Combined Community Legal Centres' Group NSW

Submission to the Board of Taxation

Charities Bill 2003

September 2003

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A. Overview

This submission is made by the Combined Community Legal Centres Group (NSW) (CCLCG) representing both

- the 38 community legal centres that are members of CCLCG (see section B of the submission), and
- the incorporated association CCLCG (see section C).

In the opinion of CCLCG, the draft Charities Bill 2003 as it currently stands has substantial flaws and is essentially unworkable.

Section B looks at the impact of the proposed Bill on community legal centres in NSW. The Bill has the potential to adversely affect the ability of individual community legal centres to claim charitable status, because part of the role of community legal centres is to advocate on behalf of their client groups to decision-makers.

The vagueness of the draft Bill, with a lack of clarity in the definitions of terms such as "dominant purpose", "ancillary purposes" and so on, set up a scheme in which CLCs and other charities are constantly vulnerable to allegations that they are acting outside their charitable purposes.

The draft Bill is also unworkable in its failure to deal with the relationship between PBIs and charitable organisations. The final Report of the Inquiry into the Definition of Charities and Related Organisations proposed a clear and well-researched framework which would deal with both charities and PBIs. CCLCG is at a loss to understand why the Taxation Board does not simply adopt the proposals put forward in that Report.

If CLCs lose charitable status, they will suffer substantial financial loss. This would seriously undermine the capacity of community legal centres to continue providing legal services to disadvantaged communities. Unless governments offset the loss of these financial benefits with increased funding grants to legal centres, many centres may struggle financially to the point that they are not longer viable. This would then have a flow-on effect of increasing pressure on other legal service providers, notably government-funded services such as Legal Aid Commissions.

Another issue which is of concern in the legislation is the lack of clarity regarding "government bodies", as potentially this could include all organisations which are substantially funded by the government – a group which includes community legal centres.

Section C examines the effect of the Bill on CCLCG. As a peak body providing services to its 38 member legal centres, CCLCG appears particularly vulnerable to the Bill, because the Bill does not adequately provide for the role of peak bodies or coordinating organisations. Loss of charitable status to CCLCG will lead to greater

financial costs for the Group, and substantially reduce its effectiveness in representing and resourcing its members.

In **section D**, the submission examines the wider implications of restricting the historical role of charities to advocate on behalf of disadvantaged communities. In advocating on behalf of the clients they see on a day-to-day level, charities play a crucial role in any democratic society. The right to express opinions, particularly about political issues, is protected under the Constitution. The International Covenant on Civil and Political Rights also provides guarantees protecting free speech and the right to form associations. It is arguable that the Bill, by penalising organisations which speak out against government law or policy, is placing indefensible restrictions on these rights.

For all of the above reasons, CCLCG urges the Taxation Board to abandon the proposed Charities Bill and return to the framework laid out in the final Report of the Inquiry into the Definition of Charities and Related Organisations.

If the Taxation Board chooses not to return to that framework, CCLCG supports amendments to the Bill, as put forward to the current Inquiry by the Victorian Federation of Community Legal Centres. These amendments are included in **Section E** to this submission.

B. Community Legal Centres in NSW

B.1. What do community legal centres do?

There are 38 community legal centres currently operating in NSW, providing legal advice, information and education to people from a wide range of disadvantaged communities. A full list of NSW community legal centres is available in the pamphlet provided with this submission, or from the website www.nswclc.org.au.

There are twenty "specialist" and nineteen "generalist" legal centres in NSW. Specialist centres work in particular areas of law, such as

- disability discrimination
- tenancy
- domestic violence
- environment
- social security
- consumer credit;

or with particular sections of the community, for example

- women
- indigenous communities
- refugees
- older people
- young people.

Specialist centres service all of NSW, usually through the provision of phone advice, but also through rural outreach programs, regular community education programs in regional areas, and the provision of training and back-up advice for CLC workers from generalist centres.

Generalist legal centres, on the other hand, provide legal advice to people living within a particular geographic area. For example Western NSW CLC (Dubbo) provides advice to people in the greater west of NSW and Shoalcoast CLC (Nowra) provides advice to people living on the south coast of NSW.

CLCs also take on test cases and class actions, which may or may not be funded by the NSW Legal Aid Commission. Many of the cases run by NSW CLCs are high-profile public interest cases, some of which have resulted in changes to the legal system. These include:

- winning damages for a six year old with spina bifida who was denied enrolment at a school because of her disability
- winning a major case against the State Bank when it was discovered that a number of their loan contracts were not legal
- winning record compensation against Katies clothing chain for women from a non-English speaking background for employment discrimination.

Community legal centres not only provide legal advice and assistance, but also encourage and enable people to develop skills to be their own advocates. Centres work towards achieving systemic change through community legal education, and through law and policy reform. This is further discussed in B.2. below.

No two community legal centres are identical. Each centre has arisen due to perceived community needs, and are managed by community members (in the case of generalist CLCs) or by experts in the field (in the case of specialist CLCs). Generalist CLCs in particular are a product of the communities in which they are located.

CLCs employ qualified staff including solicitors, administrators, advocates, social workers and community legal educators. Centres also use volunteer solicitors, barristers, law students and others to extend legal services. Centres provide legal advice over the telephone and hold interview and advice sessions after business hours.

The contribution of volunteer work to community legal centres is immensely valuable. A recent study of volunteers at NSW community legal centres reveals the extent to which community legal centres are reliant on volunteers for the quantity

their charitable status. The Bill potentially means that community legal centres would no longer be able to advocate anything which could be defined as a "political cause". If this were the case, the Bill could be in breach of the Commonwealth Constitution and in contravention of the International Covenant of Civil and Political Rights. This is further discussed in Section D of this submission.

B.3. Concerns with definition of "Government body"

CCLCG is concerned with the definition of *government body* contained the Charities Bill. Defining a government body to include a body controlled by the Commonwealth, State or Territory Governments may draw in organisations which receive funding from government.

Funding for every CLC is different, but most CLCs in NSW receive funding through the Commonwealth and/or NSW Community Legal Centre Funding Programs. Some CLCs also receive funding from other NSW government departments, local councils, statutory foundations, and from private organisations.

CCLCG would like to see the definition of government body clarified to make it clear that entities which receive all or the majority of their funding from the Government are not excluded from the definition of "charity". This can be clarified through a better definition of "control", such as that contained in the amendments in Section E of this submission.

B.4. Current charitable status of community legal centres and effect of the loss of this status

All CLCs in NSW are defined as charities. On a federal level, this entitles centres to

- income tax exemption
- refund of GST imputation credits
- FBT rebate (not a full exemption – an exemption is however available where centres are Public Benevolent Institutions, discussed below).

On a state level, charities are also entitled to a variety of benefits including

- land tax exemption for investment properties (this is not relevant to CLCs as CLCs do not own investment properties)
- payroll tax – which applies to organisations which spend more than over $600,000
- stamp duties for insurance, property transactions (including commercial leases)
- vehicle registration fees.

Loss of charitable status could have further far-reaching ramifications for individual organisations. For example, State government departments which currently provide government-owned properties at reduced rents to charities, might reconsider these offers if an organisation is not a charity. Funding grants from private or public institutions also require organisations to be endorsed as an income-tax exempt companies and deductible gift recipients.

B.5. Potential to lose Public Benevolent Institution (PBI) status

In addition to having charitable status, the vast majority of community legal centres also have Public Benevolent Institution (PBI) status.

What is PBI?

According to the recent ATO ruling (TR 2003/5), a Public Benevolent Institution is "a non-profit institution organised for the direct relief of such poverty, sickness, suffering, distress, misfortune, disability, destitution, or helplessness as arouses compassion in the community."[2] PBI status also covers peak bodies in certain circumstances, mostly where the peak body has a common benevolent purpose with its members, which are themselves predominantly PBIs.[3]

There is some confusion as to whether the draft Charities Bill 2003 would affect the rights of an organisation to claim PBI status. The Bill does not explicitly refer to PBI.

The Report of the *Inquiry into the Definition of Charities and Related Organisations* made the point that the relationship between PBI and charitable status was unclear, although the Australian Taxation Office's submission to the Inquiry saw PBIs as a subset of charities.[4] This lack of clarity was precisely the reason why the

quality staff. Given that community legal centres are chronically underfunded, and offer some of the lowest rates of pay in the legal sector,[5] FBT exemption is of crucial assistance in attracting skilled workers.

Although the problem would be common to all legal centres in NSW, it would likely impact on rural and remote community legal centres even harder than centres located in Sydney or larger metropolitan centres. Rural and remote legal centres currently experience great difficulties recruiting and retaining staff, particularly solicitors, as there are few available solicitors working in rural areas, and thus legal centres have to try and entice workers from urban centres. If the centres cannot use FBT exemption to increase the value of wages on offer, it may be impossible to convince urban solicitors to relocate.

The loss of FBT exemption to organisations which previously held such exemptions would also cause serious problems for existing staff contracts. Depending on the contracts of each legal centre with their staff members, either the staff members will suffer, in that they will experience an effective drop in pay; or the centre will suffer, in that it will have to draw on the reduced income to fulfil existing staff contracts based on the promised salary. In the words of one legal centre administrator, "we would probably have to look at ways to reduce staff numbers."

Some smaller centres may simply be unable to exist, as the number of staff they would be able to employ would be too low to make the organisation viable. Governments would need to increase funding grants to community legal centres to match any losses caused by the loss of FBT, and other benefits.

Deductible Gift Recipient status

DGR allows organisations to attract donations or gifts which can be claimed by the donor as a deduction on their income tax.

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[5] A recent survey of 18 community legal centres conducted by the National Association of Community Legal Centres in August 2003 showed that in NSW, the average salary for full-time solicitors, including principal and senior solicitors (generally of five or more years experience), was approximately $51,000. This figure is around the amount that a first-year solicitor in private practice in Sydney can expect to receive, or that a first-year Legal Officer (Grade II) at the NSW Legal Aid Commission would receive. In both the private legal sector and the Legal Aid Commission, solicitors' salaries increase significantly the longer they stay, rising after five years to around $110,000 for private solicitors, or $80,000 for Legal Aid solicitors. The situation for non-legal staff in CLCs is not much better. For example, according to the NACLC survey, the average wage paid to an administrative worker (including finance officers) in NSW community legal centres was approximately $39,000. This is around the same as the salary for a first-year Grade 1/2 Clerk at the Legal Aid Commission, but the Legal Aid Commission offers a clear path of yearly pay increases, as well as the general public service opportunities of applying for promotion. Information regarding private solicitors obtained from *Lawyers Weekly*, 20 June 2003, published in NACLC, *Community Legal Centres – An Investment in value*, p. 6. NSW Legal Aid Commission Salary Rates are current as at 4/7/2003, available from the NSW Legal Aid Commission.

In response to rising costs and increasing demand for services from the community, many community legal centres have broadened their income base by seeking project funding from sources other than the standard Commonwealth and State government funding programs. Most philanthropic institutions, private organisations and other funding bodies require evidence of DGR endorsement before providing a grant to a community organisation.

Further restriction of DGR status would also fly in the face of the Prime Minister's Community-Business Partnership which has developed tax initiatives to encourage philanthropy by allowing donors to have greater benefit from providing gifts to charities.[6]

B.6. Vagueness of the Bill could lead to greater administrative burden on legal centres

The point of codification is surely to clarify common law and to provide greater certainty. However the draft Charities Bill is a legal minefield which could substantially increase the administrative burden on legal centres.

The vagueness of the Bill, particularly in regards to tests such as "dominant", "ancillary" or "incidental" purposes, and the scrutiny on whether activities are in aid of the dominant purposes, opens it up to discretionary interpretation. This means that a centre may not know from day-to-day whether particular activities would jeopardise its charitable status.

The Bill is also potentially vulnerable to abuse. For example, if a person has a grievance against a community legal centre – perhaps because the centre is representing the opposing party in legal proceedings, or because the centre has been outspoken about a particular issue with which they disagree – then that person may decide to make a complaint about the centre's activities to the ATO or whatever body is instituted to review charitable status. The legal centre would then face the administrative burden of proving that its activities are not "disqualifying purposes". This could include

- cataloguing all activities conducted by the centre
- providing logs of staff activities over periods of time
- providing details of client statistics in particular matters
- obtaining legal advice
- answering any specific questions asked by the decision-maker.

CCLCG is concerned that defending charitable status could take up a substantial amount of time which could be better used to assist disadvantaged clients.

The amendments contained in this submission (Section E) are a substantial improvement on the current Charities Bill because they actually define phrases

[6] From 1 July 2003 taxpayers were able to spread deductions for cash donations made to deductible gift recipients, in instalments elected by the taxpayer, over a period of up to five-years: see http://www.pm.gov.au/news/media_releases/2002/media_release2032.htm

such as “predominantly charitable” and “public benefit”. They also clarify the difference between “purpose” and “activity”. They also make it clear that advocacy, law reform and policy development are permissible where these activities are conducted as part of an organisation’s overall charitable purposes.

C. The Combined Community Legal Centres Group NSW

The Combined Community Legal Centres Group NSW (CCLCG) is an incorporated association representing the network of community legal centres throughout New South Wales. As such it is the peak body for community legal centres in NSW. A full list of members of CCLCG is contained in the brochure 'Community Legal Centres' which is provided with this submission as a separate document.

C.1. Purposes of CCLCG

The objects of CCLCG include the following:

- To assist member centres fulfil their goals and policies, particularly through advocacy for the provision of adequate resources and education of the public about the role of Community Legal Centres.

- To facilitate communication and cooperation among member centres, and between member centres other bodies and to assist all member centres, especially those in remote and rural areas, to participate fully in the activities of the organisation.

- To support member centres to advocate for people who are socially or economically disadvantaged and whose inability to access the legal system further aggravates or perpetuates their disadvantage, through undertaking research and promoting legal and administrative reform.

- To provide information and referral for Community Legal Centres and related agencies and disadvantaged people in need of legal services.

- To liaise closely and, as appropriate, work co-operatively with other organisations, particularly the NSW Legal Aid Commission and relevant national networks, in relation to justice issues and the provision of community based services.

C.2. Activities of CCLCG

The Board of CCLCG is drawn from member organisations. Much of the work of CCLCG is developed through sub-committees, also consisting of member organisations. As just two examples, the Practice Committee works on issues which affect CLC legal practice (such as Public Indemnity insurance), and the Community Legal Education Worker sub-committee brings together community education workers to share resources and training initiatives.

CCLCG has negotiated important benefits for its members, including an exemption from NSW Government Interpreting fees and access to Legal Aid training forums.

CCLCG is resourced by a small office of four staff, three of whom are part-time. The state office acts as a busy referral point for members of the public seeking legal advice or seeking information about community legal centres. It also does the following

- runs four CCLCG meetings a year to provide support and training to CLC workers
- organises a bi-annual state conference with workshops on relevant areas of law
- convenes network meetings (in-person or phone link-ups) on particular issues
- coordinates and submits funding submissions on projects relevant to the network of legal centres
- publishes resources for community legal centres, for example a Financial Management Guide for Community Legal Centres
- administers a website which provides details on all community legal centres in NSW
- publishes and distributes a Directory of NSW CLCs
- publishes pamphlets and information about community legal centres
- attends university career days and other forums to promote community legal centres and encourage students and lawyers to volunteer.

CCLCG is a charity and has PBI status, with staff offered salary packaging.

C.3. Effect of Charities Bill on CCLCG

All of the concerns about the financial impact of loss of charitable and PBI status outlined above regarding community legal centres, also apply to CCLCG. It also appears that as a peak body, CCLCG is particularly vulnerable to the effects of the legislation. This is because under the Draft Bill, it may be questioned whether a peak body engages in activities of public benefit, or only of benefit to its members.

CCLCG submits that peak bodies should continue to be defined as charities if their members have charitable purposes, and if the peak body supports (directly or indirectly) its members in activities of a public benefit. This is consistent with the ATO Ruling 2003/5 which, in the context of PBI definitions, accepted that a body which coordinated services and support would be a PBI where its members were PBIs and where the activities of the peak body were "a step in the benevolent process of the group of organisations."[7]

Proposed amendments to the Bill that clarify the role of peak bodies, are located in Section E of this submission.

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[7] TR 2003/5 para 65.

D. ADVOCACY AND FREEDOM OF SPEECH ARE HUMAN RIGHTS AND ESSENTIAL ELEMENTS OF A DEMOCRATIC SOCIETY

The Taxation Board has invited submissions from organisations regarding the effect of the Draft Bill on their organisation, rather than on the community. However CCLCG would like to make the point that the Draft Bill would have a substantive effect on Australian society. If charities cannot represent the interests of their members or client-groups to the government without fear of threats to their charitable status, then effectively the government has silenced the voices of the poor and the disadvantaged.

The Charities Bill is not merely unjust; it is potentially unconstitutional. Several High Court cases have held that there is an implied constitutional right to freedom of communication on matters of government and politics.[8] This right exists because the Constitution provides for a representative government and freedom of communication is essential to such a system.

The Bill also arguably breaches the International Covenant on Civil and Political Rights. Article 19 guarantees people the right to freedom of expression. Article 22 also protects the right to freedom of association with others. In setting up a regime that financially penalises charities that seek to argue against government law or policy, or advocate on behalf of their members or clients, this Bill could be seen as contravening these fundamental human rights.

[8] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Commission* (1997) 145 ALR 96.

E. Proposed Amendments to the Draft Legislation

(As put forward by the Victorian Federation of Community Legal Centres)

PROPOSED AMENDED CLAUSES

3 **Definitions**
(1) In this Act, unless the contrary intention appears:

control of an entity, by a government body, means the power to direct completely the entity's acts and omissions, where such acts and omissions are not reasonably required under any funding agreement.

peak body means an entity:
(a) whose members engage in activities of public benefit that are further to, or in aid of, the entity's charitable purposes;
(b) membership of which is conditional on engaging in such activities; and
(c) that supports, whether directly or indirectly, its members in such activities.

...

4 **Core Definition**
(1) A reference in any Act to a charity, to a charitable institution or to any other kind of charitable body, is a reference to an entity:
(a) that is a non-for-profit entity and not an individual, a partnership, a political party, a superannuation fund or a government body;
(b) whose constituent documents disclose that the entity has one or more charitable purposes and no disqualifying purposes;
(c) whose activities are predominantly charitable and of public benefit; and
(d) that has not ceased to be a charity under subsection (2).

(2) An entity will cease to be a charity if it is convicted of a serious offence or engages in disqualifying political activities.

(3) The activities of the members of a peak body, except for serious offences and disqualifying political activities, are activities of the peak body for the purposes of this Act.

6 **Dominant Activities**
An entity's activities are ***predominantly charitable and of public benefit*** if and only if:
(a) the entity engages in activities of public benefit;
(b) the activities described in paragraph (1)(a) are further to, or in aid of, the entity's charitable purposes stated in its constituent

documents; and

(c) any other of the entity's activities are not the dominant activities of the entity and are:
   (i) incidental to the activities described in paragraph (a);
   (ii) for the proper administration of the entity; or
   (iii) are to raise funds for the entity.

7 **Public Benefit**

(1) An activity is of ***public benefit*** if it:
   (a) promotes a universal or common good;
   (b) has practical utility; and
   (c) benefits the general community or a sufficient section of the general community.

(2) An activity does not benefit a sufficient section of the general community where:
   (a) the entity deliberately prevents members of the community who are not part of that section from receiving the same benefit from the activity as those who are part of that section; and
   (b) that section is not made up of individuals affected by a particular disadvantage or discrimination, or by a need that is not being met.

(3) Open and non-discriminatory self-help is an activity of public benefit.

(4) An entity engages in activities of public benefit if its members live a life devoted to:
   (a) the contemplation and practise of religion or ethics; and
   (b) the avoidance of material wealth.

8 **Disqualifying purposes and political activities**

(1) ***Disqualifying purpose*** means:
   (a) the purpose of engaging in activities that are unlawful; or
   (b) the purpose of supporting a political party or candidate for political office.

(2) An entity engages in ***disqualifying political activities*** if and only if:
   (a) the entity endorses a political party or candidate for political office;
   (b) the entity provides a political party or candidate with funds or resources; or
   (c) its predominant activities are attempts to change the law or government policy where such activities are not further to, or in aid of, the entity's charitable purposes.

(3) For the avoidance of doubt, an entity engages in activities further to or in aid of its charitable purposes where it advocates in any manner to any person, group of persons or body that:
   (a) a particular change be made to the law; or
   (b) that a government body adopt a particular policy, make a particular

decision, or exercise its legal powers in a particular way.

(4) For the avoidance of doubt, an entity does not endorse a political party or candidate for political office by engaging in activities referred to in subsection (3), regardless of whether a political party or government body advocates the same view.

9 Open and non-discriminatory self-help

An entity engages in ***open and non-discriminatory self-help*** if:

...

INFORMATION, ANALYSIS
AND ADVICE FOR THE PARLIAMENT

INFORMATION AND RESEARCH SERVICES

Current Issues Brief
No. 5 2003–04

Redefining NGOs: The Emerging Debate

In July 2003, the Government released an exposure draft of legislation (Charities Bill 2003) which seeks to redefine what constitutes a charitable organisation. It also asked the Board of Taxation to conduct a public enquiry to determine the criteria for organisations to be given charitable status. The report of the enquiry is now expected to be submitted to the Treasurer by 19 December 2003. This Current Issues Brief explains the background to the debate on the definition of a charity and notes that there are many issues to be resolved.

Dr Ravi Tomar
Foreign Affairs, Defence and Trade Group
1 December 2003

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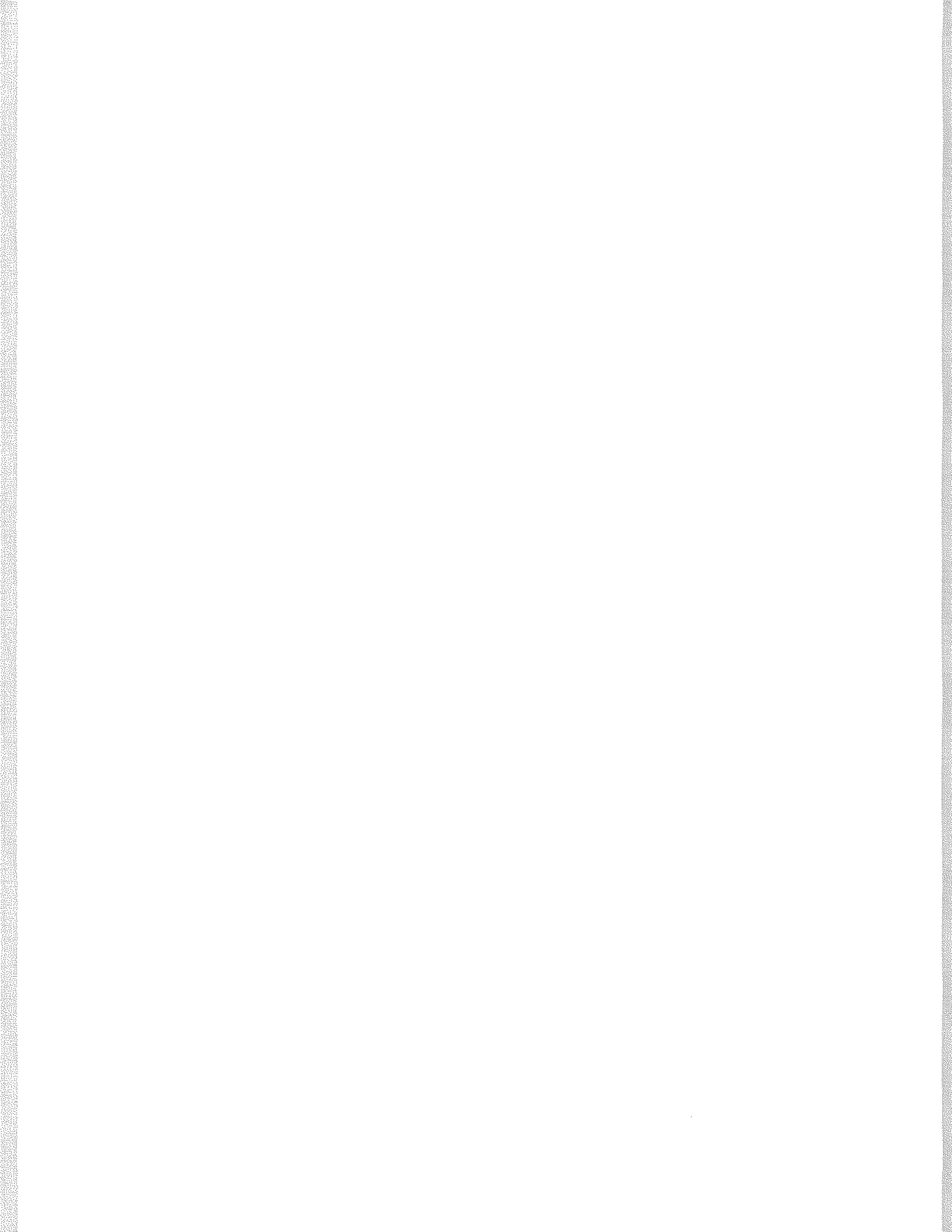


Introduction

On 22 July 2003, Treasurer Peter Costello announced 'the release of an exposure draft of legislation defining a charity for the purposes of all Commonwealth legislation,' (*Charities Bill 2003*).[1] He stated that this proposed redefinition of a charity closely followed the definition that had been determined by over four centuries of common law but that the new definition would provide greater clarity and transparency for charities. The proposed legislation covers the entire range of non-government organisations (NGOs) ranging from those which are active in poverty reduction to organisations ('think tanks') which carry out 'research directed towards expanding human knowledge'. By definition, they will all be considered to be 'charities'. Appendix 1 illustrates the size and complexity of the non-profit sector in Australia. Appendix 2 provides a select list of overseas aid NGOs, Australian NGOs and 'think tanks' which fall into the category to be captured by this legislation.

What is Being Proposed?

If this legislative proposal comes into effect, from 1 July 2004 an organisation endorsed to access tax concessions—including tax exemption as a charity and deductible gift recipient status—will need to be endorsed by the Australian Taxation Office (ATO), have its charity status attached to its Australian Business Number (ABN) and be able to be publicly accessed through the Australian Business Register (ABR). The aim of these changes is to enable greater government scrutiny of charities and improve public confidence in charities. The Treasurer also announced that the draft legislation had been referred to the Board of Taxation (BoT)[2] for consultation with the charitable sector to determine 'whether the public benefit test in the exposure draft should require the dominant purpose of a charitable entity to be altruistic, as recommended by the *Report of the Inquiry into the Definition of Charities and Related Organisations'*. Under its Terms of Reference the Board 'should consult primarily with organisations intended to fall within the new definition of a charity'.[3] Submissions were to be provided by 30 September and the Board was scheduled to provide its recommendations to the Government by 1 December 2003. This deadline has been extended and the Board is now expected to submit its report to the Treasurer by 19 December.

NGOs/charities expressed serious reservations about some provisions of the proposed legislation. Section 8 lists what would disqualify an organisation as a charity for taxation purposes. Sub-section (2c) provides for the disqualification of an organisation if it conducts activities for 'the purpose of attempting to change the law or government policy; if it is ... more than ancillary or incidental to other purposes of the entity concerned'. The explanatory note to this provision stipulates that, while NGOs can make representations to government which are incidental to their declared purpose, 'the independence of charities from government and from political processes is an important component of their role in serving the public benefit'.

Stakeholder Response

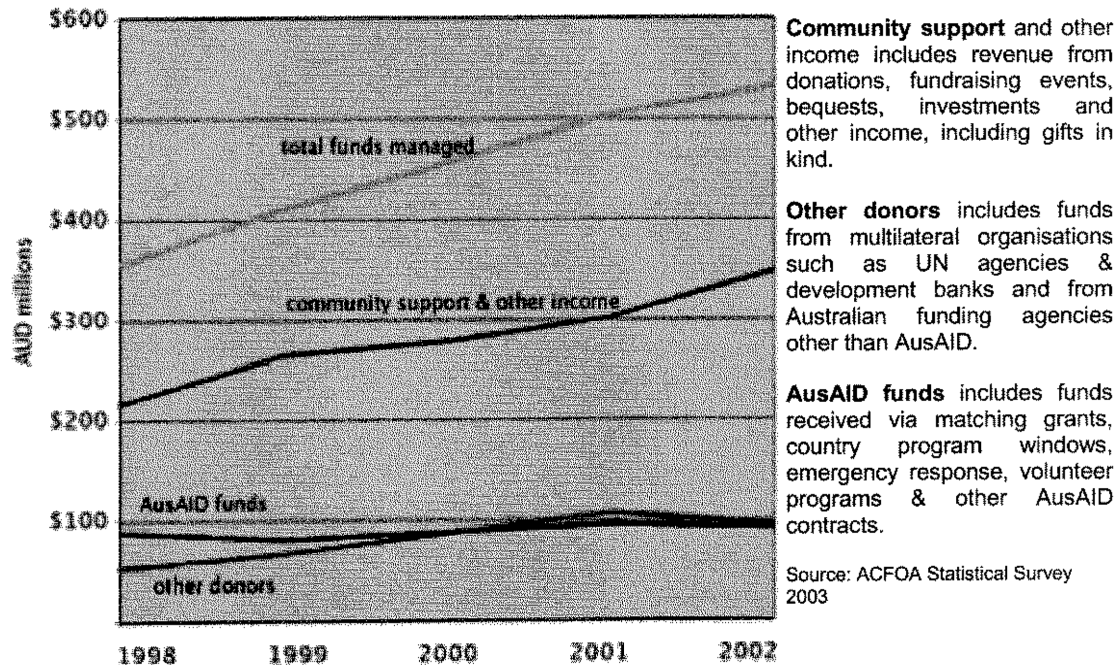
Stakeholders generally have criticised this proposal on two grounds. Firstly, the ATO, which would be responsible for administering this legislation would also have the authority to determine if an organisation was in breach of it. This would be 'unworkable and inappropriate' and the judicial system should be responsible for making such determinations. But, defending their charitable status through the judicial system could be 'potentially devastating to charities in terms of the financial costs'.[4] Secondly, on the basis that the 'disqualifying' definitions have given rise to the apprehension that the Government is 'seeking to restrain some charitable organisations or at least their peak bodies from critical comment. Aid agencies, for instance, regularly call for an increase in Australia's commitment to overseas assistance, now at its lowest percentage of GDP'.[5]

These criticisms were dismissed by the Treasurer, who stated that the proposed reform 'does not attempt to restrict criticism of public policy by recognised charities. There is no change from existing practice'.[6]

The Australian Council for Overseas Aid (ACFOA), with 80 overseas aid agencies as members, has also commented on the conflicting messages emanating from the government. Firstly, the government's aid agency, AusAID, lists governance (promoting democratic and accountable government and effective public administration) as one of the five key themes that guide Australia's aid program. The objective should be to 'encourage the development of robust, representative and capable civil society to create demand for good governance'. Secondly, it cites the current negotiations for NGO–AusAID cooperation agreements for Africa in which the priority for AusAID 'includes the capacity building of the partner NGO and relevant staff, in policy development and engagement'.[7]

Over one million Australians give their time or money to overseas aid each year and in 2002, contributed $358 million to overseas aid agencies. This represented more than 60 per cent of the aid agencies annual income. Community donations and other income increased at an average annual rate of 15.24 per cent during the period 1998–2002 compared to an average increase of 1.1 per cent of funds sourced from AusAID during the same period. ACFOA argues that if activities that the agencies undertake to achieve their organisational objectives are curtailed, 'their ability to satisfy community expectations will be hampered because the work they undertake will become less effective'.[8] In other words, the advocacy role of charities should not be singled out as a cause for disqualification. The table below is indicative of the public support for NGOs. Funds from the Australian community continue to provide the largest proportion of money for overseas work undertaken by Australian NGOs.

Overseas Aid Funds Managed by Australian NGOs 1998–2002



It should also be emphasised that charities and other not for profit organisations make a substantial contribution to the Australian economy. In 1999–2000 for example, this sector accounted for 6.6 per cent of Australians in employment and contributed 3.3 per cent of the GDP. (For details see Appendix 1). Philanthropy Australia, a peak body representing 217 philanthropic trusts, foundations and individuals, in its submission to the BoT has also been critical of the Charities Bill:

> To exclude lobbying, advocacy, or activities designed to achieve changes in government policy or legislation, is to take charities back 40 years. Such an exclusion would severely limit the effectiveness of many organisations, including the RSPCA, Cancer Councils, and environmental groups such as the Australian Conservation Foundation.[9]

The organisation is of the view that deficiencies in the Bill in its present form render it unworkable and that it should be abandoned.

Review by the Institute of Public Affairs (IPA)

Since the announcement of these planned legislative changes, the debate about the appropriate role and responsibilities of NGOs has become more heated, with the revelation that the Federal Government has appointed the Institute of Public Affairs (IPA) to audit how NGOs lobby or work with government departments. This move is controversial

mainly because the IPA, a 'think tank' NGO, is perceived to be 'a trenchant critic'[10] of the practices of many other NGOs, particularly environmental groups and those involved in foreign aid delivery.[11] The IPA audit is to cover eight Government departments and agencies which have substantial dealings with NGOs. Although the Departments themselves have not been named, they are expected to be 'those responsible for immigration, the environment, communications, forest and fisheries, foreign affairs and AusAID'.[12] The audit is due to be completed in December 2003.

Although no public announcements were made by the Government or the IPA at the time, the two had been involved in discussions on this issue since 2002.[13] The appointment of the IPA to conduct this audit was reported in *The Weekend Australian* on 2 August 2003, nearly a fortnight after the Treasurer's announcement of the BoT inquiry into the redefinition of charitable status. The newspaper report indicated that NGOs 'could be forced to prove they are legitimate representatives of community groups after the review', and stated that the Government had offered $2.5 million to fund a peak body for non-profit NGOs to be able to 'speak with one voice'.

The IPA has published a series of papers calling for greater disclosure and accountability by NGOs receiving funding from and working with Government agencies. The IPA's position is that NGOs represent a challenge to elected governments in democracies, because the electorate has no direct control over these organisations, their activities or finances.

In its January 2001 submission to the *Inquiry into the Definition of Charities and Related Organisations*, the IPA argued that a 'tight and watertight' statutory redefinition of charity was necessary. According to the IPA, organisations and activities not falling exclusively within the definition should not qualify. The IPA also recommended that the Australian Tax Office should supervise the application of definitions.

In June 2003, Gary Johns a Senior Fellow at the IPA, addressed a conference on NGOs organised jointly with the American Enterprise Institute (AEI) in Washington. He revealed that the IPA was currently undertaking a project for the Australian Government that could result in legislation similar to that existing in the US, under which the Government could 'ask that the credentials of NGOs who want access and who want money and resources be tested ...' [14]

Interestingly, the US legislation itself is not without flaws. As one commentator has observed, while the 'so called Gucci crowd' can spend as much as it wants to lobby government, yet, 'legally speaking, disability groups, hospices, community health centres and other(s) ... are regarded as something of a threat to the integrity of our political process. This is too large a price to pay for tax deductibility'.[15]

On 7 August, prominent Australian NGO, Oxfam Community Aid Abroad, 'condemned the government's decision to appoint the IPA to conduct a study of NGOs 'in light of the Institute's own NGO status and ongoing smear campaign against charities, welfare and aid

agencies'. It also stated that, in contrast to many other NGOs criticised by the IPA, the IPA itself lacked transparency with its board members not being democratically appointed and the Institute making no public disclosure of its corporate funding.[16]

Following further media coverage of the issue, on 8 August 2003 the IPA announced it had been awarded a contract by the Commonwealth Department of Family and Community Services to undertake a study entitled 'The Protocol: Managing Relations with NGOs'.[17] The objectives of the study are to make publicly available information and awareness about NGOs that have 'relationships' with the government. To capture the scope and nature of the Government–NGO relationships the study will cover the eight Government departments that have substantial dealings with NGOs. The report will contain:

- a comprehensive assessment of the links between key Commonwealth Departments and their client NGOs
- a framework for assessing the role and standing of NGOs, based on the information requirements of those Departments and Ministers
- a framework for a database of NGOs, including their standing, and
- a proposed trial Protocol that requests NGOs to supply information about their organisation that will be publicly available.

On 8 August 2003 *The Age* newspaper published an article by Mike Nahan, executive director of the IPA, endorsing the Government's draft charity legislation and accusing the non-profit sector of 'aversion to accountability'. On 10 August the *Sunday Age* quoted Gary Johns of the IPA as saying that the US system 'is the sort of direction in which we're headed'. He reportedly stated, 'It's up to government, but I'd like to see a system of disclosure'. Catholic Health Australia (which represents some 680 Catholic organisations) is of the view that the IPA audit 'only gives more credence to the view that there is an agenda to restrict charities either through less benefits or through 'big brother' tactics to gain compliance rather than permitting strong public advocacy'.[18] Other commentators argue the issue is not whether the IPA's views on NGOs are right or wrong, rather that the IPA is a player (with vested interests) in the very debate upon which it's been asked to adjudicate. One commentator claims that appointing the IPA to this role is 'akin to appointing the ACTU or the Australian Chamber of Commerce and Industry to conduct an inquiry on behalf of a government about labour-market laws!'[19] Arguably, too, the IPA is itself potentially susceptible to charges of insufficient transparency and accountability. NGO 'think tanks' like the IPA also have traditionally been the recipients of some forms of tax relief and have been criticised as reticent about disclosing the range of their sources of funding. The IPA itself intends for the first time to publish a list of donors in its next annual report.[20]

Conclusion

The debate about the accountability, funding and the ability of NGOs to lobby for their causes without losing their charity status is now on the public agenda. The redefinition of a charitable organisation currently being explored by the BoT, along with the IPA contract to enable the government to refashion its relations with NGOs, has already generated heated debate.

The response by ACFOA makes it clear that the draft legislation is perceived as an attempt to curtail what the NGOs consider to be legitimate means of achieving their objectives. However this debate is resolved, questions about the definition and accountability of NGOs are a legitimate matter of public concern. The controversy is likely to continue after the BoT and the IPA submit their reports in December 2003.

Endnotes

1. *Press Release No. 59*, 22 July 2003.
2. The Board of Taxation comes under the Treasury portfolio and provides advice to the Treasurer on taxation issues.
3. Board of Taxation, *Press Release No. 12*, 22 July 2003. The Report of the inquiry was released in August 2002.
4. Australian Council for Overseas Aid, *Submission to the Board of Taxation on the Draft Charities Bill*, September 2003, pp. 4, 8.
5. The United Nations Association of Australia in its newsletter *UNity*, No. 345, 1 August 2003.
6. *Press Release No. 66*, 30 July 2003.
7. ACFOA *Submission*, pp. 6–7.
8. ACFOA *Submission*, p. 7.
9. Philanthropy Australia, *Submission to the Board of Taxation On The Draft Charities Bill*, October 2003, p. 5.
10. Greg Barnes in the *Canberra Times*, 12 August 2003.
11. See, for example, IPA's Don D'Cruz in the *Australian*, 13 May 2002 and Mike Nahan in the *Age*, 8 August 2003.
12. *Sunday Age*, 10 August 2003.
13. ibid.
14. Transcript. *We're Not from the Government, but We're Here to Help*, Conference organised by the AEI and the IPA, Washington D.C., 11 June 2003.
15. Professor Jeffrey M. Berry in the *New York Times*, 30 November 2003.

16. *News Release*, 7 August 2003.
17. *Press Release*, 8 August 2003.
18. *Sunday Age*, 10 August 2003.
19. Greg Barnes in the *Canberra Times*, 12 August 2003.
20. *Sydney Morning Herald*, 12 August 2003.

Appendix 1: The Non-profit Sector in Australia

For an excellent overview of the Non-profit Sector in Australia, see Philanthropy Australia's Factsheet on the topic, which is available on the web at:

http://www.philanthropy.org.au/factsheets/7-05-03-nonprof.htm'

Appendix 2: Select Overseas Aid NGOs

Adventist Development & Relief Agency

Australian Baptist World Aid

Australian Foundation for the Peoples of Asia and the Pacific

Australian Legal Resources International

Australian Lutheran World Service

Australian People for Health, Education and Development Abroad

Australian Red Cross

Australian Volunteers International

Australians Caring for Refugees

Burnet Institute

CARE Australia (CARE)

CARITAS Australia

Christian Children's Fund of Australia

Credit Union Foundation Australia

Fred Hollows Foundation

International Women's Development Agency

Leprosy Mission

National Council of Churches Australia

Oxfam Australia

PLAN International Australia

Salvation Army

Save the Children Fund Australia

UNICEF Australia

World Vision Australia

World Wide Fund for Nature

Anglican Board of Mission Australia

Anglicans Cooperating in Overseas Relief and Development

Archbishop of Sydney's Overseas Relief and Aid Fund

Australian Conservation Foundation

Australian Cranio-Maxillo Facial Foundation

Marist Mission Centre

Medecins Sans Frontieres

OzGREEN–Global Rivers Environmental Education Network (Aust)

Select Australian NGOs

Smith Family

St Vincent de Paul

Leukaemia Foundation

Heart Foundation

Cancer Council

Salvation Army

Australian Conservation Foundation

RSPCA

Think Tanks

There are a few but growing number of privately funded think tanks which conduct research on foreign policy, social and other issues. A number of them also enjoy some form of tax concessions. For example, donations to the Centre for Independent Studies and The Australia Institute are tax deductible while the Institute of Public Affairs enjoys tax exempt status under Section 50–5 of the Income Tax Assessment Act.

Ms Louise Gell
Australian Senate Legal and Constitutional References Committee
Parliament House
Canberra ACT 2600

By email legcon.sen@aph.gov.au

15 December 2003

Dear Ms Gell

Inquiry into Legal Aid and Access to Justice - Response to Questions on Notice

Thank you for providing the Combined Community Legal Centres Group NSW with the opportunity to respond to questions asked at the public hearing of the Committee on 13 November 2003.

1. Statistics regarding access of culturally-diverse communities to community legal centres

In our written submission to the Inquiry, CCLCG noted (p. 31) that some CLCs are accessed by more culturally diverse communities than others. In the hearing, Senator Bolkus asked us to substantiate the use of CLCs by culturally diverse communities.

Data from the National Information Service shows that over the three years 1999 to 2002, 28.1% of service users of CLCs in NSW were born in a non-English speaking country. This compares to the figure of 17.9% which is the proportion of the NSW population born in a non-English speaking country.

The above data is taken from the Draft Report of the Law and Justice Foundation of NSW, *Access to Justice Data Digest - NSW Community Legal Centres*, October 2003. We understand that the Foundation intends to provide a copy of this data to the Senate Committee in the new year.

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2. Charities legislation

Senator Nettle asked CCLCG to outline concerns that we have of the possible effect of the Charities Bill 2003 on community legal centres. We undertook to send a copy of the submission made by CCLCG to the Board of Taxation relating to the draft *Charities Bill 2003*. This submission is attached to this letter. We also attach a briefing paper from the Department of Parliamentary Library which outlines the broader debate in relation to NGOs, although we note that the Department of Parliamentary Library's briefing paper neglects to mention that community legal centres would also be affected by the Charities Bill.

It is the opinion of CCLCG that one of the greatest threats to the funding and effectiveness of community legal centres comes from attempts by the Federal Government to restrict charities from engaging in law reform and advocacy, either through taxation laws or through funding stipulations. The *Charities Bill 2003* is one such attempt.

Like most community organisations in Australia, community legal centres are given charitable status, which gives substantial taxation benefits, enabling centres to provide more services with the same amount of funding.

The Bill as it stands (15 December 2003) has the potential to significantly limit the ability of individual community legal centres to assist clients. This is because CLCs will be forced to choose between reducing services as a result of losing its charitable status, by continuing to fulfil its obligations to undertake it's core service activities which include advocacy and law reform, or limiting the services its provides to clients. Either way the end result will be a reduction of services to clients.

The threat of defunding or loss of taxation benefits is in itself likely to have a silencing effect on community legal centres. For example, if a legal centre speaks out against a particular law or policy (for example the inadequate funding of legal aid), individuals who disagree with their perspective could complain about the organisation to the Australian Taxation Office and suggest that the organisation is engaging in too much advocacy. Traditionally, in a democratic society, someone who disagrees with the viewpoint of another would engage in an open debate on the issues.

If CLCs or CCLCG actually lose or are refused charitable status, we will suffer substantial financial loss. This would seriously undermine the capacity of community legal centres to continue providing legal services to disadvantaged communities. CCLCG for example does not only represent the interests of legal centres to Senate Inquiries, but it also resources individual legal centres through sector-wide training, writing and distributing of resource materials (for example guides for management committees and information on financial issues faced by CLCs).

Unless governments offset the loss of these financial benefits with substantially increased funding grants to legal centres and the peak bodies, many centres will simply no longer be viable not longer viable. This would then have a flow-on effect of increasing pressure on other legal service providers, notably government-funded services such as Legal Aid Commissions.

3. Legal aid for employment law

Senator Payne asked whether NSW CLCs had approached NSW Legal Aid Commission about employment law matters. Mr Moran responded but also took the question on notice, to get more up-to-date information.

We can confirm that CCLCG has discussed the possibility of the Legal Aid Commission providing legal aid in employment law over a number of years. We are currently awaiting the results of the NSW Legal Aid Commission's civil law review, and we remain hopeful that employment law may be an area which the Commission will take on.

4. Family Law caps

Senator Payne asked whether CCLCG believes the family law caps should be lifted or removed, given that some parties to proceedings may merely engage in vexatious actions extending the litigation to exhaust the cap. More particularly, Senator Payne asked whether we had suggestions for getting the Family Court to conduct better case management.

The first point we would like to make is that the issues in relation to Legal Aid caps and vexatious litigants should not be in any way connected to each other. Legal Aid capping is a Legal Aid policy and a Legal Aid issue. Management of vexatious litigants is a Family Court issue.

CCLCG strongly opposes Legal Aid caps in family law. The capping policy severely restricts women in their ability to respond to or apply for family law orders to protect their children. It forces women, faced with reaching the Legal Aid cap and having their legal representation pulled, to agree reluctantly to unsafe and unworkable family law orders. It acts against the best interests of the child - which forms the basis of the *Family Law Act*. In this way Legal Aid's capping policy breaches human rights instruments such as the Convention on the Rights of the Child.

Vexatious litigants are a Family Court issue. This group of litigants are (comparatively) very small in number but waste a large share of Court (and other party's) resources. The Family Court needs to improve its case management systems for dealing with vexatious litigants. At a case management level the Family Court should look at ways of assessing documents filed in proceedings by parties who have a long history of family court proceedings and/or several other applications on foot. The Family Court could set up processes whereby, for example, a Registrar in certain situations assesses the documents a litigant is seeking to file and refuses to accept the new application if it is determined to be vexatious.

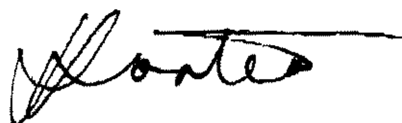
The Family Court have a history of being reluctant to declare parties vexatious. Orders declaring litigants vexatious (available to the Court under ss 117 and 118 of the *Family Law Act*), and allowing costs to be ordered against such litigants, should be made more readily by judges.

Using the concerns about vexatious litigants as a justification for keeping a policy of legal aid capping means that women and children (the largest share of legal aid grant recipients in family law) are doubly penalised for the behaviour of vexatious litigants. The responsibility for managing and limiting government money spent on vexatious litigants lies with vexatious litigants themselves and the Family Court. The responsibility for assisting disadvantaged people to gain access to justice lies with Legal Aid and uncapped legal aid grants in family law is the only way of ensuring this.

CCLCG understands that Zoe Rathus will be giving evidence on behalf of the National Network of Womens' Legal Services before the Committee in Queensland in early February 2004. Ms Rathus will also address the issues in this question in her opening address to the Committee, so further questions on the issue could perhaps be referred to her.

Thank you for allowing us to provide additional information in relation to these questions. We hope these answers have provided sufficient information to the Committee. If you wish to make further enquiries or seek further clarification, please contact Polly Porteous on 02 9318 2355 or Polly_Porteous@fcl.fl.asn.au.

Yours sincerely



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