

7 September 2003

BY EMAIL : charitydefinition@taxboard.gov.au
(COPY BY POST)

Consultation on the Definition of a Charity
The Board of Taxation
C/- The Treasury
Langton Crescent
PARKES ACT 2600

Attention: Mr Gerry Antioch, Secretary to the Board of Taxation

Dear Sir

Consultation on the Definition of a Charity

We refer to the inquiry into the definition of a charity and the Exposure Draft Legislation (the *Charities Bill 2003* or the "Bill").

The Community Services Committee of the NSW Young Lawyers (**CSC**) represents the community spirit of NSW Young Lawyers. We are a group of volunteer lawyers and law students from diverse backgrounds, all of whom share a common goal of using our legal and personal skills to benefit the community. The CSC runs various community projects and have worked, and continue to work, closely with many charities.

The CSC is grateful for the opportunity to make a submission¹ to the Board of Taxation.

The CSC wishes to make the following submissions to the inquiry.

We understand that the Bill to define charities and charitable purposes and consultation is a result of the recommendations of the *Report of the Inquiry into the Definition of Charities and Related Organisations* ("Report") delivered in June 2001.

As outlined in the Bill, a charity must have a dominant purpose that is

- (a) charitable; and
- (b) for the public benefit.

An entity will be excluded from being registered as a charity where it:

- (a) engages in activities unrelated to its dominant purpose;

¹ Prepared by Katherine Bennett and Albert Yuen on behalf of the CSC.

- (b) has a disqualifying purpose;
- (c) engages in conduct that constitutes a serious offence;
- (d) is an individual, partnership, political party, superannuation fund or government body.

Support of the Bill's Aims to Modernise Charities Definition

The CSC supports the Bill's aim to modernise the definition of charity which it does so in a number of positive ways, including:

- acknowledging that child care services are charitable;
- acknowledging that self help organisations may be charitable; and
- clarifying the list of charitable purposes to include 'advancement of social or community welfare' and of the 'natural environment'.

Disqualifying Purposes

While the CSC supports the Bill's main objectives and many aspects of the Bill, the CSC is greatly concerned by the terminology and drafting of clause 8 of the Bill relating to disqualifying purposes to the definition of a charity. The CSC believes that the disqualifying purposes aim to impose out-dated and unreasonable restrictions on the advocacy and lobbying activities of charities.

Clauses 8(2) of the Bill excludes organisations from obtaining charitable status that have among their purposes (in addition to the purpose of engaging in illegal activities), any of the following 'disqualifying purposes':

- (a) advocating a political party or cause; or
- (b) supporting a candidate for political office; or
- (c) attempting to change the law or government policy,

unless these purposes, either on its own or taken together with one or both of the other purposes, are no more than 'ancillary or incidental' to the other purposes of the organisation.

Item 1.49 of the Exposure Draft Explanatory Material to the Bill ("EM") states that "[t]here are some purposes that are not considered to be consistent with the overall charitable character of an entity", these being the 'disqualifying purposes' mentioned above. While the CSC would not see any concern with the Bill making, as a disqualifying purpose,

- 'engaging in activities that are unlawful';
- 'supporting a candidate for political office' (which is not ancillary or incidental to the other purposes); or

- 'advocating a political party' (which is not ancillary or incidental to the other purposes),

The CSC is concerned that the proposed definition of a 'disqualifying purpose' also includes purposes which:

- attempt to change the law or government policy (which is not ancillary or incidental to the other purposes), or
- advocates a 'cause' (which is not ancillary or incidental to the other purposes).

The CSC believes that the proposed definition of 'disqualifying purposes' should not include:

- attempts to change the law or government policy (which is not ancillary or incidental to the other purposes), or
- advocates a 'cause' (which is not ancillary or incidental to the other purposes),

for the following reasons:

- (a) these purposes are usually valid and essential functions of a charitable organisation. The qualification from such purposes being declared 'disqualifying purposes' are only based on the interpretation of what is considered 'ancillary' or 'incidental' to dominant purpose of the charitable organisation and may lead to ambiguity and unduly restrictive and narrow interpretations;
- (b) it is unnecessary to include these purposes as potential disqualifying purposes as clause 4(c) of the Bill already provides that a charity should not 'engage in activities that do not further, or are not in aid of, its dominant purpose';
- (c) the restriction of non-advocacy of a 'cause' is ambiguous, restrictive and unnecessary because all the activities of a charity should further, or be in aid of, a charitable purpose;
- (d) if a narrow interpretation of these purposes is provided, clause 8 may be unworkable and place undue restrictions on the resources devoted to, as well as, the form of advocacy charities provide to advocacy (eg. the necessity to document resources and costs to advocacy to be audited by the Australian Taxation Office ("ATO"));
- (e) the Report found that charities should be permitted to engage in advocacy on behalf of those they benefit. Charities, in representing their beneficiaries, see that a myriad of factors (including a number of laws, government policies and the like) may contribute to the poverty of other condition of their beneficiary. It would be nonsensical and unduly harsh to potentially exclude an organisation that supports, advocates, affiliates a charity from a 'cause' that, while related in some way to the betterment of the beneficiary, may not be considered ancillary or incidental to the charities dominant purpose. Charities should be permitted to make decisions about the best way to provide assistance without fear or favour if it seeks to advocate to government on behalf of their beneficiaries;

- (f) modern day charities increasingly have to undertake a greater role in advocacy and law reform. An entity which is charitable and for the benefit of the public may be disqualified from undertaking too much law reform and advocacy work even where this is in line with its charitable purpose; and
- (g) there seems to be internal inconsistencies within the definition. Clause 10 states that a reference to a charitable purpose is a reference to the advancement of health, education, natural environment etc. Clause 10 further states that 'advancement' includes protection, maintenance, support, research and improvement. However, arguably improvements in health and education can be made by lobbying/advocating to government to change law and/or policy and may even be noted as a purpose of the charitable organisation. However, if this was the dominant purpose of an entity it would be disqualified from being a charity. For example, a group set up to lobby government for improvements in the state school system would be disqualified as would a group set up to lobby for reforms to protect old growth forests. A group established to attempt to relieve poverty by lobbying for greater welfare support for aged or disabled people would also be disqualified. These groups would be attempting to advance education, social welfare and the natural environment as in clause 10 but prevented from being a charity under clause 8. Indeed, this would be the case not only where law reform is the dominant purpose but even where it is merely 'more than incidental or ancillary to' a dominant aim. The Report found that advocacy was a legitimate activity for charities.

The CSC prefers that the charities definition explicitly recognises that charities may engage in non-partisan advocacy that is an integral part of a strategy to promote an underlying dominant charitable purpose, such as relieving poverty or protecting the environment.

The CSC is concerned that the wording of the 'disqualifying purposes' will discriminate against organisations with charitable purposes who do significant lobbying/advocacy work and would not want to see public advocacy work of charities to be monitored or audited as to the proportion of their budgets they devote to advocacy activities which occurs in the United Kingdom and the United States of America and deny organisations, such as Amnesty International, the Australian Conservation Foundation or Greenpeace, charitable status in Australia.

If there are any queries, please do not hesitate to contact Albert Yuen, Chair of the NSW Young Lawyers' Community Services Committee on albert.yuen@younglawyers.com.au.

Yours faithfully,

Albert Yuen
Chair
Community Services Committee

Are there any good reasons why these groups should be excluded from being registered as charities?

As portrayed in the media over the last few months it seems like the Government is attempting to silence critics and curtail the abilities of charities to undertake substantial law reform work. In fact, advocacy and law reform work form a vital part of advancing health, education and community welfare etc. It is important that groups continue to be able to advocate law reform without needing to be concerned exactly how much advocacy work they can undertake before they lose their charitable status.

Advocacy and law reform work is one of the primary means by which the aims of charities can be achieved. To deny charities the ability to undertake this work in a substantial and meaningful manner would be self-defeating.