

Submission to Board of Taxation



30 September 2003

**Council of Social Service of NSW (NCOSS), 66 Albion Street, Surry Hills, 2010
ph: 02 9211 2599, fax: 9281 1968, email: <info@ncoss.org.au>**

About NCOSS

The Council of Social Service of NSW (NCOSS) is an independent non-government organisation and is the peak body for the non government human services sector in NSW. NCOSS works with its members on behalf of disadvantaged people and communities towards achieving social justice in New South Wales.

It was established in 1935 and is part of a national network of Councils of Social Service, which operate in each State and Territory and at Commonwealth level.

NCOSS membership is composed of community organisations and interested individuals. Affiliate members include local government councils, business organisations and Government agencies. Through current membership forums, NCOSS represents more than 7,000 community organisations and over 100,000 consumers and individuals.

Member organisations are diverse; including unfunded self-help groups, children's services, youth services emergency relief agencies, chronic illness and community care organisations, family support agencies, housing and homeless services, mental health, alcohol and other drug organisations, local indigenous community organisations, church groups, and a range of population-specific consumer advocacy agencies.

Introduction

In 2001, the Commonwealth Government established a Charity Definitions Inquiry to advise it about how best to develop and implement a contemporary definition of charity.

The Inquiry consulted widely across the Australian not for profit sector and with existing charities, and delivered its report in June 2001.

Its key recommendations, which appear to have been generally supported by the charitable sector:

- proposed a new definition of charity which included a sound and workable statement about advocacy;
- proposed a simple means of redefining public benevolent institution within its approach to a contemporary definition of charity; and
- proposed the establishment of a Charity Commission to effectively and appropriately regulate access to charitable status at the Commonwealth level.

The Charities Bill 2003, released by the Commonwealth Treasurer for Board of Taxation consultations and public comment, incorporates a contemporary definition of charity as its centrepiece. However, it contradicts the 2001 Inquiry recommendations in the following critical manner:

- through nominating advocacy as a "disqualifying purpose" for a charity to pursue;
- through being silent on any definition of a public benevolent institution and
- through being silent on the establishment of a Charity Commission to regulate charities at the Commonwealth level.

Development of NCOSS recommendations

NCOSS has consulted broadly with member organisations on the Charities Bill 2003. Peak non government organisations (NGOs), which constitute the NSW Forum of Non Government Agencies and regional peak NGO networks, which form the NCOSS Regional Forum, were also specifically invited to provide views about the exposure Bill.

In addition, NCOSS assisted the Board of Taxation convene a Sydney consultation on the Bill which was attended by representatives of over 50 major charities and peak NGOs. NCOSS has also consulted its sister State and Territory counterparts, as well as the Australian Council of Social Service (ACOSS).

Comments

(i) Contemporary definition

NCOSS acknowledges that the Charities Bill does succeed in modernising the definition of charity in several important ways. These are:

- including the “advancement of social or community welfare” and the “advancement of the natural environment”;
- recognising that the provision of child care services is charitable; and
- recognising that self help groups may be charitable, provided they are open and non discriminatory in their membership.

Some NCOSS member organisations have also raised the need to make explicit that the “advancement of social and community welfare” includes assisting people who are disadvantaged in terms of access to their housing.

(ii) Disqualifying purposes

However, NCOSS strongly disagrees with the approach taken in the draft Bill to exclude not for profit organisations from obtaining or maintaining charitable status that have among their purposes, unless no more than “ancillary” or “incidental” to the other purposes of the organisation:

- changing the law or Government policy; or
- advocating a cause.

There are many concerns about the appropriateness and workability of these clauses in the draft Bill. The concerns include:

- advocacy, whether for an individual client, a group of clients, a local community or a group of not for profit organisations is generally a seamless extension of human services delivery and community development in 2003 Australia. Best practice demands the involvement of all agencies in forms of individual and systemic advocacy.;

- charitable organisations are often invited by Governments to join advisory or consultative structures where it is expected that they will advocate the cause of their client group, locality or industry sector;
- the confusion and the likely unfairness that will accompany tests of whether advocacy is ancillary or incidental to the other purposes of the organisation.

It would be a highly undesirable situation to see political pressure being exerted on the Australian Tax Office (as the regulator) to deny charitable status to certain not for profit organisations which disagreed with aspects of the policies of the Government of the day.

It would also be disconcerting to see a significant number of existing charitable organisations penalised through their potential loss of income tax exempt status, GST free status on non commercial activities and FBT rebates because of the introduction of the current draft Bill.

NCOSS would also draw the attention of the Taxation Board to the potential of a loss by many charitable organisations of current exemptions and concessions on State taxes and charges in several jurisdictions. This is because of the alignment of eligibility criteria for such exemptions and concessions with Commonwealth definitions of charity and charitable purposes.

The 2001 Charity Definition Inquiry recommended that advocacy is a legitimate activity for a charity to pursue in a non political partisan way and in the pursuit of the organisations' dominant charitable purpose. Such an approach is endorsed by NCOSS as a workable and inclusive action, which is likely to be strongly supported within the human services sector and more broadly in Australian communities.

If suitable amendments were made to Clause 8 of the draft Bill, in line with the recommendations made by the Charity Definition Inquiry, and the explanatory material made explicit the inclusion of "the provision of housing and accommodation support for people who are disadvantaged in their access to housing" as a legitimate element of "the advancement of social and community welfare", then NCOSS would support the thrust of the new definitions of charity contained in the draft Bill.

(iii) The meaning of Government body

Clause 4 (1)(f) in the draft Bill is viewed by some as creating unnecessary confusion about the status of not for profit organisations which may receive Government funding assistance.

This arises from a recent Victorian Supreme Court decision (Central Bayside Division of General Practice vs Commissioner of State Revenue No 2002/137) which may suggest that a body established pursuant to a Government funding program (eg in the health or welfare area) and that receives the substantial part of its funding for Government, is a "Government body" and not a charity.

NCOSS has also been advised that bodies such as local school based Parents and Citizens Associations in NSW, which are currently income tax exempt and pay no GST on their non commercial activities, may also have these current benefits threatened by this clause in the Bill.

NCOSS concurs with the ACOSS recommendation **that this clause be revised to make it clear that a body, which receives Government funding or is established under the direction of a Government funding program, is not automatically considered a Government body.**

(iv) Public benevolent institutions

A comprehensive approach to the modernisation of charity definition and the regulatory framework in which Australia's not for profit organisations operate would include a new definition being provided for public benevolent institutions.

Such a definition would simply and clearly locate PBIs as a subset of the broader definition of charity, as recommended by the 2001 Charity Definitions Inquiry.

Neither the Australian community nor the Australian not for profit sector is served well by the current confusing and discriminatory system of charity and PBI definitions and regulation through the Australian Tax Office.

NCOSS supports the proposal, raised by the 2001 Charity Definition Inquiry that the PBI category be replaced by a new class of benevolent charity. Such a charity would be one whose dominant purpose is to benefit, directly or indirectly, those whose disadvantage prevents them from meeting their needs.

The test of whether a charity is also a benevolent charity would therefore be whether its dominant purpose is to assist disadvantaged people, not a focus on how its proceeds to do so. Such an approach is in line with the original intention of introducing PBI status.

(v) A new regulatory body

There have been dramatic changes in the scale and nature of the Australian not for profit sector and amongst charitable organisations since the 1970s. During this same period, at the Commonwealth level, the modernisation of charity law has failed to keep pace with the reality of the environment in which Australian charities operate.

The Australian Tax Office, as the principal regulator of charitable status, is primarily focused on the collection of tax revenue rather than the definition or regulation of charities.

NCOSS believes that there is a case for the Commonwealth Government to assess the need for introducing a separate, specialist charities regulator in Australia. Such a recommendation was made by the 2001 Charity Definitions Inquiry.

It would be prudent to re examine the benefits to the Australian economy, communities and the charitable sector itself of introducing such a regulator at the Commonwealth level.

A critical part of this assessment would be to further assess the costs and benefits of models such as the UK Charities Commission.

Conclusion

NCOSS supports the introduction of a contemporary definition of charity, as proposed in the Charities Bill 2003, as long as the key amendments raised in relation to Clauses 4 and 8 are incorporated into the legislation.

NCOSS, like several others, is concerned that if this appropriately amended Bill is not introduced in 2004, then current case law directions, and the policy “nudges” being given to the ATO by some within the current Commonwealth Government will see a more highly discriminatory and confusing situation arise in relation to charitable status in Australia.