The Cancer Council
New South Wales

Ms Jane Schwager
Chair, Charities Definition Working Group
The Board of Taxation
C/- The Treasury
Langton Crescent
PARKES ACT 2600

7 October 2003

Dear Ms Schwager,

Submission on Definition of a Charity

I am writing as a member organisation of The Cancer Council Australia (TCCA) to support the issues raised and recommendations provided in the TCCA submission. The Cancer Council NSW acknowledges the potential benefits to codifying the definition of a charity, but remains concerned about the way the Bill treats the role of advocacy.

The Cancer Council NSW reiterates the following points made in the TCCA submission:

- The provision of s8(2)(c) has the potential to prohibit or limit the ability of charities to engage in advocacy
- The proposed requirement that any advocacy activities be no more than 'ancillary or incidental' to the other purposes of the charity, is inadequately defined and may be susceptible to a very restrictive interpretation
- The Bill should be amended to accurately reflect the recommendations of the *Report of the Inquiry into the Definition of Charities and Related Organisations* (June 2001), ensuring that charities are expressly permitted to engage in advocacy in pursuit of its charitable purposes and on behalf of those they seek to benefit.
- The core definition of a charity should be amended to clearly express that a charity may have more than one dominant charitable purpose. Section 4(1)(c) should be amended to read

  (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 that:
  (c) engages in activities that further, or are in aid of, its charitable purposes

- Section 8(2)(a) should be amended to clarify that it is the advocating of a 'political party or *political* cause" (our emphasis) which is a disqualifying purpose
- Section 8(2)(c) of the Bill should be deleted. This provision is inconsistent with the recommendations of the Inquiry into Definitions of Charities and Related Organisations, and is redundant if s4(1)(c) makes it clear that any activities should further or aid the charitable purposes of the entity.

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In this submission, we provide additional comment in support of the recommendations of the TCCA submission. These comments relate to the issue of the workability of the Bill, including questions of clarity and transparency and the potential administrative burden on charities; and the potential unintended consequences of the Bill as currently drafted.

The Cancer Council NSW and the importance of advocacy

As the leading cancer charity in NSW, we work with and for the people of NSW to defeat cancer. This involves both benevolent and public benefit activities. We fund and conduct cancer research, provide a range of information and support services for people affected by cancer, undertake health promotion, support clinical trials, and prevent cancer through health programs and education campaigns. All these activities are encompassed under the scope of charities outlined in the discussion paper accompanying the draft bill. We also actively advocate for improved funding, policies and programs that will reduce the incidence or impact of cancer in the community.

The funding for our activities comes from the community through donations, bequests and fund-raising activities. In this context, our charitable status, and the associated tax concessions, are critical to our donors and supporters, as well as to our capacity to effectively finance our charitable activities.

Our advocacy is aimed at achieving better services for patients, and for public policies and programs that will assist in preventing cancer. Our ability to advocate for people affected by cancer is integral to the way we operate. Through our research, and our services to patients and their carers, we have a unique understanding of how changes to policy, law or funding might help them, and we use this knowledge to advise, inform and influence policy makers. Our goal is to ensure that cancer related issues receive the public funding, program and policy commitment that is required to make a difference. In cancer control there is often a gap between the medical and scientific knowledge and the application of that knowledge through systematic programs or policies. Our advocacy efforts are focused on closing this gap by seeking changes to government policy or funding that will allow the benefits of medical and research advances to be applied for the good of the entire community. The advocacy efforts of The Cancer Councils are critical and legitimate component in aid of our charitable purpose – to reduce the incidence and impact of cancer in the community - and all our advocacy activities are for the public benefit not sectional gain.

We recommend that advocacy should be explicitly recognised in the Bill as a legitimate activity where it is in pursuit of the dominant charitable purpose(s). The current drafting of the Bill raises substantial risks to the ability of charities to freely undertake advocacy activities without jeopardising tax concessions.

The workability of the Bill

The use of the phrase ‘ancillary or incidental’ in s8(2) poses substantial challenges for the workability of the Bill. In our view, the current wording of the Bill in relation to advocacy is ambiguous and needlessly restrictive. Expressing a range of activities as disqualifying purposes if they are any more than *ancillary or incidental* to the other purposes of the entity leaves a very broad discretion for some unspecified authority to determine the extent and nature of advocacy that charities can engage in advocacy before being disqualified. The phrasing implies there should be some restriction on the resources a charitable entity devotes to advocacy efforts. However, the absence of any legislative guidance on the

question of ‘ancillary or incidental’ fails to provide clarity to charities that engage in advocacy.

The explanatory material accompanying the exposure draft of the Bill provides little guidance on how ‘ancillary or incidental’ might be assessed. It is not clear whether advocacy activities would be measured according to percentage of expenditure, number or nature of staff employed, by the level of public attention and exposure achieved, or by some other measure.

The requirement to restrict the level and nature of advocacy activities below some as yet unspecified test of ‘ancillary or incidental’ is likely to lead to additional administrative burdens on charities as they seek to regulate and document their advocacy activities and expenditure to protect against the possibility of being ‘disqualified’ or in anticipation of regulatory requirements such as auditing. The lack of clarity surrounding allowable levels of advocacy may also lead some charities to withdraw from or reduce their efforts at systemic improvement to avoid the risk of losing their charitable status.

If the government adopts a policy to restrict the quantum or proportion of advocacy activities of charities, then the issue of policy enforcement needs to be considered. Presumably, there will be a need for some form of regulation or assessment of individual charities by the ATO or other authority. However, the Bill, as currently worded, provides little guidance for enforcing the policy in any transparent way. The ATO would need to develop specific rulings and guidelines to assist charities in managing their advocacy activities within the constraints of the ‘ancillary and incidental’ test, as well as a system for monitoring and assessing the extent to which charities were engaging in advocacy. This has the potential to increase the compliance costs to the government in regulating the policy, as well as the administrative burden on charities.

It is unnecessary and undesirable to impose a restriction that the advocacy activities of a charity are only ‘ancillary or incidental’. We recommend an amendment to the Bill to the effect that any activities ‘further, or are in aid of’ an entity’s charitable purpose (as proposed by the TCCA submission). This amendment would effectively transfer the focus from measuring the amount or level of advocacy activities, to a focus on assessing whether the advocacy activities are consistent with the charitable purpose of the entity. This would increase the clarity and workability of the Bill by providing charities with more certainty, and by making the Bill more easily interpreted and applied than the current construction. It would also avoid or reduce the burden on charities and on government of regulating, documenting, assessing and auditing the quantum of advocacy activities of charities.

Unintended consequences of Bill

We understand that the intention of the advocacy restrictions in the Bill is to exclude those entities that do not have a dominant charitable purpose, or those whose primary role is on party-political advocacy, or on lobbying for private, non-charitable or sectional interest, from claiming charitable status and associated tax concessions.

However, the current wording of the Bill has the potential to impact on bona-fide charities as described earlier. In addition, some types of entities – such as peak bodies or consumer organisations - may be more at risk from a restrictive interpretation of the Bill than others. Peak and consumer organisations are an essential mechanism to enable the active and skilled representation of the interests of individuals and smaller organisations and to advocate for changes to policy that will lead to advancement of health, education or social and community

welfare. They are more likely to engage in advocacy activities at a level that may exceed the 'ancillary and incidental' test.

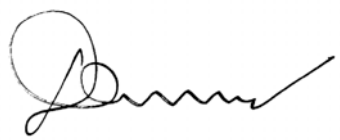
This means that peak and consumer organisations that meet the other tests of being not-for-profit, with a charitable dominant purpose that is for the public benefit, may find that they are at risk of being disqualified under the 'ancillary or incidental' clause. This would appear to be an inappropriate and unintended consequence of the Bill as it is currently framed.

We also note the potential for the Bill to create an inequity in the way the tax system treats personal or business contributions to third party organisations. Industry and business groups, and other non-charitable membership organisations are funded through individual and business subscriptions that are tax-deductible. If the legislative definition disqualifies certain entities from charitable tax status because of their advocacy activities, we will have a situation where individuals and businesses are able to deduct their contributions to interest group lobbying, but the beneficiaries of and donors to existing charities who undertake public interest advocacy efforts will be denied this. This is a very adverse weighting of interest against a generally less powerful constituency.

We are pleased to have had the opportunity to comment on the draft Bill. Our major concern relates to the provisions regarding advocacy as a disqualifying purpose. The proposal that any activities aimed at changing the law or government policy should be only 'ancillary or incidental' is unnecessarily restrictive, undesirable and inappropriate in the context of the role of charities. It also poses substantial challenges for implementation and enforcement, lacks clarity and raises potential for unintended consequences that may hinder the work of the charitable sector in Australia. We believe that the policy objectives can be achieved by the amendments recommended by The Cancer Council Australia so that advocacy is acknowledged as a legitimate activity provided it is in pursuit of the charitable purposes of the entity.

We would be happy to discuss any of these issues in further detail. Please contact Anita Tang, Manager Policy and Advocacy on 9334 1963 if the Working Group would like further information.

Yours sincerely,



Andrew G Penman
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The Cancer Council NSW