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Submission to the Board of Taxation regarding the draft Charities Bill 2003

Name of our charitable organisation

1. The name of our organisation is the Anglican Church Diocese of Sydney (the Diocese).

2. This submission is made by the Standing Committee of the Synod of the Anglican Church Diocese of Sydney. The Standing Committee is executive of the Synod. The Synod is in turn the "parliament" of the Diocese of Sydney, and is constituted under the Anglican Church of Australia Constitutions Act 1902. The Diocese is the oldest and largest of the 23 Anglican dioceses which together form the Anglican Church of Australia. The 50,000 adults who regularly attend one of the 387 churches of the Diocese represent in excess of one quarter of all people who regularly attend an Anglican church in Australia (figures from the 1996 and 2001 National Church Life Surveys).

3. Our contact details are –

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Dominant purpose

4. For the purposes of the law of charitable trusts, all property of the Diocese is held upon trust for the use, benefit or purposes of the Diocese. This underlying charitable trust is expressed as various dominant purposes in the many entities that comprise the Diocese. These entities comprise various incorporated and unincorporated associations together with various trusts which, through the members of our churches, are involved in the undertaking of social welfare, education and community work. These include entities such as our primary social welfare arm, Sydney Anglican Home Mission Society (Anglicare Diocese of Sydney), Anglican Retirement Villages Diocese of Sydney, Anglican Youth and Education Division Diocese of Sydney (Anglican Youthworks), as well as some 31 Anglican schools, to name a few.

5. These entities may be constituted separately, however they are inherently and are seen by those involved in them as, an integral part of the mission of the Church in general and our Diocese in particular. They would not exist without that mission. Their functions and activities are linked to and supported by the people in each parish by direct resourcing of gifts and staffing. They in turn are linked to the supporting central administrative bodies such as the Standing Committee and the Synod.

Workability of proposed definition of charity

6. We wish to raise 10 points in relation to the workability of the draft bill in the following areas –

- Bill fails to codify the common law meaning of charity
- Use of the definition
  - use is effectively non-purposive
  - use raises questions of religious freedom
  - use should be limited to taxation purposes
- Use of the "entity" concept
  - status of individual trustees?
  - charitable purposes of larger organisations undermined
  - proposed entity groups
- Public benefit
  - presumption at common law not reflected in the definition
  - treatment of closed/contemplative religious orders
- Not-for-profit requirement
- Commercial activities
- Serious offence disqualification
- Government body disqualification
- Disqualifying purpose of attempting to change the law or government policy
- Charitable purposes
  - advancement of social or community welfare
  - advancement of religion
  - advancement of culture

Each of these points is addressed in turn below.

Bill fails to codify the common law meaning of charity

7. The definition of charity in the draft bill represents a fundamental departure from the common law meaning of charity.

8. Under the common law, the primary concern in identifying a charity is the nature of the trusts on which certain property is held. In broad terms, the relevant issue is whether property is held on trust for a recognised head of charitable purpose and is for the public benefit. The common law has no great concern with the nature of the body that holds the property except in so far as it recognises it as the relevant trustee of the property.

9. The proposed legislative definition of charity focuses on the nature of the body or entity itself. The relevant issue is whether the dominant purpose of the entity is a charitable purpose as defined. The nature of the trusts on which the property of the entity is held, assuming there are any, becomes largely irrelevant, unless the entity is itself a trust.

10. This change to the common law meaning of charity is proposed notwithstanding comments in the explanatory materials accompanying the draft bill (at paragraph 1.4) that "the definition essentially codifies the existing common law interpretation of the meaning of charity".

11. What is being codified is not the common law meaning of charity so much as the meaning ascribed by the common law to the term "charitable institution" as that term is used in existing income tax legislation.

12. Codification of the common law meaning of charity could be beneficial in achieving clarity in this complex area of law. However the draft bill has been prepared with a narrow tax focus instead of the broad social policy framework which the broader statutory definition deserved.

13. The significance of this becomes apparent when considering the purposes for which the proposed definition is to be used.

Use of definition

Use of definition is effectively non-purposive

14. In accordance with the Government's response to the Inquiry, the proposed definition of charity is to be used in respect of a "reference in any Act to a charity, to a charitable institution or to any other kind of charitable body" (clause 4(1)). In particular, it is not proposed to limit the use of the definition to the primary purpose for which it was drafted, namely taxation.

15. In our submission to the Charities Definition Inquiry (the Inquiry) in January 2001, we observed (at paragraph 15(a)) –

> "In principle it is not possible to consider definitions that are used in legislation and administrative practices without some acknowledgment that the use of such words is fundamentally purposive. Words are not, and never can be used in isolation and apart from the context within which they are used. Definitions are necessary to precisely identify particular meaning associated with words in order to be useful for a specific purpose."

16. This observation was made in response to a suggestion in the Inquiry's terms of reference that "charity" could be meaningfully defined without reference to the purpose to which the definition is to be put. The concern behind the observation applies equally to the current situation in which a definition is proposed to be used for all Commonwealth legislative purposes. This concern would be heightened if the proposed definition is ultimately adopted more generally for the administration of religious/charitable bodies under State law.

Use raises questions of religious freedom

17. A blanket usage of the proposed definition without proper consideration of the context in which the definition is to be used may give rise to unforeseen consequences in the way that religious/charitable bodies are treated. For example, the definition may have an effect on what is regarded as a "religious body" for the purposes of the exemption extended to religious bodies under the Sex Discrimination Act 1984.

18. This matter ultimately raises questions of religious freedom. In particular we wish to reiterate the point made in our submission to the Inquiry (at paragraph 54) that –

> "International law principles of human rights contained in the Declaration of Human Rights, and the related Religion Declaration acknowledge the right of people individually and in groups to hold religious beliefs and express them, amongst other things, by the establishment and maintenance of charitable institutions."

Use should be limited to taxation purposes

19. We submit that the definition, if enacted, should be limited to taxation purposes until such time as the full implications of its broader application are properly assessed by its proponents. Any proposal to use the definition for other purposes should be implemented only after consultation with religious/charitable organisations which may be affected by such other use. It is inappropriate to expect the organisations affected by such legislation to produce impact statements on all other possible applications of the definition particularly since no such attempt appears to have been made by the proponents of the draft bill.

Use of the "entity" concept

20. The draft bill proposes to define charity by reference to the concept of "entity" (clause 4(1)). For the purposes of the draft bill, the types of entity that are eligible to be charities are effectively limited to bodies corporate, unincorporated associations and trusts. Certain types of bodies are expressly excluded from being charities, including individuals (clause 4(1)(f)).

21. It is apparent that the use of the "entity" concept is aimed at dovetailing the definition with existing tax legislation which already uses this concept extensively. Of particular note is the fact that "entity" is the only term in the draft bill defined by reference to a meaning given in other legislation, namely the Income Tax Assessment Act 1997 (ITAA 1997). We would suggest that for ease of reference, the definition should be spelt out in full in the draft bill itself.

Status of individual trustees?

22. The adoption of the ITAA 1997 "entity" definition raises an initial uncertainty as to whether individual trustees of charitable trusts would be precluded from charitable entity classification under the draft bill.

23. It would be desirable to clarify this matter.

Charitable purposes of larger organisations undermined

24. More substantively, the application of the "entity" concept in the context of large and complex religious/charitable organisations such as the Diocese, has the effect of imposing an inappropriate and artificial construct on the broader organisation to the extent that charitable status is determined by reference to its constituent parts rather than by reference to the work of the organisation as a whole.

25. Aside from increasing the costs involved in administering charitable status at the level of each constituent part, this piecemeal approach ignores the fundamental wholeness of religious/charitable mission undertaken by organisations such as the Diocese and the interdependence of its constituent parts. It is likely that, in time, a diminution of the charitable status of any part of the broader organisation's mission will undermine the ability of the organisation to effectively deliver its mission as a whole.

26. We submit that this would not be a desirable outcome for either the Government or the broader community, both of whom benefit from the synergistic effect achieved by entities working as part of a broader religious/charitable organisation.

Proposed entity groups

27. We submit that consideration be given to expanding the definition of entity in the proposed definition to accommodate the concept of groups of entities forming part of broader religious/charitable organisations. This proposal is similar to the introduction of GST religious groups to deal with an analogous problem arising under GST legislation and is also similar to the move which now permits consolidated tax treatment for corporate groups.

28. On this basis, provided the entity grouping as a whole is able to be characterised as a charity, then each of the constituent entities comprising the group would be regarded as a charity by virtue of its membership of the group.

29. It would be important that the inclusion of an entity within such a group did not preclude the entity from being assessed in its own right for the purposes of obtaining, as appropriate, endorsements for specific tax concessions such as DGR endorsement and the proposed FBT exemption/concession endorsement.

30. Provided the membership criteria for groupings of charitable/religious entities were clear, the potential savings in administrative costs for the broader organisation and also the ATO would be significant. Fundamentally however, we submit that the ability of entities within large and complex religious and other charitable organisations to group for the purposes of considering their charitable status as a whole is justifiable on the basis that, in almost all cases, the structure of the broader organisation was established well before the concept of entity was imposed on such organisations for tax purposes.

Public benefit

Presumption at common law not reflected in definition

31. The current position under the common law in relation to religious and certain other charitable purposes is that these purposes will be presumed to be for the public benefit unless the contrary is proved. In the case of religious purposes, the presumption has been developed to avoid the problems that could arise if the courts and those administering the tax and other treatment of religious charitable purposes were required to scrutinise whether those purposes were for the public benefit.

32. The presumption of public benefit under the common law has not been preserved in the proposed definition of charity. Clause 7 of the draft bill provides –

> "(1) A purpose that an entity has is for the public benefit if and only if:
>
> (a) it is aimed at achieving a universal or common good; and
>
> (b) it has practical utility; and
>
> (c) it is directed to the benefit of the general community or to a sufficient section of the general community.
>
> (2) A purpose is not directed to the benefit of a sufficient section of the general community if the people to whose benefit it is directed are numerically negligible.
>
> (3) Subsection (2) does not limit the other circumstances in which a purpose is not for the benefit of the general community or to a sufficient section of the general community."

33. The proposed formulation of public benefit and, in particular, the requirement for demonstrating "practical utility" is potentially inconsistent with the common law position where, provided public involvement in respect of the charitable gift is apparent, the court will not look beyond that to question the efficacy of the application of the gift.

34. In practice, the absence of a public benefit presumption raises a very real potential for significantly increasing the administrative burden on organisations such as the Diocese (and the ATO) if it becomes necessary to positively demonstrate a public benefit for each of its constituent entities in terms required by the definition.

35. Any loss of the common law presumption of public benefit will also raise a real possibility of an increased number of disputes between religious and other charitable organisations and Government authorities as to whether the requisite public benefit exists for charitable status. As a consequence the courts are, in the case of religious purposes, likely to be increasingly asked to make determinations on matters which they have hitherto been reluctant to consider, namely the public benefit of religious activity.

36. We therefore submit that the common law public benefit presumption be included as part of clause 7 of the proposed definition of charity in respect of all religious and other charitable purposes except where the purpose is "a purpose that is beneficial to the community" (clause 10(1)(g)).

Treatment of closed/contemplative religious orders

37. Related to the previous point, we have a concern with clause 4(2)(b) of the draft bill which provides that an entity's dominant purpose need not be for the public benefit if it is "a closed or contemplative religious order that regularly undertakes prayerful intervention at the request of members of the public".

38. While we understand the reason for including this exemption from the public benefit requirement, the inclusion of this exemption could mean that the courts would "read down" the term "public benefit". That is, they could narrowly construe the term as applied to religious activities on the basis that the legislation itself expressly indicates that certain religious activities, including those undertaken by closed or contemplative religious orders at the request of the public have no public benefit. This would be an undesirable inference.

39. In order to address this issue, we submit that the special exemption for closed or contemplative religious orders (and on the same principle, for open and non-discriminatory self-help groups) be removed from the core definition of charity in clause 4 and included as a presumed public benefit in clause 7. We consider this entirely consistent with the wording of the Inquiry's recommendation 9 in respect of this matter.

Not for profit requirement

40. We are concerned about the wording of the not for profit requirement in clause 5 of the bill.

41. Clause 5 provides that an entity is not to carry on its activities for the purposes of profit or gain to particular persons, including its owners and members, and must not distribute its profits or assets to particular persons.

42. The explanatory materials (at paragraph 1.27) indicate that reasonable payment of wages or allowances to employees, the reimbursement of expenses, payment for services and similar payments would not normally be considered the distribution of profits or assets. However the wording of the legislation itself should make this clear.

43. We also support an amendment to clause 5 to remove any doubt that a charitable entity can distribute its profits or gains to another charitable entity without falling foul of the not-for-profit provisions of clause 5.

Commercial activities

44. The explanatory material accompanying the draft bill suggests (at paragraphs 1.26 and 1.32) that a charitable entity will be permitted to undertake commercial activities provided that such commercial activities are only ancillary or incidental to its dominant charitable purpose and the profits derived from such activities are directed towards the charitable purposes of the entity.

45. In our submission to the Inquiry in January 2001, we stated that (at paragraph 70) –

> "Organisations, particularly ones which employ large numbers of people, and require buildings or property to enable the delivery of their services, must be able to accumulate reserves to ensure future provision of their services. Provided such reserves are used for the charitable purposes of the organisation, and not accumulated for their own sake, that should be the end of the enquiry. We suggest it would be inappropriate to single out organisations which prudently maintain sufficient reserves invested to ensure the consistent and continuous provision of their services."

46. We wish to reiterate this point.

47. We submit that the comments made in the explanatory materials should be recast so as not to rule out the possibility that, in appropriate circumstances, commercial activity may play a necessary and integral role in supporting or furthering an organisation's charitable purposes.

48. We submit that this is entirely consistent with recommendation 18 in the Inquiry's report and the comments made by the Inquiry (at pp 229-331) regarding the issue of competitive neutrality.

Serious offence disqualification

49. It is proposed that an entity will be disqualified from being a charity if it has engaged or engages in conduct which constitutes a serious offence (clause 4(1)(e)). A serious offence is defined to be an offence against the law of the Commonwealth, State or Territory that may be dealt with as an indictable offence.

50. The use of the criteria of indictable offence in defining serious offence lacks a degree of clarity and consistency. There is also a concern about a disqualification based on engaging or having engaged in conduct that constitutes a serious offence as opposed to an entity having been convicted or found guilty of such an offence by a court of competent jurisdiction. Who is to say that an organisation has engaged in such conduct? There is also a question as to how an unincorporated association, which is not a juristic person, would be disqualified by this provision.

51. We submit that if a disqualification along these lines is retained in the proposed definition, it should be based on a conviction or finding of guilt by a court of competent jurisdiction in respect of an offence which, if committed by an individual, would be punishable by imprisonment of 5 years or upwards.

52. In any event we are opposed to the inclusion of this disqualification because such a conviction may be unduly punitive to an organisation for 2 reasons. Firstly, because it has the effect of punishing an organisation twice for the same offence (ie double jeopardy). Secondly, because no analysis appears to have been undertaken by the proponents of the draft bill as to the range of offences which may trigger disqualification and whether disqualification would be an appropriate outcome in all such circumstances.

Government body disqualification

53. The explanatory materials to the draft bill discuss the question of when a body will be under the control of the Government and therefore disqualified as being a charity under clause 4(1)(f) of the bill. In short the explanatory materials indicate that although government funding and/or government regulation will not generally, of itself, be sufficient to establish that an entity is controlled by the government and therefore disqualified from being a charity, that in certain circumstances these matters may be considered to be factors that are relevant in determining the existence of government control.

54. We submit that the circumstances in which the receipt of funding will trigger government control should be clarified in the legislation itself rather than being the subject of generalised comment in the explanatory materials.

Disqualifying purpose of attempting to change the law or government policy

55. We are also concerned with clause 8(2)(c) of the draft bill which disqualifies an entity as a charity if it has a purpose of "attempting to change the law or government policy" and that such a purpose when taken together with certain other disqualifying purposes, is more than ancillary or incidental to the other purposes of the entity.

56. Although any attempt to change the law or government policy would generally only be ancillary or incidental to any purpose within the Diocese, and therefore should not have a significant impact on the Diocese, we do not consider it desirable for public policy reasons to retain clause 8(2)(c). The recommendation of the Inquiry in this regard has been ignored without any justification given.

Charitable purposes

Advancement of social or community welfare

57. In our view "aged care" should be included in clause 11 as part of the definition of "advancement of social or community welfare" in view of the reference to child welfare services already in that clause. Without including aged care, a court might infer that the advancement of social community welfare is not intended to extend to aged care.

58. We also do not see any justification for the non-inclusion of the relief of poverty, either as a separate head or as an express inclusion under the advancement of social or community welfare.

Advancement of religion

59. We note that the discussion in the explanatory material on the advancement of religion (paragraphs 1.68 – 1.72) focuses on the definition of religion rather than setting out an inclusive list providing guidance as to the types of matters which will be regarded as the advancement of religion.

60. We submit that in the interests of clarity and certainty, the explanatory material should confirm that matters which are currently regarded as the advancement of religion under the common law, such as the upkeep and maintenance of cemeteries and tombstones, will continue to be so regarded under the draft bill.

Advancement of culture

61. We note that the discussion in the explanatory material on the advancement of culture refers to "the protection and preservation of national monuments, areas of national interest and national heritage sites and buildings" (paragraph 1.77).

62. We submit that the limitation of upkeep and preservation to "national" items is inappropriate and as such suggest that this category be expressly expanded to include, at least, items of State significance also.

Flexibility to adapt to changing needs of society?

63. We do not consider that the definition proposed by the draft bill of itself provides the flexibility to ensure the definition of charity can adapt to the changing needs of society.

64. One of the reasons we argued in our submission to the Inquiry for the establishment of an independent charities commission was that, for all the limitations of such a body, we would have greater confidence in a body established with a broader brief and understanding of the role of charitable organisations in our society than in the ATO to adapt to the changing needs of society. The ATO exists to protect the taxation base, and does not (and should not be expected to) have the skill base to foster charities.

65. This view has been confirmed by our observation of the process of reviewing the charities definition over the past two years.

66. The explanatory material states (at paragraph 1.2) that the definition "will apply to all Commonwealth legislation, replacing the previous common law interpretation" and in particular will apply to taxation law. However we are left with the impression that from the outset the exercise of establishing an Inquiry leading ultimately to the draft bill was essentially a process of reviewing the treatment of charities under taxation law.

67. Our submission to the Inquiry and again now to the Board is that the ATO is not the appropriate body to assess any of the broader issues of charities – the ATO and the bill itself should be confined to issues of classification and treatment of charities for taxation purposes.

Financial impact of the definition?

68. The Board has asked for specific comment on the likely financial impact of the new definition.

69. The move to an entity based ITEC endorsement system at the end of 1999 has already seen an increased administrative and financial burden on the Diocese.

70. While we have indicated above (at 25 and 34) that certain aspects of the proposed definition are likely to give rise to further administrative costs for the Diocese (and the ATO), we are unable to comment further on this matter without first seeing proposed legislation to administer the definition and, in particular, to administer the expanded system of tax concession endorsements. It is regrettably that such legislation has not and, we understand, will not be made available for public comment.

Should dominant purpose of charity be altruistic?

71. The Board has asked for specific comment as to whether the concept of "altruism" should be included as an additional element in the charity definition.

72. It is our view that the concept of "altruism" would not add much of significance to the definition and may well have unintended consequences. The connection between "charity" and "altruism" is important and an essential good in human interactions, but it is unclear what would constitute a "voluntarily assumed obligation" for an incorporated or charitable organisation. While altruism is an important and meaningful term in a social or religious context, it could be problematic in a corporate entity where its activities are required under the terms of its constitution, or where services are provided under contract with government.

73. This problem further exemplifies the methodological problem underlying the issue of the exposure draft bill that we have raised above. It is not meaningful or possible to enact a statutory definition of any term in isolation from its specific intended purposes.