

Mr John Hawkins
Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Hawkins

Thank you for the opportunity to comment on the Tax Laws Amendment (Public Benefit Test) Bill 2010 (the Bill) which aims to amend Australian tax laws to require that religious and charitable institutions meet a public benefit test to justify their exemption from taxation.

UnitingCare Australia represents a national network of UnitingCare agencies that employ 35,000 staff who are supported by 24,000 volunteers working across 1300 sites around Australia, and deliver social services to around 2 million Australians each year. UnitingCare agencies provide vital services that support disadvantaged and vulnerable Australians. These agencies rely on the current concessional framework provided through the tax system to sustain and build services funded by governments and philanthropic contributions. Changes to these concessional arrangements must be considered carefully and be based on rigorous analysis of the consequences of any changes on those people and communities who access these social services.

We believe that Charities should demonstrate levels of transparency, accountability and governance which are beyond reproach, particularly when they are dealing with the most vulnerable in our communities and utilising funds from the public to deliver their services. We believe that charitable and religious institutions should be able to demonstrate a benefit to the public. However the regulatory framework that ensures these conditions are met must be appropriate, coherent and effective.

Our submission regarding the Bill provides an analysis of whether, in its current form, the proposed legislation will be effective in achieving its stated purposes.

The explanatory memorandum for this Bill explains that it has been initiated following “allegations from former members of the Church of Scientology about coerced abortions, false imprisonment, breaches of Occupational Health and Safety laws, stalking, harassment and extortion, to name but a few”¹. Such behaviours and actions can and should be dealt with via the appropriate civil or criminal justice systems through which the organisations or individuals involved can be held to account. Tax law is not the appropriate mechanism to deal with criminal allegations..

¹ Available at:
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs754%22>

Furthermore, the Australian Taxation Office (“ATO”) Ruling TR2005/21, which deals with the circumstances in which an institution or fund will be considered charitable, makes it clear that if the purpose of a charity is contrary to public policy or is either unlawful or a lawful purpose is to be carried out by unlawful means, then the purposes are not charitable (paragraph 100 and 101). Under current regulatory arrangements, such an organisation is not entitled to tax concessions afforded to charitable institutions.

If a charity, religious institution or indeed any organisation engages in illegal behaviour then those organisations should be held to account by the appropriate legal mechanisms. We do not believe that the proposed Bill is the appropriate mechanism with which to manage the allegations made in the explanatory memorandum.

One of the ways in which the Government could encourage and sustain a strong and robust not for profit (NFP) sector is to ensure that there are laws and regulatory arrangements which are supportive of its work and role². We are concerned that the proposed Bill will not serve to improve the legal and regulatory environment within which NFP social services operate.

There have been numerous reviews conducted over the past decade in which the regulatory regime for the NFP sector has been examined³. Several key recommendations for improving the regulatory environment have emerged from the resulting reports which are consistent across these reviews including:

- Improving government engagement with the NFP sector;
- Establishing a single, independent body to regulate and oversee the NFP Sector;
- Improving the complexity of regulation and reporting;
- Simplifying and enhancing the taxation environment for NFP organisations.

These recommendations should be addressed before further legislation adds to the complexity of an already fragmented regulatory system. Regulatory reform and tax law needs to be managed in a coherent manner and not by ad hoc and reactive changes. Most notably, a Public Benefit Test should not be introduced without the creation of an independent regulatory body to administer it.

In the absence of an independent body, the ATO currently takes responsibility for issues such as deciding whether an organisation qualifies as a Public Benevolent Institution or whether the advocacy activities of an organisation constitutes political activity. It is not appropriate for these roles to sit within the function of a revenue collection agency.

Firstly, there is potential for a conflict of interest for the revenue collection agency to be the arbiter of such decisions relating to charitable tax exemptions.

Secondly, what constitutes a public benefit, and what balance of harm against benefit is acceptable, are the subjects of complex legal and ethical arguments⁴. UnitingCare Australia believes the administration of this potentially subjective test regarding the relative merits of public benefit and harm would best sit with a body which would operate in a similar manner to the Charity Commission for England and Wales⁵ and could take on the responsibility for determining charitable status, public benefit and for registering and supervising charities.

² Lyons M (2003) ‘The Legal and Regulatory Environment of the Third Sector’, Asian Journal of Public Administration, Vol 25, No. 1 June 2003.

³ Previous reviews and forums include The Inquiry into the Definition of Charities and Related Organisations, 2001; The Senate Economics Committee Inquiry into Disclosure regimes for charities and not-for-profit organisations, 2008; The Productivity Commission Study into the Contribution of the Not-for-Profit Sector, 2010; The Review of Australia’s Future Tax System, 2009; The National Compact with the Third Sector.

⁴ Harpur, P 2003 Charity Law’s Public Test: is Legislative reform in the public interest? QUT Law and Justice Journal, Volume 3, Issue 1

⁵ The Charity Commission for England and Wales, Available at: <http://www.charity-commission.gov.uk>

The UK Charity Commission offers an administrative mechanism to hear and determine questions relating to charitable status. These determinations are public and provide a guide to organisations what will constitute the 'public benefit'⁶. The creation of such a body in Australia could also achieve the decoupling of charitable tax exemption from charitable status and free the tax-collecting agency (the ATO) from its obligation to interpret charitable purpose, and determine whether or not an organisation's objectives and activities can be construed as charitable⁷ and for the public benefit.

The Government has not as yet made a commitment to the creation of such a body however a Public Benefit Test should not be implemented unless the mechanics and philosophy of the administration of the test is thoroughly examined. Without an independent body to oversee the regulation of the NFP sector and to administer a Public Benefit Test, the Bill should be rejected.

Thirdly, UnitingCare Australia questions whether there is a sufficiently strong legal argument for a codified Public Benefit Test being required in Australia. The requirement for an organisation to be for the public benefit is already an implied characteristic of the meaning of a charity and this Bill, and its explanatory memorandum, does not adequately explain how the proposed legislation will improve on the Common Law treatment of this issue.

Changes to the legislative and regulatory framework within which NFP social services operate must be not be made via piecemeal, reactive measures which have the potential to "impose yesterday's answers to tomorrow's public problems"⁸. UnitingCare Australia would argue that the creation of an independent body to regulate and oversee the NFP Sector would be a much more valuable first step towards strengthening the laws and regulatory arrangements through which the transparency, accountability and governance of the work of the NFP sector can be improved.

If you require any further details about this submission please contact Kelly Bruce, Senior Policy Analyst on ph: 6249 6717 or email kelly@nat.unitingcare.org.au

Yours sincerely



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⁶ Harpur, P 2003 Charity Law's Public Test: is Legislative reform in the public interest? QUT Law and Justice Journal, Volume 3, Issue 1

⁷ O'Halloran, K. 2009 "Overview and Themes of Modernising Charity Law Since 2001 in Europe (mainly, England & Wales, Ireland, Northern Ireland and Scotland): the Critical Drivers, Barriers and Outcomes of Charity Law Reform; some Unresolved Issues and Future Challenges, presented at Modernising Charity Law Conference, QUT, 16th April 2009.

⁸ ⁸ Harpur, P 2003 Charity Law's Public Test: is Legislative reform in the public interest? QUT Law and Justice Journal, Volume 3, Issue 1