

Submission to Board of Taxation on Proposed *Charities Bill* 2003

1 Background

The Reichstein Foundation, a philanthropic family foundation established in 1970 by Lance Reichstein, provides grants to charitable organisations within the State of Victoria which tackle the 'causes' of social issues affecting disadvantaged communities and projects which work towards environmental sustainability. Approximately \$600,000 is distributed annually.

The Foundation also has a role in growing social change/progressive philanthropy and developing the capacity of charitable organisations. The Reichstein Foundation is governed by a Board of Trustees, chaired by Jill Reichstein, and is a member of Philanthropy Australia.

2 Report of the Inquiry into the Definition of Charities and Related Organisations

Submissions to the *Draft Charities Bill* have been invited by the Board of Taxation to address workability, flexibility and administrative implications. However, the Reichstein Foundation feels it is important to comment on the final *Report of the Inquiry into the Definition of Charities and Related Organisations*. Our Foundation did not contribute to this report; however we support most of the recommendations.

We take this opportunity to comment on the following statements and recommendations.

Chapter 7 The need for a contemporary and relevant approach to charities

There has been a strong trend over recent decades towards supporting prevention and early intervention strategies, rather than focusing attention on dealing with the consequences of poverty, ill health and other social problems.

As many submissions noted, prevention is better than cure, and the most effective means of addressing many of the problem areas being dealt with by the charitable and related sector is to focus on the causes rather than the symptoms of the problem. Many have also argued that the 'traditional' concept of charity can perpetuate a sense of dependency, and that it is better for people to take greater responsibility for helping to resolve their own problems and to re-engage with work and the community. The emergence of many community-based organisations with a 'self-help' focus is evidence of this change of approach. (p.56)

Reichstein Foundation Comment

In August 2000, the Foundation engaged SMS Consulting to undertake an evaluation and review of our operation and funding guidelines. An invitation to participate was sent to 495 community organizations who had sought funding from the Foundation between 1997 and 2000. Participants, including those not successful in receiving funding, were asked about what future funding direction the Foundation should take and how it could be more responsive.

We received valuable feedback from the grantseekers which shaped the future direction of our grantmaking. Advocacy was raised as a critical theme throughout this review process. Grant seekers reported that philanthropic grants were a critical, yet scarce, source of funding which enabled community organizations to advocate on behalf of consumers.

Government rarely financially supports community organizations to focus on the 'causes' of social issues. In Victoria, DHS has established the 'disability advocacy program', however, we are not familiar with many other sources of Government funding for advocacy programs.

Chapter 32: A dedicated administrative body

The inquiry recommended *that the Government seek the agreement of all State and Territory Governments to establish an independent administrative body for charities and related entities, which would advise the Government on the definitions of charity and related terms;* (Recommendation No. 25)

and

...that the endorsement processes currently undertaken by the Australian Taxation Office be extended to include the endorsement of charities and related entities in order to access all the taxation concessions to which they are variously entitled.

(Recommendation No. 26)

Reichstein Foundation Comment

We support the establishment of an independent administrative body for charities and related entities. It should not be the task of the ATO to make the range of decisions needed to administer the proposed new Charities law, which would be administratively burdensome, which would deflect the ATO from its proper function and which would be better made by people in an agency with a specialist understanding of the issues confronting organisations working the charities sector. While the ATO clearly has experience in considering charities law insofar as it relates to tax law, the issues surrounding charitable status in the Bill have much broader connotations, and should not be left to being treated as some incidental side issue to what is basically a core business of revenue collection.

Chapter 29 The need to review related provisions for PBIs and DGR status

The requirement that services provided by Public Benevolent Institution's (PBIs) must be 'direct' and the current restriction on a dominant preventative or advocacy purpose is

strongly opposed in most submissions. The 'direct relief' requirement is considered to be out of touch with current trends of service provision to those in need.

The Committee recommended: *That in the recommended definitional framework, the category of public benevolent institution be replaced by a subset of charity to be known as Benevolent Charity, that is a charity whose dominant purpose is to benefit, directly or indirectly, those whose disadvantage prevents them from meeting their needs.* (Recommendation No. 21, p. 258)

Reichstein Foundation Comment

The definitions stated in the ATO publication '*Gift Pack for deductible gifts for organizations and donors*' (produced in May 2003), illustrate how the current criteria to qualify for registration as a Public Benevolent Institution are completely out of step with contemporary solutions with social issues. The following statements have been taken from page 26.

A public benevolent institution (PBI) is a non profit institution organized for the direct relief of poverty, sickness, suffering, distress, misfortune, disability or helplessness... The condition or misfortune relieved by a PBI must be such poverty, sickness, suffering, distress, misfortune, disability or helplessness as arouses pity or compassion in the community.

Example –PBI

- *Providing hostel accommodation for the homeless*
- *Treating sufferers of disease*
- *Providing home help for the aged and the infirm*
- *Transporting the sick and disabled*
- *Rescuing people who are lost or stranded.*

Not all degrees of distress or suffering would necessarily have such an effect. For example, the emotional stress and pain encountered in normal daily life associated with such things as failure, deception, loss of status and reputation, and bereavement are not normally the needs for which PBIs cater.

Example- non PBI organisations that provide marriage guidance or counseling to sole parents who are divorced or have lost a spouse will not be PBIs.

The results of the November 2002 Philanthropy Australia national survey of Australian philanthropic trusts and foundations confirmed that most members required grant applicants to have DGR status. The current definitions are a huge impediment to Foundations who want to support a more progressive solution to social issues.

We support the recommendations stated in the Report for a review of Deductible Gift Recipient (DGR) Status and Public Benevolent Institution (PBI).

Chapter 23 Providing for a flexible approach as community attitudes change

The Committee considers the following non-exhaustive list of purposes as indicative of the types of purposes that would fall within this (other purposes beneficial to the community) head of charity:

- *the promotion and protection of civil and human rights;*
- *the promotion of reconciliation, mutual respect and tolerance between various groups of people within Australia;*
- *the protection and safety of the general public; and*
- *the prevention and relief of suffering of animals. (p. 190-191)*

Reichstein Foundation Comment

The Reichstein Foundation supports the inclusion of these additional purposes.

As previously mentioned, in November 2002, Philanthropy Australia undertook its first national survey of Australian philanthropic trusts and foundations. Questionnaires were mailed out to 196 individual philanthropic trusts/foundations taken from the Philanthropy Australia mailing list. The response rate was 32%. Whilst this response cannot be said to represent adequately the entire philanthropic sector, some of the findings are of relevance to the proposed *Charities Bill*.

1. Most philanthropic Foundations and Trusts require grant applicants to have Deductible Gift Recipient (DGR) status.
2. The areas receiving greatest support in terms of value of all grants made were: health (30%); social services/welfare (19%); education (15%); and arts and culture (11%).
3. The three areas receiving least support in terms of value of all grants made were: civil society, law and civil rights; religion; and animal welfare.
4. Foundations and Trusts most commonly make youth (48%) and social services/welfare (59%) their top grantmaking priorities but rarely prioritise gays/lesbians (2%) or people with gambling addictions (5%). (reported in *Australian Philanthropy, Winter 2003 Issue 52*)

Philanthropy Australia intends to repeat the survey every two years.

If there was an operational definition of charities consistent with the inquiry then it could be anticipated that there would be greater capacity to fund areas such as civil society, and law and civil rights. Reichstein Foundation believes this would enhance the democratic foundations of our society.

Chapter 26 Advocacy and the right to seek political support for constructive change

The law has held that political purposes are not charitable. Supporting or opposing a change to the law or Government policy has been held to be a political purpose. Attempts to sway public opinion on controversial social issues have also been held not to be charitable. (p. 209)

and

A number of submissions were made to the Inquiry stating that advocating on behalf of beneficiaries was an effective and acknowledged way for charities to achieve their charitable purpose. Submissions to the inquiry painted effective advocacy on behalf of an individual to embrace systemic advocacy, which could include seeking to change laws or Government policy. (p. 212)

and

The Committee supports the need for a distinction to be drawn between party-political activities and other types of lobbying activity. (p. 218)

Reichstein Foundation comment

The Commonwealth Attorney-General, Daryl Williams, gave the keynote address at the Commonwealth Law Conference, Melbourne Convention Centre, on 17 April 2003. At this Conference he said:

“The Commonwealth has a proud tradition of supporting democratic principles and of promoting human rights. The Commonwealth is also a strong supporter of the Universal Declaration of Human Rights. Each member country of the Commonwealth has supported the declaration through a commitment to the ideals of democracy, good governance, racial equality. Cultural diversity, education and access to modern technology...”

“It is here that lawyers have a critical role to play. Being part of the legal profession is a privilege that carries many responsibilities. One of these responsibilities is to act as an independent voice that keeps Governments accountable and speaks out on issues of national interest...”

“A strong, well-organised legal profession can scrutinize Government activities, influence public policy and maintain the rule of law and human rights. Governments may not, and in fact certainly do not, always like what the legal profession has to say about their policies or conduct. But the profession should never be beholden to the Government of the day...”

Thus, lawyers are encouraged to act on a moral responsibility towards systemic advocacy. The message to charitable organisations, however, is that activities which attempt to change a government law or policy are deemed political, not charitable, and therefore placed at risk of losing their charitable status. This, therefore, denies them access to public and philanthropic resources.

In a functioning democracy, everyone needs a voice. Some people are not able, by virtue of poverty and exclusion, to participate fully in the debate that sets the public policy agenda, or to influence the decisions of government. It is critical that such people are assisted, and that charitable organizations working with disadvantaged groups are encouraged and resourced to have input into the development, maintenance and improvement of public policy.

3 Charities Bill 2003 (Exposure Draft)

The Reichstein Foundation supports the development of a legislative definition of both a charity and a charitable purpose. A definition which reflects the reality of modern life and relationships between the role of government, the non-government sector and the philanthropic sector has been required for some time. The definition in the Preamble to the Statute of Elizabeth and the strict classifications according to Lord Macnaghten's four heads of charity do not meet contemporary need and values. Following are our comments on sections contained in the draft bill:

Part 2 – Charities

Section 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 that:
- (e) does not engage in, and has not engaged in, conduct (or an omission to engage in conduct) that constitutes a serious offence

Reichstein Foundation Comments

The Reichstein Foundation does not condone illegal activity. However, we do not believe that an exclusion in these terms is warranted. If there is any conduct that constitutes a serious offence it should be dealt with under the statutes that renders it such, and not through the definition of what constitutes a ‘charity’.

Section 7 Public Benefit

- (1) A purpose that an entity has is for the **public benefit** if and only if:
- (b) it has practical utility

Reichstein Foundation Comments

We recommend that the phrase ‘practical utility’ needs to be included in the definitions listed in Section 3.

We believe that ‘charitable purposes’ needs to include advocacy which informs law reform and Government policy formulation. The inclusion of a definition of ‘practical utility’ could prevent this.

Section 8 Disqualifying purposes

- (1) (a) The purpose of engaging in activities that are unlawful is a **disqualifying purpose**.

Reichstein Foundation Comments

As discussed above, this section should be deleted.

Section 8 Disqualifying purposes

- (2) Any of these purposes is a **disqualifying purpose**:
- (c) the purpose of attempting to change the law or government policy

Reichstein Foundation Comments

We support the rationale and recommendations as stated in the *Charities Definition Enquiry*, and as expressed in the ACOSS, VCOSS, Philanthropy Australia and Australian Conservation Foundation’s submissions.

We believe that it will undermine confidence in the transparency of government processes and accountability if Government dictates to charities what strategies they use to achieve their charitable purposes.

A participatory democracy requires that all individuals and groups are able to raise their concerns to elected representatives and that such elected representatives are accountable to the electorate. Ultimately, it is the government who has the capacity to enact laws but this should not exclude public debate. A healthy democracy is one in which opposition to the government is informed and robust.

Part 3 – Charitable Purpose

Section 10 References to charitable purpose

(1) A reference in any Act to a charitable purpose is a reference to any of the following purposes:

- a) the advancement of health;
- b) the advancement of education;
- c) the advancement of social or community welfare;
- d) the advancement of religion;
- e) the advancement of culture;
- f) the advancement of the natural environment;
- g) any other purpose that is beneficial to the community.

Reichstein Foundation Comments

We support the argument presented in the Australian Conservation Foundation submission that (f) may not be clear that it includes the 'built' environment, hence we endorse their suggested rewording of section (f) *"the advancement of the protection of the environment."*

Whilst it is clear in the explanatory material which accompanied the proposed Bill that Section 9 includes 'the promotion and protection of civil and human rights', we believe that this purpose deserves to be included in its own right as a separate category listed in Section 1.

We support the definition of 'advancement' in s.10(2). Systemic advocacy is the strategy often used to achieve the advancement of a charitable purpose.

Section 11 Advancement of social or community welfare

Without limiting what constitutes the advancement of social or community welfare, ***advancement of social or community welfare*** includes:

- (a) the care of, and the support and protection of, children and young people; and
- (b) in particular, the provision of child care services

Reichstein Foundation Comment

We support the ACOSS submission in including the following category.

The Explanatory Material should make clear that the 'advancement of social and community welfare' in Clause 10 includes:

"the provision of housing and accommodation support for people with special needs or who are otherwise disadvantaged in terms of their access to housing." (A charity by any other name – ACOSS submission to the Board of Taxation, September 2003, p.23)

Section 4 The meaning of Government body

Clause (1)(f) in the draft Bill is viewed by some as creating unnecessary confusion about the status of not for profit organisations which receive Government funding assistance. Non-government organisations, whether or not they receive government funding for specific programs or purposes, are independent entities. Many seek funding from other sources for the specific purpose of diversifying their sources of funding. This is to be encouraged, while the provisions in the current Bill would actively limit their opportunities to do that by removing their charitable status and thus discouraging other funders such as philanthropic trusts. The clause should be revised to make it clear that an organisation receiving a substantial amount of government funding is not by virtue of that fact alone a 'government body'.