



edotasmania

using the law to protect the natural and built environment

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The Manager
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The Treasury
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By email: NFPReform@treasury.gov.au

Dear Sir

Response to Definition of Charity Consultation Paper

EDO Tasmania is a non-profit, community based legal service specialising in environmental and planning law. Our organisation provides legal advice and representation, community legal education services and engages in law reform and lobbying activities to support our efforts to ensure adequate regulation in respect of environmental issues.

EDO Tasmania is on the Register of Environmental Organisations and has tax-deductible gift recipient status. We welcome the opportunity to comment on the aspects of the Definition of Charity that may impact on our work. Our submission deals principally with issues relating to:

- the extent to which activities are considered when determining the purpose of an organisation;
- the benefits of political advocacy undertaken by charitable organisations; and
- the definition of 'government body'.

Summary of comments

- ✓ EDO Tasmania broadly supports the codification of the definition of charity and the rationalisation of the various rules governing the treatment of charitable organisations across Federal and State jurisdictions. Providing a clear, consistent and encompassing definition of charity will reduce administrative burdens and ensure that charitable public interest organisations are able to access tax benefits to assist with their work.
- ✓ EDO Tasmania supports the establishment of the independent Australian Charities and Not-for-Profit Commission (**ACNC**). The ACNC should work with relevant State government agencies to encourage the adoption of identical definitions of charities and implementation guidelines.
- ✓ EDO Tasmania supports the introduction of a broader list of charitable purposes in the *Charities Bill 2003* (the **Bill**). In particular, EDO Tasmania supports explicit inclusion of the advancement of protection of the environment (rather than the narrower 'natural environment'), culture, social or community welfare and the promotion and protection civil and human rights as recognised charitable purposes.

- ✓ EDO Tasmania recommends that organisations that are recognised as having a charitable purpose be able to engage in political activities, such as law reform, advocacy and political comment, provided such activities are directed to achieving their charitable purposes.
- ✓ EDO Tasmania recommends that a definition of 'controlled by government' be introduced to clarify that organisations that receive funding from government, but whose activities are not subject to direct control by government, are not ineligible for charitable status.
- ✓ EDO Tasmania also recommends that the definitions relevant to recognition as a Public Benevolent Institution be modernised.

Charitable purposes

The significance of charitable status

As acknowledged in the Consultation Paper, charities and the not-for-profit sector are "a key part of the Australian community and economy." The public interest work of non-government organisations (**NGOs**) provides immeasurable benefits for government and the broader community in a wide range of areas. In recognition of the value of this work in addressing community needs which would not otherwise be met, many NGOs are afforded some degree of charitable status and, consequently, favourable tax treatment.

It is fundamental to the continuation of their work that charitable NGOs are able to access tax benefits to maximise the resources available to pursue their objectives. For example, charitable status can allow organisations to attract tax-deductible donations, to offer more favourable employment conditions (such as fringe benefits and salary sacrificing) and to afford suitable premises through rate rebates and other concessions. Providing public interest NGOs with greater certainty as to what is considered charitable will also assist in reducing the compliance burden (and associated administrative costs) currently faced by the sector. This was confirmed by the recommendations of the 2010 *Australia's Future Tax System* report that the tax concession framework be simplified and made to better reflect community values.¹

- ✓ For all these reasons, EDO Tasmania strongly supports moves to provide a clear, consistent and encompassing definition of charity.

Codification vs policy guidance

EDO Tasmania supports the adoption of a broad definition within a Charities Act, with further detailed guidance in relation to the meaning of 'public benefit' and 'charitable purpose' to be provided by the ACNC.

A clear, broad recognition in legislation, supported by more detailed guidance in policy documents, will reduce the administrative burden currently faced by many organisations in demonstrating that they satisfy the requirements for achieving charitable status. Leaving detailed guidance to policy documents, rather than attempting to codify all possible purposes in legislation, will provide greater flexibility and allow notions of 'charitable purposes' to adapt to changing community attitudes.

Public interest environmental organisations

Over the past few decades there has been an increasing recognition of the public benefits associated with maintaining a healthy environment, and the interdependence of natural resources and human activities.² Issues relating to pollution, water management, climate change and protection of agricultural resources are properly recognised as human rights

¹ Commonwealth of Australia, *Australia's Future Tax System*, Part 2 – Detailed Analysis, B3-1, 2010

² See, for example, Articles 1, 2 and 4 of the *Draft Principles on Human Rights and the Environment* 1994.

issues. Equally, many of those issues impact disproportionately on the most disadvantaged members of society.³

As a consequence, it is now commonly accepted that the activities of environmental NGOs can be considered charitable, and have both direct and indirect benefits for the community. EDO Tasmania therefore supports the proposal in the Bill to expand the traditional *Pemsel* heads of charity⁴ and explicitly include protection of the environment as a charitable purpose.

However, EDO Tasmania believes that the wording in clause 10 of the Bill, “the advancement of the natural environment”, is too narrow. The emphasis on natural environment ignores the complex interactions of communities, industry and the environment, and the role of planning development in achieving environmental outcomes. It is important that work to protect or manage the built environment is also recognised as a legitimate activity for a charitable organisation. This is consistent with the broad definition of ‘environment’ in the *Environment Protection and Biodiversity Conservation Act 1999*.⁵

- ✓ EDO Tasmania recommends that the list of charitable purposes in clause 10 include “advancement of the protection of the environment”.

Public benevolent institutions

Where a not-for-profit organisation's objectives and activities are directed to public interest matters, the organisation should be afforded the most favourable tax treatment possible. Favourable tax treatment allows the organisation to do more with limited resources, a benefit which is ultimately enjoyed by the community that is assisted by the organisation.

Currently, no EDO office is recognised as a Public Benevolent Institution, on the basis that our services are not considered to provide “immediate and direct relief of suffering, distress and helplessness of people.”⁶

As outlined above, the work of environmental organisations have both direct and indirect impacts on the health and well-being of affected communities. EDO Tasmania urges the government to reconsider the application of its PBI criteria, to allow a broader focus on relief of *community* suffering, rather than individual suffering.

As advocated in the previous Charity Definitions Inquiry, a simple, workable solution would be to replace the Public Benevolent Institution category with a new class of Benevolent Charity, being a charity whose dominant purpose is to benefit, directly or indirectly, those whose disadvantage prevents them from meeting their needs.

- ✓ Though not explicitly part of this inquiry, EDO Tasmania urges the government to modernise the legislative definition of Public Benevolent Institution.

Purposes vs activities

The Consultation Paper acknowledges that there has been confusion in the distinction between an organisations' purpose and its activities when determining whether the organisation is “charitable”.

EDO Tasmania agrees that this is a complex distinction, but considers it important to ensure that charitable status is not denied to an organisation that is involved in some activities which are not considered charitable in their own right, but serve to support and assist the organisation to further its charitable purpose. Consideration of the activities of the organisation should only occur where they assist in clarifying any ambiguity in the stated

³ For more discussion of this issue, see EDO NSW and EDO Vic. 2009. *Protection of Human Rights and Environmental Rights in Australia: Discussion Paper*.

⁴ *The Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531

⁵ Section 3(1), *Environment Protection and Biodiversity Conservation Act 1999*

⁶ Advice from Australian Tax Office to EDO NT when its PBI status was revoked in 1999.

objectives of the organisation. This is consistent with the position adopted in cases such as *Public Trustee v Attorney-General of New South Wales & Ors*.⁷

- ✓ EDO Tasmania supports an approach in which charitable status is determined on basis of the purpose of an organisation only.

Achieving a charitable purpose

The *Charities Bill 2003* currently seeks to prevent a charitable entity from engaging in any activities that “do not further, or are not in aid of, its dominant purpose;”

It is important that all the activities of a charitable organisation are viewed in the context of the purpose(s) to which the activities are directed. As pointed out in the Arnold Bloch Leibler submission to the previous *Charities Bill 2003* inquiry⁸:

[To] divorce the activities which a charitable body undertakes from its charitable purposes, ie: the context in which the activities are conducted, is to potentially misconstrue them and place undue weight on the nature of a particular act or activity as opposed to the purpose for which it is conducted.

As noted in the Consultation paper, the High Court recently confirmed, in *Commissioner of Taxation v Word Investments*⁹, that the activities undertaken by a charitable entity need not be intrinsically charitable. The relevant consideration is, therefore, whether the activities in question are “in furtherance of the entity’s charitable purpose.”

Any concerns regarding the adverse impacts from narrowing the scope of disqualifying purposes and allowing NGOs to engage in political advocacy in the furtherance of their objectives (discussed below) should be addressed by the requirement that the organisation itself must still demonstrate that it is furthering an accepted ‘charitable purpose’.

As discussed below, many NGOs recognise that political engagement is essential to systemic reform and regularly undertake advocacy activities. This allows the organisation to achieve long term solutions, rather than short-term, single issue remedies for the problems faced by their clients or members.

- ✓ While principally relevant to the activities, rather than the purpose, of a charitable organisation, EDO Tasmania considers that a charitable organisation that has systemic advocacy in support of its charitable purposes as an explicit objective should not be disqualified from achieving charitable status.
- ✓ EDO Tasmania supports the development of clear guidance on this issue by the ACNC.

Benefits of political advocacy

A vibrant democracy requires equal opportunities for competing interests to engage in debate and influence policies. In the *Aid/Watch* decision¹⁰, the High Court held that the traditional common law position that “political activities” disqualified an organisation from being considered charitable did not take account of the Australian Constitution, and the inherent right of constituents for agitation and communication about matters affecting government, politics and policies.

Many charitable organisations play a critical role in the development of policies and laws in Australia. Such organisations have strong community links and are well placed to identify

⁷ *Public Trustee v Attorney-General of New South Wales & Ors* (1997) 42 NSWLR 600 at p 609- 10: “The objects of the body are to be found in its constitution. This contains a statement of “objectives” preceded by a set of “principles underlying council policy”:...I consider the correct approach is to look to the constitution...[which] provides a coherent statement of the [body’s objects]... and to use extrinsic evidence of activities only if there be ambiguity and only to the extent necessary to resolve it.”

⁸ Arnold Bloch Leibler submission to Board of Taxation on behalf of various environmental NGOs. 2003. Available at www.taxboard.gov.au/content/reviews_and_consultations/definition_of_a_charity/submissions/Arnold_Bloch_Leibler.pdf

⁹ *Commissioner of Taxation v Word Investments* [2008] HCA 55

¹⁰ *Aid/Watch Incorporated v Commissioner of Taxation*

community needs and comment on the effectiveness of political responses. The recent Productivity Commission report on the *Contribution of the Not-for-Profit Sector*¹¹ recognised that charities perform a vital function in raising public awareness, representing causes of their clients and interest groups and providing expert advice and opinions to government on the best policy approaches to address systemic problems identified by their work.

Without dismissing the many benefits of on-ground environmental work, many environmental NGOs have engaged in advocating for best practice environmental law and policy, which necessarily involves advocating for changes to either the law or government policy, as a means to achieve longer-term environmental benefits. Changes to laws in relation to environmental impact assessment, climate change adaptation and water management have often been the direct result of lobbying efforts by environmental groups.

The *Report of the Charities Definition Inquiry* in June 2001 also noted that "advocating on behalf of those the charity seeks to assist, or 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. We therefore recommend that such purposes should not deny charitable status provided they do not promote a political party or a candidate for political office."

Charities engaging in 'political' activities

The *Charities Bill 2003* attempts to regulate the involvement of charities in political activities by specifying purposes which will make an organisation ineligible for charitable status:

8 Disqualifying purposes

(1) *The purpose of engaging in activities that are unlawful is a disqualifying purpose.*

(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 its recent report on the Charities Law Reform Project¹², Changemakers Australia commented that:

[O]nly charities have faced limitations on their ability to advocate, due to charity law. Trade unions, industry associations and many think tanks are eligible for tax concessions, but with no limit to the type or extent of their "political" activities. This has left charities vulnerable to attack when they participate in the policy process, particularly when charities come up against powerful economic interests or policy makers themselves.

The project found that the common law restrictions on 'political' activity had a negative impact on active charities and philanthropic charities that sought to fund the activities of other charities. None of the NGOs interviewed for the project was prevented from undertaking advocacy, but many reported that uncertainty about the level of lobbying they could engage in without jeopardising their charitable status affected their willingness to get involved in political advocacy. Philanthropic charities also raised concern that providing funds for advocacy and law reform projects could compromise their charitable status.¹³ Reluctance of such organisations to provide funding has often meant that resources are not available to undertake advocacy work that charitable organisations consider necessary.

¹¹ Productivity Commission. 2010. Research Report. *Contribution of the Not-for-profit Sector*. Available at www.pc.gov.au

¹² Changemakers Australia. March 2011. *Freedom to speak, capacity to act: Charities Law Reform Project, Removing the barriers to Advocacy*. Available at www.changemakers.org.au/projects_and_resources

¹³ Ibid. p9

EDO Tasmania is concerned that the restrictions on a charitable organisation's ability to engage in political activities such as law reform and lobbying proposed in the Bill may inhibit public debate and compromise democratic processes.

Under the previous government, a range of charitable NGOs (particularly environmental organisations) were criticised for the amount of political advocacy work they engaged in. For example, while Attorney-General, the Hon Philip Ruddock MP wrote an article calling for reform of community legal centre (CLC) funding, citing a concern that CLCs' involvement in political activities detracted from their core services:

Unfortunately, some centres devote valuable resources to running political campaigns and the promotion of ideological causes, rather than providing legal advice and assistance to Australians in need (as per their Charter).¹⁴

Funding criteria for some environmental programmes was also amended to prevent funds being used for political advocacy work.¹⁵ The uncertainty created by those comments had the effect of reducing some CLCs' willingness to participate in law reform activities, fearing that their funding would be jeopardised.¹⁶ Despite the clarification provided by the *Aid/Watch* decision, there is still an attitude amongst some sectors of the community that environmental NGOs should not participate in lobbying activities.¹⁷

The current Federal Government has stated its commitment to a strong and independent not for profit sector and endorsed the role of constructive advocacy in improving policies, programs and services.¹⁸ Providing a clear definition of charity, supported by the Draft Tax Ruling 2011/D2, with appropriate guidance regarding legitimate political activities, will be a significant statement from the government in support of the importance of advocacy in a democracy.

EDO Tasmania does not support the inclusion of "attempting to change the law or government policy" or "advocating a political cause" as a disqualifying purpose or subject to a requirement that the activities be "ancillary or incidental". EDO Tasmania considers that, consistent with the *Aid/Watch* decision, charities should be able to engage in any amount of 'political' advocacy, provided it is directed towards furthering the charitable objectives of the organisation.

- ✓ EDO Tasmania recommends that paragraph 8(2)(c) of the *Charities Bill 2003* be deleted, and paragraph 8(2)(a) be restricted to advocating for political parties.

Political comment

EDO Tasmania supports open and informed public debate and recognises that comments by NGOs regarding a political party's policies can play a role in informing the public about a particular aspect of the law, or its application. Contributing to public debate in this way can further the charitable objectives of an organisation and provide impetus for legal change.

- ✓ EDO Tasmania recommends that the definition of charity, and any guidance provided by the ACNC, allow a charitable organisation to comment upon the policies or activities of a particular party or candidate, provided the commentary relates to the charitable purposes of the organisation.

¹⁴ Hon Philip Ruddock, "Community Legal Centre Reform", *The Party Room*, Issue 4, Spring 2006, p4

¹⁵ For example, the GVESHO programme guidelines were amended in 2006 to provide that funds could not be used for "political advocacy"

¹⁶ No, 11, above. p20

¹⁷ See, for example, Chris Kenny's article in the *Australian*, 19 March 2011, "Taken for granted: how tax dollars are helping to fund green agendas".

¹⁸ Australian Government, *National Compact – Working Together*, 2010, p3.

Definition of 'government body'

The definition of 'government body' in the *Charities Bill 2003* includes a body "controlled by" the Commonwealth, State or a Territory. EDO Tasmania (in common with all other EDOs) receives funding from both the Commonwealth and State government subject to service agreements outlining in general terms how the funding is to be used.

EDO Tasmania is concerned to ensure that a definition of "controlled by government" is introduced that excludes entities receiving government funding to perform their public interest roles, but not under the direct control of those funding agencies. Government funding, often supplemented by other sources of funding, can be essential to the continuation of charitable work. The delivery of these services at relatively low cost to government has enormous benefits for government and the community.

Consistent with the decision in *Central Bayside*, the definition of 'controlled by government' should make clear that an NGO is not disqualified from charitable status on the basis that it receives government funding, provided that the funding is used to pursue the charitable purposes of the organisation.¹⁹

✓ EDO Tasmania recommend that 'control' be defined as:

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

EDO Tasmania appreciates the opportunity to make these comments. Please do not hesitate to contact us if you wish to discuss anything raised in this submission.

Kind regards,

Environmental Defenders Office (Tas) Inc



Jess Feehely
Principal Lawyer

***EDO Tasmania gratefully acknowledges the assistance of
Madeleine Summers and Amanda Haigh in preparing this submission.***

¹⁹ For example, Kirby J at 144.