

29 September 2003

Consultation on the Definition of a Charity,
The Board of Taxation,
C/- The Treasury,
Langton Crescent,
Parkes ACT 2600.

Dear Sir/Madam,

**RE CONSULTATION BY THE BOARD OF TAXATION ON THE
DEFINITION OF A CHARITY**

Oxfam Community Aid Abroad welcomes this opportunity to provide input to Board of Taxation consultation on the definition of a charity. This submission should be read in conjunction with Oxfam Community Aid Abroad's previous submission to the Federal Government's Inquiry into the Definition of Charities and Related Organisations.

1. Background.

Oxfam Community Aid Abroad's vision or dominant purpose is to achieve a fair world in which people control their own lives, their basic rights are achieved and the environment is sustained. To achieve this Oxfam Community Aid Abroad supports innovative and imaginative development projects and acts to mobilise the Australian community to address the underlying causes of inequality and powerlessness through influencing the policies and practices of governments, companies and institutions to eliminate poverty and achieve social justice and environmental sustainability.

In order to achieve its dominant purpose, Oxfam Community Aid Abroad's activities work to increase the number of people who have a sustainable livelihood, access to social services, an effective voice in decisions, safety from conflict & disaster and equal rights and status. Oxfam Community Aid Abroad works to achieve this in the Horn of Africa, Southern Africa, South Asia, East Asia, the Pacific, Central America and Indigenous Australia through long term development programs, responding to emergencies, advocacy, youth and community programs.

Oxfam Community Aid Abroad integrates its development programming and response to emergencies with advocacy, community and youth programs directed towards influencing the policies of governments multi-lateral institutions such as the World Bank and the private sector. Importantly, for the purposes of this inquiry, it should be noted that Oxfam Community Aid Abroad's advocacy program is currently funded by non-tax deductible donations.

Oxfam Community Aid Abroad's work is a partnership through which Australians enable poor and marginalised people to control their own development and exercise their basic rights. In 2001-02 Oxfam Community Aid Abroad raised gross revenue of \$26.5 million, including \$15.8 million in donations from the Australian community. Oxfam Community Aid Abroad is supported by more than 10,000 volunteers and 37,000 committed donors.

Oxfam Community Aid Abroad has two wholly owned subsidiaries. Oxfam Community Aid Abroad Trading manages 17 fair trade shops around Australia and a mail-order catalogue operation. Our development consulting arm, International Development Support Services, implements a range of commercial development contracts around the world. Oxfam Community Aid Abroad also has an Ethical Investment Trust, managed in partnership with the Bendigo Bank.

Oxfam Community Aid Abroad is the Australian member of Oxfam International, a network of 12 organisations working in more than 100 countries throughout the developing world. Oxfam International is committed to a rights based approach to alleviating poverty and engages in development programs and advocacy to meet that objective.

2. Input to Inquiry into the Definition of Charities and Related Organisations.

Oxfam Community Aid Abroad's views on the definition of charities remain consistent with the key points made by Oxfam Community Aid Abroad in its January 2001 submission to the government's Inquiry into the Definition of Charities and Related Organisations. These include;

- That the definition of a charity should be consistent with the aim of enabling disadvantaged and marginalised people in Australia and overseas to fully enjoy their human rights, (economic, social and cultural rights as well as civil and political rights) according the United Nations Charter and relevant Covenants.
- That the definition of charitable organisations should be based on the *purpose* of the activities of the organisation and not the nature of the activities themselves. For example, whilst over the last 30 years the nature of the activities of Oxfam Community Aid Abroad has widened significantly to include trading in handcrafts, consultancy services and offering ethical investment opportunities, the purpose of these activities has remained constant and consistent, namely to work with others to alleviate poverty, injustice, distress and suffering.
- That unless poor people control their own development they are doomed to welfare dependency and continuing poverty. However self-help alone is not enough. Poverty is structural and whether it is based on macro-economic issues like third world debt or unfair trade rules, people and governments in the developed world - those with the power to address these issues - have a responsibility to work for change. Currently, donations for such public advocacy on poverty issues do not enjoy tax-deductibility, despite the fact that such advocacy can be (and often is) far more effective than direct poverty alleviation

programs. Accordingly, the definition of what is charitable should include education and advocacy activities undertaken in furtherance of charitable aims.

- That the definition of charity should encompass a wide range of issues – such as poverty, human rights, the environment, animal welfare and disabilities - in order to reflect the diversity of issues ordinary Australians forego income and time to ensure that the rights and needs of these groups are met in the most effective way possible.
- That the definition of a charity should articulate the essential characteristics of a charity, is coherent, consistent and simple to administer and is flexible in response to changing social demands on charities.
- That the definition of what is charitable should include community development activities for Indigenous Australians.
- That the definition of what is charitable should include activities which indirectly address our charitable aims, such as promoting ethical standards in business and corporate responsibility.

3. Areas of Agreement with Charities Definition Exposure Draft.

Oxfam Community Aid Abroad welcomes the intent of the draft Charities Bill to codify and clarify current practice. Legislating definitions for charities and charitable purposes should see a reduction in the inconsistency of application and interpretation of these terms. The clarification of the attributes that constitute a charitable organisation should encourage clear and consistent treatment of these organisations in their dealings with Government and its agencies.

Specific aspects of the draft Bill which Oxfam Community Aid Abroad believes are a notable improvement on the current situation include;

- The reference to ‘dominant *purpose*’ of a charitable institution in the core definition of charities.
- Greater clarity in the definition of ‘Charitable Purpose’ in Section 10 of the Bill and in particular;
 - reference to *community* welfare (and within this the provision of support for indigenous people and refugees, the promotion of community development and the relief of distress caused by natural disasters and sudden catastrophies)
 - the establishment of a separate cultural category as a distinct area of charitable endeavour, including the promotion of indigenous culture and customs together with those of various language and ethnic groups.

- some degree of flexibility (albeit still insufficient) in Section 10 (1) (g) of the draft Bill noting in particular reference to the promotion and protection of human rights.

4. Areas of Disagreement with Charities Definition Exposure Draft

The draft definition, while providing clarity and certainty regarding a number of core requirements for charitable organisations, fails to reflect key recommendations of the Charities Definition Inquiry and the current nature of today's charitable sector. This constitutes a missed opportunity to discuss broader issues around charities and to implement a modern Bill.

More specifically, the following elements of the draft definition are of particular concern to Oxfam Community Aid Abroad.

4.1 Core Definition of Charity.

The core definition of "charity" is outlined in section 4 of the Bill. There are 6 sub-paragraphs to the definition contained in section 4.1. It would appear that sub-paragraphs (a) and (b) of section 4.1 are consistent with the common law interpretation of charity.

However, sub paragraph (c) may alter the common law understanding of charity by not allowing for incidental or ancillary purposes. It suggests that if the charitable body engages in activities, which are for a purpose other than dominant purpose, then it cannot be a charity. Sub paragraph 4.1(c) should read that if the charitable body engages in activities which are other than for its dominant purposes then the purpose of those activities must be ancillary or incidental to the dominant purpose.

Each of sub paragraphs 4.1 (d), (e) and (f) may also be argued to be additional elements to the common law definition of charity. Sub-paragraph 4.1 (d) of the definition refers to "disqualifying purpose". Disqualifying purpose is then given a meaning by section 8 of the Bill. Sub-paragraph 1 of Section 8 refers to the charitable body engaging in activities that are unlawful. Oxfam Community Aid Abroad believes that this paragraph is too broad. A charity may infringe the law because of fraudulent or unauthorised conduct by employees or by the commission of a strict liability offence. That offence may occur despite the charity having in place reasonable processes to guard against the offence occurring. Such an outcome would be too harsh for a charity to lose its charitable status.

Further, once a charitable body loses its charitable status it would seem from the Bill that it has lost that charitable status forever. Again, this would be too harsh. There should be provision for a charitable body to re-establish its charitable status.

Sub-paragraph (d) of section 8.1 does not require conviction of the charitable body for an event to be disqualifying. It only requires a view that the charity has engaged in such activities. If this were to be the view taken by the Australian Taxation Office it is inappropriate that drastic consequences follow a particular bureaucratic view as to whether the body has engaged in unlawful activities. There should be no loss of status until there is an actual conviction in respect of that matter.

4.2 Disqualifying Purpose.

Section 8 – Disqualifying Purposes - is the greatest area of concern to Oxfam Community Aid Abroad in the Bill. This clause states that organisations will be disqualified from obtaining charitable status if they;

*‘seek to change the law or government policy’; or
‘advocate a cause’*

where these activities are *‘more than ancillary or incidental to the main charitable purpose of the organisation’*.

Oxfam Community Aid Abroad believes that this clause is unworkable, open to subjective and inconsistent interpretation, likely to raise compliance costs and inconsistent with contemporary understandings of the role of civil society in policy development and monitoring processes.

Specific problems arising from this clause are likely to include;

- How the ATO will determine whether the activity is ‘more than ancillary or incidental to the main charitable purpose’ of the organisation is not clear and as a result will generate uncertainty within the charity sector.
- Potentially subjective and inconsistent interpretation of the clause because key terms in Section 8 are not defined in the Bill. These include the lack of a definition for “cause”, “ancillary” and “incidental”. This may lead to cancellation of the charitable status of organisations that are involved in varying degrees of advocacy or lobbying work.
- It appears likely that the Australian Taxation Office will have to introduce administrative rulings or guidelines to interpret and implement the Bill. If the Bill is left in its current form the ATO may have to define the meaning of "incidental or ancillary" in terms of proportion of funds spent on activities defined as "advocacy". For example in Canada this is defined as about 10% of a charity's expenditure. This in turn may require a reporting or auditing system to monitor the amount that is expended on defined advocacy activities each year. Such an outcome will likely result in an increased administrative burden for the Australian Taxation Office and increased compliance costs for charities. The increased administrative costs will be borne by taxpayers and the increased compliance costs will ultimately be borne by donors to charities to the detriment of beneficiaries of charity programs.

- Section 8 appears inconsistent with contemporary understandings of the role of civil society in government policy development and monitoring processes. In the international development sector poverty is increasingly understood to be linked to broader structural and macro-economic issues such as the debt levels of heavily indebted poor countries or unfair trade rules. International development is fundamentally about the allocation of resources between and within countries and, as such, is inherently a political process in which organisations and communities in both the north and south increasingly engage in attempting to both influence the development of government policies and monitor implementation of policies. Such activity should be consistent with charitable purposes so long as it is not party political in nature.
- Subject to interpretation, Section 8 may be inconsistent with other government policy. For example, AusAID's new partnership agreements with development NGO's specifically encourage policy dialogue between charities and the Australian Government as well as measures to promote good governance through policy dialogue and monitoring.

As outlined in Oxfam Community Aid Abroad's January 2001 submission to the Australian Government's Inquiry into the Definition of Charities and Related Organisations, we believe that it is essential for the Bill to recognise that lobbying and advocacy to improve or change Government policies *does* contribute to charitable purposes such as relieving poverty, improving health and education.

Oxfam Community Aid Abroad urges the Australian Government to revise the draft Charities Bill to create a modern charity law in line with the recommendations of its own Committee of Inquiry which recommended two years ago:

'Charities should be permitted to engage in advocacy on behalf of those they benefit. Conduct of this kind should not deny them charitable status even if it involves advocating for a change in law or policy. Submissions from both charities and governments have demonstrated that charities are increasingly asked to represent to governments the interests of those they seek to benefit and to contribute to the development and administration of government policies. The committee considers that the definition of a charity should not prevent these developments as they represent an effective means of delivering outcomes for individuals, charities and governments.'

Specifically, the advocacy purposes or activities of charities should be recognised as an integral part of their activities, as long as they:

- further or aid the dominant charitable purpose of the organisation; and
- are not party political; and
- do not support candidates for political office.

These same rules that apply to other activities of charities should apply to advocacy. The advocacy role of charities should not be singled out for special attention as a cause of disqualification if these activities are furthering the dominant charitable purpose of the organisation.

The adoption by the Government of the above recommendation of the Committee of Inquiry on this issue is unlikely to materially increase the number of organisations with charitable status as the draft Charities Bill includes other stringent tests as outlined in Part 2 (Section 4, 5, 6 and 7) in which a charity must:

1. Be not-for-profit;
2. Have a dominant purpose that is charitable, and this purpose must
3. Be for the public benefit defined as:
 - a) it is aimed at achieving a universal or common good; and
 - b) it has practical utility; and
 - c) it is directed to the benefit of the general community or to a sufficient section of the general community

4.3 Public Benefit.

Section 7(2) of the legislation is unclear as to the definition of 'numerically negligible'. Oxfam Community Aid Abroad recommends that Section 7(2) of the legislation be amended to provide greater clarity as to how a 'numerically negligible' section of the general community is defined.

4.4 Commercial Activities of Charities.

Oxfam Community Aid Abroad supports the Committee of Inquiry recommendation that commercial purposes should not deny charitable status where such purposes further, or are in aid of, the dominant charitable purposes or where they are incidental or ancillary to the dominant charitable purpose.

Oxfam Community Aid Abroad operates two wholly owned commercial subsidiaries which have provided significant and exclusive donations to Oxfam Community Aid Abroad and have not-for-profit winding up clauses in their Constitution and have been recognised by the ATO as Public Benevolent Institutions. Oxfam Trading Pty Ltd. promotes economic and social justice in developing communities through ethical trade in handicrafts and International Development Support Services Pty Ltd is a consulting company whose dominant objective is the relief of poverty in developing countries.)

Section 5 of the Exposure Draft Legislation proposes a legislative definition of Not-for-Profit entities such that an entity is a not-for-profit entity if:

- (a) it does not, either while it is operating or upon winding up, carry on its activities for the purposes of profit or gain to particular persons, including its owners or members; and

(b) it does not distribute its profits or assets to particular persons, including its owners or members, either while it is operating or upon winding up.

Under Corporations Law "Person" includes body corporate as well as an individual (Sec 85A) The proposed definition needs to be mended to take account of wholly owned commercial subsidiaries of charities. Accordingly, the following phrase should be added to 5 (a) and (b) of the Bill;

" unless its owners or members are a charity."

4.5 Establishment of Independent Administrative Body.

Oxfam Community Aid Abroad is concerned that key recommendations of the Charities Inquiry are not reflected in the proposed legislation. Key among these recommendations was the establishment of an independent administrative body (charities commission) for charities and related entities and modernisation of the legislative definition of Public Benevolent Institutions

Oxfam Community Aid Abroad recommends the Australian government consider the adoption of guidelines consistent with the approach taken by the UK Charity Commission. These guidelines allow for a charity to seek to influence government or public opinion based on research and direct experience on issues either relating to the achievement of the charity's purpose or the well being of the charitable sector. There is no attempt in the UK to define the proportion of spending limitations on these activities, only that they are not to be for party political purposes.

5. Altruism.

Oxfam Community Aid Abroad agrees with the Committee of Inquiry recommendation that in order to provide greater clarity to charities and the wider community, the public benefit test for charitable purposes should more explicitly embrace the concept of altruism.

Yours sincerely,

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