



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

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Summary

The Victorian Council for Social Service (VCOSS) was impressed that the Federal Government embarked on a process to modernise the tax law definitions of charities and public benevolent institutions and established the *Charity Definitions Inquiry* (the Inquiry). The Report of the Inquiry into the Definitions of Charities and Related Organisations June 2001 (the Inquiry Report) followed consultation with the charity sector and produced a range of recommendations for codification of tax definitions of charities that would offer “*clarity and certainty while retaining the quality of flexibility*”.

The Inquiry Report recognised that:

- Charities are very diverse and provide a wide range of services, including services for the specific needs of a community, and self-help groups.
- Charities operate in a changing environment and the focus of the work is *shifting from the provision of relief to those in need, to prevention and early intervention* and developing the capacity of communities to address their own needs.

It is acknowledged that the current draft Charities Bill extends the activities to include the advancement of the natural environment, health and welfare, self-help groups and child care services. However, the definition of charities that is core to an organisation’s eligibility does not reflect the manner in which charities work or are funded nor does it reflect the recommendations of the Inquiry. Specifically, the draft bill:

- Does not reflect the manner in which charitable organisations currently operate particularly excluding purposes that entail attempting to change law or government policy;
- Does not simplify the current complex and confusing system of tax concessions and endorsement of a charity and a public benefit institution; and,
- Is not to be administered in a clear and consistent accountability process independent of the Australian Taxation Office (ATO).

It is for these reasons that VCOSS does not support adoption of the draft Bill or amendment to the current draft. It is our view that a comprehensive, rather than a piece-meal and confusing, approach be taken to modernising the definition of charities and public benevolent organisations in relation to Australian tax law. The draft Bill is not flexible enough to reflect how charities currently operate hence it will be unable to adapt to changing needs in society

The adoption of inappropriate definitions of charities as set out in the draft Bill is unworkable. It is our view that the implementation of the Bill will create extensive administrative work for the ATO and charities. Moreover, it is probable that litigation regarding interpretation of the definitions of charity is likely to be instigated, as a number of organisations are vulnerable to loss of their charitable status.

For organisations no longer deemed eligible the adoption of the draft Bill will result in an increased call for funding for Federal, State and local governments. This is due to the loss of capacity of philanthropic foundations to fund organisations that are no longer deemed to be charitable under the draft Bill definition of charity.

VCOSS as the peak body of the social and community sector in Victoria is committed to the maintenance and development of a strong community services sector. The enactment of this draft Bill will undermine the development of the community services sector.

Introduction

Victorian Council of Social Service (VCOSS)

VCOSS, a not-for-profit company, is the peak representative body for the social and community services sector in Victoria. VCOSS's role is to provide a voice for, and collaborate with, organisations in the social and community sector on matters that effect the needs and interests of vulnerable and disadvantaged Victorians. The fulfilment of this role entails researching and developing government policy options, commenting on, negotiating and advocating government policy outcomes that ensure a fair distribution of resources and services and encouraging organisation and individual participation in decision making that effects access to services and resources for vulnerable and disadvantaged Victorians

VCOSS's membership is diverse and includes self-help groups, that have been established to assist members participate in decision making that effects their lives, service providers, neighbourhood houses that provide a supportive community learning environment, and statewide policy, research and advocacy peak bodies such as Brotherhood of St Laurence.

VCOSS has prepared this submission regarding the draft Charities Bill because:

1. VCOSS and its members are committed to the development of a diverse social and community service sector that can advocate for the interests of the community and sector without government restraint.
2. Many member organisations may find their charitable status in jeopardy with the enactment of this draft Bill.

In its role of support of the Victorian social, community and other sectors VCOSS sponsored a consultation regarding the draft Bill on Tuesday 26 August 2003. Representatives from 36 social and community services attended this consultation and raised numerous concerns regarding the draft Bill. These representatives were drawn

from a range of self-help groups such as Disability Rights Victoria, service providers and advocates such as Action for Disability within Ethnic Communities, large social service organisations such as Carers Victoria, community sector services such as Headway Victoria and church based services such as Anglicare Victoria.

This submission represents is a distillation of the concerns of VCOSS's membership regarding the draft Charities Bill.

The Charitable Sector

The charitable sector is a diverse sector encompassing a range of disciplines including health, welfare, education and the environment. The Report of the Inquiry into the Definitions of Charities and Related Organisations June 2001 (the Inquiry Report) outlined that the charitable sector is part of Australian socio-economic structure:

- contributing about 2% to GDP and about 5% to national employment;
- building social capital and community capacity in Australia utilising extensive volunteer effort; and,
- participating in open government decision-making and policy review processes.

The Inquiry Report assessed that only 46% of the funding for charities comes from government sources, 28% is derived from fees and a significant 10.5% is drawn from a range of fund raising activities, including receipt of grants and donations.

The Report outlined that policy development activities carried out by charitable organisations includes participation:

- on government task forces to review and develop government policies; and,
- in consultative committees and advisory councils to review the implementation of government programs.

However the draft Bill does not reflect this understanding.

In a 21st Century pluralist democracy community, social service and environment charitable organisations carry out as fundamental core activities research, critique, commentary and reporting on the implementation of current laws and government policies. This work is often driven by an analysis of the service delivery/case work experience of the organisation and/or its members regarding the effect that law and government policy have on the impoverishment, health and well being of families and individuals or on denuding the natural environment. This work, usually termed advocacy, is a primary activity undertaken to advance social or community welfare and the natural environment. Advocacy is:

- Intrinsically linked to research and policy development for the public good;
- An essential component of community development;

- Part of the process of establishing practices and policies that ameliorate disadvantage or discrimination stemming from current laws and policies;
- Part of the information exchange and debate between government and social service and environment sectors regarding the impact of law and government policy particularly the unintended consequences of law and policy; and,
- Essential in raising public awareness of issues and stimulating public debate and participation in social and environment policy development.

Federal and State governments fund organisations for a range of activities including research, consultation, training and public education and liaison regarding both development of new policies and the impact of current law, policy, and practices. Hence, advocating for the advancement of health, social and community welfare and the environment is an essential element of these activities. This policy development process is often carried out by peak bodies that represent the interests of member organisations. A key and essential role of many statewide entities that are members of VCOSS is undertaking liaison and advocacy with governments and the broader society.

It is the view of VCOSS that that if the draft Charities Bill is adopted the charitable sector's contribution to the Australian society and economy will diminish and the requirement for government funding will increase.

Workability, Clarity and Flexibility of the Draft Bill

Intention of the Draft Charities Bill

The Explanatory Memorandum sets out the context of the legislation is to:

- codify existing common law; and
- provide clarity.

However, the draft Bill does neither. It sets up a definition of charities that appears to be more restrictive than is currently applied jeopardizing the charitable status of numerous organisations. Defining charities by the proposed multi-layered process of core definition, dominant purpose and disqualifying purposes will create uncertainty and confusion and require extensive documentation, analysis and interpretation of a charity's activities making the legislation unworkable.

Definition of Charitable Purpose

Key point

The imposition of the disqualifying purpose in clause 8 regarding advocacy is contradictory to the charitable purposes set out in Clause 6, Clause 7 and Clause 10.

The consequence of this is an unworkable definition of charity that will require extensive interpretation and investigation.

The Inquiry Report recommendations did not signal out the activity of advocacy as a disqualifying purpose except in relation to promotion of a political party or candidate.

The definition of charities in the draft Bill does not reflect the manner in which charities currently operate and therefore will be unable to adapt to changing needs of society.

Not a government body

The core definition sets out in Clause 4 (1) (f) that a charity not be a *government body*.

This exclusion is not clear and raises concerns as numerous charities receive a majority of their funding from government and have been set up following establishment of government programs. The Explanatory Memorandum does not sufficiently clarify the position and appears to allow extensive interpretation and flexibility to whoever administers implementation of the legislation.

Disqualifying purpose – change of law or government policy

A charity is defined in Clause 6 and 7 as having as its dominant purpose public benefit that entails achieving universal or common good, for the general community or a sufficient section of the community.

Numerous organisations have a public benefit mission such as alleviation of poverty and disadvantage, provision of housing for homeless or disadvantaged families and individuals, enhancement of access to services for people with disabilities and protection of the natural environment. In the process of pursuing the organisation's mission and public benefit objective these organisations conduct research and analysis of the impact of law and government policy. This analysis is then imparted to government either directly or by peak bodies in submissions, at inquiry hearings, at advisory committees, and by the means of forums and public statements. This activity, often termed advocacy, is a core component of advancement of health, social and community welfare and the natural environment.

Clause 10 (2) sets out that advancement includes *research and improvement*. The Explanatory Memorandum explains:

- that research can include research into health services (1.60);
- the advancement of social community welfare includes prevention and intervention (1.66); and,
- 1.67 outlines that the promotion of community development enhances social and economic participation.

All of these explanations refer to activities that entail research and advocacy that relate to commenting on improving law and government policy. Surely, an essential

element of social participation is analysis, commentary, and public discussion of the impact of law and government policy with the aim of ensuring that health and well-being of individuals and families is not detrimentally affected.

However, the disqualifying purpose in Clause 8 (2) (c) *attempting to change the law or government policy* being no more than *incidental or ancillary* activity contradicts the definitions of charity set out above and is a clear departure from the recommendations of the Inquiry.

The Explanatory Memorandum explains incidental or ancillary (at 1.54) as ordinarily, representing to Government, from time to time, the interests of those the entity seek to benefit. This is a very vague. How often is time to time? What is ordinarily? Does it mean that when there has been a major change in law or government policy an entity can make extensive representations?

As already stated the role of researching, educating and advocating for changes to law and government policy that negatively impact on the natural environment or health and well being of families and individuals is core business for many charities.

Numerous organisations, particularly organisations whose dominant purpose is the advancement and support of people with disabilities are specifically funded by government to comment on and observe the impact of law and policy on their constituency.

The Explanatory Memorandum sets out (at 1.55) the importance of independence of charities from Government political processes in serving public benefit. But the draft Bill reflects the opposite. The exclusion of advocacy as core activity of draft Bill will constrain the capacity of charities to act independently. The way the draft Bill has been written indicates a lack of understanding of what constitutes community development and advancement of social and community welfare and the importance of an independent charitable sector.

How will interpretation of the clauses (Clauses 6, 7, 8 and 10) be carried out? What constitutes attempting to change law – is it research or public statements on negative impacts of government policy? Will organisations be required to keep a log of time and resources spent on research and critique that is related to law and government policy? Or will the log only entail time and resources spent in public dissemination of this research? Will the activities of volunteers in advocacy be considered part of an organisation's activity? Will negotiations undertaken by organisations to change funding agreements be caught under this provision? Will a range of different activities such as commentary on government policy development, advocacy to change a law and negotiating funding agreements be treated cumulatively to assess the time and funds spent on advocacy? Will this disqualification purpose be administered retrospectively i.e. will a charity's actions be monitored? All these question illustrate the problem with implementation and interpretation of this disqualifying purpose rendering the proposed legislation unworkable.

The adoption of the definition of charity will be an administrative nightmare. Rather than providing clarity it delivers confusion and could led to different treatment of organisations carrying out similar activities. Moreover, many organisations that

currently have charitable status could lose their charitable status due to a narrower definition of charity than is currently in operation using common law interpretation.

Disqualifying purpose – engaging in unlawful activities or engaging in conduct that is a serious offence

Commentary on:

The disqualifying purpose Clause 8 (1) *the purpose of engaging in activities that are unlawful.*

A charitable institution or body is an entity that Clause 4 (1) (e) *does not engage in, and has not engaged in, conduct (or an omission to engage in conduct) that constitutes a serious offence.*

The inclusion of these disqualifications is unnecessary and will cause unintended problems for administration. No charity whether it be to advance health, social and community welfare or the natural environment is established with a purpose to break the law.

It is unclear from the Explanatory Memorandum what the intention is of the inclusion of Clause 4 (1) (e) or how this will be administered.

These provisions are very vague and could result in the exclude an organisation's capacity to be involved in any public demonstration. The provision will particularly impact on environment groups capacity to be involved in pro-active action to protect threatened natural environments. The activity of charities whose dominant purpose is the advancement and protection of the natural environment have used actions that have resulted in the committing of offences whilst at the same time raising public awareness and debate regarding rare and threatened environments.

Could charities that had been tardy with submission of ASIC forms and have breached Corporations Law and received fines also be excluded under these clauses? If an entity breached Occupational Health and Safety laws would they be captured by these Clauses?

If a charity's members or volunteers participate in action that result in breach of a law are the actions of these volunteers or members to be considered a serious offence of the charity and lead to disqualification? How is this to be monitored and implemented?

If an organisation undertakes activities that breach the law any breach should be dealt with within the legislation that has allegedly been broken. To propose that an organisation's charitable status is effected imposes a 'double penalty'.

Misunderstanding the role and activities of self-help groups

The inclusion of self-help groups as charities is to be applauded and brings the notion of charity into current-day practice. However, the manner in which the draft Bill includes self –help groups indicates a lack of understanding of how self-help groups

operate and will not result in the extension of charitable status to many self-help groups.

Self-help groups are made up of people with similar needs or experiences who have come together as set out in the Explanatory Memorandum (at 1.45) to develop self-empowerment and address disadvantage, discrimination and need. In other words, they create a space for people to come together to support each other and develop a collective voice regarding actions that negatively impact on their lives. Hence, an essential element of their activity is building confidence of group members to participate in society and comment on the impact of law and government policy. But, the draft Bill's disqualifying purpose in Clause 8 (2) regarding ancillary or incidental action to change law or government policy will make consideration of eligibility of self-help groups a cumbersome and difficult task and may well render many self-help groups ineligible.

In addition, the administrative workload involved will be extensive. Many self-help groups may well have their time eaten up with documentation and negotiation regarding the level of their time and resources committed to advocacy diverting them for their key tasks and activities.

Inclusion of the Altruism

The inclusion of the term altruism in any definition of charity is unnecessary and does not add to the concept of public benefit. Moreover it is likely that the inclusion would increase the need for interpretation.

Administration

The proposed modernisation of the definition of charities has not been accompanied by modernisation of the administration. As set out in the Inquiry Report it would be more appropriate to establish an independent Charities Commission that has representatives from both Federal and State governments. This would ensure that the taxation definition of charities was compatible with the Federal and State Government bodies. Moreover, it would eliminate the conflict faced by the ATO in administering legislation regulating charities that ultimately reduces taxation revenue, the collection of which is the ATO's primary role.

Furthermore, the Inquiry's recommendation that a Charities Commission be established was supported by the ATO in its submission to the Inquiry.

VCOSS supports the establishment of a Charities Commission as recommended by the Inquiry. VCOSS does not support the proposed administration by ATO.

Comprehensive Modernisation of Australian Charity Law

The current system of provision of a range of taxation concessions to charitable and related entities is complex. There is a range of entity types and tax concession including Deductible Gift Recipient, Community Service Organisation Charity and

Public Benevolent Institution. The attainment of Public Benevolent Status is important as it carries with it the FBT exempt status.

The Inquiry examined these different definitions and recommended establishing a new class of Benevolent Charity. However, the draft Bill is silent with regard to Public Benevolent Institution status.

There is an urgent need to address the current treatment of Public Benevolent Institutions. The draft Bill will not resolve the confusion regarding the distinction between a PBI and charitable status.

Moreover, a new Taxation Ruling regarding PBI status retains outdated concepts of benevolence and does not reflect the current day operations of charities. Partial recognition of the need to bring the concept of PBI into the 21st Century has been undertaken by extending gift deductibility to certain health promotion organisations. However, this is a piecemeal approach and does not resolve the problem that many organisations with PBI status that assist disadvantaged people but no longer carry out substantive direct service delivery risk losing their PBI status and associated gift deductibility and FBT exempt status

Surely, the opportunity to comprehensively modernise tax treatment of all forms of charitable and not-for-profit entities is following the comprehensive review and development of the Inquiry's substantive report and recommendations.

The adoption of the Inquiry Report's recommendation regarding Benevolent Charities will provide clarity and improve workability of the tax concession regime.

Conclusion

VCOSS does not support the draft Bill as it is a selective adoption of aspects of the Inquiry Report's recommendation that will result in:

- Implementation of a definition of charity that does not reflect current day practice;
- Impeding the independence and capacity of charities particularly those engaged in advancement of health, social and community welfare and the natural environment;
- Few self-help groups being eligible;
- Creating an extensive administrative requirements for charities and the ATO rendering the draft Bill unworkable; and,
- Retaining a complex and confusing tax concession regime for charitable and not-for-profit entities.