30 September 2003

Consultations on the Definition of a Charity
Board of Taxation
C/- The Treasury
Langton Crescent
PARKES ACT 26000

Attn: charitydefinition@taxboard.gov.au

Dear Mr Warburton

Consultations on the Definition of a Charity

The Taxation Institute of Australia (the Taxation Institute) welcomes this opportunity to comment on the draft *Charities Bill 2003* (the draft Bill) released on 22 July 2003.

By way of background, the Taxation Institute is a tax education body, and was established in 1943. Our 11,000 members range from small rural and suburban accountants to senior tax practitioners in the legal and accounting professions, as well as the Public Service.

It is our understanding that the Board of Taxation (the Board) is to consult on the workability of the proposed legislative definition of charity in the draft Bill.

In assessing the workability of the draft Bill, it is useful to note that the Government's purpose is to provide certainty to organisations operating in this sector, while still providing the flexibility required to ensure the definition can be adapted to the changing needs of society (Treasurer's Press Release No 49 2002). The Government's intention is to codify the existing common law meaning of charity, and expand it to encompass certain child care organisations, self-help bodies, and closed or contemplative religious orders (Treasurer's Press Release No 59 2003). Whilst the Taxation Institute is particularly interested in the impact of the draft Bill from a tax perspective, it is acknowledged that the proposed definition of charity will also apply to all Commonwealth legislation. It is against this background that the Taxation Institute provides its comments.

Apart from Clause 8, the draft Bill largely conforms with the Government's stated purposes of codifying the common law and its general thrust is consistent with most of the recommendations of the *Report of the Inquiry into the Definition of Charities and Related Organisations* (the Inquiry) released on 28 June 2001.

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However, Clause 8 departs significantly from the common law and also the Inquiry's recommendations in the manner in which it seeks to limit the scope of advocacy by charitable institutions. The Taxation Institute is concerned that Clause 8 currently undermines the workability of the draft Bill and for this reason, our submission focuses on Clause 8.

The operation of Clause 8 is put into context in Clause 4 of the draft Bill, which sets out the core definition of a charitable institution or any other kind of charitable body. Paragraph 4(1)(d) excludes an entity from the core definition where it has a disqualifying purpose. A disqualifying purpose is defined in Clause 8:

> ***Disqualifying purposes***
>
> *(1) The purpose of engaging in activities that are unlawful is a* ***disqualifying purpose****.*
>
> *(2) Any of these purposes is a* ***disqualifying purpose****:*
> *(a) the purpose of advocating a political party or cause;*
> *(b) the purpose of supporting a candidate for political office;*
> *(c) the purpose of attempting to change the law or government policy;*
>
> *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.*

Looking in particular at sub-clause 8(2), the Taxation Institute makes the following comments (page citations refer to the Inquiry's Report):

- The Inquiry embraced the evidence before it that advocacy is now a fundamental part of the role of a charitable institution, drawing a distinction *"between purposes that advance a political party or a candidate for political office, which will deny charitable status, and non party-political purposes, that will not affect charitable status provided they further, or are in aid of, the charity's dominant charitable purpose"* (p. 209).

- Non party-political purposes or activities include advocating on behalf of a charitable institution's causes or needs, contributing to the development or implementation of public policy, entering into the public debate, or seeking to change a particular law or public policy (p. 218).

- The Inquiry only recommended that charities be permitted neither to have purposes that promote a political party or a candidate for political office, nor to undertake activities that promote a political party or a candidate for political office (Recommendation 17, p. 218).

- Apart from specifically proscribing what could be described as partisan political activities set out above, the Inquiry did not single out non party-political purposes or activities for special legislative treatment. Rather, the clear implication of the Inquiry's findings is that non party-political purposes should be assessed against the same principles as other purposes or activities of a charitable institution as set out in Clause 4.

- To the extent that sub-clause 8(2) embraces non party-political activities (e.g., in particular paragraph 8(2)(c) – attempting to change the law or government policy), it is more appropriate that these activities are removed from Clause 8 and are dealt with along with other activities that are covered by paragraph 4(1)(d), which prevents a charitable institution from engaging in activities *"that do not further, or are not in aid of, its dominant purpose"*. This would be consistent with the Inquiry's recommendations.

- It is also questionable on a general level whether Clause 8 is a codification of the common law, because essentially it reverses the onus of proof by treating the subject matter of the Clause as disqualifying events. For example, under the current draft Bill, an entity will not prima facie be a charitable institution if it advocates for the change in the law or government policy (paragraph 8(2)(c)), unless it can establish that this activity is *"more than ancillary or incidental to the other purposes of the entity concerned"* – a negative approach. However, under the common law, an entity's status as a charitable institution is retained when advocating for a change in the law or government policy until such time as it can be shown that this activity does not further or is not in aid of its dominant purpose (paragraph 4(1)(d)) – a positive approach.

- It follows that it is some doubt whether sub-clause 8(2) should be in the draft Bill at all, when activities set out therein come within the ambit of paragraph 4(1)(d).

- Furthermore, sub-clause 8(2) is problematic in that the concept of advocacy is introduced in a negative way as a "disqualifying event". The negative message that this sends to charitable institutions must be questioned, particularly in light of the endorsement by the Inquiry of a range of advocacy activities and purposes of charitable institutions.

Currently, Clause 8 is counter productive to the overall workability of the Bill largely because of its negative approach and its reversal of the onus of proof in relation to an entity's status as a charitable institution.

Not only is this contrary to the spirit of the Inquiry's report - it raises questions about whether Clause 8 codifies the common law and undermines the Government's intended purpose of the Bill to provide certainty to organisations operating in this sector, while still providing the flexibility required to ensure the definition can be adapted to the changing needs of society.

Accordingly, we strongly recommend that subject matter of Clause 8 is dealt with in a manner that addresses the onus of proof, bringing it more closely into line with the Inquiry's approach to the advocacy activities and practices of charitable institutions. That done, the Taxation Institute supports the essential thrust of the draft Bill.

If you have any queries in relation to any matters raised in this submission please contact the Taxation Institute's Tax Director, Michael Dirkis on (02) 8223 0011.

Yours sincerely,

Gil Levy
President