in disqualifying political activities.

8. *Recognising the Role of Peak Bodies*

62 Chapter 13 of the Report discusses the High Court's decision in *Royal Australasian College of Surgeons v Federal Commissioner of Taxation*.²⁸ This case considered that a professional association of surgeons contributed to the advancement of science through activities such as the publishing of professional newsletters, the holding of conferences, and the management of a technical library.

63 Under the Draft Bill, it may be questioned whether a peak body engages in activities of public benefit, or only of benefit to its members. The workability of the Draft Bill would be improved if it explicitly recognised the assistance that a peak body provides to its members in engaging in their activities of public benefit.

64 NACLC and the Federation therefore propose that, for the purposes of the Act, the activities of a peak body should include the activities of its members. One necessary exception to this rule is that a peak body must not be taken to have

²⁸ (1943) 68 CLR 436

committed a serious offence or engaged in disqualifying political activities if a member does so.

65 To this end, a definition of peak body in clause 3 and an appropriate provision in clause 4(3) have been included in the proposed amended clauses annexed to this submission.

9. *Charitable Purposes*

66 NACLC and the Federation welcome the inclusion of the charitable purposes that have been included in clause 10. However, NACLC and the Federation believe that, as the purposes referred to are very broad, some further clarification is needed.

67 It is already well recognised not only in Australia but in other Commonwealth jurisdictions that the advancement and protection of human rights is a charitable purpose. This head of charity may be implicit within the clause 10(1)(g) (other beneficial purposes). However, NACLC and the Federation strongly recommend that, for the avoidance of doubt, this important category be explicitly recognised in the Draft Bill, as was recommended in the Report.

10. *Administration of the Definition*

68 The Draft Bill is silent as to who will administer the proposed definition of a charity. NACLC and the Federation support the recommendation of the Report that the definition be administered by a specialist administrative body other than the Australian Taxation Office. NACLC and the Federation also support the recommendation that the Commonwealth seek State and Territory government cooperation to establish a specialist administrative body that would be able to determine the charitable status of an entity under Commonwealth, State and Territory law.²⁹

E. *PBI Status and the Charities Definition*

69 NACLC and the Federation have considered the submission prepared by ACOSS and broadly agrees that PBI status is also in need of urgent reform.

70 While PBI and charitable status are separate concepts, they are closely linked in that they are both related to the “relief of poverty”. NACLC and the Federation fear

²⁹ Report, above n 1, recommendation 25.

that reforming the definition of charity may have an impact upon an entity's PBI status.

- 71 Accordingly, NACLC and the Federation recommend that the current definition of PBI status be updated at the same time as the definition of charities to provide greater clarity and transparency to the charitable sector.

ANNEXURE

PROPOSED AMENDED CLAUSES

3 Definitions

(1) In this Act, unless the contrary intention appears:

control of an entity, by a government body, means the power to direct completely the entity's acts and omissions, where such acts and omissions are not reasonably required under any funding agreement.

peak body means an entity:

- (a) whose members engage in activities of public benefit that are further to, or in aid of, the entity's charitable purposes;
- (b) membership of which is conditional on engaging in such activities; and
- (c) that supports, whether directly or indirectly, its members in such activities.

...

4 Core Definition

(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:

- (a) that is a non-for-profit entity and not an individual, a partnership, a political party, a superannuation fund or a government body;
- (b) whose constituent documents disclose that the entity has one or more charitable purposes and no disqualifying purposes;
- (c) whose activities are predominantly charitable and of public benefit; and
- (d) that has not ceased to be a charity under subsection (2).

(2) An entity will cease to be a charity if it is convicted of a serious offence or engages in disqualifying political activities.

(3) The activities of the members of a peak body, except for serious offences and disqualifying political activities, are activities of the peak body for the purposes of this Act.

6 Dominant Activities

An entity's activities are **predominantly charitable and of public benefit** if and only if:

- (a) the entity engages in activities of public benefit;
- (b) the activities described in paragraph (1)(a) are further to, or in aid of, the entity's charitable purposes stated in its constituent documents; and
- (c) any other of the entity's activities are not the dominant activities of the entity and are:
 - (i) incidental to the activities described in paragraph (a);
 - (ii) for the proper administration of the entity; or
 - (iii) are to raise funds for the entity.

7 Public Benefit

(1) An activity is of **public benefit** if it:

- (a) promotes a universal or common good;
- (b) has practical utility; and
- (c) benefits the general community or a sufficient section of the general community.

- (2) An activity does not benefit a sufficient section of the general community where:
 - (a) the entity deliberately prevents members of the community who are not part of that section from receiving the same benefit from the activity as those who are part of that section; and
 - (b) that section is not made up of individuals affected by a particular disadvantage or discrimination, or by a need that is not being met.
- (3) Open and non-discriminatory self-help is an activity of public benefit.
- (4) An entity engages in activities of public benefit if its members live a life devoted to:
 - (a) the contemplation and practise of religion or ethics; and
 - (b) the avoidance of material wealth.

8 Disqualifying purposes and political activities

- (1) **Disqualifying purpose** means:
 - (a) the purpose of engaging in activities that are unlawful; or
 - (b) the purpose of supporting a political party or candidate for political office.
- (2) An entity engages in **disqualifying political activities** if and only if:
 - (a) the entity endorses a political party or candidate for political office;
 - (b) the entity provides a political party or candidate with funds or resources; or
 - (c) its predominant activities are attempts to change the law or government policy where such activities are not further to, or in aid of, the entity's charitable purposes.
- (3) For the avoidance of doubt, an entity engages in activities further to or in aid of its charitable purposes where it advocates in any manner to any person, group of persons or body that:
 - (a) a particular change be made to the law; or
 - (b) that a government body adopt a particular policy, make a particular decision, or exercise its legal powers in a particular way.
- (4) For the avoidance of doubt, an entity does not endorse a political party or candidate for political office by engaging in activities referred to in subsection (3), regardless of whether a political party or government body advocates the same view.

9 Open and non-discriminatory self-help

An entity engages in **open and non-discriminatory self-help** if:

...