SUBMISSION TO THE BOARD OF TAXATION

IN RELATION TO THE

CHARITIES BILL 2003 EXPOSURE DRAFT

SEPTEMBER 2003

1. Overview

UNICEF Australia welcomes and supports in principle the introduction of this Bill as part of the government's response to the 2001 Report of the Inquiry into the Definition of Charities and Related Organisations (Charities Inquiry).

We agree that the giving of legislative definitions to the terms *charity* and *charitable purpose* will bring increased clarity and certainty to the charitable sector and, for the first time, will establish by legislation the existence and legal standing of charities individually and the charitable sector as a whole.

We noted at the time and we particularly note again now the Treasurer's comment in his media release of 29 August 2002 when he said *"Charities and other not-for-profit organisations are pivotal members of society.* ***In order for them to be able to continue to be able to contribute fully, they need to be able to participate in a wide range of activities*** *including, at times, commercial activities."* (our emphasis).

We also note that the Charities Inquiry considered at length the nature and operations of charities, particularly their advocacy (often called public education) role and concluded that *"Charities should be able to engage in advocacy on behalf of those they benefit. Conduct of this kind should not deny them charitable status* ***even if it involves advocating for a change in law or policy****…"* (our emphasis).

Against this background, we are concerned at some particular provisions of the draft Bill which we believe should be changed and about which we will comment in later sections of this submission. To the extent possible and relevant, our comments will address the principles of Workability; Clarity; Certainty; and Transparency.

2. About UNICEF Australia

Australian Committee for UNICEF Limited (UNICEF Australia) is a UNICEF (United Nations Children's Fund) National Committee. We are one of thirty seven such National Committees established by UNICEF in developed countries around the world.

UNICEF Australia is an Australian public company limited by guarantee (ABN 35 060 581 437), an Income Tax Exempt Charity and a Deductible Gift Recipient.

We are also an AusAID (Australian Agency for International Development) fully accredited non-government development organisation.

We are a member of the Australian Council For Overseas Aid (ACFOA) and we are bound by and comply with ACFOA's Code of Conduct.

We have recently established a wholly owned company, UNICEF Australia Health Ltd (ACN 105 787 880) through which we will seek to raise funds for the purpose of raising awareness of Australian Indigenous health issues and, in partnership with identified organisations, delivering health programs within Australia for Indigenous Australians. We will shortly be applying to the Australian Taxation Office to have UNICEF Australia Health Ltd approved as a Health Promotion Charity and granted Income Tax Exempt and Deductible Gift Recipient status. The work of UNICEF Australia Health Ltd will be quite separate from and additional to the work of UNICEF Australia itself.

UNICEF Australia, in common with all UNICEF National Committees, operates under a Recognition Agreement in force between itself and UNICEF. Shortly stated, these Agreements formally establish each National Committee, authorise them to represent UNICEF in their particular country and set down their roles and responsibilities. The relevant part of UNICEF Australia's Agreement requires us to-

"…undertake advocacy activities and organise appropriate fundraising campaigns for UNICEF's programs….Advocacy and fundraising will encompass activities such as education for development, media relations, promotion of adequate financial contributions to UNICEF on the part of the government and all other activities undertaken in the spirit of UNICEF's policies…"

Thus, advocacy (which term includes representations to government and media activities) is one of our core responsibilities under our Recognition Agreement.

3. The Draft Bill

Against the background set out in the above sections, we make the following comments-

3.1. The Concepts Of "Ancillary or Incidental" And "Dominant Purpose"

Section 4 of the draft Bill prevents an entity from being a charity etc under any Act if, inter alia, it has a disqualifying purpose. Disqualifying purposes are set out in section 8 which provides that such purposes, either on their own or taken together, must not be "**more than ancillary or incidental to"** (our emphasis) the other purposes of the entity concerned.

One of the disqualifying purposes is "attempting to change the law or government policy" (section 8(2)(c).

We do not disagree with the principle of disqualifying purpose, but we do disagree with the present provisions of section 8, particularly section 8(2)(c) and the words "more than ancillary or incidental to" on the grounds that the section as drafted is unclear, uncertain and unworkable.

In our view, section 8(2)(c) should be deleted altogether. We do not see why attempting to change the law or government policy should be seen as a disqualifying purpose at all and certainly not if it is merely more than ancillary or incidental to a charity's other purposes.

Workability

Virtually since their inception, charities have undertaken advocacy activities aimed at changing the law or government policy. Indeed, if they had not we may not today, for example, have anti child labour laws, paupers' gaols may still be commonplace and the disabled may still be treated as social outcasts.

There is nothing wrong in principle with charities undertaking such activities. In fact, there is a very strong argument that charities have an obligation to do so when they see the need, even if some might say that this represents something more than merely an ancillary or incidental activity. In our own case, for example, the undertaking of advocacy activities is a core requirement of our Recognition Agreement with UNICEF.

There are basically two ways in which charities can undertake their work. They may simply react to the need(s) for which they exist and seek government and public financial support to alleviate that need. Or they may take a more pro-active approach and, in addition to alleviating the immediate need, try to address the cause of the problem which will often involve trying to change the law or government policy.

In our view, the latter approach is to be preferred and should be encouraged rather than discouraged. By following this course, charities are seeking to eradicate the cause of the problem, thus reducing their need to call on financial support from the public and government. We do not see this as any different from the government's own policy of

tying its overseas aid program to the requirement that recipient countries take positive steps to reform their government and social practices to eradicate the causes of need.

We submit that the inclusion of section 8(2)(c), certainly in the present context of the draft Bill, would be unworkable as it would have the effect of discouraging, perhaps stopping altogether, charities from undertaking activities that they have always undertaken and that are complementary to their other purposes.

Clarity

The words "ancillary" and "incidental" are vague and open to wide interpretation. Consequently, the government's intention in including these words is not clear.

Is it intended, for example, that this would be decided by the number of times over a given period a charity undertook such activities? Or would just a single event be regarded as being in breach of this prohibition if that event were sufficiently large or received significant media coverage?

Or would, as in our own case, the inclusion of advocacy activities in a charity's establishing documents be regarded as more than "ancillary" or "incidental"?

It is also unclear by whom and how a decision would be made that a charity was (allegedly) in breach of this section. Is it the government's intention that, for example, the Treasurer or the Commissioner of Taxation would make this decision unilaterally? Or would "due process" be required and the allegation have to be referred to an independent authority for decision, with each party having the opportunity to argue their case? If so, to what authority would the allegation be referred?

In making these comments, we are aware of the Treasurer's public statements rejecting any suggestion that the draft Bill does anything other than replicate into statute the present common law position. We accept that is the government's intention. However, we are concerned that the Treasurer uses the concepts of "dominant purpose" and "ancillary or incidental" synonymously, whereas in fact they are different. The concept of "ancillary or incidental", particularly when that concept is undefined, is more restrictive than the concept of "dominant purpose". Thus, in our view, the draft Bill is in fact more restrictive than the present common law.

If, as we accept, the government's intention is simply to prevent "lobby groups" from being given charitable status, we submit that that intention has not been achieved in the draft Bill.

Section 4 of the Bill provides that a reference to a charity etc is a reference to an entity "that…has a dominant purpose that is charitable…". However, the section also provides that the entity must "not have a disqualifying purpose". Each subsection of section 4 is joined by the word "and" which appears to mean that all of section 4 must apply to an entity for that entity to meet the definition. If an entity fails on one test, it would seem that it fails the whole test and would not be included in the definition of a charity etc. Therefore, we submit, in this regard the effective test of the draft Bill is the concept of "ancillary or incidental", not the concept of "dominant purpose" and thus the draft Bill is more restrictive than the present common law position.

Certainty and Transparency

For the reasons outlined above, and particularly in the absence of any clarifying provisions as to measurement or process, the draft Bill is not transparent and will cause significant uncertainty amongst charities, as it already has, as to whether they can or cannot, and if so to what extent, undertake advocacy activities.

As the Bill presently stands, charities will not know when such activities will be judged to exceed the "ancillary or incidental" test. Given the serious consequences of failing this test, it is inevitable that charities will be driven to adopt a very conservative approach and not undertake such activities at all. If that is the result, the Bill, if enacted as it presently stands, will have defeated the Treasurer's expression of the government's intention to do no more than replicate the present situation.

3.2. Conduct That Constitutes A Serious Offence

Section 4 of the Bill also prohibits a charity etc from engaging in "conduct (or an omission to engage in conduct) that constitutes a serious offence". The explanatory material subsequently circulated defines "serious offence" as *"an offence against the law of the Commonwealth, of a State or of a Territory that may be dealt with as an indictable offence, even if it may also be dealt with as a summary offence".*

Again, we do not disagree with the general principle that charities should not engage in illegal activities but we are concerned by the wording of this section on the following grounds.

Workability

We understand that there are different definitions of "indictable offence" in the several jurisdictions referred to in the explanatory material. If our understanding is correct, we are unclear as to how this section will apply if, for example, a charity does something in a jurisdiction that does not constitute an indictable offence in that jurisdiction but does in one of the other jurisdictions.

Would the charity be able to be held to be in breach of this section on the ground that had it done that thing in the other jurisdiction it would have been able to have been dealt with as an indictable offence?

We are also unclear as to what would happen if a charity engaged in an activity that could have been dealt with as an indictable offence but was not. In this circumstance it would seem that the charity would be, or at least could be held to be, in breach of this section even though no action at all may have been taken against it.

There does not appear to be any requirement that a charity actually be found guilty, by due process, of a "serious offence". Merely that a charity did something that could have been dealt with as an indictable offence somewhere in Australia.

We believe this situation would be contrary to the principle of natural justice and would be unworkable.

Clarity

We are unclear as to what is intended by the inclusion of the words *"(or an omission to engage in conduct)"* in this section. As drafted, it appears to be saying that a charity must not now or in the past have engaged in **or omitted to engage in** (our emphasis) this conduct. That would seem to be illogical.

If our reading of this is correct, the words in brackets should be deleted.

If our reading is incorrect, their meaning should be clarified.

We are also unclear as to whether this section will apply to a charity if an employee or other representative of the charity, but not the charity itself, contravenes this section. Would the principle of vicarious liability operate such that the charity itself would or could be held to be in breach of the section? If so, would that still be the case even if the charity had taken appropriate action in response to the conduct?

Certainty and Transparency

As we noted above, this section does not require "due process" to be followed in establishing that a charity has or does engage in conduct that constitutes a serious offence.

In the absence of such a requirement, it would appear that all that is necessary is for someone (the Treasurer or the Commissioner of Taxation?) to form the view that a charity has or does engage in such conduct.

If this is, in fact, all that is required, then in our view the section lacks both certainty and transparency.

If this allegation is to be made against a charity, it must surely be necessary for there to be an open and transparent process under which the charity can respond to the allegation and the matter be decided by an independent authority.

We further note that there is no time limit in relation to the requirement that a charity must not have engaged in such conduct in the past.

In our view, if this requirement is to remain, there should at least be a reasonable time limit imposed (for example, within the preceding five years). In the absence of such a time limit, again charities will be faced with significant uncertainty because they will not know if something that may have happened many years ago will now be resurrected to hold them in breach of this section.

4. An Independent Authority

Although not part of the draft Bill, we feel obliged to express our deep disappointment that the government apparently has not seen fit to adopt the recommendation of the Charities Inquiry that a single independent administrative body for charities and related entities be established.

We acknowledge that to do so will require the agreement of the States and Territories and that, consequently, it would not have possible to include this provision in this Bill.

However, in our view the government should announce its intention to adopt this recommendation and to commence immediate discussions with the States and Territories for this purpose.

5. Recommendations

Our recommendations in relation to the draft Bill are:

(i) that the definition of serious offence be amended by:

- deleting the words "of a State or of a Territory";
- deleting the words "that may be dealt with" and replacing them with "that has been dealt with"; and
- deleting the words in brackets

(ii) that section 4 (1)(e) be redrafted to

- require a charity to have been found guilty by an independent authority of engaging in such conduct;
- define the preceding period (say five years) during which it must not have been found guilty;
- delete the words “(or an omission to engage in conduct)”

(iii) that section 8 be amended by either;

- deleting subsection (2)(c) or
- deleting the words “more than ancillary or incidental to the other purposes of the entity concerned” and replacing them with “the dominant purpose of the entity concerned”

We also recommend that the government announce its intention to commence immediate discussions with the States and Territories with the view to establishing a single independent administrative body for charities and related entities.
