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Submission

Commonwealth draft Charities Bill 2003

Introduction

Combined Pensioners and Superannuants Association of NSW (CPSA) was founded in 1931. CPSA is a non-profit, non-party-political membership association which represents pensioners of all ages, superannuants and low-income retirees. CPSA has 130 branches and 7 affiliate organisations with a combined membership of approximately 12,500. In turn, it is represented by peak organisations such as the Australian Pensioners' and Superannuants' Federation (APSF) and the Council of Social Services NSW (NCOSS). It is also affiliated with the National Coalition Against Poverty, Carers Coalition and other umbrella groups.

Because of its status as a non-government organisation (NGO), CPSA is opposed to the draft Charities Bill 2003 (the Draft Bill). Its peak organisation, APSF, was defunded by the Commonwealth in 1997 along with other NGOs. The main reason given by the Federal Government of the time was that the deficit left by the previous Keating Labor Government was much larger than expected. The newly elected Coalition Government supposedly needed to make emergency savings in order to repair the economy. It is interesting that savings had to be made by penalising NGOs critical of governmental policy.

In this regard, CPSA is wary of any policy and legislative changes the Commonwealth makes in regard to NGOs.

While there may be a case for modernising the definition of a charity for administrative and legislative purposes, the Draft Bill as it stands is not a suitable instrument. In fact, the Draft Bill's aim appears to be in direct contrast to how it has been publicised by the Federal Government. A 30 July 2003 media release from the Federal Treasurer stated that:

"Claims that the tax status of charities has been threatened by draft legislation on the definition of a charity are false. Charities have never been penalised for speaking out on public policy."

However, Section 8 (2) of the Draft Bill clearly states that the following are disqualifying purposes:

(a) the purpose of advocating a political party or cause;
(b) the purpose of supporting a candidate for political office;
(c) the purpose of attempting to change the law or government policy.

Paragraph 1.50 of Charities Bill 2003: Explanatory Material makes it clear that:

"With the exception of illegal activities, the purpose will be a disqualifying purpose if it, either by itself, or when taken together with one or both of the other purposes, is more than ancillary or incidental to the other purpose of the entity concerned."

The problem here is that for NGOs, speaking out on government policy is neither ancillary nor incidental to their purposes. It is integral. Service delivery and speaking out in the political arena are intertwined. Despite the Federal Treasurer's reassurances, NGOs will never be certain whether their statements to the broader community will be considered "incidental" or part of their main purpose by the government of the day once this legislation is in place.

Political context

It is no coincidence that this draft legislation has been drawn up now. The so-called "War on Terror" has been declared for about two years. Since then, the Australian Government has supported the United States Government in a war with Afghanistan (2001) and a war with Iraq (2003). NGOs have spoken out against these wars and have organised anti-war activities in various coalitions.

According to political commentator Naomi Klein:

"Terrorism doesn't just blow up buildings; it blasts every other issue off the political map. The spectre of terrorism, real and exaggerated, has become a shield of impunity, protecting governments around the world from scrutiny for their human rights abuses."[1]

In other words, a government can use as a shield legislation to insulate itself from political criticism. It can threaten its critics with defunding or "disqualifying purposes". All in the name of an overriding cause.

After four centuries of common law definition, suddenly the definition of a charity has to be modified. Many of the Commonwealth's critics in the NGO sector are looking at the current international situation, looking at how it affects the domestic situation and asking "why now?" After all, the Federal Coalition has been in office since 1996. That has been ample time to draft legislation – especially legislation as brief as the proposed Charities Bill 2003. Moreover, the current Federal Government told the Australian electorate during the 1998 Federal Election that comprehensive taxation reform was an urgent necessity. If that was the case, why wasn't the taxation status of NGOs discussed during that election? If reform was needed in this area, why didn't the Government make it a part of the GST legislation? We have good grounds for believing there is more to this proposed legislation than what we are being told.

Furthermore, inquiries about proposed legislation are usually conducted by the Senate and submissions to the inquiry are

[1] http://www.nologo.org/

electronically published. In this case, the inquiry is being conducted by the Taxation Board and the submissions will not be published. NGOs, not surprisingly, are asking why this is the case with this particular piece of proposed legislation.

It is also interesting that the proposed legislation comes at time when a Federal Election maybe sooner rather than later. The Medicare legislation, put forward by the Federal Government, has been opposed by many NGOs. In that regard, the proposed Charities Bill does look like a tool to exclude NGOs from this political debate over important national issues.

Role of advocacy in NGOs

NGOs can be characterised as non-government deliverers of particular services or as advocacy organisations. However, many NGOs are both. An artificial distinction cannot be made. Service delivery entails advocacy and advocacy is integral to service delivery. The Draft Bill constructs advocacy in such a way as to make it separate from other activities of NGOs. This does not work in practice.

NGOs, in order to provide a service, must advocate on behalf of its constituency. For example, CPSA's Older Persons Tenancy Service (OPTS) can only deliver the service it is funded for by advocating on behalf of tenants in the older age bracket. Not to do so would be a dereliction of duty and the funding provider would not be getting value for money.

CPSA's Policy and Information Unit is responsible for casework on behalf of Centrelink customers – namely, people on pensions. In order to perform this role the Policy and Information Officers must advocate in both a narrow sense (represent their clients by writing on their behalf to, for example, the Minister for Family and Community Services) and in a broader sense produce submissions Ministerial Inquiries, Senate Select Committees (such as the recent one on poverty).

In other words, the service delivery, policy work and advocacy are integrated. This is how NGOs operate. Government departments

may have a greater separation between policy work and service delivery. However, they are usually larger than NGOs. They can afford to employ people who only perform policy work or who only deliver services. NGOs not only tend to have a philosophical approach that refuses to make artificial distinctions between advocacy and service delivery, they simply cannot afford to make such distinctions on the grounds of time and money.

Consequences of attacking NGOs

NGOs, apart from peak employer organisations such as the Local Government and Shires Associations and Employers First, provide advocacy and service delivery on behalf of marginalised groups. CPSA's constituents are all pensioners or low income retirees. That is, people on the Disability Support Pension, Sole Parents, Age Pensioners, recipients of the Carers' Payment and low income retirees.

If the Commonwealth was to use the Bill to attack NGOs such as CPSA, it would mean an erosion of service provision for many marginalised groups in our society. CPSA auspices a funded project called the Parks and Village Service (PAVS). PAVS advocates on behalf of residents of caravan parks. It is a very specific role that cannot be taken on by the NSW or Australian Governments. The nature of this service is pure advocacy. If PAVS was unable to deliver this service, the only way caravan park residents would get a hearing would be if their cause was taken up by another tenancy service. This would still be problematic as the underlying issue (the wording of the legislation) would remain. For instance, CPSA has recently received an increase in government funding for PAVS to further resource its role in advocating against the closure of a huge tide of residential park closures. Under the draft legislation, if it was to become an Act, CPSA would lose its DGR status (because of its advocacy work around residential parks – and other areas of interest) and it could cause the Association a fiscal crisis.

NGOs provide services which require advocacy work much more cheaply than State or Federal Government entities. For example, policy workers in NGOs can earn much more in the NSW Government sector. Recently, the policy worker for a NSW NGO

took up an equivalent position with the NSW Public Service. The difference in salary was at least $10,000 per annum. Does the Federal Government intend to fund the salaries of workers and services performed by NGOs if the NGO sector can no longer perform its role?

Wording of the draft Bill

If the Bill is to be introduced then it needs considerable revision.

- **Part 2, Section 7 Public benefit**

(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.

It is not entirely clear that the aims and objectives of CPSA fall under the definition of "public benefit". We would argue that they are. The welfare of pensioners, superannuants and low income retirees is an essential part of the welfare of the general community. It may be that that is the intention of those who drafted the Bill. However, we don't know whether "public benefit" will be used in that way if the Draft Bill becomes an Act of Parliament.

The term "sufficient section of the general community" can be open to interpretation. What is a "sufficient section"? Fifty percent? Two-Thirds? Who will measure this?

(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.

This appears to undermine the reason for including Subsection (1).

- **Part 2, Section 8 Disqualifying purposes**

(2) Any of these purposes is a ***disqualifying purpose***:
(a) the purpose of advocating a political party or cause;

(b) the purpose of supporting a candidate for political office;
(c) the purpose of attempting to change the law or government policy;

if it is, either on its own or when taken together with one or both of the other of these purposes, more than ancillary or incidental to the other purposes of the entity concerned.

In regard to (a), a political cause could be the call of CPSA to end discrimination in employment on the basis of age. "Advocating a cause" could potentially mean CPSA and other NGOs would not be able to make submissions to Federal Parliamentary committees. Making such submissions is not "incidental" to our work. It is an integral part of it.

Regarding (c), most NGOs attempt to change laws if they feel that current legislation is unjust or an impediment to their activities. This form of lobbying is an essential part of the democratic process. CPSA, for instance, has recently lobbied to change the law in regard to anti-discrimination legislation (on the basis of age), early access to superannuation and the pensioner rate rebate. We are always arguing for changes in government policy on a host of issues. This work forms an essential part of our work on behalf of our clients and constituency. Again, it is not "incidental" to our activities. Nor can it be measured by some mathematical formula.

Section 8 of the Draft Bill is probably the most contentious part of this draft legislation. It should be removed. However, it also appears to be the main part of the Federal Government's agenda with regard to NGOs. The rest of the Draft Bill could be described as window dressing.

Conclusion and recommendations

The Commonwealth is dissatisfied with the present definition of charities based on common law. Understandably, there are many people, including politicians, who want to see that definition updated via new legislation. CPSA agrees in principle that the definition of a charity does need to be updated.

However, it is hard not to be suspicious of the motives of this current Federal Government. It has a history of defunding NGOs and publicly attacking church and other non-profit groups when they speak out. Therefore, CPSA would like to make the following recommendations:

1. That the Draft Charities Bill 2003 should be rescinded

2. That existing laws should be used to define “charities” until suitable legislation is drafted

3. That draft legislation aimed at updating the definition of “charities” should only become a bill after extensive consultation with the NGO sector and the broader community