



Consultation on the definition of a charity

Submission by Cutler Hughes & Harris

September 2003

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Who are we?

Cutler Hughes & Harris is a Sydney law firm. We act for numerous charitable organisations whose activities include health and aged care, research institutes, community service and environmental organisations.

This submission is made on our own behalf and not on behalf of any client.

Workability of the Charities Bill 2003

We believe the Bill will provide increased clarity on the requirements for maintaining charitable status. However, there are a number of areas that warrant amendment.

Where does aged care fit in?

Proposed section 11 specifically defines “advancement of social or community welfare” to include the care of and the support and protection of, children and young people and in particular the provision of childcare services”. However, neither the general definition of “charitable purpose” in section 10 nor the specific extension to that section, refer to care and support of the aged.

Paragraph 1.67 of the Explanatory Memorandum does list care, support and protection of the aged and people with a disability, as being included in the advancement of social and community welfare (along with 9 other specific activities), which is in accordance with Recommendation 13 of the CDI Report.

As the Bill now stands it is strange that children are specially mentioned, but not the aged. We understand this is because care of the aged has always been accepted at common law as charitable. However, if the Bill is to codify, it should confirm key features of the current law.

SUBMISSION 1

It would be preferable for aged care and the other activities specified in the Explanatory Memorandum, to be included in the legislation.

Lobbying by charities

Having a “disqualifying purpose”, disentitles charitable status. Disqualifying purposes are:

- advocating a political party or cause
- supporting a candidate for political office, or
- attempting to change the law or Government policy

if that is “more than ancillary or incidental” to the other purposes of the entity. The first 2 situations are not likely to be of concern to charities. Under the existing law, political purposes and the purpose of advocating a change in the law are not charitable. However, the proposed disqualifying purposes go further than the existing law. In particular, there is justifiable concern that pressure by charitable organisations on the Government might disqualify charitable status by being “more than ancillary or incidental” to the main purposes of the charity. There is clearly scope for considerable doubt as to when something becomes more than ancillary or incidental. There is also considerable doubt as to when an activity can be a purpose, particularly if the activity is not listed in the constitution of the organisation as a purpose.

SUBMISSION 2

There would be no risks to Government policy for a charity to have to show that it has dominant purposes that are charitable and for the public benefit and that any other purposes it has are 'in aid of' the charitable purposes. These tests are already clearly stated as part of the criteria for being a charity. It is not necessary to have a specific listing of disqualifying purposes.

Conduct constituting a serious offence

An entity will lose the benefits of charitable status if it commits a serious crime. We do have some concerns with the proposed provision:

- the disqualifying event is “engaging in conduct that constitutes” a serious offence. The disqualification should only occur because of conviction for an offence, not a public servant’s assessment of whether conduct would constitute an offence
- a charity may infringe the law because of fraudulent or unauthorised conduct by employees, or commission of a strict liability offence, despite having in place reasonable processes to guard against that occurring. Even if a Court imposed only a nominal penalty on a charity because of such circumstances, its charitable status would be lost to the detriment of the people benefiting from its activities
- If the loss of charitable status means the entity will lose its tax exempt status (which would almost invariably be the case) then the entity is subject to 2 penalties – the tax itself, and the penalty for the offence
- Once an entity engages in the relevant conduct, it loses its charitable status, and so almost invariably its tax exempt status, forever. Loss of tax exempt status does not apply to other non-charitable organisations that are tax exempt and engage in conduct that constitutes a serious offence, such as local governments and trade unions.

SUBMISSION 3

Proposed section 4(1)(d) should be removed.

Distribution of profits or assets to owners or members

To be a not-for-profit entity a charity cannot carry on its activities for the purposes of profit or gain or distribute profits or assets to owners or members. This test already exists for achieving ITEC status.

Paragraph 1.26 of the explanatory memorandum issued with the Bill confirms that an entity can still be not-for-profit even if it undertakes commercial activities for the purpose of generating a profit, provided the profits are directed towards the charitable purpose of the entity. This is in accordance with the recommendations of the CDI. However, there are still 2 difficulties:

- Paragraph 1.27 of the EM states that the reasonable payment of wages or allowances to employees, the reimbursement of expenses, payments for services and similar payments would not normally be considered the distribution of profits or assets. However, this is not clear on the face of the Bill and should be expressly stated
- The provision does not take account of the realities of the conduct of charities of significant size and complexity that often need to operate within a corporate group structure. The Government should take the opportunity to recognise that charitable groups exist in which all the component entities promote the same underlying charitable objectives. This would facilitate the efficiencies of conduct of the overall charitable activity and would enable flow of funds within a group without prejudicing the charitable status of the entities comprising the group.

SUBMISSION 4

Charitable organisations that are part of a group of charitable organisations should be able to make distributions within that group, even if the recipients are company law members of the charitable organisation.

SUBMISSION 5

Proposed section 5(b) should be amended to allow distributions on a winding up to a named charitable organisation (including a member of the charity if that member itself is a charity), and to allow distribution of assets to the objects of the charity.

Charitable groups

A charitable group can consist of a number of companies serving separate purposes. However, if the purpose of a particular company becomes too narrow and possibly removed from the provision of services of the charitable group as a whole, then that particular company may not be a charity. An example of this is a company that does nothing else but derive rental income that is distributed to associated companies providing direct services.

SUBMISSION 6

Section 6 should allow company groups that comprise a charity to have their purpose assessed by looking at the purpose of the group as a whole, and so allow charities to have different functions in different companies.

What is a sufficient section of the general community?

Catholic Health Australia has expressed a concern that if the people to whose benefit a purpose is directed are “numerically negligible” they would not constitute a sufficient section of the general community. For example, where a retirement village only had a small number of residents falling within the *Aged Care Act*.

SUBMISSION 7

The definition should be made clear that a community, in the case of a small country town, might not overall comprise a lot of people and that it was not disqualifying of charitable status that the number of aged people who could potentially reside in the aged care facility is small.

Is the Charities Bill a code?

There are many areas where recourse will still be required to existing case law in interpreting the new definition. The draft Bill draws many concepts from the current case law and does not define them.

SUBMISSION 8

It should be made explicit in the legislation that the definition is not a code, and that the existing case law applies to the extent it is not inconsistent with the Bill. Alternatively, the Bill should be rewritten to make it possible for a non legally trained person to read it and determine whether an organisation is or isn't a charity (if this were possible).

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