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2 December 2011

Manager
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Dear Sir/Madam

SUBMISSION IN RESPECT OF THE PROPOSED INTRODUCTION OF A STATUTORY DEFINITION OF 'CHARITY'

INTRODUCTION

General

1. The Australian Council of Jewish Schools (ACJS) expresses gratitude to the Philanthropy and Exemptions Unit for the opportunity of making this submission.
2. Each of the registered schools that are members of the ACJS are also members of their respective Association of Independent Schools (AIS) and each school generally supports the submission of their AIS and the ISCA.
3. These submissions deal with those matters of particular importance to Jewish schools and Early Learning Centres together with those aspects that are peculiar to our Schools' interests.
4. The ACJS represents 19 Jewish schools throughout Australia (2 schools have 2 campuses registered as schools) and also has, amongst its membership, an organisation that provides Hebrew language and Jewish studies to government schools. Each of our schools also manages an early learning centre.

5. Generally, the interests of the Jewish schools are represented by the respective AIS on matters that are common to the non-government sector. Most interests affecting the operation of schools are common to the sector. The ACJS has also sighted the submission prepared by the ECAJ and the ACJS supports that submission
6. Each school has a board of management, which includes members of the Jewish Community, including parents of students at the school, and operates under very strict governance principles, including the election (sometimes contested election) of officeholders. Each school operates on a not-for-profit basis and no officeholder is entitled to be employed by the school, or to contract with the school other than on a strictly transparent basis.
7. The ACJS Schools and the associated Early Learning Centres, are academically non-selective and vary in average socioeconomic status considerably. Many ACJS Schools will enrol non-Jewish students, although preference is given to students of the Jewish faith (or persons converting to Judaism). Further, the ACJS Schools vary significantly in their approach to religion, culture and ethos.
8. For example, in both Sydney and Melbourne there are schools that cater for Progressive Judaism, modern Orthodox Judaism and “Torah True” Judaism. In Melbourne, there are also schools that cater for “cultural Judaism” (i.e. the teaching of Jewish culture but otherwise consistent with pluralism).
9. All of these schools are represented by the ACJS to both State and Federal Governments, within the AIS community and generally. Their interests are significantly different in some areas, and these interests are generally considered and catered for by Governments, other non-government and government schools, and the community generally.

Enrolment Policy and Internal Subsidies in Each School

10. As earlier stated, the ACJS Schools are non-selective. The Jewish community has a long history of support for education. Education is one of the key fundamentals of Jewish culture. This has been the case for at least 2000 years. The Jewish community considers that education, including education in its own culture, is one of the cornerstones of Jewish continuity.
11. Judaism (and Jewish culture, if that be different) has developed, or has always taught, policies which would, today, be classified as multiculturalism. The Jewish view is that members of the Jewish community should integrate into general life, while adhering to Jewish values: integration, but not assimilation.
12. As a consequence, the Jewish community has always expended a far greater proportion on education than is the norm. It also has continued to adhere to a policy that no Jewish child should be denied an education; nor denied a Jewish education for financial reasons. This practise results in the need of the schools to rely on wide community support in addition to fees charged.

13. Enrolment at our schools occurs at a young age (i.e. well before admission) and enrolment is accepted, generally, without regard to the capacity to afford fees. If, on admission of a child, a family is unable to afford education at the particular institution, a number of different methods are used to subsidise that education and to allow the child or children to continue at the school.
14. The methods used to cross subsidise poorer members of the community vary from school to school and from State to State. In New South Wales, for example, there is a general communal appeal from which the schools are allocated amounts to subsidise families that are unable to afford the ordinary level of school fees and each school effects further subsidies from its fees. That subsidy will vary depending upon the means of the family. In Victoria, Western Australia, South Australia and Queensland, each school takes its own steps in order to subsidise families, usually by way of cross-subsidisation from within the fees otherwise received. Our schools are often aligned for a variety of reasons to various community bodies.
15. Generally, but not universally, the school will insist upon a commitment to some fees, albeit, in some cases, quite nominal. The number of families on subsidy fluctuates, and the proportion of families varies between the different schools. In some of our schools up to 83.2% of families are subsidised. The lowest proportion of subsidised families was, in one year, 7%, but generally would not be lower than 13%, at any school. The median proportion of students assisted at ACJS Schools is 29.6%, and the average 30.9%.
16. The means test by which an entitlement to subsidy is measured, and by which the level of subsidy is fixed, includes family income, family size, family assets and takes account of disposable income. If income alone were the criterion by which subsidy was measured, there would be significant anomalies and inequities in the application to different families.
17. Further, there is no academic selectivity in the enrolment process. Except to the extent that a young child may be classified as not yet ready for school (on the same basis that would occur in, say, government schools), all children are accepted, without regard to academic performance.
18. ACJS Schools also have a significant number of students who suffer intellectual and/or physical disabilities, for which additional funding is available from the government, but, unfortunately, at a minimal level. Three ACJS Schools have over 7% of such students, the highest being 15%. No school has less than 1%; the median being 2%, and the average 4%.
19. ACJS Schools are mostly co-educational and operate mostly at both primary and secondary levels. The "Torah True" religious Jewish schools are single gender schools (for at least all classes above Year 4) or operate single gender campuses, for reasons associated with a strict application of religious ethos. Some of the ACJS Schools operate only at a primary school level. Most of the schools conduct a preschool, and/or operate early childhood services, on a sessional or long day-care basis.

20. Each of the schools conduct programs through different structures that integrate the teaching of general studies with religious studies. The primary objective of the organisations which conduct the activities is often difficult to define. Education by definition includes the teaching through formal and informal methods of core designated curriculum as defined by ACARA as well as the teaching of moral values, civics and citizenship as well as religion and religious teaching.
21. The activity in the main includes formal class room teaching. It however also includes extracurricular activities that occur in a form of social environment that may be conducted through youth group and may occur during or out of normal school hours. Our school day is extended in order to take into account the dual general and religious curriculum in a variety of delivery methods. A number of our schools conduct weekend classes and a number are associated with youth groups that meet on weekends and evenings to deliver an informal education program in line with the values and teaching of the school.
22. Using existing definitions of charitable purpose, where both “the furthering of educational goals” and the “furthering of religious teachings” and practises were both deemed naturally charitable purposes the distinction between the two was less important, as goals were in either situation being met. The introduction of a public benefit test may impact in one area affecting the charitable status of the other, particularly if sole purpose is also introduced. This can have an overall global adverse impact on the totality of our educational programs as the two although delivered and managed through separate structures are highly integrated and dependent on each other.
23. If the tests that will be introduced in respect of public benefit differentiate between religious practise and teaching and core educational practise and the dominant purpose more strictly defined as the sole purpose, the practical application may present considerable difficulty for our organisations. The interrelationship and cross methodology cannot be underestimated.
24. The ACJS in reading the draft definition and the associated discussion fears that the Philanthropy and Exemptions Unit may have underestimated the complexity and interrelationships that give rise to “faith” based school education. There are structures in place that distinguish the general teaching arms from the religious teaching arms and again distinguish from the fund raising arms all of which combine as one to deliver an integrated program.
25. The ACJS sees the need for flexibility between these arms as essential to conduct its activity and maintain the outcome that has been achieved to date within our educational structures. The distinction between charitable purposes in education is very difficult and impractical to distinguish between. Our educational programs are multifaceted and integrated programs that cannot be categorised having a single purpose.

Question 1: Are there any issues with amending the 2003 definition to replace the 'dominant purpose' requirement with the requirement that a charity have an exclusively charitable purpose?

26. Education requires a multi faceted approach and educational concepts cross defined boundaries. The “dominant purpose” by definition can be an inclusive concept that allows movement in and around the purpose in executing the purpose goals. The change to an “Exclusive purpose” can result in restrictive activity depending on how it is interpreted. If interpreted to restrictively, or too literally, the restriction can prevent the ultimate outcome from being achieved.
27. Educational activity involves a multitude of enterprise and a variety of objectives which by definition cross paths. Within the teaching of the Jewish faith, and at our schools, there is the teaching of religious culture and practise integrated with the teaching of core curriculum. This includes both theoretical and practical teaching.
28. An example of the issue can be demonstrated as follows:
 - a. Within the teaching concepts, the relief of poverty and care for the needy is a fundamental and key component. Within itself the relief of poverty is a charitable purpose on its own.
 - b. The relief of poverty however is only one aspect taught as a part of religious practise. Scripture, text, tradition and culture is another part of a charitable purpose under the heading of the advancement of Religion.
 - c. These aspects are taught in conjunction with and integrated into the teaching of general curriculum as defined by the State. The general education falls under yet another charitable heading, “the Advancement of education.

These aspects coupled with differing corporate structures and fundraising structures add to the complexity envisaged if dominant purpose is changed to sole purpose.

29. The present funding system as it applies to Independent schools determines a reliance on community fund raising. This within our faith based schools is even more prevalent as our funding mechanisms from Government do not fund the religious teaching aspects nor do they assist in the infrastructure required to deliver that program. Structures to fund raise are also required. These include as well as the structures to deliver the direct programs, structures to manage and operate Building Funds, School Library Funds and other associated funds to assist with overall education as noted above in paragraphs 12-18.

30. The implementation of the educational programs in a faith based environment involves activities of a wide nature. In some cases these activities may appear in themselves, not to have a charitable purpose and may emulate on the surface a commercial or other enterprise. To change the eligibility criteria from a dominant purpose that has been interpreted to include activities that are 'incidental or ancillary to a charitable purpose if it tends to assist, or naturally goes with, the achievement of the charitable purpose' could if interpreted too strictly, or in the future to be a "sole purpose", may prevent the inclusion of the activity and deteriorate the overall program frustrating the achievement of the charitable purpose overall.
31. The redefining of charitable eligibility to that of a sole charitable purpose will likely bring into question each and every activity undertaken. The task of applying each activity that may appear to fall outside the sole defined charitable purpose will delay the introduction of programs and increase the management costs considerably and again detract from the overall charitable purpose.
32. The present system as noted with the consultation paper requires on-going internal assessment of the charitable activity and ensuring compliance with the dominant purpose. This too is subject to independent verification. The ACJS would not support the change from "dominant purpose" to "sole purpose"

Question 2: Does the decision by the New South Wales Administrative Tribunal provide sufficient clarification on the circumstances when a peak body can be a charity or is further clarification required?

33. The legislation should expressly provide that a body whose dominant purpose is to enhance the effectiveness or viability of charitable organisations by providing them, on a not-for-profit or membership only basis, with professional development, mentoring, advocacy, planning, financial, investment or other support services should also be a charitable institution. The ACJS supports that peak bodies in the circumstances outlined be charitable institutions within themselves.

Question 3. Are any changes required to the Charities Bill 2003 to clarify the meaning of 'public' or 'sufficient section of the general community'?

34. The question of "public benefit" goes beyond the definition of "public" and also considers what might be considered a definable quantity of members of the public to be sufficiently represented and to have their activity if otherwise eligible recognised as charitable.

35. There has been a standing practise that what benefits members of the Jewish community (and other statistically smaller groups) irrespective of statistical representation is deemed to be in the overall public interest if that group (and potentially others) benefit.

The ACJS would be opposed to any change in that understanding or application.

36. The Charities Bill 2003 provided that a purpose is not directed to the benefit of a sufficient section of the public if the people to whose benefit it is directed are numerically negligible. The ACJS believes this definition of 'a sufficient section of the public' that is based exclusively on numerical criteria can lead to discrimination and ineligibility based on popular practise or statistical anomaly.
37. This is of particular concern within the Jewish community as there is within the community and amongst the schools, schools which have an interest in cultural and heritage teaching, schools that give priority to specific religious and or other aspects of learning and or religious priority, and schools that lean to the generalisation. Each of these groups and schools, service communities that could statistically be identified and deemed to be statically negligible.

Question 4: Are changes to the Charities Bill 2003 necessary to ensure beneficiaries with family ties (such as native title holders) can receive benefits from charities?

38. The question of family heritage, culture and affiliation and identification is important. It is clearly important to members of races, such as Aboriginal and Torres Straight Island families. It is equally as important to families that have come from other culturally at risk communities and in other cases, families of people who have suffered from an event, common and significant community crisis or natural disaster.
39. The present legislation accommodates these aspects when deemed sufficient by making one off exceptions or granting one off specific event allowances, such as the Black Saturday bush fire relief appeal, or the Queensland flood relief appeals. The definition of charity should be sufficient to incorporate family ties from a range of events, relationships or associations based on a family tie, rather than an exception application.

Question 5. Could the term ‘for the public benefit’ be further clarified, for example, by including additional principles outlined in ruling TR 2011/D2 or as contained in the Scottish, Ireland and Northern Ireland definitions or in the guidance material of the Charities Commission of England and Wales?

40. The Charities bill 2003 determined a charitable purpose where
- a. There was an aim for a common good and
 - b. There was a practical utility and
 - c. It is directed to a significant section of the general community

Common law develops over time to accommodate the perceived changing conditions and the altering needs of society. In some senses this will reflect on social process to effect change in public opinion.

It is our view that the legislature should determine the proper definition of charity and not leave it to the judiciary to develop a code that is absent of legislative intervention.

The question of applicability to a significant section of the community was addressed above in paragraphs 34-36

Question 6. Would the approach taken by England and Wales of relying on the common law and providing guidance on the meaning of public benefit, be preferable on the grounds it provides greater flexibility?

41. The common law interpretive reliance is based over time on public and or perceived public vocal opinion. The media today is active through its emotive language and often through its release of selective superficial information designed to generate sales, acts in a manner that it sees in the public interest. The media is active in forming and directing public opinion. In respect of charitable organisations the Common good needs to have protection for minority and small sector populations. Common law determination is not appropriate without deeming guidelines.
42. Common law determinations can have the effect of setting guidelines and of making aspects of charitable acts a defining feature to determine a charitable purpose. Our schools operate in a variety of ways and provide support and education in a variety of ways. It would not be appropriate for a “test case” to determine that one way is better than another, and thus by common law be interpreted thereafter that all schools should follow a defined practise in order to meet the public benefit test.

43. In other words, the tolerance that Australia has traditionally displayed toward minority groups, religious or otherwise (with the possible exception of the Indigenous Community) should not be discouraged. It is essential if Australia is to continue as a fair and just society that what is considered good for minority groups is considered good for Australia. The tests by which this is measured must accommodate multiculturalism and religious tolerance as well as the teaching of religion by religious groups in society.

Obviously there could be tests associated with religious teaching that ensure such teaching is not inconsistent with the general enjoyment of all Australians, but the legislature needs to ensure that the charitable purpose is not diminished.

Question 7. What are the issues with requiring an existing charity or an entity seeking approval as a charity to demonstrate they are for the public benefit?

44. The response to this question in the absence of the other issues and questions raised is difficult to respond. The response will vary depending on the outcome of “dominant purpose” versus “sole purpose” and of course the interpretive decisions on what constitute a sole purpose. The extent of the issue will also change depending on what is determined as a significant section of the public and how that is measured. The extent of the issue will change again depending on what test is required to demonstrate common good.
45. The overturning the presumption of common good in respect of the four existing heads, and requiring organisation to demonstrate that they are for the public benefit and that they represent a significant sector of the general community would impose very significant additional compliance costs and reduce the funds and time that charities have available to meet their core purposes.
46. The demographic and social research that would be required to meet the criteria in cases of smaller communities or special interest schools would be such that the onerous task involved would see the school fail. These smaller special interest schools rely heavily on volunteers to manage and direct the school. If their time is taken in overseeing and sourcing, demographic studies to demonstrate statistical representation and social research to demonstrate common good and overall outcomes, the school will not receive its management and direction and the core activity will fail as a result of the compliance and registration testing requirements.

Question 8. What role should the ACNC have in providing assistance to charities in demonstrating this test, and also in ensuring charities demonstrate their continued meeting of this test?

47. Organisations that have been established for the relief of poverty, the advancement of education or the advancement of religion (whether they are existing charities or entities seeking approval as charities or new organisations, the ACJS supports the maintenance of the existing presumption of public benefit for such bodies.
48. The ACJS is of the view that the ACNC should act in a monitoring role in a way that they assist the schools and entities comply with the charitable purposes and guide them through the legislative and registering requirements.

Question 9. What are the issues for entities established for the advancement of religion or education if the presumption of benefit is overturned?

49. In response to this question we refer you to our response at paragraphs, 40 to 42

Question 10. Are there any issues with the requirement that the activities of a charity be in furtherance or in aid of its charitable purpose?

50. The World Investments decision, accepted, the activities undertaken by an entity need not be intrinsically charitable for the institution to be charitable. Our schools as noted above conduct activities in a variety of fields in order to demonstrate and teach the practical implication of the teachings of both general and religious study. The activity within itself at any given time may not be charitable within its self or meet that purpose if looked at in isolation. It is imperative that any legislation consider the intent of the activity and the ultimate use of funds when considering charitable purposes and be interpreted as widely as possible.
51. The response again in respect to this question will be different with additional care and considerations required if the dominant purpose is replaced with a sole purpose. The integration of dual activities may well be impacted.

Question 11. Should the role of activities in determining an entity's status as a charity be further clarified in the definition?

52. Refer to paragraphs 49 and 50

Question 12. Are there any issues with the suggested changes to the Charities Bill 2003 as outlined [in the Consultation Paper] to allow charities to engage in political activities?

53. The role of a peak body represented group and or a charity or school as a part of achieving its goals must be in a position to advocate for rules, laws, legislation and regulation that allow it to further its purpose and to act in furthering its purposes.
54. A definition of political activity as activities that seek to attempt to change the law or government policy, or decisions of governmental authorities should not be deemed as political activism for charitable purposes.

Question 13. Are there any issues with prohibiting charities from advocating a political party, or supporting or opposing a candidate for political office?

55. The ACJS as are our constituent members are apolitical, and bipartisan. As a peak body we do not advocate for a political party or a particular candidate on a personal level. It is important however to be able to distinguish between the support for a candidate or party, and the policy of that candidate or party as it impacts on the activity and or charitable purpose with which we engage.
56. If there is a prohibition introduced that limits advocating for a political party or a particular candidate, it must be clear that advocacy in respect of policy must be allowed to occur.

Question 14. Is any further clarification required in the definition on the types of legal entity which can be used to operate a charity?

57. There is no present entity structure that really suits a not-for-profit. Entity structures can vary immensely and must have the flexibility to be sufficiently adaptive so that a structure can meet and comply with the operating stakeholders with which it engages.
58. Clause 56 above presupposes that the not-for-profit clauses and wind up clauses are suitably embedded in the structural documentation.

Question 15. In the light of the *Central Bayside* decision is the existing definition of ‘government body’ in the Charities Bill 2003 adequate?

59. In the 2003 *Central Bayside* decision, the High Court, considered the meaning of government control, and whether on the facts the extent of government control and influence meant the entity was carrying out the functions of government. In the case of Independent schools and the question of funding that is now of public interest this question arises specifically and it is questionable as to what was determined by partnership arrangement
60. It must be clear that within the legislation that it is the dominant purpose that is deemed charitable in its own right. That purpose should not be considered in the light of who else may be providing that service or activity. It should not matter if that service is also provided by Government, a semi Government body, a government company or another charitable institution.
61. In respect of receipt of funds and contributions from Government, these funds should not determine or be a deeming factor in the definition of a “government body”. The compliance requirements that are a part of receiving Government funds should also not be considered as an act on behalf of government.

Question 16. Is the list of charitable purposes in the Charities Bill 2003 and the *Extension of Charitable Purposes Act 2004* an appropriate list of charitable purposes?

62. The ACJS maintains concern that with lists of charitable purposes defined, the activity becomes the primary determinant and there can be a loss of dominant purpose.
63. ACJS schools, has a wide integrated program that cover a large variety of activities designed to achieve their goals from an educational and religious or cultural perspective. To define each activity or to limit activities to those activities on defined lists can limit the initiative of the teacher and the program impact. It is the submission of the ACJS that the activity be demonstrated applicable to the dominant purpose to be considered eligible and not subject to its presence on a list.

Question 17. If not, what other charitable purposes have strong public recognition as charitable which would improve clarity if listed?

64. To identify today and enact today a defined list of charitable purposes limits the ability to recognise and address new issues as they become apparent. Today's society is changing very fast. Technology is introducing issues through social media that 5 years ago or even 2 years ago were not evident or thought of. Tomorrow may well have a new issue that require address. It is imperative that the legislation be adaptive and a guide. It must not be comprehensive, all inclusive and exhaustive.
65. Educational institutions are often the first to detect these new phenomena and their impact. The dominant purpose criteria as distinct from the sole purpose criteria, acts naturally to address this issue. The ACJS does not support the introduction of a pre approved list of charitable purposes

Question 18. What changes are required to the Charities Bill 2003 and other Commonwealth, State and Territory laws to achieve a harmonised definition of charity?

66. The Australian Government through a range of bodies is presently defining consistent guidelines and definitions that will apply in all States and Territories equally. They are presently doing this with
- a. ACARA and the Curriculum and National testing:
 - b. AITSL and national teacher registration criteria:
 - c. Early Years reform Agenda and
 - d. are looking at the same logic in respect of equal opportunity and discrimination.
- It is imperative that the Charities Bill be nationally accepted. Peak bodies and institutions, today work across State and Territory boundaries. Funds and services need to be applied where necessary and the rules and guidelines should be uniform.

Question 19. What are the current problems and limitations with ADRFs?

67. As noted above, the relief of poverty and the addressing of need whether caused by natural disaster or other event is a part of the teaching within our schools. The wider the definition and broader the assistance the more this enhances our teaching.
68. A concept within our religious and general teaching is to assist in areas of need and to not be judgemental in respect of the creation of the need or the needy themselves. To this end the wider the definition and the more inclusive the more appropriate.

Question 20. Are there any other transitional issues with enacting a statutory definition of charity?

69. In the event of any change extensive consideration and time must be given to the impact on any currently-existing organisation.
70. In respect of change that adversely impacts on the activity of an existing organisation the ACJS argues that a grandfather and a carryover provision be adopted and any new rules apply to newly registering organisations only.

The ACJS thanks the unit for considering the issues that we raised and for offering us the opportunity to respond.

Through the structure in which the consultation has been phrased and broken into divisions, sections and topics, the ACJS is concerned that the responses will not allow the unit to appreciate the complexity, interrelationship and extent of integration of charitable purposes being undertaken that our schools operate through. The diversity and structure of our schools with changing goals needs and methods, complicates these issues further. Many of the consultation question outcomes impact on latter questions. The risk we foresee is the prescription becoming inflexible and within that urge the unit in its deliberations to protect against inflexibility and to protect small statistical groups within the general community and to take care that “the common good” test is applied in a manner that protects against short term public opinion that may at a time be misdirected.

We invite you to contact us so that we can elaborate or clarify in respect of this submission.

Yours Sincerely



Leonard Hain,
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