Community Cultural Development NSW Submission To The Board of Taxation on the *Draft Charities Bill 2003*

Summary

Community Cultural Development NSW strongly supports the Government's intention to clarify the common law definitions of Charities. We particularly welcome the inclusion of "the advancement of culture" as a charitable purpose for the first time. This will overcome the century old common-law ruling that has forced non-profit cultural organisations to gain tax relief through the educational value of their activities rather than their genuine and otherwise well-recognised contribution to the cultural life and well-being of Australian society.

There are, however, a number of issues CCDNSW wishes to see addressed, as there are possible negative unintended outcomes from the current wording of the Bill. The major concern is around the possible exclusion of lobbying and advocacy activities by charitable organisations. There are also other issues of workability that arise from a lack of clarity in some items in the Bill. CCDNSW also believes an opportunity make the application of taxation relief fairer, and an opportunity to reduce the administrative burden of accessing that relief, have both been missed in this Bill. Finally, CCDNSW supports the suggestion that the concept of altruism be introduced into the Bill before it is reintroduced to Parliament.

After making some detailed observations about the content and implications of the Bill, CCDNSW provides 9 recommendations for improving it, in the interests of the Community Cultural Development and Community Arts Sectors, mostly in relation to improving the workability of the legislation.

Contextual note

Community Cultural Development NSW ltd is a not-for-profit company that serves as the peak community arts and community cultural development organisation in NSW. Our dominant purpose is the advancement of this particular field of cultural practice. The field is a diverse one, comprising local government run agencies, non-profit community groups, individual freelance artists and collectives, and many more. Our field of practice revolves around the use of arts and cultural activity as a means of achieving community development outcomes. This is usually done with the involvement of a professional artsworker/facilitator who collaborates with the community on a project that works towards outcomes such as community building, skills development, and empowerment of participants as outcomes, along with the more obvious artistic and cultural development outcomes. Projects usually develop around existing community cultures and/or in response to self-identified social issues.

OBSERVATIONS

Workability

CCDNSW has a major significant concern that the current wording of the Disqualifying Purpose Clause in the Exposure Draft of this Bill will limit its workability for our sector.

- The exposure draft introduces a disqualifying purpose, which seems to be intended to prevent party-political and other partisan lobby groups from accessing tax relief by being a non-profit entity with an otherwise charitable purpose. This disqualifying purpose rather throws out the baby with the bathwater, however, as it includes "the purpose of advocating a cause" and "the purpose of attempting to change the law or government policy".

  On the surface, this would not seem to be a concern for our sector, as it would be very unlikely that an arts or cultural development organisation would be formed with such a purpose in mind. There are many instances, however, when lobbying and advocating for change on a particular issue, law, policy or practice of Government is an entirely appropriate activity for a charitable community arts or ccd organisation to undertake, and that these activities would be entirely consistent with the purpose of advancing culture. Indeed, many key service organisations, such as CCDNSW are expected, if not required, by our (Government) funding bodies, to undertake such activity on behalf of the field, such as activity leading to or responding to inquiries such as the Major Performing Arts and the Myer Report. Our very participation in the consultative process on this Bill, is an example of that activity! Community based arts organisations should also be able to lobby on behalf of their communities, as this is as vital to their work as it would be to any community development or welfare agency.

  In practice, as demonstrated under item 1.32 of the Explanatory Material, lobbying and advocating activity undertaken by such an organisation can be deemed a dominant purpose, even when it is not a stated purpose. Such a determination could be used to disqualify an otherwise charitable organisation simply using that activity to further a legitimate purpose. CCDNSW joins with the key organisations in other sectors to call upon the Board of Taxation to ensure that advocacy and lobbying activities cannot be used to disqualify deserving charitable organisations from meeting the Bills definition of a charity.

  This issue was also explored by the *Report of the Inquiry into the Definition of Charities and Related Organisations* (June 2001), which considered that "…lobbying for changes in law or policy that have direct effects on the charity's dominant purpose, are consistent with furthering a charity's dominant purpose…therefore…such purposes should not deny charitable status." CCDNSW strongly supports this approach, and would very much like to see it reflected in the Bill in place of the current Disqualifying Purpose wording.

  CCDNSW is also concerned that the Australian Taxation Office is not equipped to judge the nature, purpose and proportion of advocacy and lobbying activities. Moreover, the Bill does not provide parameters or mechanisms for such judgments. This severely

impacts upon the workability of the Bill in its present form. If passed, it would lead to ATO officials attempting to quantify the amount of lobbying activity undertaken by a charity, and determining if this reflected an unstated dominant purpose which then failed the convoluted test which appears in the Bill *"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."* Such a situation would undoubtedly lead to great confusion, appeals and complaints if actually applied, and would prove unworkable in practice.

There are also issues of clarity that need to be addressed before the Draft is finalized. The first of these continues the concerns with workability CCDNSW has observed in the Disqualifying Purposes clause.

- The current wording of the 'disqualifying purpose' clause, and the definition of 'advancement' contained clause 10(2) and in the explanatory notes at 1.58, could lead the reader to view lobbying and advocacy as a 'purpose'.

  This is misleading, because these activities are, in fact, methods of pursuing a purpose, rather than being purposes in their own right. It seems from comments made by the Treasurer and the Board of Taxation that the intent is to exclude groups that are primarily Political in nature from being considered charities. Both the altruism test (if added-see below) and the current wording of the Definition of a Charity sections should achieve this aim already.

  The concept of advocacy must be recognized in the Bill, as must its appropriateness as a means of achieving a charitable purpose. Advocacy (including where appropriate, lobbying) should be included in the definition of 'advancement' as it is a method of achieving the aims of a charity and is not a purpose in its own right.

Other issues of concern in terms of clarity are raised by items that appear in Section 3, Definitions.

- While the definition of 'Government Body' is straightforward, further explanation is needed, as the recent judgment in Victoria raises serious concerns for independent organisations that are funded by State and Federal Government. As there is now a legal precedent for organisations performing Government functions, and those financially resourced directly by Government being considered *instruments* of the Government, they need the protection of further clarity in this definition. The Bill should specifically exclude them from its definition of 'government body'. This is particularly vital for fledgling organisations where seed funding from Government sources may constitute 100% of their finances during start-up.

  Particularly in a climate where Governments continue to outsource and privatize what were formerly considered 'Government functions', an organisation that meets all of the other tests and operates independently of Government, should be clearly classified in this Bill as an independent body rather than a Government instrumentality.

- 'Serious Offence' is defined as "an offense against a law…that may be dealt with as an indictable offence". It would seem that this clause would enable permanent loss of

charitable status for 'engaging in activities which constitute a serious offence'. Some kind of process for determining this, appealing against such a determination, and a surer test of culpability need to be included in the Bill. Under the current wording, an administrative error resulting in a failure to lodge an annual Return with ASIC would be classified as a serious offence. It also follows that the qualification of 'engaging in activities' is also too broad. It should be a case of 'conviction for' unlawful activities or something similarly indisputable that provides grounds for disqualification.

- Another factor which would limit the workability of the Bill, when applied to the community arts and community cultural development sector, is the fact that some communities are very small. For example, migrant populations from new countries of origin or ethnicities which are a minority within their country of orgin, small rural communities, and some Indigenous communities are all tiny when taken as a proportion of the National, their State, or other broad geographic populations. Clause 7 (2) indicates that if that number of people to benefit from an otherwise charitable purpose is 'numerically negligible' then it is not deemed in the public benefit. There must be clarification of this term to ensure that communities already marginalized by their small size are not disadvantaged. The inclusion of a contextual definition, or an exemption for small or remote but distinct Australian communities would solve this problem.

Administrative Burden

While we do not believe that the proposed legislation would impose a significantly increased administrative burden on CCDNSW or any of our field, there is an opportunity missed in the Draft Bill to reduce one. A significant administrative burden is placed on our sector by the three different processes and tests which we are required to meet in order to qualify for income tax exemption, GST exemptions, fringe benefits tax relief and tax deductibility recipient status. Simplification of this process could also be used to reduce the unfairness of a system that extends the full range of tax relief to some charitable organisations, and not to others.

- Paragraph 1.9 of the explanatory memorandum indicates the intent for this one definition of charity to apply to all Commonwealth legislation. This should be taken further to ensure that all administrative processes, such as the Tax Deductible Gift Recipient Status qualification for cultural organisations which currently takes the form of being enrolled on the Register of Cultural Organisations by the Minister for the Arts.

- The single definition should be backed up by a single qualification and application process for various components of tax relief. In the current system, some types of charitable bodies qualify for Income Tax relief, Fringe Benefits Tax Relief, GST relief and TDGR status. There is a significant administrative burden in simply understanding the different relief schemes, their qualification tests and how your organisation is defined. This is also an essentially unfair system, which extends benefits to some organisations and denies it to similar organisations. The cultural sector is for the first time being recognized as a worthwhile charitable field in its own right. Its exclusion from the other

modes of tax relief should also be addressed through this Bill.

- Although it is not within the Board of Taxation's brief to address and consider State issues, the intent of the Bill to create certainty and lower compliance costs is reduced by the lack of consistency across the States. CCDNSW believes that the lack of consistency across the States and the further administrative burdens imposed by qualifying for stamp duty and other State Tax exemptions needs to be considered and addressed in concert with this Bill.

Altruism

CCDNSW believes that the inclusion of the test of 'altruism' for the dominant purpose of an organisation purporting to be charitable, as recommended by *Report of the Inquiry into the Definition of Charities and Related Organisations* would improve the draft Bill.

- It would reduce the need for the problematic disqualifying purpose clause; and
- It would reduce the possibility of a commercial cultural enterprise qualifying for tax relief through an apparently non-profit organisational structure. This in turn would remove some of the administrative burden imposed by the qualification process for the Register of Cultural Organisations etc

Recommendations

CCDNSW puts the following recommendations for change to the Draft Charities Bill 2003, to the Board of Taxation;

Recommendation 1:
Clause 8(2)(c) be deleted

Rationale: "attempting to change the law or government policy" is not a purpose. It is, in fact, an activity. When it is undertaken as an activity that is consistent with the Charitable Purposes appearing in clause 10, then it is an appropriate and acceptable activity for a charitable organisation to engage in. Where it is not, then clause 4 and Part 3 of the draft Bill would already be sufficient to exclude the organisation from gaining undeserved tax relief.

Recommendation 2:
Clause 10(2) to read
"***Advancement*** includes protection, maintenance, support, research, improvement and advocacy"

Rationale: this change will both recognize and protect the role of charitable organisations in non- partisan and non-party political advocacy for people they are

charged with assisting, and for change which will contribute to the pursuit of their dominant purpose.

Recommendation 3:
Clause 3, after line 15, a new item to be inserted:
"a body which is funded by The Commonwealth, a State or a Territory, and/or which carries out Government Functions, but is legally constituted as an independent body other than a statutory authority, and is free from any Ministerial powers to approve or remove appointments, overturn Board of Management decisions or approve its activities, is not a Government Body".

Rationale: this will provide clarity and certainty in the wake of the recent Victorian precedent.

Recommendation 4:
Clause 4 (e) to read:
"Has not been convicted of an indictable offence"

Rationale:
Provides a clearer and stronger test than the current draft

Recommendation 5:
Explanatory note 1.16 to indicate the process for being re-instated as a charity, if an organisation were to fail to meet the definition because of an offence.

Rationale:
A charity should, perhaps at the Commissioner's discretion, be able to reclaim its status through some kind of rehabilitative process, rather than being permanently and punitively excluded, as other remedies for such offences are already available.

Recommendation 6:
A definition of 'numerically negligible' to be added, including the specific exemption of distinct ethnic minorities, and remote communities from that definition, no matter how small those communities may be.

Rationale:
Arts and cultural development, health, education, community welfare and other charitable purposes should be available to these communities even if they are very small in number, and their small number increases the need for tax relief for organisations attempting to service them.

Recommendation 7:
That qualifying as a charity under the Charities Bill 2003 provides direct and automatic access to Exemptions from Fringe Benefits and Tax Deductible Gift Recipient status as well as Income Tax exemption.

Rationale:
This will reduce the current administrative burden, and remove the unfair situation where similar organisations do and do not qualify for different components of Federal taxation relief. Also, as most of the Arts and cultural organisations which will qualify for Charitable status under this Bill are operationally funded by Government, Fringe Benefits Tax exemptions in our sector will enable us to address the low salaries available in the sector without an increase in grant and operational support from the public purse.

Recommendation 8:
That in concert with the introduction of this Bill, the Commonwealth pursue the aim of gaining consistent qualification for tax relief for charities across all States and Territories

Rationale:
This will reduce the current administrative burden, particularly for national organisations, and address the unfair situation where similar organisations do and do not qualify for different components of taxation relief.

Recommendation 9:
That the test of Altruism (a voluntarily assumed obligation towards the wellbeing of others or the community generally) be added to the Bill, as part of the dominant purpose.

Rationale:
This will further remove the need for the current and problematic disqualifying purpose clause, and ensure that only entities that are both not-for-profit and genuinely pursuing the improvement of the situation of others, can be recognized as having a charitable purpose

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