

Submission to the Board of Taxation on the Proposed Legislative Definition of a Charity

1. Summary

KPV supports a legislative definition of a charity. It also broadly supports the definition contained in the draft legislation. The definition, however, has some disqualifying purposes that may cause difficulties both for KPV and the charitable sector as a whole. The inclusion of:

- activities that do not support its dominant purpose,
- activities that could be construed as advocacy, and
- commercial activities that were more than ancillary or incidental to its dominant purpose

as disqualifying conditions could severely restrict the beneficial work performed by many charities.

KPV also supports the establishment of a Charities Board to oversee the administration of the proposed Act and act as a low cost avenue of appeal against the administrative decisions of the Australian Taxation Office (ATO).

2. Background

Kindergarten Parents Victoria

Who is Kindergarten Parents Victoria (KPV)

Kindergarten Parents Victoria (KPV) was formed in 1990 and provides a comprehensive range of management support to early childhood services. It is a not-for-profit, non-government organisation that promotes, develops and sustains quality early childhood education.

KPV's membership consists of over 1,000 Victorian Preschool Committees of Management and various other organisations associated with early childhood education, which have:

- Qualified early childhood staff with specialist training in interacting with and planning programs for young children;
- Developmentally appropriate programs based on the recognition and understanding of the needs, interests and abilities of young children;
- Safe and attractive play areas both indoors and outside which provide opportunities for children to develop new skills and practice and enhance those they have already learned.

KPV's Mission

KPV is a not-for-profit, non-government organisation that promotes, develops and sustains quality early childhood education.

KPV's Vision

Parents are vital partners in quality early childhood education.

Structure

KPV has an Incorporated Board of Management made up of member committee representatives and early childhood professionals. Board members are elected at the Annual General Meeting.

The KPV Statement on the Importance and Value of Early Childhood Education

Early childhood education is an investment in the future of this country as well as in the future prosperity and well being of our community and all its citizens. There must be an ongoing commitment from all levels of government to give priority to affordable and accessible early childhood care and education so that all young children are given the best possible educational opportunities.

KPV members support and endorse the following statements.

High quality early childhood education is essential because it:

- Builds on the foundations of the family and enriches and strengthens local communities;
- Provides opportunities for all young children to develop to their maximum potential;
- Allows an enriching partnership between parents and early childhood educators;
- Is vital to the future economic, social, cultural and intellectual development of our nation and all its citizens;
- Includes and values everyone irrespective of difference in race, religion, class, ability, gender and geographic location;
- Draws people together and creates greater tolerance and appreciation of differences.

KPV itself is endorsed as an Income Tax Exempt Charity and the vast majority of our members are also endorsed as Income Tax Exempt Charities.

3. Benefits of Proposed Legislation

Certainty

The current arrangements relating to the definition of a charity rely on an unwritten framework that has evolved over four centuries of common law. There have been few decisions by the courts, particularly over the last 30 years and few Australian decisions, so, the case law that is relied on has doubtful relevance to the status of charities in Australian society today.

The proposed legislation will accept the existing common law interpretation and codify it into a legislative definition for the purposes of all Commonwealth Acts. Provided that the definition accurately reflects the current practice then a legislative definition can provide some certainty to the more than 700,000 organisations that currently operate in the charitable sector. As some 35,000 of these organisations are employers there is an obvious benefit that the taxation concessions available to these organisations will be based on a sound legislative framework.

Inclusion of Community Managed Child Care

The Bill does modernise the definition of charity in a number of positive ways by:

- clarifying the list of charitable purposes to include "advancement of social or community welfare" and of the "natural environment";
- acknowledging that child care services are charitable;
- acknowledging that self-help organisations may be charitable, provided they are open and non-discriminatory in their membership.

KPV supports the inclusion of child care services in purposes that advance social or community welfare. Many of our members provide both preschool services and child care to the community. The provision of preschool programs satisfied the previous conditions for endorsement as an Income Tax Exempt Charity (ITEC) and our members who provided only preschool services were all endorsed. Where members provided a mixture of services, the ATO was unable to provide any certain guidelines on how to determine eligibility. As a consequence these members were unable to gain ITEC endorsement.

4. Issues

Altruistic purpose

Clause 4 of the draft Bill provides a "core definition" of charity.

KPV supports the core definition as a clear and workable formulation. We welcome the special provisions for open and non-discriminatory self-help groups.

We support the proposition that the Public Benefit Test should specify that charities should be altruistic. The Charity Definitions Inquiry defined altruism as "unselfish concern for the welfare of others". This is, in our view, an essential distinguishing feature of charity, as understood by most charities themselves and the general community. It is important to distinguish between altruistic organisations and organisations that improve health, education or welfare (all charitable purposes) in the direct interest of the individuals that control the organisation (for example, friendly societies).

There is a difficulty in the application of the Public Benefit Test in that the proposed legislation is couched in relative terms. Terms such as "numerically negligible" or "a sufficient section of the general community" are too general to provide certainty. Undoubtedly the ATO will produce a ruling to indicate how it will interpret these terms. The ability of a charity to challenge ATO rulings through the courts is severely limited because of the costs involved in protracted litigation and whether or not the allocation of funds to this purpose is consistent with the purpose of the charity. There is a clear need for a more specific definition of Public Benefit and/or an accessible appeal process by which charities can challenge the decisions of Government agencies.

Meaning of Ancillary

KPV supports the requirement in the proposed legislation that for an entity to be a charity its dominant purpose has to be charitable or for the public benefit. The difficulty arises with the requirement that other purposes or activities are ancillary or incidental to the dominant purpose. How is this to be measured or quantified?

KPV provides support to community managed preschools. In assisting volunteer committees KPV staff have developed skills and competencies in areas of management and industrial relations. KPV uses these skills and competencies as consultants, to provide advice to Local Government Authorities who also manage preschool services. Although Local Governments are not charities they are not-for-profit and the consultancy support is aimed at the advancement of education. This is clearly ancillary to and consistent with our predominant purpose. We also, on a much smaller scale, provide support to private child care operators who are clearly in business to make a profit for their owners. The support provided is still aimed at assisting these private operators to offer quality education programs. If we were to go one step further and provide management and industrial relations consultancy to private businesses who were not in the education sector at what stage would this become more than ancillary or incidental to our dominant purpose?

Attempting to Change the Law or Government Policy

Charities have always engaged in public advocacy to influence Government policies, in order to improve the circumstances of those they are charged with supporting. Given the resources and authority of Governments, public advocacy can often lead to greater improvements in the lives of poor people, sick people, and others assisted by charities, than direct help. KPV has been active in its advocacy role in negotiating with the relevant State Government Department around the level of funding provided to support Preschools. This advocacy on behalf of our members was directed purely at ensuring a sufficient level of funding to support their charitable purposes. Similarly KPV provides our members with a list of priorities immediately before elections. Our recommendation is that our members approach the candidates in their area and ask for a commitment to support our suggested priorities. The priorities are specific to the promotion of preschool programs and are apolitical. We would not regard this level of advocacy as being inconsistent with our predominant purpose or our status as a charity. The proposed legislation could allow a Government to silence a charity by challenging its charitable status because of its "attempts to change the law or government policy."

There are numerous examples of Government policy changes that have had their origins in advocacy by charities. There are numerous examples of charities co-operating or even leading investigations into the effects of Government policies that have resulted in positive change for the public benefit. Surely no Government should feel threatened by a charity advocating for a change that would benefit its predominant charitable purpose.

Commercial Activities

A non-profit organisation could engage in commercial activity with the sole purpose of raising funds to promote its dominant charitable purpose. While the dominant purpose of the entity is charitable, the financial turnover required to fulfil this dominant purpose could be significantly lower than the financial turnover required to raise sufficient funds to support the charitable activity.

The term "non-profit" is adequately defined in the proposed legislation. The profits or assets of a non-profit entity cannot be distributed to particular persons including its owners or members either while it is operating or upon winding up. A similar test could be applied so that an entity that uses more than half of its profits or assets for a charitable purpose could still be regarded as having a charitable purpose.

5. Conclusion

KPV broadly supports the aims of the proposed legislation however we have concerns about some of the restrictions imposed by the definition. A charitable entity could have its charitable status removed if it engaged in:

- activities that did not support its dominant purpose;
- activities that could be construed as advocacy;
- commercial activities that were more than ancillary or incidental to its dominant purpose.

The administration of the definition would be left to the ATO who would presumably issue Tax Rulings and Interpretative Decisions. While the ATO processes include consultation prior to final rulings and decisions being published there is no low cost appeal process for a charity to challenge these rulings and decisions. While in the past the ATO has not engaged itself in limiting the activities of charities there is a real danger that, as a result of the proposed legislation, the ATO could be required to take a more active role in interpreting the non-specific areas of the proposed legislation.