australian network of environmental defender's offices

Submission to the Board of Taxation on Proposed *Charities Bill* 2003

The Australian Network of Environmental Defender's Offices ("the Network") consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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28 September 2003

Consultation on the Definition of a Charity
Board of Taxation
c/- The Treasury
Langton Crescent
PARKES ACT 2600

Submission of the Australian Network of Environmental Defenders Offices regarding Draft Charities Bill 2003

This submission on the exposure draft of the *Charities Bill* 2003 ("the Draft Bill") is made on behalf of the Australian Network of Environmental Defenders Offices ("the Network").

The Australian Network of Environmental Defenders Offices

The Network is comprised of nine Environmental Defenders Offices (one in each state and territory with a regional office in Cairns). Each office is separately incorporated, non-profit and, with the exception of EDO Tasmania Inc., holds charitable, deductible gift recipient status for the purposes of State and Federal Taxation Laws. None of the offices hold public benevolent institution status. Whilst the constitutions of each EDO office set out slightly different objectives the Network is united in its dedication to protecting the environment in the public interest and aims to:

(a) arrange and promote the provision of legal assistance, advice, information and services in connection with the conservation, protection, enhancement and/or promotion of the environment or any part of it;
(b) promote community educational programs in matters relating to environmental law and the legal system
(c) undertake research with a view to ascertaining the needs of the community for legal assistance in environmental law matters and the most effective way of meeting those needs; and
(d) advocate for law reform for the purpose of protecting, conserving and enhancing the environment.

The Network's resolution to the 2003 National Community Legal Centre Conference was that:

1. Clean air, clean water and a healthy environment in which to live and grow are legal rights that are central to the life and wellbeing of every community member in Australia;
2. The Environmental Defenders Office Network together with the network of Australian community legal centres and the National Association of Community Legal Centres will continue to work with all Australian communities to uphold and entrench these rights as matters of social justice;

3. The defence of these legal rights is a community process. As such, the National Association of Community Legal Centres through the Environment Defenders Office Network will work with community groups for positive change to environment laws and the way these laws are administered by Federal and State Governments.
4. In this context, an important focus of the Environment Defenders Office Network for the coming year is to work on strategic environment protection litigation opportunities
5. Parallel with and integral to the focus outlined in no. 4 above are the continuing projects of community legal education, policy reform and law reform in response to the concerns of the communities that we represent.

It is clear from the above that one of the key objectives of the Network is to work for positive change to environment laws and policies and their administration. Somewhat self evidently, one of the most efficacious ways of achieving this is through advocacy work. This core service area is set out in the strategic plans of each EDO and therefore incorporated in its service agreement with relevant State, Territory and the Commonwealth Governments. The EDOs are thus specifically funded to provide this service.

The Network and individual offices are involved in law reform activities in their own right and also on behalf of national, State and regional conservation organizations. It should be noted that the offices are often expressly requested by government bodies to put forward submissions to assist with reviews of various pieces of government policy and law.

Introduction

The operation of the Draft Bill

The long title of the Draft Bill is "A Bill for an Act to define charities and charitable purposes, and for related purposes". The Bill does this by establishing a core definition of charity, charitable institution or any other kind of charitable body. The core definition provides that an entity must be not for profit and must not be an individual, a partnership, a political party, a superannuation fund or a government body. The core definition then states that an entity must have a dominant purpose that is charitable and that the entity must have a dominant purpose that is for the public benefit[1]. Further, the entity must not have a disqualifying purpose. Finally, the core definition provides that the entity must not engage in activities that do not further or are not in aid of its dominant purpose and that the entity must not engage in and must not have engaged in conduct that constitutes a serious offence.

[1] or that the entity must be an open and non-discriminatory self help group or a closed or contemplative religious order that regularly undertakes prayerful intervention at the request of members of the public.

Charitable purposes are defined in clause 4 and include activities such as the advancement of health, the advancement of social and community welfare and notably, the advancement of the natural environment.

A purpose is defined as being for the public benefit only if it is aimed at achieving a universal or common good; and has a practical utility and is directed to the benefit of the general community or a section of the community that is not numerically negligible. Disqualifying purposes are defined to be a purpose of engaging in activities that are unlawful, the purpose of advocating a political party or cause, the purpose of supporting a candidate for political office and a purpose of attempting to change the law or government policy.

Major Concerns With the Draft Bill

The Network understands that the Charities Bill has been introduced to provide a legislative definition of both a charity and a charitable purpose in an attempt to codify the common law definitions, with the aim of thereby removing uncertainties and inconsistencies in the regulation of the charitable sector. Whilst the Network applauds this endeavour, we have a number of concerns with respect to the Charities Bill 2003 ("the Draft Bill") in its present form.

The Network has the following major concerns:

1) Clause 8(2)(c) - The disqulifying purpose of attempting to change the law or government policy.

Whether or not clause 8 truly codifies the common law[2] the reality is that if the Bill as proposed becomes law it will alter the status quo and many organisations will be likely to lose their charitable status. In the past, the Australian Taxation Office has not systematically regulated the advocacy activities of charities. If the Bill is passed, this would be likely to change. This provision places unnecessary restrictions on the advocacy role of organisations and appears to be aimed at either silencing public debate on government law and policy or at decreasing government funding of the charitable sector.

The Network submits that this provision be removed.

2) Clauses 4(1)(e) & 8(1) Provisions regarding illegal conduct

The Network has serious concerns regarding the workability of the provisions regarding illegal conduct and is also concerned that clause 4(1)(e) is capable of retrospective operation. Further, the provisions go beyond the common law position, which is simply that a charity must not have an illegal purpose.

[2] The stated intention of clause 8 in the Explanatory Memorandum is to codify the common law.

The Network's primary submission is that the unlawfulness provision should be removed from the Bill and replaced by a provision stating that a charity must not have a purpose (to be ascertained from its objects as set out in its constituent documents) that is illegal.

3) Conflation of the concepts of "purpose" and "activity".

The Network is of the view that the conflation of the concepts of "purpose" and "activity" in a number of the Bill's provisions impacts on the workability of the Bill and will result in increased uncertainty and administrative difficulties.

The Network recommends that the charitable status of an organisation be assessed on the basis of an independent assessment of its activities and purposes and that its purposes ought be ascertained from its objects as set out in its constituent documents.

Detailed Submissions of the Network

The remainder of this submission sets out in detail the concerns of the Network with respect to the Draft Bill.

Constitutional Limitations

The Network refers to the Explanatory Material, which provides that the Draft Bill introduces a legislative definition of both a charity and a charitable purpose. The Network notes however that the Commonwealth Parliament does not have an explicit power under the Commonwealth Constitution to legislate with respect to charities and their activities.[3] Whilst the power to define charities for the purposes of another Commonwealth Act may be located in the head of power under which that Act is passed and the Parliament's incidental power[4] it must be recognized by the Commonwealth that the purpose of the Draft Bill must be to define charities for certain purposes, for example taxation law, and not to regulate their activities. Should the Draft Bill go beyond defining charities it could be challenged as unconstitutional.

Relationship Between the Purposes and Activities of a Charity

It is submitted that the workability of the Draft Bill may be impaired by its conflation of the concepts "purpose" and "activity".[5] The Draft Bill does not specifically provide how an organisation's purpose(s) is/are to be ascertained. However, it is arguable that the Bill operates on the assumption that an organization's activities will be used to infer the organisation's purpose (see for example, clause 8(2)). There is a concern that the entire Draft Bill could be administered in this way.

The Network recognises that an organisation's activities are a relevant factor in assessing whether an organisation should receive charitable status. However, the purpose of an organization ought not to be inferred from its activities alone.

Rather, it is submitted that an entity's purpose would best be ascertained from the objects of its constitution or equivalent. This would be the most cost effective and certain means of accurately ascertaining an entity's purpose and also provides an important safeguard and indicator for donors, volunteers and other supporters. This approach is consistent with the current common law position.[6]

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[3] See further Commonwealth of Australia Charities Definition Inquiry, *Report of the Inquiry into the Definition of Charities and Other Related Organisations* (2000) 37 ('the Report")

[4] *Commonwealth Constitution* s. 51(xxxix)

[5] See also the submission of the Australian Conservation Foundation and the Federation of Community Legal Centres (Victoria) Inc.

[6] The Courts have recognised that the first step in ascertaining the charitable status of an organisation is to have regard to its objects provisions and that extrinsic evidence such as activities ought only be used to resolve and ambiguity: *Public Trustee v Attorney-General of New South Wales & Ors* (1997) 42 NSWLR 600 *at p. 609/10*

Furthermore, the blurring of the concepts of purpose and activity could result in a circular attempt to define an organisation's purpose from its activities and to then question whether those activities are in line with its purposes.

Having said that, it is obviously vital that an organisation's activities do give effect to its purpose, so as to ensure that the definition of a charity is not manipulated. It is clear that a charitable purpose does not necessarily guarantee that the activities of the relevant organisation will be in furtherance of that purpose.

Recommendation # 1: The Network submits that another requirement in the core definition of a charity is that the objects of its constitution or equivalent disclose that it has one or more charitable purposes.

Recommendation # 2: The Network supports the inclusion of a requirement in the core definition of a charity that the entity must engage in activities of public benefit and, that the dominant activities of the organisation must further the organisation's charitable purposes as stated in its constituent documents.

Disqualifying purposes and activities

The failure to appropriately distinguish between purpose and activity creates even greater confusion with respect to disqualifying purposes and activities.

The Draft Bill does not draw a distinction between disqualifying purposes and disqualifying activities. Consequently, it currently provides that an entity must not have a disqualifying purpose of engaging in certain activities but does not explicitly state that the organisation should not engage in those activities themselves.

The result is ambiguity and uncertainty. On the one hand, it might be argued as a matter of construction that a charity may therefore engage in activities to change the law or in support of a candidate for political office in furtherance of its dominant purpose.[7] On the other hand, clause 8(2) may well result in an examination of an organisation's activities to ascertain whether it is excluded from the definition of a charity. Furthermore, the Draft Bill contains an additional uncertainty in that the extent to which an activity would have to be engaged in before it constitutes a purpose is not spelt out and would have to be ascertained by the relevant decision maker.

The Network therefore recommends that an entity's charitable status ought be determined by an independent analysis of whether it has a disqualifying purpose (to be ascertained by the stated objects in the constitution or equivalent of an organization) and whether it engages in disqualifying activities.

Recommendation # 3: The Network submits that there be a reference to disqualifying activities included in the section 4 core definition in addition to the section 4(1)(d)

[7] Clause 4(1)(c)

reference to disqualifying purposes. In this respect, it should be specifically stated that disqualifying purposes will be ascertained only from the constituent documents.

Disqualifying Activities

The Network submits that the disqualifying activities in the political arena should be significantly limited. These presently include:

i) clause 8(2)(a) advocating a political party or cause
ii) clause 8(2)(b) supporting a candidate for political office
iii) clause 8(2)(c) attempting to change the law or government policy

i) Clause 8(2)(a) advocating a political party or cause

The reference in clause 8(2)(a) of the Bill to advocating for a political cause is of great concern. The lack of a definition of "political cause" is uncertain and therefore subject to subjective interpretation. Further, if the Draft Bill is interpreted widely, this could be seen as the imposition of an unjustifiable curtailment of freedom of political expression which could lead to invalidity under the Commonwealth Constitution.[8]

ii) Clause 8(2)(b) supporting a candidate for political office

The Network also submits that the clause 8(2)(b) reference to supporting a political party or cause could be interpreted broadly to impinge on freedom of expression and to prevent open and informed debate from surrounding Australian political processes. The Network acknowledges that charities ought not to engage in party politics. However, a charity ought to be permitted to lawfully comment upon the policies and activities of a particular party or candidate provided that it is in furtherance of the charitable purposes of the organization. Such comment is vital in a truly democratic society.

Recommendation # 4: The Network submits that the reference to advocating a cause be removed and that the only disqualifying provision in this regard be a provision preventing a charity from having a dominant activity of the promotion of a political party or candidate for political office or having an activity involving the provision of funds to a political party or candidate.

iii) Clause 8(2)(c) attempting to change the law or government policy

This clause is of most concern to the Network. This disqualifying purpose will exclude many community organizations, including most community legal centres and environment groups.

This provision fails to recognize the important work of many community organizations in promoting law and policy development in a truly democratic manner. In an under funded

[8] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520

Australian public sector it is increasingly community based organizations (including community legal centres) that are working directly with disadvantaged groups in society and who are thus ideally placed to flag structural factors that contribute to this disadvantage.[9] Advocacy is therefore a necessary extension of the work of these organisations and indeed, is often seen as a duty under their service obligations. Many marginalized groups simply do not have the capacity to lobby at this level on their own behalf. If Australian laws and policy are to truly reflect the need of the community then the role of community organizations in advocating for change and reform at this level is vital.

The implications of the definition of disqualifying purpose for the protection of the environment in the public interest in Australia is particularly problematic. The EDO offices have as their core service delivery function, theprovision of case work and advice, provision of community education and advocating for change to law and policy.

EDO offices become aware, through the provision of case work and advice services to clients, of the implication of legislative or policy level factors for the conservation of the environment. The Network is therefore well placed to advocate for changes to law and policy in this area. Indeed, the work of Environment NGOs and the EDOs has played a crucial role in a shift in societal attitudes towards the environment.

In this respect, we note that the recognised role for the environment is built into the Draft Bill. First, it is in the definition of a charitable purpose in clause 10, which specifically includes the advancement of the natural environment. Second the explanatory material to the Bill states that the specific category of advancement of the natural environment in the section definition of charitable purpose recognizes the increased value society places on the natural environment.

The recognition in the Draft Bill of the importance society places on the environment, partly the result of the policy and law reform work of environmental NGOs and the EDOs, is at odds with the exclusion of the majority of these organisations from playing such a role by including in clause 8(2) definition of “disqualifying purpose” the purpose of attempting to change the law or government policy.

Finally, it should be noted that the common law recognizes that a charity may engage in activities that may be considered political, such as lobbying and advocating for changes to law and policy so long as this is in furtherance of the charitable objects of the organisation.[10]

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[9] Community legal centre workers, in their legal advice and casework capacity witness daily the on ground operation of legislation and policy for either the economically disadvantaged general public or in the case of specialist centers, specific sectors of the community. Working for positive reform to law and policy in the interests of their client groups has become an essential element of their work. In fact, many centers are often directly approached by government to make such comments on behalf of the communities they serve.

[10] For example, *Public Trustee v A-G (NSW)* (1997) 42 NSWLR 600, 610 (Santow J); *Australian Conservation Foundation Inc. v Commissioner of State Revenue*, VCAT, No T34 of 2002, 17 October 2002, (Geoffrey Gibson); *Re Inman* [1965] VR 238

<u>Recommendation # 5</u>: The Network submits that clause 8(2)(c) be removed and that the Bill expressly provide that a charity be permitted to engage in advocacy activities including advocacy for or against changes to laws and policy so long as such activities may reasonably be expected to further, or aid, its charitable purposes.

Disqualifying Purposes

As set out above, it is the view of the Network that community organizations (such as the EDOs, community legal centres and environment groups) ought to be able to engage in policy and law reform activities where these activities may reasonably be expected to further or aid its charitable purposes, without running the risk of losing their charitable status. The Network recommends that these organisations should also be permitted to develop objectives to facilitate policy and law reform activities, to facilitate the conduct of their work in a structured and strategic manner rather than on an ad hoc basis.

<u>Recommendation # 6:</u> The Network submits that the purpose of engaging in activities that are unlawful or the purpose of promoting a political party or candidate for office ought to be the only disqualifying purposes included in the Bill.

Public Benefit

The definition of "public benefit" also conflates the concepts of "activity" and "purpose", raising similar problems with workability as found with respect to the definition of "charitable". Again in section 4, the core definition requires that a charity must have a dominant purpose that is for the public benefit (unless certain exceptions apply) but does not specifically require that it undertake activities for the public benefit.

An additional problem becomes clear when one has regard to the definition of a purpose of "public benefit" in clause 7 of the Draft Bill, which states that a purpose is for a public benefit if it has practical utility. Obviously a purpose (as a statement of intention) cannot in itself have practical utility. A practical utility will only be evidenced by the activities of an organization. Again, there may be an assumption in the Draft Bill that an organization's activities will be in furtherance of its purpose(s). But as discussed above, this is not specifically spelt out and will therefore create uncertainty. Further, similarly to the argument stated above, it is not a necessary consequence of purposes for the public benefit that the appropriate activities will follow. The Bill should provide safeguards to ensure that an organization's activities are charitable and for the public benefit.

<u>Recommendation # 7:</u> The Network advocates amending the Draft Bill to provide that whilst an entity's activities must be charitable and for the public benefit, its purposes ought only be charitable, as a statement of principle and as opposed to an activity or series of activities actually having a public benefit. Alternatively, it is submitted that clause 4 could simply be reworded to clarify that a purpose of an organization seeking charitable status must be to seek to achieve a public benefit. Clause 7 Public benefit could then be reworded to state that "a public benefit is a universal or common

good…"(albeit with further amendments as discussed in the paragraph below which outlines additional concerns with clause 7).

The Network also has concerns with the current requirement in clause 7 that a public benefit must be directed at the general community or a sufficient section of the general community, which is defined as a number of people who are not numerically negligible. This is considered inappropriate. Often charitable organizations specifically work with minority groups, and sometimes very small minority groups, who have been marginalized and are not adequately supported by mainstream society. For this reason, they are in most need of assistance from charities. To exclude such work from the definition of public benefit simply because the members of the public who are assisted are limited would be misguided. The test should always be based on the quality and legitimacy of the issues raised, not the quantity of people who support that view.

The Network also notes that it is the advocacy work on behalf of marginalised groups (as discussed above) that often results in a causes being accepted by mainstream society and the work of those organizations becoming more widely recognized and accepted as important. Values and ideals articulated over decades by a formerly "fringe" environment movement are now widely recognized as central to the proper protection of the Australian environment.

Recommendation 8: The Network submits that there should be a significant amendment of the definition of "public benefit" to ensure that minority groups who are disadvantaged or discriminated against are not excluded from the services of charities. For example in defining public benefit it could be stated that an activity is of public benefit if it promotes a universal or common good, has practical utility; and benefits the general community or a section of the community that is affected by a particular disadvantage, discrimination or has a particular need.

Government Body

The Network is also concerned with the definition of "Government Body" in clause 3 of the Draft Bill, in the context of the core definition in clause 4, which excludes from the definition of "charity", "charitable insitution" or any other kind of charitable body an entity that is amongst other things, a government body.[11]

Clause 3 includes in the definition of government body a body controlled by the Commonwealth, a State or a Territory.[12] The Network is concerned that the term "controlled" may be given a wide interpretation and thereby result in the loss of charitable status by bodies that are government funded or regulated.

This is a concern that is well founded in light of the recent decision of *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue.*[13] In that case, the

[11] Draft Bill cl 4(1)(f)
[12] Drat Bill cl 3(1)
[13] [2003] VSC 285

Court came to the conclusion that because the organisation in question was funded by Government, it was thereby controlled by the Commonwealth. As a consequence the organisation was denied charitable status.

The Network is of the view that the definition of "government body" has serious implications for many community organisations. Many such organisations currently have charitable tax deductible gift status and receive at least part of their funding from government sources. Government routinely funds organisations to do charitable work not done by the State, on the understanding that the funds will be augmented by additional monies from other non governmental sources. Not only does this often result in considerable services to the community at minimal public cost, it also facilitates relationship building between the community sector and financially privileged individuals and organisations and raises awareness and understanding of social justice issues. If such community organistions are denied recognition as charities, the funds from private individuals and organisations will be less likely to be forthcoming. Consequently, the work provided by those community organisations may no longer be performed and the valuable relationships between the private sector and the community will be diminished.

On this issue, the Network supports the submission prepared by the Federation of Community Legal Centres (Victoria) Inc.

Recommendation # 9: The Network submits that the definition of "control" as it relates to the definition of a government body, be further defined to mean:

the power to direct completely the entity's acts and omissions, where such acts and omissions are not reasonably required under any funding agreement.

Criminal Activities

The Network has serious concerns about the provisions regarding illegal conduct by charitable organizations (namely clauses 4(1)(e) and 8(1).

Clause 4(1)(e) provides that a charitable body etc is an entity that does not engage in, and has not engaged in, conduct (or an omission to engage in conduct) that constitutes a serious offence. This clause has the potential to operate retrospectively. Furthermore, there is also no clear test for ascertaining whether an organization itself has committed a serious offence when one of its employees or members or volunteers is so convicted.

Moreover, the section could be construed as preventing environmental organisations that currently have a charitable status from engaging, organising and/or promoting peaceful protesting activities. The protection of significant environment and world heritage sites has often been achieved by the peaceful protest activities of environmental organizations and the public. For example, it was the activities of these organizations and individuals in places such as the Franklin River in Tasmania and the Wet Tropics World Heritage Area

in North Queensland which highlighted the environmental justice issues and resulted in subsequent protection of these areas.

There is a strong argument that the peaceful protest of environment organizations has played a crucial role in a shift in society's attitude towards the natural environment, as reflected in the presence of a strong enivronmental definition of "charitable purpose" in clause 10. Again, the emphasis in the Draft Billon the advancement of the natural environment sits oddly with provisions that have the potential to exclude some of these organizations on the basis of the peaceful protest that played a role in this shift in attitudes.

There are also problems with the clause 8(1) (regarding disqualifying purposes) of engaging in activities that are unlawful. Firstly, the Draft Bill contains no stated procedure for ascertaining the purpose of the organization. Consequently it is unclear whether the organisation's illegal purpose would be ascertained by illegal activities, either of the organization or its members or employees. If so, it is still unclear how many and what degree of illegal activities would be permitted to be undertaken prior to an organization being excluded on the basis of having an illegal purpose of engaging in activities that are unlawful. Second, the term unlawful activity is not defined, which will create further uncertainty.

In addition, based on the assumption that an organisation's purpose would be ascertained from its activities, all the issues raised with respect to clause 4(1)(e) will also apply to clause 8(1) (presumably with the exception of the issue of the potential for retrospective operation of clause 4(1)(e)).

Recommendation # 10: The Network submits that the unlawfulness provisions should be removed from the Bill and replaced by a provision stating that a charity must not have a purpose (to be ascertained from the objects as set out in the constitution or equivalent document of the entity) that is illegal. This would be in line with the current common law position.

Alternatively, the Network submits that the unlawfulness clauses be amended to provide that the activities of an entity (including the activities of members, volunteers or employees) do not have effect on the entity's status as a charity unless the entity is convicted of a serious offence pursuant to Part 2.5A of the Criminal Code Act 1995 (Cth) or the common law.

Charitable Purposes

The Network appreciates the recognition of the advancement of the natural environment as a charitable purpose in clause 10(1)(f). However the Network is of the view that this provision does not fully encompass the factors relevant to the attainment of good conservation outcomes and would support broadening the reference to the advancement of the natural environment in clause 10(1)(f) to include the built environment. A broader

definition would accommodate initiatives focused on the built environment and would also recognize the role of people and communities in environmental degradation and thus conservation. This approach reflects the submission of the Australian Conservation Foundation.

The Network would also support the inclusion of a further purpose in clause 10 of the Bill, namely "the promotion and protection of civil and human rights and reconciliation". Again, this is consistent with the submission of the Australian Conservation Foundation.

Recommendation # 11: The Network submits that the reference to advancement of the natural environment in clause 10(1)(f) be replaced with a broader definition – namely "the advancement of the protection of the environment".

Recommendation # 12:The Network submits that a further purpose should be included in clause 10, namely the promotion of civil and human rights and reconciliation."

Thank you for the opportunity to comment on the Draft Charities Bill 2003. If you require any clarification as to any aspect of the above submission, please contact Joanna Cull on jcull@edo.org.au.