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Philanthropy and Exemptions Unit
The Treasury
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PARKES ACT 2600

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Dear Sir / Madam,

Please find attached a submission from Changemakers Australia to the Consultation Paper on a Definition of Charity.

Changemakers' role is to grow the resources from the philanthropic sector towards better supporting charitable organisations to address the underlying causes of social and environmental ills. With close links to both the philanthropic sector and the wider not for profit sector, we are interested to see both sectors strengthened through the government reform process.

Modernisation of charity law is a key priority of Changemakers as the out-dated nature of charity law has stymied the not for profit sector in reaching its potential. We support the concept of having a statutory definition of charity and welcome the opportunity to have input into this process as a means of ensuring the eventual definition is robust and has wide community support.

Our interest in charities working to address the root causes of social and environmental problems has led us to focus on advocacy. We were funded by the Legal Services Board of Victoria to undertake research into the barriers faced by charities undertaking or funding advocacy and in April of this year we released the report *Freedom to Speak, Capacity to Act*.

This report identified the restrictions on political activity under charity law, emanating from the 'political purposes doctrine', as being a significant barrier to advocacy. While 'doing' charities understood that they could undertake advocacy with some restrictions, philanthropic organisations perceived much higher levels of legal restriction impacting upon the funding of advocacy. Generally, there was (and still is) much confusion within the philanthropic sector about the law in relation to advocacy and what should be done to comply with it.

The report concluded that many of the barriers to advocacy would be removed if the Australian Tax Office (ATO) reflected the High Court decision on Aid/Watch in the Charities Tax Ruling. We therefore focused attention on the process of formulating TR 2011/4, including working with the ATO, the Australian Council of Social Service, NSW Council of Social Service and Victorian Council of Social Service to hold two forums to consult with not for profit organisations on the draft Tax Ruling.

Over one hundred people participated in these forums, demonstrating the high level of interest within the sector. In the past month we have also held workshops with the ATO and Philanthropy Australia to inform philanthropy about the changes due to TR 2011/4. We have plans to continue educating philanthropy and the not for profit sector about the changes to the law relating to advocacy.

Clearly, ensuring the statutory definition reflects the shift in the law post Aid/Watch is an important goal for Changemakers. The Gillard Government is on the record as supporting the integration of the High Court decision on Aid/Watch into the statutory definition and we commend the government for this approach. We understand that the last attempt to establish a statutory definition failed largely due to the way the draft legislation restricted advocacy, so it is crucial that this aspect of the legislation is dealt with adequately.

We believe that the best contribution Changemakers can make to the consultation process is to focus on the issue of advocacy, towards upholding the principles of the High Court decision, in a manner that is clear for charities. Therefore we have not attempted to respond to every question in the consultation paper.

We also note that other organisations we collaborate with are making submissions that pick up on their particular areas of expertise and interest. We broadly endorse the submissions of ACOSS, PILCH Connect and Philanthropy Australia. In addition we note that Melbourne University Law School has made a substantial submission, based on their significant knowledge of charity law, both in Australia and overseas, and also the sector which works under the law.

Finally, we understand that the current consultation process will have no impact upon the overall framework of tax concessions which charities can access. In supporting the process of clarifying what a charity **is**, Changemakers also stresses the importance of revisiting what it **means to be** a charity. In particular, we believe the inequitable distribution of access to deductible gift recipient status must be addressed by the Government. We note that Minister Shorten has flagged a future process to consider tax concessions in the latest Treasury Not-For-Profit Reform Newsletter. We look forward to the opportunity to participate in the next round of reforms, towards providing a clearer, fairer and more coherent approach by Government to the NFP sector.

Yours sincerely,

Jill Reichstein

Chair

Responses to consultation paper

Political advocacy - questions 12 & 13

Are there any issues with the suggested changes to the Charities Bill 2003 as outlined above to allow charities to engage in political activities? Are there any issues with prohibiting charities from advocating a political party, or supporting or opposing a candidate for political office?

The key issue to be resolved is what changes need to be made in order to make the Charities Bill 2003 reflect the High Court decision on Aid/Watch. To address this issue we will revisit the situation pre-Aid/Watch and reflect on how the Tax Office responded to the Aid/Watch decision in the Charities Tax Ruling TR 2011/4.

What did the High Court decision on Aid/Watch achieve?

It is Changemakers view that the High Court decision on Aid/Watch made two key changes to charity law. Firstly, it displaced the 'political purposes doctrine'. Secondly, it created a new type of charity under the fourth head, being to generate public debate about a charitable subject matter.

Political purposes doctrine

This doctrine created a rift between 'charitable' and 'political', so that an organisation would not be a charity if it had 'political' purposes, or if it undertook so many 'political' activities that they became a purpose in and of themselves. There was a long list of activities which could be seen as 'political', virtually all of which would be perceived as important and legitimate activities for contemporary charities to engage in. Indeed, *Freedom to Speak, Capacity to Act* noted that while non-charitable organisations such as industry associations and trade unions receive beneficial tax treatment, they haven't had to restrict their political activities in the same way as charities.¹

The ATO's 2005 *Charities – political, lobbying and advocacy activities* guidance material informed charities that they could undertake a wide range of political activities, including campaigning for law reforms, advocating for clients and raising public awareness, so long as these activities were incidental and ancillary to their charitable purpose. While charities could campaign during election times, they were not allowed to engage in party political activities meaning they couldn't field or support candidates or political parties during an election campaign.

TR 2011/4 responded to the removal of the 'political purposes doctrine' by explicitly stating that "there is no general doctrine in Australia which excludes a charity from having political purposes".² It also removed the brightline distinction between political activities which were legitimate for charities to participate in (so long as they were incidental and ancillary) and non-legitimate political activities (party political activities). It did this by stating that a charity wouldn't affect its status if it engaged in activities associated with political parties as a means to effect its sole charitable purpose.

¹ Changemakers Australia, *Freedom to Speak, Capacity to Act – Removing the Barriers to Advocacy*, 2011, p35

² Australian Taxation Office, *Taxation Ruling Income Tax and Fringe Benefits Tax – Charities*, TR 2011/4, p16, clause 70

It also clarified that charities could seek to persuade members of the public to vote for or against candidates or parties to effect its charitable purpose.³

While the removal of the political purposes doctrine has been widely welcomed by charities who engage in advocacy as a means of achieving their charitable purpose, it should be noted that this has special significance for some charitable trusts and foundations. Many Australian trusts and foundations have trust deeds which require them to fund “charitable purposes”. The historical rift between charitable purposes and political purposes placed these trusts and foundations in an uncertain position when it came to funding advocacy projects.

Impact upon the 2003 Charities Bill

In order to reflect the High Court decision on Aid/Watch, all of the disqualifying purposes under clause 8 (2) need to be removed. There is no justification for picking or choosing one type of political purpose over another as the High Court was clear that the political purposes doctrine did not apply in Australia.

Charities with purposes to generate public debate

The significance of charity advocacy was upheld by the High Court determining that Aid/Watch was a charity because it had a purpose of generating public debate in relation to a charitable subject matter. This increased the status of advocacy from being a type of activity which charities could engage in to effect their charitable purpose, to a legitimate charitable purpose in and of itself. This has the effect of providing access to charity status to organisations which are focused on advocacy as the primary means of achieving their charitable status.

TR 2011/4 reflects this through stating that:

- An entity can be charitable if it has a purpose of generating public debate with a view to influencing legislation, government activities or government policies. This needs to be in relation to subject matter that comes within the four heads of charity.
- Subject matter outside of this will be decided on a case by case basis;
- Organisations which only lobby government rather than generate public debate will be decided on a case by case basis;
- Entities do not need to present a balanced position and can take a singular point of view;
- The means and ends need to be consistent with the rule of law and established system of government.⁴

Changemakers is broadly supportive of the way the Tax Office has updated the Charities Tax Ruling to reflect the High Court decision on Aid/Watch. Our main concern is in relation to lobbying, which has been somewhat singled out in TR 2011/4. Under TR 2011/4, lobbying is not described as non-charitable. However, an organisation that only lobbied rather than ‘generating public debate’, may or may not be eligible for charity status.

We understand that lobbying has been given a level of special treatment due to the fact that the High Court decision does not make any mention of lobbying. Aid/Watch used more indirect

³ Ibid, p17, clauses 72-73

⁴ Ibid, page 17, clause 71

campaigning methods to influence government, rather than an approach taken by many charities where they seek to speak more directly to decision makers.

While the word 'lobbying' was not used in the High Court decision, an underpinning principle of their decision was that communication between the electorate, government officials and elected representatives is fundamental to the Australian constitution. Changemakers understands lobbying to describe the process of communicating with decision makers. On this basis we believe that there is no justification for giving it different treatment to any other activities which have traditionally been seen as 'political'.

Impact upon the 2003 Charities Bill

We recommend changes to the Charitable Purposes described at Part 3 as a means of reflecting the High Court decision on Aid/Watch. The overall approach we recommend is to extend the definition of advancement at clause 10 (2). Without prejudice, we suggest the following definition of advancement:

Advancement includes protection, maintenance, support, research, improvement, generating public debate with a view to influencing legislation, government activities or government policies, communicating with government.

Other questions raised in the consultation paper

Peak bodies – question 2

Changemakers acknowledges the important role of peak organisations in addressing the underlying causes of social and environmental problems, as well as providing other functions which strengthen and support the not for profit sector. We support extending the statutory definition to explicitly include peak organisations.

Public benefit – questions 5, 6, 7, 8 & 9

Changemakers supports in principle the removal of the presumption of public benefit from the heads where the presumption currently applies, creating an across-the-board requirement that charities need to be for the public benefit. We recognise that in removing the presumption there will be an even greater need to clarify the 'public benefit' concept and see significant challenges in its codification. It is our view that a statutory definition should state the key principles of the public benefit test, rather than leaving this to common law and regulatory guidelines.

It is our understanding that the removal of the presumption of public benefit was not achieved without difficulty in England and Wales and their experience is not one that we would recommend revisiting here in Australia. Changemakers perceives that this aspect of the statutory definition consultation is causing more concern, justified or not, within the not for profit sector than any other issue under consideration. We therefore recommend a cautious approach be taken.

We understand that PILCH Connect supports retaining the presumption of public benefit at this time and recommends extending this presumption to all of the charitable purposes listed in the statute,

except for the residual category of 'other purposes beneficial to the community'. PILCH Connect makes a number of concrete proposals to boost public confidence in the sector. If Government decides that, on balance, the risks of removing the presumption outweigh the benefits, Changemakers would then support the extension of the presumption to other charitable purposes and using other measures which achieve the same policy objectives.

Charitable purposes questions – questions 16 & 17

Changemakers supports extending the list of charitable purposes in Part 3 of the draft Charities Bill 2003. We recommend including the word 'prevention' in addition to 'advancement' under charitable purposes where it is clearly relevant (for example, in health to (b) the advancement of health including the prevention of sickness, disease and suffering).

In relation to the specific charitable purposes, we recommend extending (c) social and community welfare so that it more comprehensively reflects this wide purpose. We recommend adding the following to (c):

- The prevention and relief of poverty, distress or disadvantage of individuals or families
- The care, support and protection of the aged and people with a disability
- The care, support and protection of children and young people
- The promotion of community development to enhance social and economic participation and
- The care and support of members or former members of the armed forces and the civil defence forces and their families.

Additional charitable purposes we would recommend including are:

(g) The advancement of human rights

(h) The advancement of animal rights and prevention and relief of the suffering of animals

As described earlier in this submission, we recommend extending the definition of advancement to reflect the High Court decision on Aid/Watch. We suggest the following wording:

Advancement includes protection, maintenance, support, research, improvement, generating public debate with a view to influencing legislation, government activities or government policies, communicating with government.

Transitional issues – question 20

We understand that the ATO will administer TR 2011/4 until the assessment of charity status is transferred to the Australian Charities and Not for Profit Commission. At that time we assume that the ACNC will be guided by the content of TR 2011/4 in its decision making, until the statutory definition comes into force. However, Changemakers has not heard that this approach has been confirmed. We strongly recommend that the content of TR 2011/4 is used as the basis of determining charitable status, until the statutory definition comes into force. This needs to be made explicit to the sector.