

Jane Schwagger  
Chair  
Charities Definition Working Group  
Board of Taxation  
C/- Treasury  
Langton Crescent  
Parkes ACT 2600

Dear Ms Schwagger,

Please find attached our submission to the Board's consultation on the draft Charities Bill 2003.

TasCOSS has no objection to this submission being posted on the Board's website, and we urge that all submissions so authorised be posted for public access as soon as possible.

We look forward to the Board providing a speedy report on its consultation and that this report be made available publicly prior to any response from the Government.

TasCOSS participated enthusiastically in the Board's consultation process, assisting with the organisation of a focus group in Hobart. We are disappointed that the summary of issues raised at that focus group have not been distributed to participants as promised. It is likely that the Board would have received more submissions from non-government organisations had this undertaking been honoured.

Yours sincerely,

Lis de Vries  
Executive Director

29 September 2003

# **Tasmanian Council of Social Service Inc**



## **Submission to Board of Taxation on the draft Charities Bill 2003**

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- 4. Civil society – the conceptual context for assessing proposed changes to the treatment of charities**
- 5. Core definition of charitable organisation**

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# 1. ABOUT TASSCOSS

## *Mission*

The mission of TasCOSS is to represent and uphold the interests of low income and disadvantaged people in Tasmania.

## *TasCOSS Values*

- Equality of civil, political, social, economic and cultural rights and participation for all individuals and communities.
- The equal consideration of social, economic and environmental goals to improve community living standards for all in a fair and sustainable manner.
- The expertise and experience of people living on a low income and experiencing disadvantage, their communities and the sector organisations who work with them.
- Working with people affected by poverty and inequality in a consultative, collaborative and participatory way on issues which impact on their lives.
- Good governance and organisational management and the independent non-party political nature of the organisation.

## *Aims*

TasCOSS as a peak council for the community welfare sector fulfils its mission by:

- Establishing effective representative structures;
- Consulting with low income and disadvantaged people and the sector;
- Providing strategic advice to government and other bodies through research and social policy development and analysis;
- Systemic advocacy to effect social change;
- Providing leadership in shaping community opinion;
- Supporting sector development; and
- Maintaining a well governed well managed and well resourced organisation.

TasCOSS's membership includes a wide range of community service organisations from across Tasmania. TasCOSS is recognised as the major peak body for welfare and related issues in Tasmania and is an independent member of the Council of Social Service network across Australia.

## **2. INTRODUCTION — SUPPORT FOR CREATION OF CHARITIES ACT**

TasCOSS supports the development of a national legislative framework that seeks to codify and clarify existing common law provisions relating to the definition and status of charitable organisations. The vast majority of the draft Charities Bill is welcome. We strenuously oppose the likely impact of Clause 8 of the draft Bill and argue in this submission that this section be significantly redrafted.

We wish to make the point that while the form of the resulting legislation, and the issue of whether the proposed legislation is passed or not, are clearly important, the broader social policy orientation of the Commonwealth Government to non-government organisations is arguably just as important. By this we mean that the impact of a given approach to the definition of a charity will be determined by the way in which that definition is applied by the responsible government agency (in this case the Australian Taxation Office). That is, it does not follow that the withdrawal or defeat of the proposed legislation would necessarily signal an end to the threat to the (current or prospective) charitable status of non-government organisations. That threat is much more a function of the ‘activism’ of the ATO in pursuing existing common law determinations of what defines a charity.

Put simply, a targeted ‘campaign’ by the ATO to audit many/all existing charitable organisations to determine whether they engage in forms of advocacy deemed to be inconsistent with the ruling definition of a charity would be more significant than the proposed legislative changes as such.

## **3. FAILURE TO ADDRESS PUBLIC BENEVOLENT INSTITUTION STATUS IN PROPOSED LEGISLATION**

TasCOSS is disappointed that the recommendation of the Charity Definitions Inquiry that PBI regulations be modernised has not been addressed in the draft Bill. The linkages between the two statuses and the widespread confusion in the community about these statuses are such that a single legislative response would have been appropriate.

We urge the Government to move speedily to develop a legislative framework that clearly defines charities and PBIs in such a way that the Australian community is able to readily identify the relevance of each status. We support the recommendation of the Charity Definitions Inquiry, echoed by ACOSS in its submission, that a Charity Commission be established to oversee the administration of both charity and PBI accreditation and to work cooperatively with state and territory agencies that have a regulatory role with respect to charities. We do not believe the ATO has the expertise or the necessary independence to make assessments of the claims of organisations to charity or PBI status.

## 4. CIVIL SOCIETY — THE CONCEPTUAL CONTEXT FOR ASSESSING PROPOSED CHANGES TO THE TREATMENT OF CHARITABLE ORGANISATIONS

The underlying policy challenge for the Commonwealth Government — and indeed for the Australian community more generally — is to develop charities legislation in such a way that the role of our civil society is enhanced rather than diminished.

By ‘civil society’, we mean the array of organisations and associations that are non-government and non-market in their structure and function. By non-government, it is implied that these organisations and associations are (a) not formally part of any government structure, and (b) able to act independently of government influence or edict (albeit within a broad legal framework developed by governments at various levels). By non-market, it is implied that these organisations and associations are not primarily driven by the motivations and pressures of market-oriented organisations — profit margins, returns to shareholders, market share, etc — instead allocating their resources and distributing their ‘products’ according to other value frameworks.

We value civil society because its constituent groups provide a ‘buffer’ between the individual/family/household and the large-scale structures of government and market. Civil society groups provide a mechanism for citizens to come together to collectively address shared concerns without (necessarily) requiring the intervention of government or the response of the market. Our understanding of the value of a robust, resilient civil society has been heightened over the past decade as we have witnessed the struggle of those nations (especially in the former ‘Eastern Bloc’) attempting to recreate the structures of civil society that had been suppressed for so long. These are nations that are now fully equipped with the key democratic institutions and fully functioning market institutions, but where social capital stocks are still worryingly low because the skills and dispositions involved in developing and maintaining non-government associations and organisations are developing only slowly. The key elements of trust, cooperation and reciprocity are not merely given expression in these associations and organisations — they are learned there too.

Civil society is not a magic pudding that automatically renews itself. It needs regular attention to ensure that neither governments nor markets are infringing on the opportunities that citizens have for free, lawful association and collaboration. The networks of civil society are impacted by governments policy settings and changed markets in various ways (e.g., changes in workforce participation; withdrawal of key services from small communities; unsustainable increases in insurance costs for non-government organisations, etc).

Civil society groups generally permit citizens to address their shared concerns in four ways:

- mutual support (the classic self-help approach);
- collaborative coordination (anything from a body-corporate in a block of residential units to the formation of a volunteer fire brigade);
- the collective provision of goods and services to those identified as being in need of such provision; and

- the opportunity to give collective voice to participating members on issues of concern.

This last point is fundamentally important. The capacity of individual citizens to interact with the political sphere is limited. Few of us are comfortable with the processes of individual advocacy — directly approaching political representatives or individually attempting to use the media to express political views. The collective advocacy of ‘interest groups’ is a crucial means of maximising the participation of citizens in political decision making.

Consideration of the likely impact of proposed charities legislation on non-government organisations should not focus solely on the tax concessions that may or may not be available to those organisations. Disincentives to such organisations engaging freely in political advocacy undermine the value of Australian civil society in general. To whatever extent non-government organisations respond to such disincentives by withdrawing from advocacy activities, they are surrendering a core element of their independence. At the same time, they are narrowing the options that citizens — especially those citizens less able to give voice to their concerns — to participate in our democratic institutions.

Historically, so many of our non-government community service organisations grew from origins firmly rooted in political advocacy. The service-provision functions frequently followed years, decades even, of attempts to highlight patterns of disadvantage, to point to patterns of unmet need. It was often the case that small unfunded providers of key services were identified as appropriate auspices for larger-scale, publicly funded service provision through formal government sponsored programs. It is not surprising, in this context, that so many of our organisations have formal ‘Objects’ in their constitutions that simultaneously embrace the need for direct service provision and for advocacy.

There is a Tasmanian angle to this issue as well, or at least a rural and regional angle. In jurisdictions with smaller, dispersed populations, there is a natural tendency for organisations to be generalist in their orientation and function. Without the critical population mass of larger urban centres, organisations are obliged to tackle multiple tasks, knowing that resources — essentially human resources — are too scarce to permit a division of labour, a diversity of organisational forms. Consequently, Tasmania has fewer organisations whose role is specifically to engage in advocacy activities. Indeed it is difficult to envisage a context where such specialist organisations might develop in a state as small as Tasmania. We will continue to witness the valuable generalist work of community service organisations, simultaneously providing services, seeking to generate community capacity, and engaging in forms of advocacy that are often explicitly political. To target these forms of advocacy as excluding organisations from charity status is thus to apply a filter that discriminates against smaller regions and states.

Two further points need to be made about advocacy. First, the proposed legislation seeks to distinguish between generic attempts to influence legislation and policy, on the one hand, and activities that advocate a political party or cause or support a candidate for political office. The capacity of organisations to influence legislation or government policy without simultaneously impacting on the electoral prospects of candidates or parties is very limited. It is frequently the case that key decisions about important policy directions are taken in the context of election campaigns, and it is essential that non-government organisations be able to fully participate in processes that inform electors about the policy implications of their voting choices.

Here there is an issue of principle and a related ‘workability’ issue with respect to the proposed legislation. The principle has already been articulated above — that non-government organisations, including those engaged in charitable activity — must be free to advocate within the context of election campaigns, even where that advocacy may affect the outcome of the elections. To abstain from such involvement would be to accept (a) a much reduced level of independence and (b) a seriously flawed account of how legislative and policy frameworks are developed.

The workability issue surrounds the curious focus of the proposed legislation on ‘supporting’ a candidate for political office. Can we read this as indicating that *opposing* a candidate (or party, presumably) for office would be an acceptable feature of a charity — that such opposition would not represent a disqualifying purpose? It is often the case that non-government organisations will, in the context of an election campaign, seek to elicit the policy positions of candidates on key issues and then publish summaries of this research so that voters are aware of the policy implications of their choices. It is clear in many of these cases that information is being provided as a means of alerting voters to the ‘dangers’ of voting for a particular candidate or party. Typically, a table might be published outlining the way that candidates have responded to a questionnaire or summarising past voting patterns in the relevant parliament or conveying past public statements made by candidates. Such a table will seek to influence voters in such a way that some candidates are ‘supported’ by the material while others, if only by implication, are opposed.

One problem here is that any statement of opposition to a specific candidate or party is potentially a form of assistance to other competing candidates or parties. The provision of this indirect support is unlikely to be the motivation of the non-government organisation involved, however. It would be grossly unfair for a non-government organisation engaged in electoral advocacy of the sort described above to be deprived of charitable status because of the potential indirect impacts on particular candidates or parties.

The second point about advocacy to attempt to change legislation or government policy is that such advocacy is regularly and frequently sought by governments, and indeed is subject to important protections. Participation in the inquiries of Commonwealth and State/Territory parliamentary inquiries are generally subject to forms of privilege. That is, the provision of evidence to such inquiries is invited on the basis that witnesses will be protected from any form of retaliation. These inquiries are specifically about proposed changes to legislation or government policy, and they have grown in number and importance in recent years. Non government organisations are being encouraged to devote increasing proportions of their advocacy resources to this particular mode of advocacy.

The issue here is straightforward: would an organisation that participated energetically in a privileged parliamentary inquiry be protected from an attempt by the Australian Taxation Office (or any other government agency) to withdraw/downgrade the charity/PBI status of that organisation? The answer is very likely that such protection would be provided, as the Privileges Committees of the various parliaments in Australia have been consistently active in ensuring that witnesses are encouraged to participate.

Other government inquiries — including this very Board of Taxation consultation process — are not subject to parliamentary privilege and the protections it is likely to offer. Does this mean that organisations whose activities include significant amounts of advocacy work —

amounts that might not easily be described as only ‘ancillary or incidental’ — will be obliged to ‘shop around’, strategically choosing those opportunities for advocacy that are ‘safe’ in terms of potential ‘retaliation’. Our point here is that organisations engaging in the same form of activity — public advocacy of policy positions — may potentially be treated differently depending on the specifics of the legislation or policy being targeted and the specific administrative arrangements in place within government (e.g., parliamentary versus non-parliamentary inquiries). This would not be an equitable outcome of the proposed legislation.

The key governing factor in determining the level of explicitly party-political activity by non-government organisations will continue to be the likely public response to such activity. That is, groups that are seen as being too overtly political will endanger their base of public support for their other charitable activities. In this context there is no need for the intervention of a government agency such as ATO, and consequently no need for the proposed ‘disqualifying purpose’ clauses.

## 6. SPECIFIC RECOMMENDATIONS

In broad terms, TasCOSS supports the recommendations included in ACOSS’s submission to this Consultation:

### **On the Core Definition**

1. TasCOSS supports the notion that altruism should be incorporated as the dominant purpose of a charity, but we wish to raise two concerns about the application of the concept of altruism. First, we would wish to see the definition of charity focus more clearly on the issue of disadvantage and/or discrimination. That is, it is insufficient for altruism to be understood as ‘other regarding’ in general, if that implies that the activities of an organisation may be targeted at a section of society that is already advantaged, privileged. Second, there appears to be a potential clash between the ‘other regarding’ nature of altruism and the explicitly self-regarding nature of self-help groups, and we would not support any core definition that excluded those self-help groups active in disadvantaged sections of the Australian community.
2. We support a change to 4(1)(c) to stress the positive rather than the negative (“whose activities further, or are in aid of, its dominant purpose” or similar).
3. The paragraph 4(1)(e) relating to unlawful conduct has no place in this proposed legislation and should be removed.
4. TasCOSS is very concerned at the current understanding of what constitutes a ‘Government body’. We wish to stress again that the key independence of non-government organisations stems from their capacity to speak and act freely with respect to their concerns. That independence is not a function of the level of funding they receive from a government agency, nor is it determined by the fact that they may have a detailed service agreement with such an agency that requires government/ministerial approval prior to significant changes are made. It is essential that the definition of ‘Government body’ is clarified to ensure that service-providing organisations are not excluded from charitable status because the existence of contractual agreements with government agencies.

5. TasCOSS supports the notion that charities will frequently have more than one dominant charitable purpose and recommends that the proposed legislation reflect this.

### **On disqualifying purposes:**

We recommend that Clause 8 be replaced by the following:

“A charity may have public advocacy purposes where such advocacy is directed at benefits to sections of the Australian community identified as suffering disadvantage or discrimination, but shall only engage in activities that promote or oppose political parties or candidates for political office where such activities do not represent a dominant component of the charity’s advocacy purposes.”

### **On Charitable purposes**

TasCOSS supports the ACOSS recommendation that Clause 10 include reference to housing/accommodation support services where such services are addressing disadvantage. We point out, however, that there is a need for a sufficiently capacious definition of charitable purpose such that emerging purposes are not excluded unnecessarily. For example, a direct parallel of the instance of housing services might be identified in the field of community transport services, again targeting sections of the community suffering disadvantage. It is not clear whether the notion of the ‘advancement of social and community welfare’ would include these transport services if it might otherwise have excluded housing services. Our purpose here is not to add another category to the suggested list but instead to urge the adoption of a flexible approach that can embrace important new charitable purposes as they emerge.

### **On Public Benevolent Institution status:**

We echo the ACOSS recommendation that the Board seek Government agreement to a second round of reform consistent with the very clear and coherent advice provided by the Charities Definition Inquiry. That is, the reform process should encompass the legislative modernisation of the definition of Public Benevolent Institutions and the establishment of a Charities Commission as a ‘gatekeeper’ of charitable status.