

CONSULTATION ON THE DEFINITION OF A CHARITY

SUBMISSION FROM UNITING HEALTHCARE

1. Contact details

This submission has been prepared by Uniting HealthCare (UHC). UHC operates within the Queensland Synod of the Uniting Church in Australia. The contact details for UHC are:

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2. Purposes of Uniting HealthCare

The purposes for which Uniting HealthCare exists are set out in the constituent documents of the organisation. The objects and purposes of UHC include:

- to provide relief from sickness, injury or disease in human beings and medical treatment and care for those who need it;
- to conduct the activities of the organisation as a ministry of healing and compassion administered in the name and spirit of Christ;
- to provide health and community services to the public irrespective of religious beliefs in a manner which best serves the needs of the community
- to address the health care needs of disadvantaged individuals and communities through direct service and advocacy for health care justice.

Of the seven charitable purposes that are set out in clause 10 (1) of the Charities Bill 2003, UHC believes it would fall within at least two directly: the advancement of health and the advancement of social or community welfare. Of course, UHC also would have, in the context of these purposes, an indirect purpose of the advancement of religion.

The detailed discussion in the Explanatory Material of the intentions of what is included in the advancement of health indicate that UHC would comply with this purpose. Organisations within UHC undertake both preventative and curative activities; further, these activities include care, treatment and rehabilitation of sickness and other matters, the provision of public health services and the conduct of research and associated activities.

In the context of the advancement of social and community welfare, UHC provides a wide range of services that can be characterised in terms of enhancing the welfare of both individuals and communities.

3. Reasons for submission

UHC provided a submission to the original inquiry into the definition of charities and related organisations, the report of which was released by the Federal Government in August 2001.¹ That Report made a number of recommendations, many of which have been incorporated in the proposed Charities Bill 2003.

UHC has some concerns that are raised by the Bill. UHC wishes to use the opportunity provided by the Board of Taxation inquiry to present these concerns to the Federal Government. Given the consideration of these matters, appropriate amendments may be incorporated in the Government's legislation.

4. Status of Uniting HealthCare

(a) Taxation determination

The taxation status of Uniting HealthCare is that the organisation has been endorsed by the Australian Taxation Office as an Income Tax Exempt Charity (ITEC). UHC also has been accorded status as a Public Benevolent Institution (PBI) by the Australian Taxation Office.

(b) Impact of Charities Bill 2003

UHC interprets that the definition of a charity, as proposed in the Charities Bill 2003, will not affect the endorsement of UHC as an ITEC nor as a PBI. According to the key elements of the proposed core definition of a charity (refer clause 4), UHC assesses its status as follows:

- UHC is a not-for-profit entity;

¹ *Report of the Inquiry into the Definition of Charities and Related Organisations*, Australian Government, Canberra, June 2001. References in this submission to the 'Report' are references to that Report.

- UHC has the dominant purpose of the advancement of health (supported by the purpose of the advancement of community welfare);
- UHC does not engage in activities that do not further its dominant purpose;
- UHC does not have a disqualifying purpose;
- UHC has not and is not engaged in conduct that constitutes a serious offence.

UHC agrees that the preferred approach to defining a charity should be in terms of establishing the purposes of an organisation. The definition should not be based on the activities that an organisation may undertake.

5. Consequences of Charities Bill 2003

UHC has specific concerns about several provisions of the Charities Bill 2003 and the consequential additional administrative burden that will be imposed on charities. These concerns are outlined below. However, UHC does not believe that, in respect of the other provisions, the application of the Charities Bill 2003 will impose any additional administrative requirements on UHC. UHC reaches this conclusion based on the assumption of there being appropriate interpretations of the provisions in the Bill (and the associated Explanatory Memorandum and other relevant material).

Provisions relating to advocacy and associated issues

There is one aspect of the proposed Bill that does cause UHC some concern and, depending on interpretations that might be adopted, that could cause UHC to be involved in additional and unnecessary administrative activities.

This concern relates to the inclusion, as a disqualifying purpose, of the purposes of “advocating a political party or cause” (refer clause 8 (2) (a)), of “supporting a candidate for political office” (refer clause 8 (2) (b)) and “attempting to change the law or government policy” (refer clause 8 (2) (c)). UHC notes that the inclusion of this disqualifying purpose extends the conclusions reached and recommendations made in the Report.²

There are two concerns with this approach to advocacy. The first concern that appears to UHC is where an organisation, that would otherwise clearly be considered to be a charity, might have a clause in its constituent documents that refers to advocacy or some similar activity. In this situation, there appears to UHC to be a danger that the effect of this purpose – among all the purposes specified for the organisation – might be interpreted as challenging the provisions of the Charities Bill 2003.

There has been considerable public debate over the inclusion of this disqualifying purpose. UHC supports the concerns expressed in this debate that the inclusion of this provision will cause difficulties for charities. In

² Report, p 108

particular, UHC is concerned about UHC's advocacy role in matters affecting the delivery of health and social justice, and on moral issues such as the use of embryo stem cells.

UHC acknowledges that there is a clear statement in the Bill that there will be no cause for concern where such advocacy is only "ancillary or incidental to the other purposes of the entity" (refer clause 8 (2)). Nevertheless, UHC concludes that the inclusion of this disqualifying purpose does not add to the effectiveness of the Bill; rather, it has the potential to distract from the application of the Bill as disputes occur over the extent of advocacy that might be both specified in constituent documents, and actually be undertaken on behalf of the relevant community or segment of the community.

UHC would not relish the prospect of having to become engaged in extensive consideration of its advocacy activities, in the context of all its other charitable activities, to establish and confirm its status as an ITEC.

UHC proposes that clause 8 (2) (c) be deleted from the Bill.

The second concern relates to the response that might be generated to any advocacy activities that are undertaken by charities such as UHC. In many situations involving advocacy, the position adopted by and the actions of a charity may align or even be the same as those of particular political parties or candidates for political office.

The key issue that arises in these situations appears to be one of distinguishing between a purpose that has a 'direct' link with the advocacy activities rather than an 'indirect' link (in the case of clause 8 (2) (a)) and between a 'direct' link with support activities rather than 'indirect' support (in the case of clause 8 (2) (b)). It is easy to envisage UHC advocating very strongly a position on the use of embryo stem cells; further, in advocating this position, UHC could find itself arguing for a position similar to that adopted by a political party. There is no direct or deliberate intent on the part of UHC to align itself with that political party but it will be evident that, on the issue of the use of embryo stem cells, the interests of each entity will coincide – and this outcome may be reinforced in public debate and public reporting about the issue.

Likewise, in debates about particular social and other issues, it may be that UHC – as a charity – holds views that are similar to those of candidates for political office. Again, there should be a clear distinction between direct support for a candidate and indirect support for a candidate – that is, support that arises simply from the linking of the common views about the issue concerned. Again, any similar views on issues may be reinforced in public debate and reporting.

A possible response to this matter is to consider the inclusion of "directly" after 'advocating' in clause 8 (2) (a) and after 'supporting' in clause 8 (2) (b).

Such amendments have the benefit of simplicity while retaining the intent of the proposed clauses.

6. Flexibility of proposed definition

In general terms, UHC believes the Exposure Draft of the Charities Bill 2003, supported by the accompanying explanatory material, represent a reasonably sound basis for defining charities and charitable purposes. The Bill, as it is currently drafted, is refreshingly straightforward; the logic of the application of the definition and its component parts to organisations seeking to be considered to be a charity is excellent.

As far as UHC can judge, the proposed definition of a charity should provide sufficient flexibility for the definition to adapt to the changing needs of society. In particular, in addition to the relatively broad coverage of the charitable purposes set out in clause 10 (1) (a) to (f), the catch-all paragraph (g) appears to provide sufficient opportunity for other entities to seek to be considered as a charity based on their purposes.

Application of common law

It is almost inevitable that there will be matters relating to the characterisation of charities that will be brought before the courts. Hence, it will ultimately rest with the courts to determine where the boundaries of the definition will be set. In this context, UHC notes that there has been extensive common law developed around the concept and application of charities over 400 years. The concern of UHC is to retain the benefits of much of this common law following the passing of this legislation.

There is no question that, once passed by Federal Parliament, the Charities Bill will become the primary source of advice where issues relating to charities in Australia need to be resolved. UHC understands that, in situations where there may be issues that are before a court and some extraneous material might be sought to aid in the court's deliberations, appropriate elements of the common law could be called up.

It seems important to UHC that, where possible and appropriate, the Explanatory Memorandum to the Bill incorporate discussion of common law that is relevant to the consideration of matters included in the legislation. This would ensure that the benefits of the common law developed to this point will be retained.

Consideration of 'serious offence'

UHC also is concerned about the inclusion of the concept of a 'serious offence' in the core definition of a charity (refer clause 4 (1) (e)).

UHC is not in a position at this point to provide expert commentary on this matter. Rather, UHC wishes to raise some issues about the concept of ‘serious offence’ as defined by clause 3 (1):

- UHC is not sure how a ‘serious offence’ impacts on the determination of charitable status;
- UHC is not sure of the outcome of a situation where a person employed by a charity engages in criminal conduct;
- UHC is not sure of the relationship between the criminal conduct of an employee and the ‘charitable status’ of the organisation.

UHC suggests that there is merit in considering further the relationship between the notion of an entity – that has been determined to be a charity – and the issue of the committing of what is a ‘serious offence’.

UHC raises this matter so that the Board might give further consideration to the need to include clause 4 (1) (e) in the Bill. UHC is especially concerned to ensure that there are no unintended consequences arising from the inclusion of the concept of ‘serious offence’ in the definition of charity.

7. Consideration of altruism

The Board has raised the question of whether the notion of altruism should be included in the consideration of the public benefit test, as recommended in the Report.

UHC does not believe that the addition to the public benefit test of the dominant purpose of a charitable entity also to be altruistic would affect UHC. Nevertheless, UHC does not accept that there is any need for the public benefit test to be strengthened in this way.

The Bill, as it is currently drafted, sets out three criteria that must be satisfied for the public benefit test to be successful: briefly, these are to achieve a universal or common good; to have practical utility; to be of benefit to the general community. This approach picks up the relevant recommendation from the Report.

The Report then gives consideration to the question of including the concept of altruism and concludes that the public benefit test should “embrace the concept of altruism.”³ UHC submits that the arguments provided in the Report in favour of this course of action are not particularly strong.

The Report provides two examples of where the inclusion of the concept of altruism could strengthen the notion of a charity. It would appear, however, that each of the two types of organisation used as examples in the Report

³ Report, p 124

would be excluded from being considered to be a charity through the application of other elements of the proposed definition of charity.

The Report also suggests that some measure of voluntary effort should be required to confirm the altruistic nature of an organisation. Again, UHC submits that the comments in the Report are not particularly strong in favour of this approach. Moreover, UHC believes that the notion of voluntary work is sufficiently encompassed in the approach already proposed for the public benefit test.

It also is quite reasonable to argue that the concept of altruism is encompassed in the notion of ‘not-for-profit’ – as this phrase is used in the proposed definition of charity.

A concern that occurs to UHC about any attempt to incorporate the concept of altruism is that this could raise questions about seeking to quantify the extent of voluntary work. UHC does not believe this would be useful in achieving the overall purpose that is being sought by this legislation – particularly retaining the essential simplicity that is evident in the Bill as it is currently drafted.

Possible alternative

If the Board is convinced that some reference to altruism is necessary, one option could be for the word ‘altruism’ to be used as an adjective in the description of ‘entity’ in clause 4 (1). A definition of ‘altruism’ could then be included in the Definitions in clause 3 (1). This may not be a realistic option, however, if the ultimate effect leads to a restriction of the determination of some organisations as charities.

As noted above, however, UHC believes it is not necessary to incorporate a reference to altruism in the Bill as it is currently drafted. This would be a superfluous addition to the Bill.

8. Recommendations

UHC recommends that:

- (a) Clause 8 (2) (c) be deleted from the Bill;
- (b) The word “directly” be added after ‘advocating’ in clause 8 (2) (a) and be added after ‘supporting’ in clause 8 (2) (b);
- (c) The Board consider carefully the implications of the current definition of ‘serious offence’ for the determination of an entity’s charitable status;
- (d) That the public benefit test not incorporate altruism as part of the dominant purpose.