

Submission to the Board of Taxation
Charities Bill 2003

September 2003



Fitzroy Legal Service

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INTRODUCTION

This submission is written from the shared experience of Fitzroy Legal Service (FLS) staff and volunteers, it seeks to cover some discrete areas of the Charities Bill only. The Fitzroy Legal Service endorses the more comprehensive coverage of issues related to this Bill as contained in the Submission made by the Federation of Community Legal Centres (Vic).

About Fitzroy Legal Service

The Fitzroy Legal Service established in 1972 was Australia's first Community Legal Centre. Over this time the FLS has assisted over 70,000 clients through our legal advice clinics, which operate 5 nights per week.

We operate a casework practice representing individuals in court and have a strong commitment to Community Legal Education and Law Reform. We remain predominantly a volunteer organization, and currently have over 150 volunteers actively involved in one of the busiest legal centres in Australia.

The organisation seeks to work with its local community as well as make a contribution to the broader policy debate. We, like many other CLCs have a long tradition of fearless advocacy on a range of issues and take pride in the ability to work with those who do not have the means to have their voices heard. The legal service holds charitable, deductible gift recipient (DGR), and public benevolent institution (PBI) status for the purposes of State and Federal tax laws.

The clientele of the legal service is diverse, both in cultural and linguistic background and the range of legal matters attended to by the legal service is very broad. The overwhelming majority of clients have been long term unemployed, and are, either on low incomes or in receipt of some form of government benefit.

The legal service operates through funds received from a combination of Commonwealth, State and Local government, as well as specific purpose grants from philanthropic trusts. At times we also undertake fundraising activities as a means of supplementing the inadequate levels of funding.

The mission of the legal service is to work towards a just and equitable legal system. The Service's objectives are –

- i.** to provide a free and readily accessible legal service to people in necessitous circumstances and who qualify under the Service's eligibility criteria, and who live, work or study in the catchment area and to such other persons as the Service may from time to time decide;
- ii.** to seek guidance and direction on policy and its development from the community;
- iii.** to involve local citizens in the recognition, understanding and solution of their own legal and related problems;
- iv.** to establish programs of preventative law;
- v.** to provide legal education in the community; and

vi. to initiate and participate in law reform programs.

and in implementing such goals priority be given to -

- innovative service delivery; and
- analysis and criticism of government, the legal profession and social structure.

In endeavoring to provide an accessible legal service to people without means the Service is-

- free;
- a shop front location in the suburbs where people live;
- operates at night so that those who cannot take time off work can consult us;
- informal, in that we seek to avoid an inhibiting atmosphere by taking a more personal and human approach; and
- holistic in its approach to people and their problems, by not focusing solely on legal solutions.

Concerns with the Workability of the Charities Bill 2003

The enactment of the Charities Bill in its current form will have a number of serious flaws, which in our view will significantly impact on the charity sector.

Comments on some areas of concern:

In summary we have concerns related to the following areas:

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;
2. The definition of 'government body' is too broad, in particular in its inclusion of bodies 'controlled' by government;
3. The definitions of self-help groups and contemplative religious orders should be clarified;
4. The Draft Bill is not clear as to the scope of permissible advocacy by charities;
5. The Draft Bill needs to be further refined to recognise the role of peak bodies;
6. The Draft Bill needs to clarify further how an entity's charitable status may be affected by illegal activities;
7. The categories of charitable purpose should more particularly specify charitable purposes to recognise explicitly the protection of human rights;
8. The Draft Bill does not provide as to who will apply the new definition of charities; and
9. The reform and codification of the definition of 'charity' may have unintended effects upon PBI status.

Specific comments about some of these areas are outlined as follows.

Codification

The Fitzroy Legal Service supports efforts to examine the area of Charities and the legislation under which Charities function to the extent that it will modernize the law to recognize current day circumstances under which they operate.

We remain skeptical however, that codification of the common law definition of charity will solve all problems or provide greater transparency, certainty, and clarity for those in receipt of, or seeking charitable status. In fact it may further complicate the situation.

Dominant and Ancillary

There appears to be a lack of clarity contained in the Bill regarding the terms 'dominant', 'ancillary' or 'incidental' purposes. How to determine whether activities are in aid of the 'dominant purposes', opens it up to discretionary interpretation of what is appropriate or not. Issues abound regarding how to determine the status of activities, and as a result the opportunity for confusion and uncertainty are considerable.

Whether there will be requirements for increased accountability through the provision of increased documentation or cataloging of activity is also of concern. We would be very concerned if onerous accountability mechanisms were to be implemented as part of any changed regime, especially if increased scrutiny would be time consuming and costly and take valuable resources away from the organisations purpose.

Defining a Charity

While it may be appropriate for Parliament to define a 'Charity', there is some concern that Parliament may be acting unconstitutionally if it goes beyond this and attempts to regulate their activities.

Definition of a Government Body

We have serious concerns about the definition of *government body* contained in the Bill, particularly that of defining a government body to include a body "Controlled" by the Commonwealth, State or Territory Governments. Unintended consequences of this may be to rope in many organizations which while funded by government in every other way act and operate independently as charities.

Circumstances where a Community Legal Centre like Fitzroy should loses it's 'Public Benevolent Institution', 'Deductible Gift Recipient' and as a result its 'Fringe Benefits Tax' status would be catastrophic to its existence. As a consequence philanthropic funding would be virtually eliminated. In-kind support from local government for rates, utility costs, and even the attractiveness for current or future staff would place an unsupportable burden on an already seriously under-funded organization.

The loss of charitable status for organizations like Fitzroy Legal Service could have further far-reaching ramifications. The consequent reduction of services or likely closure will have many other broader consequences for the community. This issue must be clarified to ensure that organizations, which may be in receipt of Government funding, are not excluded from the definition of "charity".

Purpose and Activity

The Bill is couched in the negative, the focus is on what charities shouldn't do rather than what they should do to achieve their purpose. In our view there remains uncertainty and inconsistency in the usage of the terms to define a charity, namely, 'purpose' and 'activity'.

Disqualifying Purpose

Inexplicably, the Bill seeks to impose a restriction on the advocacy and lobbying activities of charities. Clause 8 of the draft Bill would exclude from charitable status organisations that have among their purposes:

The purpose of attempting to 'change the law' or 'Government policy', and or "advocating a cause"; unless these purposes are no more than "ancillary or incidental" to the other purposes of the organisation.

Such a clause is of considerable concern for Community Legal Centres like Fitzroy, who's raison d'être is to advocate on behalf of the poor and disadvantaged and to seek changes to the law where the law is harsh and unjust.

Community Legal Centres like Fitzroy Legal Service have made an exceptional contribution to 'social justice' the 'rule of law' and the enhancement of a cohesive and civil society over the past 30 years. We were established, to not only deal with the unmet day-to-day legal needs of our clients, the inequitable access to justice, and the protection of basic human rights for people in our community, but to seek socio-legal change where it was warranted. We have a commitment to seeing improvements in the law, and to lobby government for law reform where the law is harsh and unjust. The possible impact of aspects of Clause 8 may in fact become one of stifling democratic participation and involvement by placing barriers on charities, which 'advocate' and pursue 'positive' social change agenda's.

Furthermore, the requirement to determine if advocacy is 'ancillary' or 'incidental' to the other purposes of the entity concerned' negates the fundamental nature of advocacy to an organization's very existence. Problems would still remain under this legislation as to the basis of defining the quantum level at which an organization is more 'charitable'. Inevitably, the opportunity for confusion and uncertainty would be great.

It is somewhat astounding that all the effort expended in the development of this Bill failed to recognize or incorporate a more realistic interpretation of the fact that modern day Charities do in fact engage in advocacy which incorporates 'attempting to change the law or government policy', and that this is often a significant part of their function. A failure to incorporate this reality would seemingly revert our understanding of Charities to a pre-Elizabethan era.

Political Purposes and Activities

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:

- i. Has a disqualifying purpose; or
- ii. Engages in a disqualifying activity.

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;
- 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.

A significant 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 problematic as the term 'political cause' does not appear to be limited to 'party politics' and in its future interpretation is highly subjective and could see an entity's charitable status being subject to changing political climates or subjective assessments of the term 'political' by the authorities.

Furthermore the Draft Bill's treatment of political activity 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.

The cumulative effect of these provisions is that an entity is apparently free to engage in political *activities* if:

- they do not lead to an inferred *purpose* that is more than incidental or ancillary to the objects of the entity; and
- they are in furtherance of the entity's dominant purpose.

We are of the view that the scope of the Draft Bill's restrictions on political activities and purposes need clarification.

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

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.

Charities and institutions like Fitzroy Legal Service and other Community legal Centres 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 bare, 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.

Our reading of the current Draft Bill in its present form could lead to the curtailment of this vital role that charities play. 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*.¹

We submit that the Draft Bill should be clarified as to the scope of 'political'

Regulation

It is unclear how the legislation when enacted would be regulated, and how the granting or removal of charitable status will occur. Is this the responsibility of the Australian Taxation Office, ASIC or the Courts. Is it envisaged that there would be opportunity for independent review of an adverse decision by the regulating body, where would this occur?

It would surely be counterproductive if any new legislation were to result in a situation that might be more constraining, costly, time consuming, or litigious. If this were to be the case then the current situation under common law should remain.

In our view a specialist administrative body other than the Australian Taxation Office should undertake the administration of future legislation in this area. A co-operative scheme established by Commonwealth and State's could be explored to determine the charitable status of an entity under Commonwealth, State and Territory law

Peak Bodies

There is some concern that the Draft Bill fails to recognize the role of peak bodies. 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 recognized the assistance that a peak body provides to its members in engaging in their activities of public benefit. We are of the view 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.

Charitable Purposes

We are of the view advocacy and protection of human rights is a charitable purpose, and as such should be clearly stated in the Bill.

¹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

Criminal Activities

There are concerns about the workability of the illegal activity exclusion in clause 4(e) of the Draft Bill. This concern arises because:

- i. the clause does not specify the circumstances in which an entity is taken to have engaged in a serious offence. (under what circumstances is an offence deemed to have occurred). The definition of serious offence in clause 3 is of no assistance in this regard.

- ii. 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.

We are of the view that 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.