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12 May 2009

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Dear Sir

Australia's future tax system – Review Panel submissions

We welcome the review of Australia's future tax system and appreciate the invitation to make submissions to the Review Panel.

Together with the Human Rights Law Resource Centre (**HRLRC**), we wish to make a submission in response to Chapter 7 of the Australia's future tax system consultation paper (**Consultation Paper**). Our submission requests that the Review Panel consider amending the *Income Tax Assessment Act 1997* (Cth) (**ITAA**) to introduce a deductible gift recipient (**DGR**) category for human rights organisations.

The reasoning and policy basis supporting the introduction of a human rights DGR category are set out in detail below.

1. EXECUTIVE SUMMARY

The common law definition of "charity" forms the basis for determining whether certain tax concessions are available to not for profit organisations. One of the key principles that has evolved from this definition is that organisations involved in political activities (such as advocacy, or lobbying for changes to the law or government policy) are not "charitable" in nature. This means that organisations involved in advocating social or structural change in favour of recognising human rights are denied access to a number of tax concessions.

The previous Australian government recognised the difficulties with the current conception of "charity" and the lack of access for "advocacy" organisations to tax concessions, such as income tax exempt charity (**ITEC**) and DGR status. However, the recognition of these problems did not manifest in any actual changes to the way in which "charity" is defined in our law, nor to the availability of tax concessions under the ITAA for entities that take part in advocacy-based activities.

It is hoped that the strong support that the Rudd Government has shown for advancing human rights, together with the introduction of amendments in the United Kingdom, may indicate that there is now a climate supporting real and achievable change, in favour of entities that engage in human rights activities. We therefore ask the Review Panel to consider introducing amendments to the ITAA to create a new DGR category for

entities that promote the advancement of human rights in our community, on the basis of the submissions set out below.

2. RELEVANCE TO AUSTRALIA'S FUTURE TAX SYSTEM REVIEW

Chapter 7 of the Consultation Paper acknowledges that "[t]he tax concessions for the [not-for-profit] sector are complex and applied unevenly". Question 7.1 asks:

> What is the appropriate tax treatment for [not-for-profit] organisations, including compliance obligations?

We consider that the uneven tax treatment of not for profit human rights organisations would be remedied through the introduction of a DGR category for such organisations. In particular, this would enable human rights organisations to compete for donations and conduct their activities in the same way as other types of organisations that are eligible for DGR relief. Judicial and (in comparative overseas jurisdictions) legislative thinking on what constitutes a "charitable" activity has progressed in a manner which justifies this approach.

The "uneven" application of tax concessions for not-for-profits also arises because of the traditional approach to what does and does not constitute a "charity" at common law. This is not the key focus of our submission, however, we briefly address below how views as to what constitutes a "charity" have changed over time, such that equitable treatment for not-for-profit charities could be achieved by introducing a legislative definition of "charity" that overrides the (now outdated) common law definition of this term.

3. BACKGROUND

Australian common law and legislative conceptions of "charities" are currently limited to cover specific types of organisations that carry on particular charitable activities.

This restrictive approach means that human rights organisations, which are not for profit entities working towards betterment of society, are not within the ambit of many legal concessions available to charitable organisations. This includes eligibility for ITEC status and DGR status (**Tax Concessions**).

Details of the difficulties that human rights organisations encounter when faced with the current definition of "charity", and legislation relating to Tax Concessions, are set out below.

3.1 Common law definition of "charity"

(a) Statute of Elizabeth

The Australian legal meaning of "charity" owes its central meaning to the preamble to the *Charitable Uses Act 1601* (UK) (more commonly known as the **Statute of Elizabeth**). The preamble to the Statute of Elizabeth sets out a number of charitable purposes, as follows:

> The relief of the aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea-banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction, the marriages of poor maids, the supportation [sic], aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.

It is pertinent to note that this list of 21 charitable uses was not intended to create a definition of "charity" and was, in fact, simply meant to demonstrate a "collection of instances of a somewhat miscellaneous character" that could be charitable in nature (see *Chichester Diocesan Fund and Board of Finance (Incorporated) v Simpson* [1944] AC 341 at 354 (Lord Wright); Gino Dal Pont, "Charity Law in

Australia and New Zealand", 1st Ed, 2000, page 6). Nevertheless, as discussed in part (b) below, the preamble to the Statute of Elizabeth has remained central to the common law definition of "charity" and "charitable purposes" for over 400 years.

In the UK case of *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531, Lord MacNaghten divided the miscellaneous "uses" in the Statute of Elizabeth into four "heads" of charity, which are as follows:

(i) the relief of poverty;

(ii) the advancement of education;

(iii) the advancement of religion; and

(iv) other purposes beneficial to the community.

In many instances, entities do not fit squarely within one of the first three items set out above. This means that the ambit of item (iv) above (while imbuing uncertainty (and flexibility) into the definition of charity) becomes of great significance to those entities that seek the common law and legislative benefits of charitable status.

The character of item (iv) has also been viewed as an outlet for changing concepts of "charity" to be captured by the definition of "charity" originating from the Statute of Elizabeth. According to Ann O'Connell, this "catch-all category has allowed courts to respond to more modern community views as to what categories of entity should be recognised as charities (see A O'Connell, "The tax position of charities in Australia – why does it have to be so complicated?" (2008) 37 ATR 17, 18).

The importation of the "definition" in the Statute of Elizabeth into the Australian legal system, and the ambit of "other purposes beneficial to community" in the context of human rights organisations, are discussed in turn below.

(b) Definition of "charity" in Australia

The "miscellaneous" uses in the Statute of Elizabeth now form the basis for the Australian common law definition of "charity".

According to *Royal National Agricultural & Industrial Association v Chester* (1974) 3 ALR 486, a purpose will be "charitable" if that purpose:

(i) is beneficial to the community, or deemed to be for the public benefit; and

(ii) falls within the spirit or intendment of the Statute of Elizabeth.

Accordingly, an entity cannot demonstrate that it is "charitable" in Australia unless it exhibits some characteristics that are broadly aligned with the collection of "uses" in the preamble to the Statute of Elizabeth.

However, also accompanying the definition of the Statute of Elizabeth are a series of well-entrenched principles that exclude certain entities from being charities. The evolution of the definition of "charity" to respond to changing conceptions of this term (under Lord MacNaghten's "other purposes beneficial to the community" head of charity) cannot, therefore, expand indefinitely and is inhibited by the presence of a number of accepted "non-charitable purposes", such as:

(i) political purposes, including support of a political party, support for a change in the law (or maintenance of a current law) (*Bowman v Secular Society Ltd* [1917] AC 406; *Royal North Shore Hospital of Sydney v Attorney-General* (1928) 60 CLR 296);

(ii) purposes that are sporting, recreational, or social (*Trustees of Sir Howell Jones Williams' Trusts v Inland Revenue Commissioners* [1947] 1 All ER 513; *Latvian Co-Operative Society Limited v Commissioner of Land Tax (Vic)* (1989) 20 ATR 3641); and

(iii) purposes that involve carrying on a commercial enterprise to generate surpluses (*Re Smith (deceased); Executor Trustee and Agency Co of South Australia Ltd v Australiasian Conference Association Limited* [1954] SASR 151 (although, note *FCT v Word Investments* [2008] HCA 55 (***Word Investments***), in which the High Court found that an entity that carried on commercial activities and applied the profits of these activities to its charitable purposes was a "charity").

The substantial amount of common law authority for the view that each of these purposes are "non-charitable" means that it is inherently difficult for any entity engaging in the above activities to argue that society has evolved to a point whereby these types of activities can now be described as "charitable". The further development of the definition of "charity" is also stunted by the fact that, aside from the recent High Court decision in *Word Investments*, in the last 30 years, there have been no High Court decisions on the scope of the term "charity" (L Falkiner Rose, "The State of Play... Charitable Law Issues", unpublished paper, 15 June 2008).

The particular difficulties facing human rights organisations in Australia, relating to the above definition, is discussed in detail below.

(c) Human rights organisations and the definition of "charity"

If we briefly return to Lord MacNaghten's four categories of "charity", it is possible that promoting and preserving human rights could fall into any of those categories.

In particular, entities seeking to advance human rights may aim to:

(i) provide relief from poverty (by entrenching access to shelter, food, water, and other life essentials for all individuals);

(ii) promote education (through educating people and governments about human rights, and by encouraging a right to education for all individuals);

(iii) facilitate the advancement of religion, by allowing for freedom of religion and advocating the preventing behaviour that opposes a particular religion or way of life; and

(iv) provide other benefits to the community, such as discussion of the need for dignity, equality, freedom of movement and respect for all persons.

However, human rights entities seek to change the fabric of society, and are, by their nature, inherently involved in advocating changes to the law. This means that human rights entities are constantly involved in activities that are deemed, by the common law, to be political in nature and, therefore, "non-charitable".

Interestingly, the rationale for excluding "political" activities from the definition of "charity" does not owe to the fact that there is no social benefit in these activities. Rather, the exclusion is due to the inability of the Court to determine what is a "valid" political purpose that operates for the benefit of society. This was discussed by Lord Parker in *Bowman and Ors v Secular Society Limited* [1917] AC 406 (at page 442):

> [A] trust for the attainment of political objects has always been held to be invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.

It is, therefore, the Court's inability to determine political issues (such as the merits of a proposed change to law) which means that entities advocating political issues cannot be "charitable" in nature. This prohibition can even extend to institutions that exert "moral" pressure on government (*McGovern v Attorney-General* [1982] 3 All ER 493).

We therefore encounter an outcome in which human rights organisations seeking to promote globally recognised rights for all individuals (such as those espoused in the United Nations Covenant on Civil and Political Rights (**UNCCPR**)) are not considered to be "charities" under Australian law. This then limits the ability of human rights organisations to take advantage of the tax concessions that are available to other not for profit organisations that do meet the definition of "charity".

3.2 Eligibility for Tax Concessions

There are two key tax concessions that may apply to charitable or not for profit entities. These are ITEC and DGR status. An entity's eligibility for these concessions can, in turn, make available other tax concessions such as GST charity status, FBT-rebatable employer status or FBT-exempt status.

As discussed in detail below, human rights organisations are, again, due to their "political" activities, restricted from receiving the benefits of these concessions.

(a) Criteria for endorsement as an ITEC

Division 50 of the ITAA exempts certain categories of not for profit entities from liability to calculate and pay income tax.

While these categories cover a range of entities, there is no category that refers to human rights organisations. The relevant "catch-all" category for Division 50 is section 50-5, which permits "charitable institutions" that satisfy certain additional requirements to obtain endorsement as an ITEC.

The terms "charitable" and "institution" are not defined in the ITAA. However, the Commissioner of Taxation (**Commissioner**) has provided guidance on how these terms should be interpreted in Taxation Ruling TR 2005/21. In particular, the Commissioner has adopted the common law "definition" of charity (as outlined in part 3.1(b) of this submission) as the test for determining whether an institution is "charitable" in nature (Taxation Ruling TR 2005/21, at paragraph 8). This brings with it the common law conceptions of the types of activities and purposes that are "non-charitable". As a result, Taxation Ruling TR 2005/21 (at paragraph 18) states that political activities, including lobbying and advocacy, are not "charitable" activities for the purposes of the ITAA.

There is, however, some flexibility in the activities that a "charitable institution" may engage in. In particular, the Commissioner is of the view that an organisation with a primary purpose that is charitable in nature may engage in certain "incidental" or "ancillary" activities that are non-charitable, such as political or lobbying activities (Taxation Ruling TR 2005/21, at paragraphs 121 to 127).

While this outlet does provide charitable organisations with an opportunity to lobby or advocate on human rights issues, a situation in which these activities may only be pursued in an "ancillary" or "incidental" manner is not ideal, as entities with the **key purpose** of lobbying or advocating in favour of human rights are not entitled to obtain ITEC status. Human rights organisations are often well-established, and specifically focussed on targeting human rights issues. To only recognise a right to obtain ITEC endorsement in circumstances in which such activities are ancillary to some other charitable purpose, is to relegate or diminish the incentive upon not for profit organisations to engage in human rights advocacy. This is undesirable, as it denies the significance of human rights advocacy in sustaining and enhancing our democratic society.

Accordingly, the current criteria for ITEC endorsement do not favour human rights organisations, meaning that those organisations (while operating on a not-for-profit basis) must allocate funds to calculating and paying their income tax liabilities. This is an expense that does not arise for other not-for-profit organisations which do meet the criteria for being endorsed as an ITEC. Additionally, human rights organisations may be at a disadvantage when seeking funding, as many philanthropic organisations donate funds only to organisations with ITEC status.

(b) Criteria for endorsement as a DGR

Division 30 of the ITAA sets out a range of categories, under which various types of entities may be eligible for endorsement as a DGR. As donations to a DGR are tax deductible (provided that these donations are for $2 or more), it is clearly an advantage for a not-for-profit organisation to hold this status.

In contrast to the criteria for ITEC endorsement, the criteria for DGR endorsement do not require that an organisation be "charitable" in nature. However, the categories of entities that may be endorsed as DGRs are discreet and, while they address broad "types" of not-for-profit organisations (such as health promotion charities, harm prevention charities, and cultural organisations), there is no clear-cut category that encompasses human rights organisations.

Accordingly, the "catch-all" DGR category calls for examination. This category applies to "public benevolent institutions" (**PBIs**), being, institutions that provide direct assistance to persons in need. Taxation Ruling TR 2003/5 provides that the essential characteristics of a PBI include:

(i) activities that are directed towards persons in need of relief, and not for the promotion of social welfare in the community generally (paragraph 13);

(ii) aid and services that are dispensed directly to persons in need through the work of employees or volunteers (paragraph 61);

(iii) that the relief the organisation provides must relate to a particular need that arouses compassion or pity in the community (paragraph 10); and

(iv) that other activities (including research or educational activities) that the organisation engages in must be ancillary or incidental to its primary purposes (paragraph 95).

Unfortunately, organisations that promote the advancement of human rights are unlikely to meet the above criteria. The activities of human rights organisations are targeted towards social welfare generally, even if those organisations may target a particular "cause" or "causes". Further, human rights organisations often take part in reviewing the actions of the community (including, the actions of government, or the actions of employers) and speaking out against these actions if they violate or contravene human rights. This involves a research and educational role, rather than one of directly providing assistance to those individuals that are being denied their human rights (although this may also form part of the organisation's activities).

Accordingly, it is highly unlikely that human rights organisations will be involved in the level of direct aid to people in need to be PBIs. In the absence of any other DGR category that could apply to human rights organisations, such entities are unlikely to obtain the benefit of DGR status. As with a lack of ITEC status, this may result in philanthropic and other entities being less likely to donate to organisations that promote human rights (as the donations will not be tax deductible).

The somewhat less apparent consequence of this is that, in such circumstances, the only way in which such donations will be tax deductible for the donor, is if the donor receives some form of business benefit for the donation (eg, advertising). This may mean that human rights organisations are pushed towards a situation in which they may have to agree to advertise or promote their corporate donors in order to obtain funding. This is clearly undesirable, especially given the role that human rights organisations take on in objectively and independently reviewing the conduct of our community (including corporations) to determine whether this conduct conforms to current conceptions of "human rights".

4. CLIMATE FOR CHANGE

The above discussion demonstrates the presence of a number of difficulties in our legal system that complicate (and, in certain cases, obstruct) the ability of not-for-profit human rights organisations to actively encourage and promote the recognition of human rights in our community. In the discussion below, we seek to identify the movements (in Australia and overseas) towards redressing these difficulties and providing a suitable and equal platform for not-for-profit organisations that engage in human rights.

4.1 Australian movements towards change

There are a number of difficulties that human rights organisations face in relation to the current definition of "charity" and the legislative provisions dealing with tax concessions.

As discussed above, these difficulties primarily relate to the appropriateness of continuing to rely on common law concepts. This has led to calls by the Treasury and the community for amendments to be made to the definition of "charity". Given the change in government and the consistent support that the Rudd Government has offered to promoting social and cultural advancement in our community, we consider that there is a climate that supports a change in the approach to the tax concessions available to human rights organisations.

(a) Identification of complexities in current ITEC and DGR provisions

The first step towards the recognition of the need for change in the ITEC and DGR provisions evolved from the reviews of taxation in the 1980s and 1990s.

Ann O'Connell notes that, in 1985, the Treasury White Paper on the Reform of the Business Tax System (Treasury, *Reform of the Australian Tax System,* Draft White paper (1985) (**White Paper**)) advocated the need for a simpler tax system (White Paper, [1.8]). This need was reiterated in the Review of Business Taxation Final

Report, in 1999 (Review of Business Taxation Final Report, A Tax System Redesigned: More Certain, Equitable and Durable (1999), page 104) (see A O'Connell, "The tax position of charities in Australia – why does it have to be so complicated?" (2008) 37 ATR 17, 19, 19) (**O'Connell Paper**). Ann O'Connell notes that this complex tax system, as recognised by the White Paper and the Review of Business Taxation Final Report, indicate that the tax legislation that applies to charities is too complex (O'Connell Paper, 19).

Recognition of the complexity in the ITAA (and the ITEC and DGR provisions) also arose from the Inquiry into the Definition of Charities and Related Organisations (**Inquiry**), in September 2000. The Inquiry was a response to "the need to ensure that the legislative and administrative frameworks that [charitable organisations] operate in are appropriate to the modern social and economic environment", and culminated in the "Report of the Inquiry into the Definition of Charities and Related Organisations" (**Report**).

The Report (at page 34) indicated that the confusion as to the ambit of the tax concession provisions in the ITAA related to:

(i) which types of entities were entitled to access the various tax concessions available under the ITAA; and

(ii) the boundaries between the different categories of entities in Divisions 30 and 50 of the ITAA.

The Report also noted that the confusion was not surprising, as the categories of organisations that are able to access the various tax concessions is wide-ranging (page 34, Report). Most importantly, the Report recommended that a new, statutory definition of "charity" be enacted, to overcome existing complexities (page 163, Report).

(b) Identification of the need for a new definition of "charity"

In response to the Report's advocacy of a new definition of charity, the former Treasurer, Peter Costello, issued a Press Release (Press Release No. 49, dated 29 August 2002), stating that:

> [T]he legislative definition of a charity will closely follow the definition that has been determined by over four centuries of common law, but will provide greater clarity and transparency for charities.

Draft legislation was subsequently released in July 2003. The draft legislation closely followed the common law definition and (unfortunately for human rights organisations) legislatively enunciated a series of "disqualifying purposes" that included advocacy of a political purpose or change in law or government policy (see draft section 8(1), Charities Bill 2003 – Exposure Draft, available online at www.taxboard.gov.au/content/downloads/charities_bill.pdf).

The Board of Taxation (**Board**) considered that the legislation did not achieve the level of clarity that was originally intended. In its summary of recommendations in the Board's Report to the Treasurer (**Board Report**), the Board stated that the "disqualifying purpose" provisions should be clarified to ensure that "advocacy" was not excluded via the references in the disqualifying provisions to activities that advocated a particular political cause, or a change in law or government policy. Demonstrating the increasing shift in the role of advocacy in relation to modern charitable work, the Board stated, (at paragraph 3.7 of the Board Report) that:

> Many submissions expressed the view that advocacy activities are central to the work of the modern charitable sector. A number of submissions argued that the draft Bill should acknowledge the role of advocacy to modern charities positively, rather than refer to it in the negative as a 'disqualifying purpose'. They also proposed that public advocacy should be clearly distinguished from partisan or party-political advocacy.

Following this comment, the Board Report explicitly discussed the concerns relating to human rights organisations (at paragraph 3.24) (**emphasis** added):

> A number of submissions argued that human rights organisations are by their very nature involved in significant advocacy for changes in law or policy. One noted that the concept of human rights is not static but rather has evolved over time. Charities may therefore find themselves ahead of the law and public opinion. Another thought it could be seen as contradictory to acknowledge civil and human rights as a 'purpose(s) beneficial to the community' (paragraph 10 (1)(g)) if such an organisation could be construed as having a disqualifying purpose because it sought to protect those rights through a change in the law or government policy.

Accordingly, the Board Report recognised that the proposed definition of "charity" did not properly attend to the difficulties faced by organisations that are heavily engaged in advocacy work, including human rights organisations.

In response to the Board Report, the Howard Government refrained from enacting the Charities Bill 2003. Rather, the *Extension of Charitable Purposes Act 2004* (Cth) was enacted, to extend the definition of "charity" to organisations providing non-profit child-care to the public, self-help groups with open, non-discriminatory membership, and closed or contemplative religious orders (Treasurer's Press Release No. 31, dated 11 May 2004).

The Board Report and the consequent *Extension of Charitable Purposes Act 2004* (Cth) did not achieve reform in favour of human rights entities or advocacy-based not-for-profit organisations. However, the measures taken are significant, as they display changing attitudes towards the adequacy of the common law definition of "charity" and the application of that definition to our tax laws. The extension of the definition of "charity" (albeit in discreet circumstances) is of most importance, as it demonstrates an increasing recognition of the fact that the definition of "charity" is not inherently suited to capturing "worthwhile" not-for-profit entities and filtering out those entities that should not obtain the benefits that flow from being a "charity".

We therefore consider that the results of the Inquiry, the Board Report, and the *Extension of Charitable Purposes Act 2004*, illustrate that there is scope to build upon, replace, or expand conceptions of those organisations that are entitled to concessional treatment under Australia's tax laws.

(c) Recent case law

There have been recent developments in case law addressing the way in which "charitable" and "political" purposes are said to interact. These changes lend support to the view that a climate for redefining the interaction between political activity and charitable activity has evolved.

In the recent case of *Victorian Women Lawyers' Association Inc v Commissioner of Taxation* [2008] FCA 983 (**VWLA Case**), French J found that the Victorian Women Lawyers' Association (**VWLA**) was entitled to income tax exempt charity status, even though it engaged in certain "political" activities, such as promoting human rights and discussing changes in law. According to French J, the character of the VWLA was to be assessed "holistically" with primary regard to the VWLA's constitutional objectives. His Honour stated (at paragraph 149) (**emphasis** added):

> The activities of the association, including the social and networking functions, may have benefited its members. They were, however, plainly directed to the larger object and in many cases to a larger audience, the legal profession in Victoria. They were in aid of the principal objective. There was certainly a relentless push by the association for changes to attitudes and practices affecting women within the profession. There were representations and public positions taken from time to time on matters affecting the position of women generally. **None of these things translated into a political purpose that would disqualify the organisation from being characterised as a charitable institution.**

It is therefore apparent that the courts in Australia are moving away from a narrow conception of charity, in which any activities involving advocacy or taking a position on changes to law are deemed to disqualify an organisation from being "charitable".

French J's decision indicates that the interaction between what have historically been known as "political" activities, and the concept of "charity" may be changing. While this altered approach would only relate to political / advocacy activities that are being taken on as an "ancillary" or "incidental" activity to the main purposes of an organisation, the presence of this shift marks the evolving nature of the definition of "charity" and indicates that old perceptions as to how this concept interacts with political activity may no longer reflect the current reality. In effect, this provides further support for a change to the manner in which politics and charity interact in Australian law.

(d) The time for change – the Rudd Government's commitment to human rights

In light of the increasing recognition of the difficulties with the current definition of "charity" in Australia, and the recent reforms in the United Kingdom on this issue (as discussed in detail, in part 4.2(e) below), there is a climate supporting change to Australia's charity laws. We consider the existence of this climate to be both strengthened and underpinned by the change of government, given the general social policies of the Rudd Government, and the particular policies of the Rudd Government relating to human rights.

In particular, we refer to the Rudd Government's paper, titled "Respecting Human Rights and a Fair Go for All" (**Rudd Paper**). Items 7 to 9 of the Rudd Paper state that the Rudd Government is committed to hearing from the public on how it can best recognise and protect the human rights of all Australians, and to establishing a system of public consultation in furtherance of this.

We consider that the ultimate aim set out in the Rudd Paper, being, for a "united nation, where freedom, responsibility and power are fairly and equitably shared" can be both facilitated and achieved through the encouragement of human rights-based laws and policies, and by increasing awareness of human rights issues. We submit that human rights organisations can play an integral part in delivering these objectives to our community, by working with the Rudd Government to foster a society that recognises and lives out the key principles of freedom, equality, dignity and respect for all.

We also refer to the Rudd Government's commitment to developing Australia's domestic laws to reflect international conceptions of human rights. In particular, Item 4 of the Rudd Paper states:

> Labor supports both the promotion of human rights internationally and the development of international standards and mechanisms for the protection and enforcement of these rights. Labor will adhere to Australia's international human rights obligations and will seek to have them incorporated into the domestic law of Australia and taken into account in administrative decision making.

We consider that this statement provides additional support for the view that our domestic laws (including our tax laws) should be updated to acknowledge and uphold the need for both protection and promotion of human rights. Creating a new DGR category for "human rights" promotion charities is one way in which this objective can be practically integrated into Australia's domestic law.

By enabling human rights organisations to access the tax concessions that are available to other entities, the Review Panel can realise the Rudd Government's objectives by assisting these organisations to obtain philanthropic and community support, which will, in turn, increase the scale and quality of human rights discourse in Australia. Further, enabling current ITEC and DGR not-for-profit entities to engage in advocacy activities without (potentially) jeopardising their tax concessions may also encourage these organisations to take on roles as advocates for human rights, in more than a minor or ancillary manner.

In light of the changing political climate in Australia, and the opportunities that this presents, we ask the Review Panel to consider the important role it may play in facilitating and advancing the significance of human rights to our society.

4.2 Introduction of "human rights" category in the United Kingdom

To assist the Review Panel in considering the nature and scope of any changes to the definition of "charity", or to the available tax concessions for human rights organisations, we provide below an overview of the changes to charity laws in the United Kingdom, which have seen the introduction of a legislative definition of "charity" that extends to entities that encourage "the advancement of human rights".

Details of the reforms in the United Kingdom, and the political and socio-economic motivations for these reforms, are set out below.

(a) Charities Act 2006 (UK)

The *Charities Act 2006* (UK) (**Charities Act**) was introduced in the United Kingdom in 2006. The Charities Act sets out a statutory definition of "charity" and provides for "charities" that meet the statutory criteria to be registered under the Charities Act. Section 1(1) of the Charities Act defines "charity" as follows:

> For the purposes of the law of England and Wales, "charity" means an institution which –
>
> (a) is established for charitable purposes only; and
>
> (b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities.

Accordingly, for the purposes of the Charities Act, a "charity" in England or Wales is determined by reference to the "charitable purposes" that the "institution" carries on (subject to a jurisdictional requirement).

The term "charitable purposes" is defined in section 2(1) of the Charities Act, as a purpose which falls within a list of purposes set out in section 2(2), and is for the "public benefit".

The list of "purposes" contained in section 2(2) is of utmost significance to the current issue. In particular, paragraph 2(2)(h) states:

> (h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;

This paragraph effectively acknowledges that institutions engaging in the promotion of human rights may be recognised as "charities" under the Charities Act, provided that those institutions can satisfy the "public benefit" test.

"Public benefit" is not defined, and section 4 of the Charities Act states that the Charity Commission for England and Wales (**Commission**) must give guidance on this issue. The presence or otherwise of a purpose within section 2(2) will not determine whether the furtherance of that purpose is of "public benefit" (section 3).

Accordingly, while the Charities Act does not provide for institutions for the advancement of human rights to be "charities", of themselves, the Charities Act marks a movement away from the common law definition of "charity", towards a broader conception of what may constitute a "charity" in the United Kingdom.

(b) Reasons for the introduction of the *Charities Act 2006*

In July 2001, the Prime Minister's Strategy Unit was commissioned to undertake a review of the laws relating to charities and non-profit organisations. The review, titled "Private Action, Public Benefit" (**Review**), was published in September 2002. A copy of the Review is **enclosed** with this submission.

In the Foreword to the Review, the British Prime Minister at the time, Mr Tony Blair, recognised that the law relating to charities was not up-to-date with developments in societal conceptions of this term. The Prime Minister acknowledged that this could have the effect of undermining public confidence in charities (Review, pages 5 to 6).

The Review made a number of recommendations that were intended to modernise charity law, provide greater clarity on the concept of "charity", and place a greater emphasis on the "public benefit" in conceptions of charity. The key criticisms of the law as it stood at the time of the Review (which was based on the definition of "charity" in the Statute of Elizabeth) were similar to those enunciated in the Inquiry and Board Review in Australia, namely that the definition based on the Statute of Elizabeth was outdated and unclear, and excluded certain organisations that would clearly provide public benefit. Two of the ten primary recommendations advocated the modernisation of the concept of a "charity".

The Review considered it necessary to introduce a specific "charitable purpose" for advocating human rights, to enable human rights not-for-profit organisations to "play their full part in the vital tasks of protecting human rights both in the UK and overseas" (Review, page 43).

(c) **Responses to the Review and the Charities Act**

The Review was welcomed by the Commission, who supported the proposals, and considered that the implementation of the Review would achieve the following:

(i) promote public confidence in charities;

(ii) help charities to serve their users and clients better; and

(iii) help the Commission regulate charities in the public interest.

In particular, the Commission considered the proposal to redraft the meaning of "charity" in a manner that recognised a broader range of "charitable purposes" while placing greater emphasis on the "public benefit" recognised modern notions of "charity", and the expansion of the "charitable" sector.

The Commission now plays a key role in regulating the Charities Act and providing guidance to charitable organisations on its ambit and application.

The Charities Act was also welcomed by politicians in the United Kingdom. During the second reading speech of the Charities Bill in 2005, Baroness Barker of the Liberal Democrats welcomed both the Charities Bill and "the central thrust behind it", being "to modernise the structures for charities and to make them more workable" (see House of Lords Second Reading Speech of Charities Bill at column 817, 7 June 2005). The Baroness considered that the new Bill would be of great benefit to many organisations.

The Liberal Democrats also issued a statement on 13 November 2006 (titled "BILL - Charities Act 2006", available at http://www.libdems.org.uk/parliament/charities-bill.html) outlining their position on the new legislation. Despite stating that they would have included further restrictions within the Charities Act (eg, tightening the "public benefit" test and placing further safeguards on the powers of the Commission), the Liberal Democrats welcomed the changes and confirmed that the introduction of the new laws would result in "the modernisation of charity law", and, in particular, would:

(i) level the playing field between all types of charities;

(ii) better suit the needs of smaller charities; and

(iii) place all charities working for the betterment of society on equal footing.

We consider that, given the solid basis for reform in Australia and the previous support that the Opposition has given to amending the definition of "charity", similar bipartisan support for any amendments broadening the tax concessions available to not-for-profit entities would be found in Australia.

(d) The ambit of the human rights "charitable purpose"

The Commission was established under section 6 of the Charities Act. Among other things, the function of the Commission is to determine whether institutions are "charities" under the definition of this term in the Charities Act.

The Commission has provided guidance on this issue in its publication "Review of the Register 12 (RR12) – The Promotion of Human Rights" (**RR12**). We **enclose** a copy of this publication, with this submission.

Among other things, RR12 provides that a charity may engage in the advancement of human rights in a number of ways, including:

(i) monitoring abuses of human rights;

(ii) obtaining redress, or relieving need for victims of human rights abuse;

(iii) research into human rights issues;

(iv) educating the public (including individuals and corporations) about human rights;

(v) providing technical advice to government and others on human rights matters (including commenting on proposed legislation); and

(vi) international advocacy of human rights.

In order for an institution to fall under the human rights advocacy "charitable purpose", it must identify a "code" or "codes" of human rights that it seeks to address. In paragraph 13 of RR12, the Commission recognises several codes of human rights, which include (but are not limited to), the *Universal Declaration of Human Rights* (1948), other human rights conventions and declarations ratified by the United Nations or a body of rights that may be established by an individual or non-government organisation.

The Commission has also recognised that the advancement of human rights will often overlap with "political activity". For this reason, the Commission has stated that charities are permitted to "engage in political activities in the furtherance of their charitable purposes", provided that (RR12, at paragraph 34):

- there is a reasonable expectation that the proposed activities will further the purposes of the charity to an extent justified by the resources committed; and
- the activities will not be allowed to dominate the activities which the charity carries out in order to further its objects directly.

The Commission has also issued guidelines on campaigning, in response to public debate about whether or not charities should be entitled to campaign for political outcomes. In the guidelines, the Commission states that charities may undertake certain campaigning and political activities, provided that the charities do not, of themselves, have political purposes (page 6 of the guidelines). A copy of these guidelines is **enclosed** with this submission.

(e) Impact of the Charities Act on not-for-profit organisations

A number of charitable institutions have been registered under the Charities Act as "charities" that are advocating the advancement of human rights.

These charities have been identified by the Commission in RR12 at paragraph 9, and include (but are not limited to):

(i) charities promoting race relations, the elimination of racial discrimination, and equal opportunity between different racial groups;

(ii) charities promoting equal rights for women and homosexuals;

(iii) charities promoting religious harmony; and

(iv) charities promoting equality and diversity.

In addition to the above, the reforms in England and Wales are replicated in both Scotland and Northern Ireland. The Scottish reforms (passed prior to the Charities Act) came into force on 14 July 2005, under the *Charities and Trustee Investment (Scotland) Act 2005*. The "Charities Bill for Northern Ireland" was introduced into the Northern Ireland Assembly in December 2007.

5. PROPOSED AMENDMENTS

In light of the above discussion, we propose that Division 30 of the ITAA be amended to include a specific deductible gift recipient category for human rights organisations. The ambit of this category, and the proposed amendment, are discussed below.

5.1 Proposed human rights category

We propose that the following category **4.1.8** be inserted into section 30-45 of the ITAA (under the categories of DGRs relating to "welfare and rights"):

Item	Fund, authority or institution	Special conditions
4.1.8	a public institution whose principal activity is the advancement of human rights	none

We suggest that the term "human rights" should be defined in the ITAA, in a manner that would provide some guidance, while leaving the definition of "human rights" fluid and open to interpretation and guidance. A proposed definition for "human rights" is discussed in part 5.2(b) of this submission.

We suggest that the term "advancement" should not be defined in the ITAA, but, rather, should be defined by reference to common conceptions of this word, accompanied by the Commissioner's guidance. This would be similar to the approach in the United Kingdom and would allow for a range of activities to fall within the ambit of the new category.

The proposed operation of the new human rights category is discussed in detail below.

5.2 Operation of proposed category

The ambit of the category would be contingent on how key words in the description of the category were interpreted. These key words are "public institution", "principal activity", "advancement", and, most importantly "human rights".

(a) Guidance from the Rudd Government and the Commissioner

We suggest that the ambit of the proposed category, and the definition of each of the terms isolated above, should be determined by the Commissioner and set out in a public ruling on the issue. This would afford clarity to not-for-profit entities seeking to use the new category, and avail the Commissioner of the opportunity to determine how he interprets the category, and provide public, practical guidance on how the category may operate.

If there are any matters that the Review Panel would seek to address or define in a particular way (and would rather not leave to the Commissioner's interpretation of an issue), we suggest that the Review Panel could procure the legislature to discuss these matters in the Explanatory Memorandum to the Bill introducing the category, to provide guidance on the intended operation and "outer limits" of the category. We have provided discussion on the potential ambit of the terms used in the new category in parts (b) and (c) below, which the Review Panel may wish to consider in further detail.

Prior to discussing the proposed ambit of the provisions, we wish to emphasise that, as the new category would involve a component of advocacy and political activity, the courts may be reluctant to define or interpret the scope of the phrase "advancement of human rights", of itself. For this reason, it is essential that there is sufficient guidance on the operation and intended use of the key terms used in the proposal, so that courts are not faced with the difficulty of making overtly political decisions on the scope and operation of the new category.

(b) Definition of "human rights"

The central issue for the Review Panel to consider will be how it recommends that "human rights" be defined. The legislature may choose to define this term in the

ITAA, or may leave this term to be interpreted in accordance with its ordinary meaning.

While the term "human rights" is defined in section 1 of the *Human Rights and Equal Opportunities Commission Act 1986* (Cth), this definition does not reflect current conceptions of "human rights". Accordingly, we suggest that the ITAA contain a new definition of "human rights", which could read as follows:

> **human rights** means the rights and freedoms:
>
> (a) recognised in the customary human rights norms; or
>
> (b) recognised in the norms, principles and standards contained in international human rights treaties to which Australia is a party, from time to time, whether or not these treaties have been enacted into Australian domestic law.

By defining "human rights" with reference to "customary human rights norms" as they exist from time to time, the concept of "human rights" can change as the views of society (and the international community) expand. Additionally, by referring to the norms, principles and standards that are contained in treaties ratified by Australia (rather than those that Australia has enacted into its own laws), the full ambit of "human rights" that the government has committed to upholding will be recognised. This will encompass both political and socio-economic conceptions of human rights.

We would, however, suggest that the Review Panel procure that the Rudd Government commits to a review of the new category and the definition of "human rights" within the ITAA, within two to five years of the commencement of the operation of the category. We suggest that the review could determine issues, such as whether the category is appropriately catered towards recognising "human rights" as they have evolved at that time. The government could also include any other matters that it would like to monitor or reconsider in the review process.

(c) Definition of "advancement"

We suggest that the term "advancement" be left undefined in the ITAA. This would allow for the term to take on its natural meaning, and provide an inherent flexibility in the ambit of the proposed category, so that new concepts of "advancement" of human rights could be captured by it, as these concepts evolve.

In the United Kingdom, the notion of "advancement" of human rights is discussed in guidelines issued by the Charities Commission (which are extracted in part 4.2(d) of this submission). We consider that a similar approach could be adopted in Australia, with the Commissioner (perhaps, working together with the Human Rights Commission (**HRC**)) providing guidelines on what may constitute "advancement" of human rights in a public ruling on this issue.

We would suggest that the Commissioner's public ruling be guided by the scope of the term "advancement" in the United Kingdom, and by the recommendations of key stakeholders, including the HRC and other not-for-profit organisations and peak bodies. Dialogue as to the appropriate ambit of this term would be facilitated if the Commissioner first issued a draft public ruling, which members of the public and, in particular, the not-for-profit sector could comment upon, before finalising his ruling on the ambit of the new category.

(d) Definition of "public institution", and "principal activity"

We consider that guidance on the terms "public institution", and "principal activity" could be provided by the Commissioner, through the issue of a draft public ruling

that addresses these issues. We would envisage that this would be the same draft public ruling that discussed the definition of "advancement" (as discussed above).

We note that the terms "public institution" and "principal activity" have both already been discussed by the Commissioner in current publications relating to DGRs. We consider that this discussion could be replicated in a public ruling addressing the scope of these terms in relation to the new category. In particular

(i) The definition and discussion of "public institution" in Taxation Ruling TR 2003/5 (public benevolent institutions) could be adapted in a manner that discusses the "public" and "institution" components of this term, and used to depict the ambit of this term in relation to the new category for the advancement of human rights (see, in particular, paragraphs 73 to 94 of Taxation Ruling TR 2003/5).

(ii) The definition and discussion of "principal activity" from Taxation Ruling TR 2004/8 (health promotion charities) could be adopted to determine whether an organisation's principal activities involve the advancement of human rights (see, in particular, paragraphs 27 to 28 of Taxation Ruling TR 2004/8).

We consider that use of the above concepts would allow the use of established concepts in the law (and the Commissioner's views) relating to not-for-profit tax concessions to be applied to the new category. Importantly, this would provide the Commissioner with confidence and familiarity as to the manner in which these terms (and thus, the new category as a whole) should operate.

We also consider that, as the above concepts are already used and well-known in the not-for-profit sector, organisations seeking to rely on the new category will have a degree of knowledge as to how such concepts usually operate. It is hoped that, by using terms that are clear and known to the major parties that will engage with the new category, the new category may seamlessly integrate itself into the current landscape of not-for-profit tax law.

5.3 Potential difficulties with proposed category

The introduction of a "human rights promotion" DGR category is simply a step on the way to resolving the broader issue of how "charity" is defined in Australia.

We emphasise that the following difficulties will still exist (and remain to be addressed), even if a "human rights promotion" DGR category is introduced:

(a) human rights organisations will not be entitled to obtain ITEC status, as they will not be "charities", unless a specific exemption is granted; and

(b) philanthropic trusts established for "charitable purposes" will not be permitted to distribute funds to human rights organisations, under general trust law, because such distributions will not be made to "charities".

These difficulties stem from the use of the Statute of Elizabeth as the cornerstone for the definition of "charity" in modern society, and raise understandable concerns as to whether it is viable (or, indeed, desirable) to override 400 years of common law by introducing a statutory definition of "charity".

While this step has been taken in the United Kingdom, we recognise that this is not a matter that should be taken lightly and, accordingly, submit that the current proposal (to introduce an additional DGR category) would represents a positive step towards providing recognition for not-for-profit organisations that do not meet the common law definition of "charity", without invoking far-reaching reform.

However, we ask the Review Panel to consider whether such reform may be appropriate in the future, and would welcome an opportunity to provide submissions on this issue.

5.4 Impact of proposed amendments

The implementation of a new human rights DGR category would be of great benefit to not-for-profit organisations in Australia.

In particular, the introduction of the new category would allow more philanthropic organisations to fund social and structural change. Many philanthropic organisations have been inhibited from pursuing this type of funding in the past, due to the fact that organisations pursuing these objectives do not receive the benefit of any tax concessions.

We therefore consider that the new category would be a welcome movement towards providing some assistance to human rights organisations that do not currently receive the benefits that may accrue (in a taxation context) from being considered as "charitable" in nature. The fact that philanthropic organisations may be more likely to support and donate to these organisations if they obtain DGR status provides a firm case for demonstrating that the proposed reform will have a real and immediate impact on not-for-profit organisations seeking to advance the role of human rights in our community.

On the grounds set out above, the HRLRC and Blake Dawson request that the Federal Government amend the Act, to introduce a DGR category for human rights organisations.

If you would like to discuss the submissions in this letter further, please contact Phil Lynch, Director and Principal Solicitor, HRLRC on (03) 8636 4450, or Teresa Dyson, Partner, Blake Dawson, on (07) 3259 7369.

Yours faithfully

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