

Combined Community Legal Centres' Group NSW

Submission to the Board of Taxation

Charities Bill 2003

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A. OVERVIEW

This submission is made by the Combined Community Legal Centres Group (NSW) (CCLCG) representing both

- the 38 community legal centres that are members of CCLCG (see section B of the submission), and
- the incorporated association CCLCG (see section C).

In the opinion of CCLCG, the draft Charities Bill 2003 as it currently stands has substantial flaws and is essentially unworkable.

Section B looks at the impact of the proposed Bill on community legal centres in NSW. The Bill has the potential to adversely affect the ability of individual community legal centres to claim charitable status, because part of the role of community legal centres is to advocate on behalf of their client groups to decision-makers.

The vagueness of the draft Bill, with a lack of clarity in the definitions of terms such as “dominant purpose”, “ancillary purposes” and so on, set up a scheme in which CLCs and other charities are constantly vulnerable to allegations that they are acting outside their charitable purposes.

The draft Bill is also unworkable in its failure to deal with the relationship between PBIs and charitable organisations. The final Report of the Inquiry into the Definition of Charities and Related Organisations proposed a clear and well-researched framework which would deal with both charities and PBIs. CCLCG is at a loss to understand why the Taxation Board does not simply adopt the proposals put forward in that Report.

If CLCs lose charitable status, they will suffer substantial financial loss. This would seriously undermine the capacity of community legal centres to continue providing legal services to disadvantaged communities. Unless governments offset the loss of these financial benefits with increased funding grants to legal centres, many centres may struggle financially to the point that they are not longer viable. This would then have a flow-on effect of increasing pressure on other legal service providers, notably government-funded services such as Legal Aid Commissions.

Another issue which is of concern in the legislation is the lack of clarity regarding “government bodies”, as potentially this could include all organisations which are substantially funded by the government – a group which includes community legal centres.

Section C examines the effect of the Bill on CCLCG. As a peak body providing services to its 38 member legal centres, CCLCG appears particularly vulnerable to the Bill, because the Bill does not adequately provide for the role of peak bodies or coordinating organisations. Loss of charitable status to CCLCG will lead to greater

financial costs for the Group, and substantially reduce its effectiveness in representing and resourcing its members.

In **section D**, the submission examines the wider implications of restricting the historical role of charities to advocate on behalf of disadvantaged communities. In advocating on behalf of the clients they see on a day-to-day level, charities play a crucial role in any democratic society. The right to express opinions, particularly about political issues, is protected under the Constitution. The International Covenant on Civil and Political Rights also provides guarantees protecting free speech and the right to form associations. It is arguable that the Bill, by penalising organisations which speak out against government law or policy, is placing indefensible restrictions on these rights.

For all of the above reasons, CCLCG urges the Taxation Board to abandon the proposed Charities Bill and return to the framework laid out in the final Report of the Inquiry into the Definition of Charities and Related Organisations.

If the Taxation Board chooses not to return to that framework, CCLCG supports amendments to the Bill, as put forward to the current Inquiry by the Victorian Federation of Community Legal Centres. These amendments are included in **Section E** to this submission.

B. COMMUNITY LEGAL CENTRES IN NSW

B.1. What do community legal centres do?

There are 38 community legal centres currently operating in NSW, providing legal advice, information and education to people from a wide range of disadvantaged communities. A full list of NSW community legal centres is available in the pamphlet provided with this submission, or from the website www.nswclc.org.au.

There are twenty “specialist” and nineteen “generalist” legal centres in NSW. Specialist centres work in particular areas of law, such as

- disability discrimination
- tenancy
- domestic violence
- environment
- social security
- consumer credit;

or with particular sections of the community, for example

- women
- indigenous communities
- refugees
- older people
- young people.

Specialist centres service all of NSW, usually through the provision of phone advice, but also through rural outreach programs, regular community education programs in regional areas, and the provision of training and back-up advice for CLC workers from generalist centres.

Generalist legal centres, on the other hand, provide legal advice to people living within a particular geographic area. For example Western NSW CLC (Dubbo) provides advice to people in the greater west of NSW and Shoalcoast CLC (Nowra) provides advice to people living on the south coast of NSW.

CLCs also take on test cases and class actions, which may or may not be funded by the NSW Legal Aid Commission. Many of the cases run by NSW CLCs are high-profile public interest cases, some of which have resulted in changes to the legal system. These include:

- winning damages for a six year old with spina bifida who was denied enrolment at a school because of her disability
- winning a major case against the State Bank when it was discovered that a number of their loan contracts were not legal
- winning record compensation against Katies clothing chain for women from a non-English speaking background for employment discrimination.

Community legal centres not only provide legal advice and assistance, but also encourage and enable people to develop skills to be their own advocates. Centres work towards achieving systemic change through community legal education, and through law and policy reform. This is further discussed in B.2. below.

No two community legal centres are identical. Each centre has arisen due to perceived community needs, and are managed by community members (in the case of generalist CLCs) or by experts in the field (in the case of specialist CLCs). Generalist CLCs in particular are a product of the communities in which they are located.

CLCs employ qualified staff including solicitors, administrators, advocates, social workers and community legal educators. Centres also use volunteer solicitors, barristers, law students and others to extend legal services. Centres provide legal advice over the telephone and hold interview and advice sessions after business hours.

The contribution of volunteer work to community legal centres is immensely valuable. A recent study of volunteers at NSW community legal centres reveals the extent to which community legal centres are reliant on volunteers for the quantity and the quality of the services centres are able to provide.¹

B.2. The crucial role of systemic advocacy in the work of community legal centres

Community legal centres are unique of all legal service providers in Australia because they provide a mix of

- advice / casework services to disadvantaged people,
- community legal education to community and client groups, and
- law reform / systemic advocacy on behalf of client groups.

The importance of systemic advocacy to the work of community legal centres cannot be underestimated. Legal centres work with some of the most disadvantaged groups in Australian society. They are therefore in a good position to see the effect of laws and policies on particular client groups. Governments do not always have the opportunities to see the effect of such laws and policies, and legal centres therefore see it as a crucial part of their job to inform governments what is actually happening out there on the ground. Changes to laws and policies are often the only solution to the legal problems facing legal centre clients, and if legal centres were unable to attempt this kind of systemic advocacy, they would not be doing their best to help their clients groups.

CCLCG believes that the Draft Charities Bill 2003 is unworkable in its potential to limit the amount or sort of advocacy that charities may undertake without losing

¹ Roselyn Melville, *My Time is not a Gift to the Government: An Explanatory Study of NSW Community Legal Centre Volunteers*, University of Wollongong, May 2002; copies available from State Office of CCLCG, (02) 9318 2355.

their charitable status. The Bill potentially means that community legal centres would not longer be able to advocate anything which could be defined as a “political cause”. If this were the case, the Bill could be in breach of the Commonwealth Constitution and in contravention of the International Covenant of Civil and Political Rights. This is further discussed in Section D of this submission.

B.3. Concerns with definition of “Government body”

CCLCG is concerned with the definition of *government body* contained the Charities Bill. Defining a government body to include a body controlled by the Commonwealth, State or Territory Governments may draw in organisations which receive funding from government.

Funding for every CLC is different, but most CLCs in NSW receive funding through the Commonwealth and/or NSW Community Legal Centre Funding Programs. Some CLCs also receive funding from other NSW government departments, local councils, statutory foundations, and from private organisations.

CCLCG would like to see the definition of government body clarified to make it clear that entities which receive all or the majority of their funding from the Government are not excluded from the definition of “charity”. This can be clarified through a better definition of “control”, such as that contained in the amendments in Section E of this submission.

B.4. Current charitable status of community legal centres and effect of the loss of this status

All CLCs in NSW are defined as charities. On a federal level, this entitles centres to

- income tax exemption
- refund of GST imputation credits
- FBT rebate (not a full exemption – an exemption is however available where centres are Public Benevolent Institutions, discussed below).

On a state level, charities are also entitled to a variety of benefits including

- land tax exemption for investment properties (this is not relevant to CLCs as CLCs do not own investment properties)
- payroll tax – which applies to organisations which spend more than over \$600,000
- stamp duties for insurance, property transactions (including commercial leases)
- vehicle registration fees.

Loss of charitable status could have further far-reaching ramifications for individual organisations. For example, State government departments which currently provide government-owned properties at reduced rents to charities, might reconsider these offers if an organisation is not a charity. Funding grants from private or public institutions also require organisations to be endorsed as an income-tax exempt companies and deductible gift recipients.

B.5. Potential to lose Public Benevolent Institution (PBI) status

In addition to having charitable status, the vast majority of community legal centres also have Public Benevolent Institution (PBI) status.

What is PBI?

According to the recent ATO ruling (TR 2003/5), a Public Benevolent Institution is “a non-profit institution organised for the direct relief of such poverty, sickness, suffering, distress, misfortune, disability, destitution, or helplessness as arouses compassion in the community.”² PBI status also covers peak bodies in certain circumstances, mostly where the peak body has a common benevolent purpose with its members, which are themselves predominantly PBIs.³

There is some confusion as to whether the draft Charities Bill 2003 would affect the rights of an organisation to claim PBI status. The Bill does not explicitly refer to PBI.

The Report of the *Inquiry into the Definition of Charities and Related Organisations* made the point that the relationship between PBI and charitable status was unclear, although the Australian Taxation Office’s submission to the Inquiry saw PBIs as a subset of charities.⁴ This lack of clarity was precisely the reason why the Report recommended holistic review of the charitable area and made 27 recommendations to further this review.

In the absence of clarity with this new Bill, it seems likely that if an organisation were excluded from the definition of a charity, the organisation would also lose PBI status.

Effect of loss of PBI status

PBI status gives CLCs two valuable benefits: Fringe Benefit Tax (FBT) exemption and Deductible Gift Recipient (DGR) status. It is the belief of CCLCG that the loss of these two benefits has the potential to destroy the community legal centre sector.

FBT exemption

By using salary packaging and taking advantage of the FBT cap of \$30,000 grossed-up value, centres are able to maximise their grant funding to employ

² Australia Taxation Office, Taxation Ruling 2003/5, “Income tax and fringe benefits tax: public benevolent institutions”, para 7.

³ ATO, TR 2003/5, paragraphs 63-65.

⁴ Report of the Inquiry into the Definition of Charities and Related Organisations, Overview, pp 1-2; see recommendation 21 which replaces PBIs with a subset of charity to be known as Benevolent Charity.

quality staff. Given that community legal centres are chronically underfunded, and offer some of the lowest rates of pay in the legal sector,⁵ FBT exemption is of crucial assistance in attracting skilled workers.

Although the problem would be common to all legal centres in NSW, it would likely impact on rural and remote community legal centres even harder than centres located in Sydney or larger metropolitan centres. Rural and remote legal centres currently experience great difficulties recruiting and retaining staff, particularly solicitors, as there are few available solicitors working in rural areas, and thus legal centres have to try and entice workers from urban centres. If the centres cannot use FBT exemption to increase the value of wages on offer, it may be impossible to convince urban solicitors to relocate.

The loss of FBT exemption to organisations which previously held such exemptions would also cause serious problems for existing staff contracts. Depending on the contracts of each legal centre with their staff members, either the staff members will suffer, in that they will experience an effective drop in pay, or the centre will suffer, in that it will have to draw on the reduced income to fulfil existing staff contracts based on the promised salary. In the words of one legal centre administrator, “we would probably have to look at ways to reduce staff numbers.”

Some smaller centres may simply be unable to exist, as the number of staff they would be able to employ would be too low to make the organisation viable. Governments would need to increase funding grants to community legal centres to match any losses caused by the loss of FBT, and other benefits.

Deductible Gift Recipient status

DGR allows organisations to attract donations or gifts which can be claimed by the donor as a deduction on their income tax.

⁵ A recent survey of 18 community legal centres conducted by the National Association of Community Legal Centres in August 2003 showed that in NSW, the average salary for full-time solicitors, including principal and senior solicitors (generally of five or more years experience), was approximately \$51,000. This figure is around the amount that a first-year solicitor in private practice in Sydney can expect to receive, or that a first-year Legal Officer (Grade II) at the NSW Legal Aid Commission would receive. In both the private legal sector and the Legal Aid Commission, solicitors' salaries increase significantly the longer they stay, rising after five years to around \$110,000 for private solicitors, or \$80,000 for Legal Aid solicitors. The situation for non-legal staff in CLCs is not much better. For example, according to the NACLC survey, the average wage paid to an administrative worker (including finance officers) in NSW community legal centres was approximately \$39,000. This is around the same as the salary for a first-year Grade 1/2 Clerk at the Legal Aid Commission, but the Legal Aid Commission offers a clear path of yearly pay increases, as well as the general public service opportunities of applying for promotion. Information regarding private solicitors obtained from *Lawyers Weekly*, 20 June 2003, published in NACLC, *Community Legal Centres – An Investment in value*, p. 6. NSW Legal Aid Commission Salary Rates are current as at 4/7/2003, available from the NSW Legal Aid Commission.

In response to rising costs and increasing demand for services from the community, many community legal centres have broadened their income base by seeking project funding from sources other than the standard Commonwealth and State government funding programs. Most philanthropic institutions, private organisations and other funding bodies require evidence of DGR endorsement before providing a grant to a community organisation.

Further restriction of DGR status would also fly in the face of the Prime Minister's Community-Business Partnership which has developed tax initiatives to encourage philanthropy by allowing donors to have greater benefit from providing gifts to charities.⁶

B.6. Vagueness of the Bill could lead to greater administrative burden on legal centres

The point of codification is surely to clarify common law and to provide greater certainty. However the draft Charities Bill is a legal minefield which could substantially increase the administrative burden on legal centres.

The vagueness of the Bill, particularly in regards to tests such as “dominant”, “ancillary” or “incidental” purposes, and the scrutiny on whether activities are in aid of the dominant purposes, opens it up to discretionary interpretation. This means that a centre may not know from day-to-day whether particular activities would jeopardise its charitable status.

The Bill is also potentially vulnerable to abuse. For example, if a person has a grievance against a community legal centre – perhaps because the centre is representing the opposing party in legal proceedings, or because the centre has been outspoken about a particular issue with which they disagree – then that person may decide to make a complaint about the centre's activities to the ATO or whatever body is instituted to review charitable status. The legal centre would then face the administrative burden of proving that its activities are not “disqualifying purposes”. This could include

- cataloguing all activities conducted by the centre
- providing logs of staff activities over periods of time
- providing details of client statistics in particular matters
- obtaining legal advice
- answering any specific questions asked by the decision-maker.

CCLCG is concerned that defending charitable status could take up a substantial amount of time which could be better used to assist disadvantaged clients.

The amendments contained in this submission (Section E) are a substantial improvement on the current Charities Bill because they actually define phrases

⁶ From 1 July 2003 taxpayers were able to spread deductions for cash donations made to deductible gift recipients, in instalments elected by the taxpayer, over a period of up to five-years: see http://www.pm.gov.au/news/media_releases/2002/media_release2032.htm

such as “predominantly charitable” and “public benefit”. They also clarify the difference between “purpose” and “activity”. They also make it clear that advocacy, law reform and policy development is permissible where it is conducted as part of an organisation’s overall charitable purposes.

C. THE COMBINED COMMUNITY LEGAL CENTRES GROUP NSW

The Combined Community Legal Centres Group NSW (CCLCG) is an incorporated association representing the network of community legal centres throughout New South Wales. As such it is the peak body for community legal centres in NSW. A full list of members of CCLCG is contained in the brochure 'Community Legal Centres' which is provided with this submission as a separate document.

C.1. Purposes of CCLCG

The objects of CCLCG include the following:

- To assist member centres fulfil their goals and policies, particularly through advocacy for the provision of adequate resources and education of the public about the role of Community Legal Centres.
- To facilitate communication and cooperation among member centres, and between member centres other bodies and to assist all member centres, especially those in remote and rural areas, to participate fully in the activities of the organisation.
- To support member centres to advocate for people who are socially or economically disadvantaged and whose inability to access the legal system further aggravates or perpetuates their disadvantage, through undertaking research and promoting legal and administrative reform.
- To provide information and referral for Community Legal Centres and related agencies and disadvantaged people in need of legal services.
- To liaise closely and, as appropriate, work co-operatively with other organisations, particularly the NSW Legal Aid Commission and relevant national networks, in relation to justice issues and the provision of community based services.

C.2. Activities of CCLCG

The Board of CCLCG is drawn from member organisations. Much of the work of CCLCG is developed through sub-committees, also consisting of member organisations. As just two examples, the Practice Committee works on issues which affect CLC legal practice (such as Public Indemnity insurance), and the Community Legal Education Worker sub-committee brings together community education workers to share resources and training initiatives.

CCLCG has negotiated important benefits for its members, including an exemption from NSW Government Interpreting fees and access to Legal Aid training forums.

CCLCG is resourced by a small office of four staff, three of whom are part-time. The state office acts as a busy referral point for members of the public seeking legal advice or seeking information about community legal centres. It also does the following

- runs four CCLCG meetings a year to provide support and training to CLC workers
- organises a bi-annual state conference with workshops on relevant areas of law
- convenes network meetings (in-person or phone link-ups) on particular issues
- coordinates and submits funding submissions on projects relevant to the network of legal centres
- publishes resources for community legal centres, for example a Financial Management Guide for Community Legal Centres
- administers a website which provides details on all community legal centres in NSW
- publishes and distributes a Directory of NSW CLCs
- publishes pamphlets and information about community legal centres
- attends university career days and other forums to promote community legal centres and encourage students and lawyers to volunteer.

CCLCG is a charity and has PBI status, with staff offered salary packaging.

C.3. Effect of Charities Bill on CCLCG

All of the concerns about the financial impact of loss of charitable and PBI status outlined above regarding community legal centres, also apply to CCLCG. It also appears that as a peak body, CCLCG is particularly vulnerable to the effects of the legislation. This is because 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.

CCLCG submits that peak bodies should continue to be defined as charities if their members have charitable purposes, and if the peak body supports (directly or indirectly) its members in activities of a public benefit. This is consistent with the ATO Ruling 2003/5 which, in the context of PBI definitions, accepted that a body which coordinated services and support would be a PBI where its members were PBIs and where the activities of the peak body were “a step in the benevolent process of the group of organisations.”⁷

Proposed amendments to the Bill that clarify the role of peak bodies, are located in Section E of this submission.

⁷ TR 2003/5 para 65.

D. ADVOCACY AND FREEDOM OF SPEECH ARE HUMAN RIGHTS AND ESSENTIAL ELEMENTS OF A DEMOCRATIC SOCIETY

The Taxation Board has invited submissions from organisations regarding the effect of the Draft Bill on their organisation, rather than on the community. However CCLCG would like to make the point that the Draft Bill would have a substantive effect on Australian society. If charities cannot represent the interests of their members or client-groups to the government without fear of threats to their charitable status, then effectively the government has silenced the voices of the poor and the disadvantaged.

The Charities Bill is not merely unjust; it is potentially unconstitutional. Several High Court cases have held that there is an implied constitutional right to freedom of communication on matters of government and politics.⁸ This right exists because the Constitution provides for a representative government and freedom of communication is essential to such a system.

The Bill also arguable breaches the International Covenant on Civil and Political Rights. Article 19 guarantees people the right to freedom of expression guarantees regarding the right to free speech. Article 22 also protects the right to freedom of association with others. In setting up a regime that financially penalises charities that seek to argue against government law or policy, or advocate on behalf of their members or clients, this Bill could be seen as contravening these fundamental human rights.

⁸ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Commission* (1997) 145 ALR 96.

E. PROPOSED AMENDMENTS TO THE DRAFT LEGISLATION

(As put forward by the Victorian Federation of Community Legal Centres)

PROPOSED AMENDED CLAUSES

3 Definitions

(1) In this Act, unless the contrary intention appears:

control of an entity, by a government body, means the power to direct completely the entity's acts and omissions, where such acts and omissions are not reasonably required under any funding agreement.

peak body means an entity:

- (a) whose members engage in activities of public benefit that are further to, or in aid of, the entity's charitable purposes;
- (b) membership of which is conditional on engaging in such activities; and
- (c) that supports, whether directly or indirectly, its members in such activities.

...

4 Core Definition

(1) A reference in any Act to a charity, to a charitable institution or to any other kind of charitable body, is a reference to an entity:

- (a) that is a non-for-profit entity and not an individual, a partnership, a political party, a superannuation fund or a government body;
- (b) whose constituent documents disclose that the entity has one or more charitable purposes and no disqualifying purposes;
- (c) whose activities are predominantly charitable and of public benefit; and
- (d) that has not ceased to be a charity under subsection (2).

(2) An entity will cease to be a charity if it is convicted of a serious offence or engages in disqualifying political activities.

(3) The activities of the members of a peak body, except for serious offences and disqualifying political activities, are activities of the peak body for the purposes of this Act.

6 Dominant Activities

An entity's activities are ***predominantly charitable and of public benefit*** if and only if:

- (a) the entity engages in activities of public benefit;
- (b) the activities described in paragraph (1)(a) are further to, or in aid of, the entity's charitable purposes stated in its constituent

- documents; and
- (c) any other of the entity's activities are not the dominant activities of the entity and are:
 - (i) incidental to the activities described in paragraph (a);
 - (ii) for the proper administration of the entity; or
 - (iii) are to raise funds for the entity.

7 **Public Benefit**

- (1) An activity is of **public benefit** if it:
 - (a) promotes a universal or common good;
 - (b) has practical utility; and
 - (c) benefits the general community or a sufficient section of the general community.
- (2) An activity does not benefit a sufficient section of the general community where:
 - (a) the entity deliberately prevents members of the community who are not part of that section from receiving the same benefit from the activity as those who are part of that section; and
 - (b) that section is not made up of individuals affected by a particular disadvantage or discrimination, or by a need that is not being met.
- (3) Open and non-discriminatory self-help is an activity of public benefit.
- (4) An entity engages in activities of public benefit if its members live a life devoted to:
 - (a) the contemplation and practise of religion or ethics; and
 - (b) the avoidance of material wealth.

8 **Disqualifying purposes and political activities**

- (1) **Disqualifying purpose** means:
 - (a) the purpose of engaging in activities that are unlawful; or
 - (b) the purpose of supporting a political party or candidate for political office.
- (2) An entity engages in **disqualifying political activities** if and only if:
 - (a) the entity endorses a political party or candidate for political office;
 - (b) the entity provides a political party or candidate with funds or resources; or
 - (c) its predominant activities are attempts to change the law or government policy where such activities are not further to, or in aid of, the entity's charitable purposes.
- (3) For the avoidance of doubt, an entity engages in activities further to or in aid of its charitable purposes where it advocates in any manner to any person, group of persons or body that:
 - (a) a particular change be made to the law; or
 - (b) that a government body adopt a particular policy, make a particular

decision, or exercise its legal powers in a particular way.

(4) For the avoidance of doubt, an entity does not endorse a political party or candidate for political office by engaging in activities referred to in subsection (3), regardless of whether a political party or government body advocates the same view.

9 Open and non-discriminatory self-help

An entity engages in ***open and non-discriminatory self-help*** if:

...