

Philanthropy Australia

Submission to the Board of Taxation
On
The Draft Charities Bill

October 2003

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Introduction

Philanthropy Australia is the peak body for philanthropy in Australia and has a membership of 217 philanthropic trusts, foundations and individuals. Philanthropy Australia can speak with authority on the regulatory provisions for charities and other not for profit organizations in Australia as its members have extensive contact with a vast number of such organizations, often over many years.

Philanthropy Australia's National Director, Elizabeth Cham, has been a member of the Prime Minister's Community Business Partnership since its inception, and has been central in the Federal Government's program of legislative reform supporting philanthropy.

Therefore, as a consequence of Philanthropy Australia's role, both with its members and through its working relations with government, it is well able to comment on the likely impact of changes to the definition, regulatory and taxation provisions for charities. It is also able to comment on the administrative implications of legislative change.

Consultation with Members

The membership of Philanthropy Australia has for many years supported the need to update the definition of charities, and improve the legislation that pertains to them. Philanthropy Australia and many of its members contributed to the deliberations of the Charity Definitions Enquiry. The findings of that Enquiry were supported by Philanthropy Australia.

Following the release of the Draft Charities Bill in July 2003, there has been extensive consultation and opportunities for debate within the not for profit sector. Philanthropy Australia has been actively involved in several of the forums organized by arms of the not for profit sector, and has also held three meetings for its own members, which have been well attended. This paper has been subject to comment by the Philanthropy Australia membership. The issues raised below are those of greatest concern to our membership with regard to the Charities Bill.

Support for Reform

As indicated above, Philanthropy Australia has for many years supported the need for reform of the legislative definitions of charities. It is the strongly held view of the Philanthropy Australia membership that the existing provisions, stemming from the

Statute of Elizabeth, and with a wealth of case law have served the Australian community well. However, changed needs and concerns in the Australian community indicate the need to add to existing legislative and regulatory provisions. The major factors are summarized below.

Service Change:

The various rights movements commencing from the 1960s have resulted in a shift in service provision away from reactive to preventive community based services. For example, over the last three decades this has resulted in the closure of large institutions for children, for the intellectually disabled, psychiatric institutions, and other 'outmoded' warehousing or remedial services, and along side this, the emergence of specific issue services or small locally based community services. Philanthropic organisations have been trailblazers in providing funding for new, preventive services, and have often faced difficulties where the services were not able to establish charitable status.

Activity Change:

The shift in philosophy which saw the abandonment of residual, remedial styles of service provision, also saw the rise in systemic approaches to social change. There has also been an expansion of new service types, for example, child care, environmental services, community arts and many others. Inherent in the value base and practice of the progressive services emerging from the 1970s has been the importance of achieving social change through the political system, via advocacy, and representation. Among the more celebrated examples have been the poverty campaign led by Professor Ronald Henderson in the 1960s and 1970s, the disability rights campaign to put legislation for disability access in place in the 1980s and 1990s, and the campaign to save the Franklin in the 1980s.

Sector Growth:

In Australia today there are 700,000 not for profit organizations. Of these roughly 36,000 employ staff. There are in excess of half a million employees working in the not for profit sector, making up nearly 7% of the Australian workforce and generating an estimated 3.5% of national GDP. If an adjustment is made for the uncosted component of volunteer activity, which is such a major characteristic of the not for profit sector, then the contribution to GDP is believed to be around 5% - clearly an enormous benefit being delivered to the Australian community by the not for profit sector. (ref. ABS Non-Profit Institutions Satellite Account, 2002)

Transparency and Accountability:

Concomitant with these figures are the taxation benefits that apply depending on the tax status of the individual organization. The complexity of current provisions makes it difficult to estimate the dollar benefit that the not for profit sector receives in terms of tax concessions, corresponding to the taxes forgone by the federal government. The table that was included in the Enquiry on the Definition of Charities demonstrates this complexity well. An estimate based on ABS data for this figure is \$16.4 billion nationally for the year 1999/2000.

Philanthropy Australia believes that the Australian community has the right to know that organizations receiving favourable taxation treatment are delivering services that benefit the community in ways that are broadly consistent with community expectations. Furthermore Philanthropy Australia believes that the legislative and administrative provisions that underpin these entitlements should be accountable, transparent and readily understood.

In other words, on the one hand there is a strong economic as well as social argument for the advantageous treatment of charities in taxation provisions, but there is also a corresponding economic argument for a regulatory framework which is better understood than that which presently exists, and has greater transparency and accountability than currently is in place in Australia.

Philanthropy Australia's comments on the Charities Bill

The Charities Bill seeks to define charities and charitable purpose. As such it proposes to introduce, for the first time in Australia, a codified approach which would replace the common law concept which has and continues to apply to charities and charitable activity. Philanthropy Australia does not support the approach proposed in the Charities Bill. It supports the adoption of an approach suggested in the Freehills submission. We are concerned that rather than provide clarity, the code approach will raise significant and difficult issues of interpretation. Alternatively, and preferably, we suggest that rather than attempting to codify the common law concept with all the attendant issues, the approach adopted in a number of jurisdictions already with regard to recreational charities. Under this approach, essentially the legislation retains the common law concept but changes it only to the precise extent desired by parliament

Philanthropy Australia supports the addition of the new categories of eligibility for charity status, ie

4 (2) (b) Self help groups. The inclusion of self help groups is welcomed as a progressive change consistent with the developments in the not for profit sector summarized above, and will, it is contended, be in line with community expectations.

and the listing under 10 and 11 in the Bill, including 'advancement of the natural environment' and 'the provision of child care services'

These additions are seen as progressive and are also in line with community expectations.

Philanthropy Australia would also support the inclusion of eligibility provision for organisations with the predominant purpose of promoting human rights.

Sn 4 of the Bill provides core definitions of charities.

With the following exceptions the definitions provided in the Bill, are supported by Philanthropy Australia.

4 (1) (d) excludes organizations from being defined as a charity where the organization ‘does not have a disqualifying purpose’. Disqualifying purposes are dealt with in Sn 8. A number of the grounds for disqualification are unacceptable to Philanthropy Australia, specifically:

8 1 ‘The purpose of engaging in activities that are unlawful’ On the face of it this appears inappropriate a) because unlawful activities should be dealt with in the appropriate jurisdiction and not as part of a definition of core activity, and b) because there are no qualifications with regard to time limitations, restitution, level of seriousness or other boundaries.

8 (2) (a) and (c) which states:

‘Any of these purposes is a disqualifying purpose:

- (a) the purpose of advocating a political party or cause
- (c) the purpose of attempting to change the law or government policy’

these exclusions are then qualified

‘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.’

Philanthropy Australia is of the view that these exclusions are inappropriate on a number of grounds. Firstly, as described above, it has been accepted as good practice in the not for profit sector for organizations to seek to address the wider systemic issues pertaining to the purposes for which the organization exists. To exclude lobbying, advocacy, or activities designed to achieve changes in government policy or legislation, is to take charities back 40 years. Such an exclusion would severely limit the effectiveness of many organizations, including the RSPCA, Cancer Councils, and environmental groups such as the Australian Conservation Foundation.

In the event that these exclusions were included in the legislation, the administrative task of ensuring compliance would appear to be highly discretionary and difficult to ensure fairness and equity. Furthermore, any entity that was concerned about losing charitable status might well choose to restructure to retain the advocacy functions and protect the main body of the organization.

Over and above the philosophical and practice and community expectations with regard to advocacy, Philanthropy Australia’s members are concerned that granting to advocacy groups could prejudice the granting body’s charitable status and may also involve trust legislation.

Returning to Core Definitions, 4 (1) (e) requires that a charity ‘does not engage in, and has not engaged in, conduct (or an omission to engage in conduct) that constitutes a

serious offence'. Once again Philanthropy Australia does not accept that this requirement is appropriate on the grounds that the requirement is quite inadequately defined, and is also retrospective. The same comments apply as for advocacy. To administer such a requirement would be discretionary, difficult to ensure equity and fairness and could be avoided by any organization that actively set out to do so, by means of reconstitution.

It is also noted that implementation would be further confounded by the lack of consistency between the states and territories with regard to indictable offences. Indeed, as a general comment, there is a need to ensure that the lack of consistency between commonwealth, state and territory legislation is adequately taken into account.

'Ancillary' and 'Incidental' are not clearly defined. Use of such terms would present major difficulties in administrative interpretation.

Administrative Locus

Given the large numbers of not for profit organizations in Australia, and their extraordinary diversity, spanning as they do the arts, education, sport, the environment, religion, social welfare and community issues, the challenges of administering the processes concerned with registration (does the organization meet definitional and other qualifying requirements?) monitoring and accountability (presumably requiring regular returns and updating of information), there would appear to be a good argument for a separate office – charities commission – or the like, on the basis of volume and complexity of workload. There is also a reasonable argument that to keep the administration of charities within the ATO presents a conflict of interest to some degree. This is a matter which calls for further attention at a later date, involving wide community consultation.

Conclusion

The draft Charities Bill contains material that is welcomed as supporting current developments in the not for profit sector. The major deficiencies, as seen by Philanthropy Australia have been commented upon, and are felt to be of such significance as to make the Bill unworkable. The Bill would need to be closely reviewed and amended to ensure that its provisions are possible to implement administratively and meet reasonable expectations of fairness and equity and transparency, with a minimum of discretionary administration. However, it is the view of Philanthropy Australia that a better approach is to retain the existing system based on case law and to amend the eligibility provisions to include the new fields of charitable activity identified in the Bill.

Recommendations

1. That the Bill in its present form be abandoned
2. That the existing legislative and case law provisions for determining charitable status be retained and extended to include categories for self help groups, child care, advancement of the natural environment, and human rights.
3. That advocacy be recognised as an established integral activity undertaken by not for profit organisations, and not be regarded as an exclusion
4. That unlawful activity not be an exclusion for charitable status
5. That administrative provisions be subject to further consideration and consultation at a later date.