

Submission to the Board of Taxation
Consultation on the Definition of a Charity

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Sir

Further to your invitation to submit a statement for the consultation of the definition of a charity. I make this submission on behalf of the Queensland Institute of Medical Research (QIMR), 300 Herston Road, Herston, Queensland.

EXECUTIVE SUMMARY

1. The Charities Bill 2003 has the potential to have a major impact on QIMR's status as a public benevolent institution as determined recently by the Australian Taxation Office.
2. QIMR is constituted under the QIMR Act (1945). Thus QIMR is a statutory body governed by the QIMR Council.
3. Embodied within the act is the QIMR Trust. The QIMR trust is charged with the raising of donations and bequests and the management of investments received by the QIMR Council or the QIMR Trust.
4. The capacity of the QIMR Trust to compete for the charitable dollar is very much dependent upon QIMR's charitable status as many of QIMR's supporters look to a tax deduction for their donation.
5. In addition, recent amendments to the Taxation Act allows supporters to claim a tax deduction over three years for in kind donations, thereby making it more attractive for gifts of property, art etc to be made to QIMR.
6. QIMR's charitable status also enables QIMR to be income tax exempt.
7. What is the significance of QIMR's charitable status to QIMR's viability?
8. Currently, QIMR requires approximately \$12 million per annum to fund its infrastructure (scientific support services, buildings, communications, capital purchases etc). QIMR receives approximately \$5.3 million from the Queensland government with the remainder from the QIMR Trust (\$1.75million) and the rest from retained earnings and interest. QIMR has a deficit budget of approximately \$1 million which is offset by donations and bequests raised by the QIMR Trust.
9. QIMR is unable to recover core operating funds from competitive research grants that are projected to be \$25million for the current year.
10. Thus the donations and bequests raised by the Trust are essential for the on-going viability and indeed the survival of QIMR.
11. The success of the Trust is in turn largely dependent on QIMR's charitable status.
12. The charitable status of QIMR has a flow-on effect to its Fringe Benefit Tax status. Recently QIMR successfully submitted a case to the Australian Taxation Office for QIMR to be recognized as public benevolent institution and therefore eligible for FBT-exempt status.

This has a major impact on QIMR's ability to attract and retain staff through the benefits of salary sacrifice.

13. What are the major threats to QIMR's status as a public benevolent institution or charity????

- There is no doubt (and the ATO agrees) that QIMR:
- Is an institution.
- Exists for the public benefit
- Has charitable purposes
- Purpose is beneficial to the community (Queensland, Australia and the world)
- Is Non profit
- Does not carry out the function or work of government
- IS CONSTITUTED PRINCIPALLY TO PROMOTE THE PREVENTION OR CONTROL OF DISEASE IN HUMAN BEINGS.

14. However QIMR:

- Is a government instrumentality
- Is constituted by government
- Is partly funded by government (although 83% is not government funding)
- Is in some parts controlled by government through the QIMR Act (1945). (The QIMR Act (1945) is one of the oldest acts administered by the Queensland Department of Health. It is highly amended and is recognized as being out-dated for its purpose.)

15. But QIMR:

- Is administered by the QIMR Council rather than the government directly
- Members of Council and Trust are not removable at will by government according to the QIMR Act. They can be replaced under only very limited circumstances
- QIMR employees are not public servants

16. Thus;

- The element of government control may be interpreted as essentially to safeguard the purposes of QIMR, rather than to serve the purposes of government.
- In summary, the application of the Charities Bill 2003 has the potential to severely impact on the viability and survival of QIMR. There is ambiguity in the QIMR Act as it is currently drafted but analysis suggests that government control may be inferred from some parts. Consideration of the core business of QIMR and the source of funding however leads to the conclusion that QIMR exists for the public benefit and does not carry out the function of government and is for the most part not controlled by government.

This submission asserts:

- The Queensland Institute of Medical Research (QIMR) is a statutory body and also a charitable institution

Because

- QIMR is not controlled by government
- Precedent through case law has been used to confirm that QIMR is predominantly not government controlled

Background

17. The Queensland Institute of Medical Research (QIMR) is one of Australia's largest medical research institutes, which is incorporated under the QIMR Act (1945) www.qimr.edu.au. QIMR is a statutory body under the control of the QIMR Council.

18. QIMR's sole purpose is:

“To be a world renowned medical research institute”

19. QIMR promotes:

“Better health through medical research”

20. QIMR's philosophy:

“QIMR supports scientists who perform world-class medical research aimed at improving the health and well being of all people”

The QIMR Trust

21. Embodied within the QIMR Act is the QIMR Trust. The QIMR Trust is a statutory body. The functions of the QIMR Trust are:

- a) To raise moneys for and on behalf of the QIMR Council
- b) To invest moneys raised on behalf of the QIMR Council
- c) To Pay moneys collected to QIMR Council on demand

22. Thus the combined charter of the QIMR Council and the QIMR Trust embodies the primary charitable purpose to:

“The advancement (through medical research) of health, which without limitation includes the prevention and relief of sickness, disease or of human suffering”

QIMR is a Statutory Body

23. QIMR is a statutory body according to the QIMR Act (1945)

24. A statutory body is an entity that may be considered to be **controlled** by the state government.

25. The decision as to whether a government entity is or is not a charitable institution pivots on the matter of 'government control', which is still based upon case precedent.

26. The Charities Bill 2003 does not define 'control' by government.

27. QIMR is not substantially controlled by government when considered against case precedent and is therefore a charitable institution.

QIMR is a Charitable Institution

28. A recent submission by QIMR to be recognized as a charitable institution to the Australian Taxation Office was accepted on all counts based upon the following arguments and precedent of:
The case of Legal Aid Commission of Victoria v Commissioner of Pay-Roll Tax (Vic) 92 ATC 2053

29. The following are extracted from the case in summary along with comments as they relate to QIMR:

30. *The Legal Aid Commission is a Commission made a Body Corporate by s3 of their act.*

QIMR is also made a Body Corporate by their Act.

31. *Pursuant to s 15 officers and employees are not by virtue of their office or employment subject to the Public Service Act 1974 (Vic), but their conditions of employment and remuneration are fixed by reference tot the Public Service Board.*

Employees of QIMR are employed under a Certified Agreement and are not by virtue of their office or employment subject to the Public Service Act of Queensland.

32. *The Public Service Act 1974 (Vic) does provide for any direct ministerial intervention in the operation of the Commission.*

The Minister does not have any involvement in the day to day operations of QIMR. The Act provides that Council will have the control and authority to conduct the activities of QIMR. The Act provides that contracts or agreements as determined by Council will be referred to the Minister for approval.

This is similar in nature to the Ministerial arrangements as set out in the Legal Aid Act 1978 Sect 12 M except for Clause 3 where the QIMR Council does not have to comply with the directions of the Minister:-

“12M. Attorney- General may give directions to the board

(1) The Attorney- General may give to the board written directions in relation to –

- (a) the performance of the functions or exercise of the powers of VLA;*
- b) the policies, priorities or guidelines of VLA, including priorities in the funding of legal aid;*
- c) the provision of legal aid by VLA in accordance with a legal aid arrangement.*

(2) The board must comply with any direction given under sub-section (1)”

33. *The income of the Commission is currently derived in approximately the following manner: 37.2% from the Commonwealth Government, 24% from the State Government via the Solicitors’ Guarantee Fund, 9.4% from State Government grants, 18.6% recovered from clients, 7.8% from costs recovered, 0.8% from the Appeals Cost Fund, and 2.2% from interest on investments.*

The income of QIMR as set out in the annual report for 2001 outlines that only 16% of the operating revenue was obtained from Queensland Government. The balance of the funding was obtained through grants, donations and bequests. The Report also shows that some \$15,000,000 of capital funding that was donated by the Queensland Government. This relates directly to the matching of a Philanthropic donation for \$20,000,000 and was a condition of the Donor and not of QIMR. It is a once only transaction.

34. The case deals with four main issues. In relation to the first two issues we feel there is sufficient information provided to date to confirm the application of QIMR in these areas.

Issue 3

“Does the amount that the Commission receives by way of contributions take it out of the class of public benevolent institutions?”

We would expect that the QIMR is indeed confirmed as public benevolent and charitable from the source of its funding.

Issue 4

“Does the level of government involvement and compulsory acquisition of funds mean that the Commission is in some way carrying out a government function with the consequence that the Commission should not be characterised as a public benevolent institution?”

In the case the reference was made to the Full Federal Court in Metropolitan Fire Brigade’s Board v FCT (1990) 21 ATR 1137:91 ATC 4052 where the court held *“The court held that the Board was a body constituted, funded and controlled by government, and was performing functions on behalf of government. It went on to hold that a purely government body was hardly ever likely to satisfy the tests of public benevolent institution status.”* We would argue strongly that this is not the case with QIMR.

As stated further in the Legal Aid Case *“ The Commission is plainly in a different category. It is only partly funded by government. It does not appear to be subject to the same degree of government control. (I refer to those parts of the Second Reading Speech set out above.) Indeed many if not most, of its clients are pitted against the government. It is publicly accountable, but not solely dependent on government for funds.”*

These similarities are evident throughout the information provided by QIMR.

This is further reinforced by other comments made in the case *“In the course of its judgment, the Full Court remarked (at ATR 1140; ATC 4055) that the connection of a body with government may in some circumstances assist toward a conclusion that it is a public benevolent institution. Government involvement in an institution may be the best evidence that that institution is public in the required sense”* and *“Nor do I think that the manner in which the Commission is funded, or the extent of Government involvement in its activities, are such of themselves to entail that the Commission does not have that eleemosynary character of charity in the popular sense that is referred to in the authorities. As indicated above, I do not think that an activity is removed from considerations of ordinary humanity just because it becomes the object of government attention”*.

35. As stated in the summary of the case *“The Commission is not a purely governmental body, and the level of government involvement in the Commission is not such as to preclude it from being characterised as a public benevolent institution”*, which we feel is similar to that of QIMR.
36. We go on further to compare that of the case of *Mines Rescue Board of New South Wales v Federal Commission of Taxation 2000 ATC 4191:*

The constitution of the applicant, being the Mines Rescue Board stated that its board would be constituted as follows: *“there are 7 directors of the applicant who are appointed by the Governor on the recommendation of the Minister. Of those directors, three are to be nominated to represent the interests of mine owners, three are to be nominated to represent the interests of mine employees and one is to be a person nominated by the Minister [Mines Rescue Act 1994 (NSW), s 10]. The Minister may remove a director from office at any time. A director is entitled to receive such remuneration as the Minister may from time to time determine in relation to that director. The Chief Executive of the applicant is appointed by the Governor [Mines Rescue Act 1994 (NSW), s 12].”*

In the case of QIMR the Council is constituted as follows

- (a) the chief health officer (an “**official member**”);
- (b) the chairperson of the Trust (also an “**official member**”);
- (c) 2 nominees of the National Health and Medical Research Council, at least 1 of whom has expertise in health research;
- (d) 1 nominee of the senate of The University of Queensland;
- (e) 1 person with expertise in health research;
- (f) 1 medical practitioner with expertise in health research;
- (g) 1 person with expertise in health ethics;
- (h) 1 lawyer;
- (i) 2 persons with expertise in financial management, business of public administration.

These members are appointed by the Governor in Council and, in the case of (c) and (d), are appointed on the nomination of the relevant bodies.

In addition, the members of the QIMR Council may only be removed by the Governor in council for misbehavior or incapacity (s6 (f)).

37 In the area of Ministerial control the case outlined that *“The Minister may give written directions to the directors as to the exercise of the applicant’s functions (Mines Rescue Act 1994 (NSW), s 14). The directors must ensure that the applicant complies with any such direction. The applicant is required by s 15 of the Mines Rescue Act 1994 (NSW) to:*

- *provide the Minister with such information relating to the applicant’s activities as the Minister requires;*
- *keep the Minister informed of the general conduct of its activities, and of any significant development in its activities.”*

As outlined in the comments of the Legal aid case the Ministerial control in QIMR is restricted to the approval of any agreements made between QIMR and other bodies, distribution of royalties to inventors and approval of that part of the Institute budget related to the Queensland Government grant.

38. The Mines Rescue Act also stated *“the applicant is required to prepare a corporate plan for each financial year, upon which the Minister may comment when in draft form. As far as practicable, the applicant must exercise its functions in accordance with the corporate plan”.*

The strategic plan and financial plans other than the general fund budget of the QIMR are under the full direction of the Council and are totally within their discretion to amend or revise during the course of a financial year.

39. The function of the QIMR is the purpose of research into any branch or branches of medical science. (s3 (2)). This is in compliance of Section 57A(5) and in no way similar to that of the Mines Rescue Board.
40. The funding of QIMR is primarily from donations, bequests and competitively obtained research grants. The again is in direct contrast to that of the Mines Rescue Board who received in funding as stated *“The applicant’s activities are funded from the Mines Rescue Fund (the fund) which is established and governed by Pt 4 of the Mines Rescue Act 1994 (NSW), and is under the control and administration of the applicant. Owners of coal mines are required to make contributions to the fund, as prescribed by regulations, towards the applicant’s expenses in carrying out its principal functions [Mines Rescue Act 1994 (NSW), s 31]. Regulations are made by the Governor under s 50 of the Mines Rescue Act 1994 (NSW).”*
- 41 Under the heading of the respondent’s contentions the Commissioner submitted that *“for any one or more of the following additional reasons, the applicant is not a “public benevolent institution” within the meaning of s 57A of the FBTA:*
- *the applicant is a government body performing functions which are a government responsibility;*
 - *the applicant’s activities do not fall within the terms “relief of poverty, sickness, destitution or helplessness”;*
 - *the persons to whom the applicant provides benefits are too limited a class to constitute the public;*
 - *that the element of altruism inherent in the concept of benevolence is absent from the circumstances of the applicants case.”*

In the case of QIMR:

- QIMR is not a government body performing functions which are a government responsibility. This is evident in the documentation provided and the nature of the work conducted. It is also further reinforced by the donations and bequests that they receive.
 - QIMR falls within the terms of 57A (5) of the FBTA *“(a) the employer of the employee is a charitable institution and (b) the institution’s principal activity is to promote the prevention or the control of diseases in human beings*
 - QIMR provides benefits to the public by virtue of the type of research it conducts
 - the element of altruism inherent in the concept of benevolence is clear within the organization.
42. In the consideration of the Mines Rescue Case the Judge stated *“Here the applicant is a governmental body, under the control of the Minister, brought into existence to give effect to government policy that owners of underground coal mines should fund, man and equip the provision of a rescue service capable of dealing with emergencies in underground coal mines. The provision of a rescue service by a statutory body incorporated to discharge that function is outside the ordinary conception of benevolence.”*
This is clearly not the case with QIMR. As outlined in the comments made the organization should fit within the requirement of Sec 57A(5) of the FBTA as it is in direct contrast to that of the Mines Rescue Board. The requirements of TD94/73 are also addressed within the information provided and again confirms that QIMR complies with the statements made.
43. Reference was also made to the requirements of a winding up clause with the Act. On preliminary legal advice it would indicate that where the act is silent on this matter the Council at the time would make the determination as to the disposal of assets and funds on winding up. In the event the assets and funds would be transferred to an organization with similar objects to that of the QIMR. Failing the Council being able to make this resolution

the assets and funds would revert to the Crown. This winding up clause would seem not to be an absolute prerequisite of a Charitable organization, especially in cases such as QIMR that was established in 1945. This is further confirmed in comments made in the Government's response to the Charities Definition inquiry as reported in *Treasurer's Press Release No. 049 of 29 August 2002 – "Entities established in perpetuity by the Parliament to be allowed to be endorsed as deductible gift recipients from 1 July 2003.*

: They are currently denied endorsement because they cannot meet the requirement that their constituent documents or governing rules require that any surplus assets be transferred to another deductible gift recipient if they are wound up."