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Submission in relation to the Exposure Draft – Charities Bill 2013

To whom it may concern

We thank you for the opportunity to comment on the statutory definition of charities contained in the Exposure Draft of the Charities Bill 2013.

The Conservation Council of South Australia (Conservation Council SA) is the peak body of the environment movement in South Australia and we have a concern about tax charity issues both as a charity in our own right, and on behalf of our member groups.

The Conservation Council SA (in conjunction with other Conservation Councils around the country) made a submission in December 2011 on Treasury's Consultation Paper on the Statutory Definition of Charities, and at the time also drew on the submission made by The Wilderness Society. This submission draws on those earlier submissions, as well as our analysis and consultations on the Exposure Draft Bill.

Our submission deals with three substantial areas, namely:

- The goal and framing of the Draft;
- The potential constraint on charities' advocacy where political parties or candidates are involved; and
- The consideration of detriment and public benefit.

We make four simple recommendations to address our concerns on these issues, namely:

1. That the words "or urban" be included in s11(1)(j) so that it reads:
 - i. (j) the purpose of advancing the natural or urban environment;

2. The Charities Bill 2013 should be amended to remove the confusion between purposes and activities. This could be done by the amendment of s5(b)(ii) by changing it to be additional (rather than alternative) to s5(b)(i) and to state:
 - i. All activities are in furtherance or in aid of the charitable purpose or purposes.
3. The Explanatory Memorandum should be amended to reflect the change above and to categorically state, as per TR 2011/4 that seeking to persuade members of the public to vote for or against particular candidates or parties in an election, or distributing material designed to underpin a party political campaign may not affect charitable status if they are simply a means of effecting a charitable purpose.
4. The consideration of possible detriment in s6(3)(b) should either be removed or qualified. If it is to remain, it needs to be clear that the public benefit test will only be failed where the detriment is so serious that it far outweighs the public benefit and the detriment is not an inevitable result of the charitable purpose.

We thank you for your attention to this submission and we would be happy to answer any questions or provide further comment on any issue raised here.

Kind regards,



Tim Kelly
Chief Executive,
Conservation Council of SA



Dr Greg Ogle
Member, Executive Committee
Conservation Council of SA

Submission of the Conservation Council of South Australia on the Exposure Draft of the Charities Bill 2013

The Conservation Council of South Australia (Conservation Council SA) is the peak body of the environment movement in South Australia and represents over 50 member groups whose main purpose is conservation and protection of the environment. Combined, these groups represent over 60,000 South Australians. We are an independent, non-profit and strictly non-party political organisation, but play our part by championing the environment and the people who care about it. We give a voice to the growing environmental challenges that face us and the emerging solutions showing the way to the future. And we educate and engage people about what they can do to help.

As the peak body for environment groups in South Australia, we have an interest in tax charity issues both as a charity in our own right, and on behalf of our member groups – some of who have no charity status, some who are tax concession charities and others who also have Deductible Gift Recipient (DGR) status. We also note that there are many environment groups across the country with tax charity status. The latest ATO figures show that in 2010-11, there were 670 environmental tax concession charities in Australia, almost all of whom were income tax exempt and most (612) were eligible for GST concessions. There were 573 groups receiving DGR status by virtue of being on the register of environmental organisations,¹ with another 23 having DGR status by being specifically listed in the *Income Tax Assessment Act 1997*.

For all of these organisations, the benefits of tax charity status are important in attracting funds and assisting in stretching funds to get the maximum benefit for the environment, and therefore for the public benefit. It is with these groups and purposes in mind that we wish to comment on three key areas in relation to the Exposure Draft of the Charities Bill 2013.

Goals and Framing of the Bill

The structure of the proposed bill is clear and easy to follow, but it is framed with a view to capturing the current common law into legislation. This is limited and disappointing given the public consultation last year and the ongoing processes around the NFP Sector Working Group's paper on tax concessions.² Crucially, this framing means that the Exposure Draft does not seek to enlarge the categories of charitable purposes and simply repeats the anachronistic and at times confusing framing of the current common law definition.

In our submission on the Consultation Paper in 2011, we noted the submission of The Wilderness Society that the definition should move away from its anthropocentric

¹ ATO (2013), *Taxation Statistics, 2010-11*, Australian Tax Office, Canberra.

² Not-for-profit Sector Tax Concession Working Group, (2012) *Fairer, Simpler and More Effective Tax Concession for the Not-for-Profit Sector Discussion Paper*, Treasury, Commonwealth of Australia, Canberra.

frame of “public benefit” and include environmental protection as a framing issue rather than a purpose directed toward public benefit. We also argued that the explicit recognition of protection of the natural environment as a charitable purpose was welcome, but that it was a dated and limited conception of the environmental protection. Alongside the protection of the natural environment sit many urban environmental issues. There are many environment groups dedicated to issues around planning and development, energy and waste disposal, and most importantly, climate change. Our own headline campaign, “Green our Grid” is about moving from carbon polluting energy sources to environmentally-friendlier power generation. All these issues are clearly fundamentally important environment protection issues, and although groups whose purpose is to address these issues may be captured under one or more of the other headings of charitable purposes, we concluded that:

It is bizarre to suggest that these groups working to prevent climate change or make sustainable urban environments do not have a charitable purpose or are not regarded in the same way as groups seeking to protect a river, park or forest simply because their purpose is about protecting urban rather than “natural” environments.

Unfortunately, in seeking only to capture the existing common law definition, the Exposure Draft continues this situation. Accordingly, we stand by the conclusion from our earlier submission that:

A statutory definition of charity should include promotion of sustainable urban environments as a charitable purpose.

Recommendation

1. That the words “and urban” be included in s11(1)(j) so that it reads:
(j) the purpose of advancing the natural or urban environment;

Advocacy and Political Parties

Beyond the framing issues, and even on its own terms of simply trying to capture the current common law definition, we have a concern that the Exposure Draft has not adequately done this in relation to the crucial area of political advocacy. Our previous submission noted that campaigning and advocacy was an important part of our, and many other environment groups’ efforts to protect the environment. The submission of The Wilderness Society noted some of the history of this in relation to groups charitable status being challenged and in some cases being revoked. We welcomed the decision in the *AidWatch* case that advocacy to change laws or government policy or practice in relation to charitable concerns was itself a charitable purpose.

The Exposure Draft captures this well at s11(1)(l). However, a problem arises where the Draft also lists purposes which would disqualify an organisation as being a charity – including “the purpose of promoting or opposing a political party or a candidate

for political office" (s10). This is problematic partly because the Exposure Draft is not clear about what a "purpose" is and at what point an activity becomes a "purpose".

The Exposure Draft proposes that to be a charity, *all* of the purposes of an organisation must be charitable, but it also refers to purposes that are incidental to and furtherance of the purpose of an entity (s5(b)(ii)). The idea that there are sub-purposes is in current case law (eg. the *Word Investments* case) but is confusing and opens up activities being seen as "purposes". Rather than fixing the confusion, and notwithstanding the submissions on the Consultation Paper from Moores Legal, ACOSS and The Wilderness Society, the Exposure Draft simply adopts the confused formulation.

We suggest again that, as a matter of definition, if an activity is pursuant to a broader purpose, then it should not be regarded as a purpose (unless the notion of purpose becomes meaningless or trivial).³ You can have multiple purposes (ie. goals being pursued independently), but a sub-purpose is not really a purpose. Sorting this out is necessary to draw clearer lines around when a charity may be "disqualified", and is particularly important in relation to advocacy and political parties. This is evident where the Exposure Draft potentially draws the lines somewhat differently from the current law and may curtail some political advocacy activity.

The current ATO tax ruling (TR 2011/4) says, at paragraph 73, that

if the purpose of an organisation is otherwise charitable, its status will not be affected by non-charitable political activities that are simply a means of effecting its sole charitable purpose. These activities could include seeking to persuade members of the public to vote for or against particular candidates or parties in an election, or distributing material designed to underpin a party political campaign

This clear statement is muddled (or worse) by the Explanatory Material to the new Bill which says that:

An entity must not engage in partisan political activities that support or oppose a candidate or party for office or other partisan political activities where this can be construed as a purpose (s1.80).

This makes sense if we are talking about the overarching purpose of an organisation (a political party is not a charity), but if there can be sub-purposes under the Act, then it actually causes confusion and constrains the freedom for charities to engage in political advocacy. This problem was pointed out in submissions on the earlier Consultation Paper. ACOSS noted that:

³ For example, a person is walking along the street to the train station to go to work to earn a living. Does the person have 4 purposes that morning (to walk, to catch the train, to go to work, and to earn a living), or just one? To claim that one of the person's purposes is to walk along the street makes the notion of "purpose" trivial and inseparable from an activity. Walking along the street is simply an *activity* incidental to and in furtherance of the real purpose of the morning.

there may be considerable difficulty in separating policy and law reform work from a political cause/activity. Obvious examples include the relationship between environment issues and the Green's political platform, the work of those providing support and advocacy around problem gambling and various "no-pokies" MPs, and disability advocates supporting people with disabilities running for parliament. ... There may be situations where a cause or issue is taken up by a political party as a result of an organisation's advocacy – in this situation would the organisation be required to stop advocating around this issue?

The Wilderness Society argued that

where one party or candidate was clearly opposed to environmental protection, and another was advocating what was required to advance the protection of the environment, is silence really the option for environmental protection? In these circumstances the prohibition on supporting candidates is a limitation on the achievement of a charitable purpose as well as a source of much stress, confusion and much time-wasting trying to navigate "non-partisan" positions.

Both argued that, where charities have already established their charitable purpose, they should be allowed to engage in all legal activities pursuant to their charitable purpose. Otherwise, as The Wilderness Society pointed out, it is equivalent to the government telling the charity how to best pursue its charitable purpose – which does not support the independence of the charity sector and the environment movement.

To be clear, the Conservation Council SA does not allow political parties to be members, and has a constitutional bar on candidates for public office or members of the Executive of any political parties being members of our governing bodies or chairs of any of our subcommittees. However, we recognise that the ability of charities to boldly advocate for policy, particularly at crucial times like elections, has historically been important in the achievement of charitable goals. Major wins for the environment have been achieved through engagement with the political process at election times – for example, the Franklin Dam, ending landclearing in Queensland, forest protection in WA, NSW and Tasmania, and advances in climate change policies. Given this, while the Conservation Council does not engage in this way, we view it as a legitimate choice for environment groups to support political parties or candidates if that is in furtherance of their environmental purpose.

We believe our position is consistent with the *intent* of the Exposure Draft in that if a group goes beyond its environmental purpose and is actually about electing a candidate or party, then it should not be a charity under this definition. However, we do not believe the Exposure Draft and Explanatory Material actually draw the lines at that point – largely because of the confusion around purposes, sub-purposes and activities. The wording in the Exposure Draft threatens to take the environment

movement (and other charities) back to the confusing situation prior to 2011 where we were allowed to comment on policy, even compare the policies of political parties, but could not be seen to support or oppose a party on the basis of that comparison. The 2011 tax ruling removed that confusion and constraint. Its principles should be incorporated into the Bill. This could be done via a simple amendment to remove the purposes/activities confusion and a minor adjustment to the Explanatory Material.

Recommendations

2. The Charities Bill 2013 should be amended to remove the confusion between purposes and activities. This could be done by the amendment of s5(b)(ii) by changing it to be additional (rather than alternative) to s5(b)(i) and to state:
All activities are in furtherance or in aid of the charitable purpose or purposes.
3. The Explanatory Memorandum should be amended to reflect the change above and to categorically state, as per TR 2011/4 that seeking to persuade members of the public to vote for or against particular candidates or parties in an election, or distributing material designed to underpin a party political campaign may not affect charitable status if they are simply a means of effecting a charitable purpose.

Public Benefit and detriment

The Exposure Draft requires that charities must be for the public benefit and there are a range of factors to consider in determining this. However, one problematic factor is that when assessing whether an organisation's purpose is in the public benefit, regard needs to be had for "any possible detriment" to the general public, a section of the general public, or to an individual – s6(3)(b). There is no guidance as to what "regard" should be given or what weight should be put on such regard as opposed to the public benefit.

The Explanatory Material is not helpful here. The examples listed include damage to mental or physical health, encouraging violence or hatred towards others, and damaging the environment, but the framing of the relevant clause in the Exposure Draft is very open-ended and could go way beyond these examples (again, particularly where there is confusion between purposes and activities). For instance, action to protect a particular species or an area of high conservation value is a clear charitable purpose, but if that protection required closing or adversely impacting on an industry which employed people, this would be detrimental to a section of the general public and should be considered under s6(3)(b) as being against the public interest. The consideration of benefit and detriment here is inherently subjective and political. Balancing such issues is an appropriate thing for government to do in various policy decisions, but it is not an appropriate consideration in relation to an organisation's charitable purpose. An environment

group whose purpose in protecting the environment may have a detrimental impact on a section of the population should nonetheless still be a charity.

A similar argument would apply in other areas, for instance, for animal welfare groups opposing the live export of stock animals, or disability advocates campaigning for an NDIS paid for by taxpayers. These examples are very different from a situation where, for instance, a religious cult may have a charitable purpose but its *activities* cause harm to its members. The issue there, and in most of the examples considered in the Explanatory Material, are about activities rather than purposes.

Recommendation

4. The consideration of possible detriment in s6(3)(b) should either be removed or qualified. If it is to remain, it needs to be clear that the public benefit test will only be failed where the detriment is so serious that it far outweighs the public benefit and the detriment is not an inevitable result of the charitable purpose.