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Monday, 29 September 2003

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

By facsimile: 02 6263 4471

Dear Sirs

**SUBMISSION ON DRAFT CHARITIES BILL, 2003**

I refer to the draft Charities Bill 2003 released by the Treasurer on 22 July 2003 and to the Board of Taxation's invitation for submissions from interested charitable organisations on the proposed legislation. While I am not currently involved with a charitable organisation as such, I am in the process of establishing a Prescribed Private Fund under relevant provisions of the Income Tax Assessment Act, which will provide money, property or benefits to deductible gift recipients that are charities. I am also considering the establishment of a charity whose dominant purpose will be the prevention and relief of suffering of animals.

As such, I wish to comment on some aspects of the proposed legislation that are of concern to me and how this may impact on my desired aims in establishing a Prescribed Private Fund or charity as outlined above.

I note I have reviewed a number of submissions to the Board of Taxation prepared by various interested parties on the proposed legislation. These include submissions prepared by Philanthropy Australia Inc, ACOSS, Freehills and Arnold Bloch Liebler.

While I am generally supportive of the provisions of the draft legislation, there are two areas of the Bill that are of concern and which may impact directly on the proposed activities of the charities I am seeking to establish, namely:

- (a) Section 8 - dealing with *disqualifying purpose*; and
- (b) Section 4(1)(e) - engaging in conduct that constitutes a *serious offence*.

### Disqualifying purpose

Section 8 of the draft Bill deals with *Disqualifying purposes* and I am concerned over the unnecessary limitations that this section of the Bill may impose on a charity's activities. This Section has certainly been the main focus of a number of submissions on the proposed legislation and seems to be of widespread concern to a large number of charitable organisations.

It is acknowledged that Section 8 of the draft Bill is an attempt to codify the current common law position on charities and their inability to engage in activities that are more than ancillary or incidental to their dominant charitable purposes. What constitutes *ancillary or incidental* purposes, for the purposes of these provisions, is ambiguous. A liberal interpretation of these provisions would achieve that end. A liberal interpretation of these provisions, however, is not guaranteed. The current provisions of Section 8 are likely to lead to conflicting interpretations and cause confusion among peak bodies and charities as to the extent of advocacy and lobbying activities in which they may engage.

It is my view that the advocacy work of a charity should not be restricted, provided such work is in furtherance of the dominant charitable purpose of the relevant charity. Advocacy is an important part of the activities of a charity in its aim to achieve its charitable purposes.

Restricting a charity's ability to advocate a cause or to attempt to change the law in furtherance of its own charitable purposes, in the manner set out in Section 8 of the draft Bill, is open to differing interpretation. I agree with the submission made by ACOSS that a narrow interpretation of this Section will require charities to 'restrict the resources they devote to advocacy' or that charities be regulated 'in terms of the *kind* of advocacy they perform'. This will lead to increased scrutiny of a charity's activities and the manner in which those activities are conducted, in order to ensure compliance with these new provisions. A charity will need to keep accurate and comprehensive records of its advocacy activities and its cost and be able to demonstrate that any such activities are no more than 'ancillary or incidental' to its dominant purpose, adding to its administrative burden as well as the audit functions of the Australian Taxation Office. There has been no regulation of such activities to date under current laws and charities will be unnecessarily burdened with the added obligations to ensure that any advocacy or lobbying activities they undertake are kept to an absolute minimum for fear that they may be viewed by the regulators as more than just 'incidental' or 'ancillary' to their main charitable purposes.

I do not believe the draft legislation, in its current form, sufficiently distinguishes between a charity's 'purpose' and its 'activities'. It is not clear at what point a charity's activities may be viewed as its dominant purpose.

There are many charities in existence today that regularly engage in public advocacy and the lobbying of political parties to assist them in achieving their charitable purposes. Indeed, some of these charities would view their advocacy activities as being central to their goal of promoting and achieving their charitable purpose. By engaging in these activities, such charities are able to lift public awareness of important issues at hand as well as raise the level of debate on such issues across a broader section of the public. In particular, a number of peak bodies would see one of their primary functions as representing their members in consulting with, lobbying and campaigning government, government bodies and other political parties on a broad range of social issues.

A charity must be able to engage in public awareness activities and advocate its concerns provided this is in furtherance of its own charitable purposes. Provided such activities may

reasonably be expected to further that charitable purpose, there appears to be no good reason what a charity's activities should be restricted in the manner set out in Section 8 of the draft legislation.

**As such, I concur with the views expressed in a number of submissions I have reviewed that the limitations imposed on charities by Section 8 of the Bill should be removed and that *disqualifying purpose* contained in Section 8(2) be limited to the supporting of a political party or candidate for political office.**

**Conduct constituting a *serious offence***

I am also concerned with the provisions of Section 4(1)(e) of the draft Bill. This provides that a charity is an entity that does not or has not engaged in 'conduct...that constitutes a serious offence'.

I also agree with the propositions put forward in a number of submissions I have reviewed (as detailed above) that a restriction of this nature should not form part of the statutory definition of 'charity'. I strongly concur with the view that the appropriate remedy in such a case should be found in the law that has been breached and not the disqualification of the entity's charitable status.

This provision does not specify whether the relevant charity needs to have been convicted of the relevant offence by an appropriate court, or whether the ATO can simply conclude, or even allege, that illegal activities have been engaged in constituting, in its view, a 'serious offence'.

As noted above, I am currently in the process of establishing a Prescribed Private Fund. This fund will seek to make donations to a variety of charities. If a charity to whom a donation has been given is found to have breached a law, and as a consequence, loses its deductible gift recipient status, this will impact adversely on the my Prescribed Private Fund. Donors to charities will need to be sure that the charity to whom it is intending to make a donation, is not liable to have its charitable status revoked because of conduct engaged in at any time, which may constitute a 'serious offence'; an untenable and unworkable position. Donors to such charities would be penalised for the actions (inadvertent or otherwise) of those charities who have, or may have, engaged in conduct that constitutes a serious offence (which may have occurred many years before).

I concur with the view expressed by Freehills in its submission that the removal of the charitable status of a charity in such circumstances is likely to penalise the community and not the individuals who caused the serious offence.

**As such, I support the deletion of Section 4(1)(e) from the draft Bill. This section is unnecessary and if a charity engages in illegal activities, it should be subject to the same penalties under law as any other entity.**

Yours faithfully



**Brian Sherman**