

THE ASSOCIATION OF INDEPENDENT SCHOOLS OF QUEENSLAND INC

SUBMISSION TO THE BOARD OF TAXATION ON THE EXPOSURE DRAFT OF THE CHARITIES BILL 2003

Introduction

The Association of Independent Schools of Queensland (AISQ) was established in 1968 as a non-profit organisation to represent and promote the interests of its member schools. AISQ's current membership comprises 161 schools which are responsible for the education of over 80,000 students.

The Association is a Member Association of the Independent Schools Council of Australia (ISCA), the peak national body covering the independent school sector.

ISCA has made a submission to the Board of Taxation on the Exposure Draft Charities Bill. AISQ strongly supports that submission and its recommendations. In particular, AISQ endorses the ISCA recommendation that the public benefit test not be extended to include the requirement that the dominant purpose of a charitable entity be altruistic.

There are a number of matters, some of which are covered in the ISCA submission, that The Association wishes to highlight to the Board.

General

Independent schools have always held charitable status. This charitable status has been long standing and unquestioned based on the clear purpose of independent schools being the advancement of education.

The Australian Taxation Office clearly considers independent schools as charitable institutions. The ATO's Draft Ruling TR 1999/D21 provides that "*the conducting of schools, colleges and universities for general learning are well known ways of advancing education*".

Further, the ATO uses grammar schools as an example of a "charitable institution".

The Association's concern then is whether or not the proposed Charities Bill 2003, if enacted, will in any way change this longstanding and uncontroversial acceptance of independent schools as charitable institutions.

It is the view of The Association that the Bill, if enacted in its current form, would result in areas of uncertainty for independent schools, particularly in the short term.

Some of this uncertainty will come from the need for independent schools to demonstrate that they qualify under the legislation as charities. This might include having to demonstrate that their purposes are for the public benefit.

Public Benefit

The definition of charity contained in the Bill requires that an entity have a dominant purpose that is charitable and (subject to two limited exceptions), that the dominant purpose must be for the public benefit.

The ISCA submission strongly argues the case for minimizing any uncertainty in relation to the public benefit test for independent schools. These arguments are endorsed by AISQ.

In particular, independent schools should not be placed in a position where there is a need for each school to continuously review its circumstances and activities in order to be satisfied they are meeting the requirements for charitable status.

This could be avoided through a restatement of the principles of public benefit which have been developed through the common law, namely, the general presumption that the relief of poverty, the advancement of education and the advancement of religion are (unless there is express evidence to the contrary) for the public benefit.

On its face, the Bill requires that public benefit be positively proved whereas currently for a vast number of entities, including independent schools, it has been accepted that their dominant purpose is for the public benefit.

The recommendations proposed by ISCA would assist to eliminate any uncertainty in ensuring that both direct and indirect benefits are considered in determining if an independent school's purposes are in the public benefit.

It is also necessary to eliminate any uncertainty for independent schools which have small numbers of students or which serve isolated or rural communities in respect to the proposed legislation's requirement that beneficiaries "must not be numerically negligible".

Further the requirement of the Bill that a charity benefits a "sufficient section" of the community clearly creates some uncertainty for independent schools. This is a much stricter test than the "public benefit" test applying under common law.

Government Bodies

Section 4 (1) (f) of the Bill specifically excludes from the definition of "charities" an institution that is a "government body".

The Bill's definition of a "government body" includes a body controlled by the Commonwealth, a State or a Territory. The Bill does not define the concept of government control, however, the explanatory materials indicate that the meaning of government control that is intended to apply is the meaning that has been developed by the courts to date. In other words, a government minister's authority to control the operations and activities of an entity will be determinative of whether or not that entity can be said to be government controlled.

Some independent schools in Queensland have been established by statute (for example, see the Queensland *Grammar Schools Act 1975*). Based on common law indicators, these schools might be considered to be government bodies and as such would be excluded from being charities under the Bill.

Clearly these independent schools are bodies which were established under statute to conduct charitable activities (the advancement of education). However, historically the bodies are subject to an element of government involvement by virtue of supervision, reporting and funding arrangements.

These schools are not different from other independent schools and in respect to whether or not they have charitable status, they should not be treated in a different manner by virtue of their historical establishment by statute.

Further AISQ believes that the establishment of some bodies by statute can be consistent with a charitable purpose. This is the case for those independent schools in Queensland established under the *Grammar Schools Act (1975)*.

The Bill, as currently drafted, does not assist in clarifying the charitable status of these bodies.

The best method of resolving whether an entity established by statute is a charitable institution is on a case-by-case basis taking into account the relevant facts. With the enactment of legislation, this may not be possible, thus increasing the uncertainty for these particular types of independent schools.

Unlawful Activities

Section 4 (1) (e) of the Bill provides that an entity cannot be a charity if it has engaged in conduct that constitutes an offence that can be dealt with by way of indictment.

In the view of AISQ, there are a number of difficulties with this definition.

Firstly, there is no time frame specified. This means that if an organisation was knowingly (or potentially even unknowingly) engaged in conduct constituting an indictable offence 5 years ago, for example, although the organisation may have undergone a complete change in management since that time, it will be excluded from being a charity under the Bill.

At a minimum there should be a time limit on past offences to ensure that entities are not punished for offences that were committed some time ago when the actual perpetrators of the offence may have left the organisation.

Secondly, the definition of “serious offence” does not assist in determining the types of offences the commission of which would disqualify an entity from being a charity. As it stands, the definition captures a broad range of offences including, for example, offences under the *Fair Trading Act 1989* (Qld) and the *Environmental Protection Act 1994* (Qld).

It is The Association’s understanding that each State and Territory and the Commonwealth have different regimes for the classification of offences and indictable offences do not feature in all of the regimes. As a result, the definition of “serious offence” should use terms referable to the legislation in each State and Territory as well as the Commonwealth. This would make the definition far clearer and more relevant.

Even with this clarification, a charity could still have its charitable status cancelled for a breach of the law in an area that has no direct relevance to its dominant charitable purpose. Given the extraordinary range of legal requirements around the activities of schools, it would be unacceptable to exclude a school from charitable status because of a breach of the law in conducting its day-to-day activities (particularly where the breach occurs inadvertently or through lack of resources or experience). Clearly, such a case is different from an entity carrying on an illegal activity as its dominant purpose and this should be recognized in the Bill.

The Purpose of Attempting to Change the Law or Government Policy

The Bill defines a charity as, among other things, an entity that does not have a purpose of attempting to change the law or government policy when that purpose can be described as more than incidental to the other purposes of that entity.

This disqualifying purpose could impact on schools and organisations such as AISQ and other sector representative bodies.

The Report of the Inquiry into the Definition of Charities and Related Organisations (June 2001) concluded –

“the Committee considers that advocating on behalf of those the charity seeks to assist, or lobbying for changes in law or policy that have direct effects on the charity’s dominant purpose, are consistent with furthering a charity’s dominant purpose. We therefore recommend that such purposes should not deny charitable status provided they do not promote a political party or a candidate for political office” (page 6).

AISQ agrees with this conclusion and believes that the disqualifying purpose provisions of the Bill should be as recommended by the Charities Report. This would eliminate any uncertainty for schools and organisations such as AISQ in relation to their representative role.

For independent schools and AISQ, advocating changes in government policy and law is a key part of assisting the beneficiaries whom the entities were established to benefit.

Independent schools and their peak body association such as AISQ play a key role in encouraging public debate on issues concerning education and students. This advocacy role is more accurately described as a companion or secondary purpose to their primary purpose of advancing education and the interests of students rather than an “ancillary purpose”.

The Bill as it currently stands has not achieved its aim to clarify, simplify or make more relevant this purpose test for charities.

Conclusion

Independent schools are likely to face increased uncertainty in relation to their charitable status as a result of the Charities Bill. Organisations such as AISQ and other representative bodies within the independent sector will also be uncertain of their charitable status.

For independent schools such uncertainty could be overcome by allowing administering agencies to treat non-government schools as a class of institution that satisfies the public benefit test.

Uncertainty could also be eliminated by including in the legislation a formulation which provides that the common law existing at the time of the passage of the legislation should remain in force except in so far as it might be inconsistent with the express provisions of the Act.

Attention also needs to be given to the proposed disqualifying provisions in relation to unlawful activities and attempting to change the laws or Government policy, in order for the legislation to clarify and simplify the current position. Consideration also needs to be given to not-for-profit bodies established under statute for charitable purposes, in order to clarify the position of such bodies.

This would ensure the Government’s intentions in respect to the definition of charities do not have unintended consequences for independent schools and the organisations that represent them.

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