

Samantha Parsons
Committee Clerk
Standing Committee on Legislation
Legislative Council
Parliament House
PERTH WA 6000
Via email to - Jlc@parliament.wa.gov.au

7 October 2014

Dear Ms Parsons

Inquiry into the Taxation Legislation Amendment Bill 2014

Thank you for the invite to provide a written submission to the Standing Committee on Legislation inquiry on this Bill.

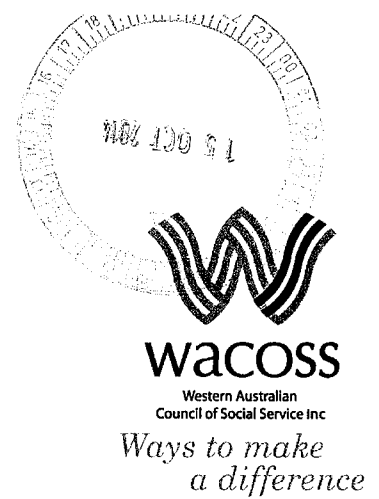
I note that your letter asked for a submission on "*whether the Bill imposes unintended consequences, if any, on legitimate fourth-limb charities*" and seek to clarify that the inquiry will consider the consequences of the Bill more broadly.

The concerns previously raised by the Western Australian Council of Social Service (the Council) relate to whether the Bill may have unintended consequences for *other* legitimate charities providing services and support to members of our community. The Council notes the stated intention of this Bill, as outlined in The Minister for Finance Dean Nalder's second reading speech, is to restrict the access of "fourth-limb" charities and professional associations established to promote trade, industry or commerce (such as the Chamber of Commerce and Industry) to the benefits of State tax exemptions or concessions (including payroll tax, transfer duty and land tax). That is, the Bill is clearly based on the premise that such professional associations and industry bodies are not legitimate charities and thus intentionally restricts their access to tax benefits intended to support charitable activities that benefit those in need.

The Council does not have a problem with the WA Government seeking to ensure that the benefits of charitable status (and concomitant costs to the public purse of foregone tax revenue) are targeted to ensure they are supporting what the community would consider genuinely charitable purposes that are to the benefit of vulnerable and disadvantaged Western Australians and the community as a whole.

The Council is concerned by advice we have received from a number of trusted sources including the Australian Charities Law Association, the Law Society of WA and other experts in charities law who regularly advise the community services sector. They suggest that the manner in which the Bill has been drafted may result in unintended consequences for some of our member community service organisations of a charitable nature. I have attached for your information a recent article from *Pro Bono News* and a media release from the *Australian Charities Law Association* that outline some of these concerns with the Bill.

The Council acknowledges the response of the Minister and the Department for Finance to our raising of these concerns with them. We welcome their response in meeting with the Council to discuss the issues we have raised, their assurances that it is not their intent that legitimate charities should be affected, and their undertaking to review the legislation and propose any amendments they deem necessary to address and such unintended consequences. At the end of the day the Council did not feel it had the necessary legal knowledge and expertise to



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definitively assess the competing claims and considered the most appropriate response was to place these issues before the Standing Committee for their consideration.

The Council suggests that the members of the Standing Committee on Legislation need to satisfy themselves that the measures within the Bill are defined in a way that have the potential to affect many more organisations that are intended, and that the manner in which the decision making powers to enable an exclusion from its provisions are placed at the discretion of the Minister of Finance the day do not leave the door open to the politicisation of decision-making about charitable status.

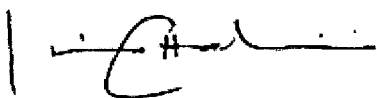
The Council is concerned that the Bill appears to apply a 'catch-all' test relating to a purpose to "promote trade industry or commerce" from which organisations then need to seek an individual exemption (rather than narrowly defining industry bodies). Standing Committee members should consider whether the administrative interpretation of this test could see it potentially apply to legitimate charitable organisations engaged in activities involving trade or commerce as a means of delivering better outcomes for vulnerable or excluded groups - for example disability employment, Aboriginal organisations and others promoting the economic development of disadvantaged groups, community housing providers and charities developing or promoting social enterprises. The Council notes that Professor Ian Murray has raised concerns that advocacy bodies and peak organisations may be more at risk under these measures should this decision making be politicised in the future and is seeking reassurance from the Parliament that this is not the case.

The Council notes that there is an exemption for organisations whose sole or dominant purpose is relieving poverty, advancing education or advancing religion, but is concerned that this definition is narrower than that usually used in charities law.

Our initial analysis suggests that the measures within the Bill may have the potential to affect different types of charitable organisations in two ways. Firstly it may directly affect the charitable status of those organisations who are Incorporated Associations under the WA Act (predominantly smaller charities only operating within WA) by removing their charitable status. Secondly, it may also indirectly affect those organisations whose charitable status is determined federally by removing their access to State concessions (such as payroll tax, land tax or stamp duty concessions). This second group comprise larger organisations who are considered constitutional corporations within industrial relations law and/or have Deductible Gift Recipient (DGR) or Public Benevolent Institution (PBI) status as determined by the Commonwealth. To illustrate, we are advised that around one third of (smaller) community housing providers are Incorporated Associations who (if the concerns about unintended consequences are true) could be directly affected through loss of their tax status, whereas the remaining two-thirds of (larger) community housing providers would retain their Federal charitable tax status by could have their financial viability affected by the impact on their access to stamp duty and land tax exemptions.

We are seeking assurances from the members of the Standing Committee on Legislation that the Bill is not passed before these issues are clarified and resolved. We are heartened to see that the legislation has been referred to committee for public debate and are hopeful that amendments to the Bill will be put forward to address any unintended consequences.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Irina Cattalini', written in a cursive style.

Irina Cattalini, Chief Executive Officer

Pro-Bono News

WA Charities Open to Political Intimidation

Posted: 12 August 12 2014

Proposed legislation in Western Australia aimed at removing some charitable organisations from state tax exemptions will leave them vulnerable to political intimidation, law experts have warned.

The Western Australian Government says its Taxation Legislation Amendment Bill 2014 will amend the Duties Act 2008; Land Tax Assessment Act 2002; Pay-roll Tax Assessment Act 2002; and Taxation Administration Act 2003, to improve the efficacy of existing State tax exemptions for charitable institutions.

But according to the Australian Charity Law Association it would also mean that applications by organisations seeking tax exemptions would be determined by the Minister of the day.

As well Assistant Professor Ian Murray, from the Law Faculty at the University of Western Australia said the Bill, more generally, risked politicisation of the concessions, which might render advocacy bodies more at risk.

The amendments came in response to a decision of the State Administrative Tribunal that found the Chamber of Commerce and Industry of Western Australia to be a charitable organisation and therefore, eligible for State taxation exemptions.

"The State Government is concerned with the precedent created by that decision, including the potential extension to other organisations for which a State taxation exemption is considered inappropriate," the State Government said in its explanatory memorandum.

"By way of background, the common law definition of charity encompasses organisations that promote: the relief of poverty; the advancement of education; the advancement of religion; or other purposes considered beneficial to the community, the last of which is commonly known as a 'fourth limb' charity."

However the Australian Charity Law Association said it would also mean that certain otherwise charitable entities that do anything to promote or advocate for trade, industry or commerce in WA would risk losing their State tax exemptions.

"It is most unfortunate that certain charities will be left to the mercy of the Minister of the day to be able to access State Tax exemptions," the Australian Charity Law Association said in a statement.

"The Minister's determination will "not be subject to objection or review ... or to any other form of appeal or review" [proposed section 34A of the Taxation Administration Act 2003].

"This is a most unusual and concerning development.

"The legislation will, we fear, leave otherwise charitable organisations potentially vulnerable to being penalised on a political whim. No other State or Territory in Australia has any such legislation. Nor does the Federal law seek to penalise charities in this way."

Assistant Professor Ian Murray, from the Law Faculty at the University of Western Australia, has been following the Bill and has spoken to Not for Profits who he said were surprised by the changes.

Prof Murray said more generally the Bill risked politicisation of the concessions, which might render advocacy bodies more at risk.

"The risk is increased by the fact that the Bill also enables additional classes of charities to be prescribed so that they no longer receive state tax concessions," he said.

"Further, if charities are seeking to convince the Minister for Finance that they ought to be re-included for the concessions, it is likely to be harder for bodies that provide less tangible benefits to achieve this. For instance, advocacy bodies, again, and peak bodies may find this difficult.

"My interpretation of the Bill is that the exclusions it applies to charities are broader than is strictly required to deal with the WA Chamber of Commerce and Industry decision and like organisations.

"Indeed, the mechanism that the Bill adopts is to rely on a relatively broad exclusion and to then provide a process for re-inclusion within the state tax concessions.

"The concern is that the re-inclusion mechanism purportedly relies on the absolute discretion of the Minister - it is a non-reviewable decision and is to be made without reference to any factors identified in legislation.

"This is not best practice. This will mean that for affected charities, it comes down to the absolute discretion of the Minister, whether those concessions apply or not."

Prof Murray said that while the exclusions could be described as broad and, to judge from the explanatory materials, certainly broader than the Government appears to contemplate, the changes won't impact all charities.

"They will primarily affect any charity that promotes trade, industry or commerce and, to a lesser extent, professional associations," he said.

"However, these exclusions could still apply to a wide range of organisations. First, there is no definition of what 'trade', 'industry', or 'commerce' means and the ordinary meaning of these words is likely to be fairly wide and subject to some debate.

"Second, an entity need only have a purpose, within its broader range of purposes, of promoting or advocating trade, industry or commerce.

"Any entity which has such a purpose is automatically excluded unless it can show that it has a sole or dominant purpose of relieving poverty, advancing education or advancing religion. Does an entity with the dual purposes of relieving poverty and advancing education meet these requirements? Very possibly not.

"Further, many entities will have other sole or dominant purposes, such as the protection of the environment or the relief of sickness. A purpose of promoting trade, industry or commerce within the purposes of such organisations would cause them to be excluded.

"The worry is that any organisation that is working to assist with economic development for disadvantaged people might be characterised as having a purpose, amongst its various charitable purposes, of promoting trade, industry or commerce.

"For instance, charities which aim to close the gap for Indigenous people, or charities working to address disadvantages faced by rural, regional and remote communities. There have always been some limits on the extent to which charities can assist with economic development, but this Bill poses risks for what has been permitted so far."

Australian Charities Law Association
Media release – WA state taxes
Posted: 21 August 2014

The Australian Charity Law Association is very concerned that the proposed legislation to carve out certain otherwise charitable organisations from state taxes exemption will leave them vulnerable to political intimidation. It will also mean that certain otherwise charitable entities that do anything to promote or advocate for trade, industry or commerce in WA will risk losing their State tax exemptions.

It is most unfortunate that certain charities will be left to the mercy of the Minister of the day to be able to access State Tax exemptions. The Minister's determination will "not subject to objection or review ... or to any other form of appeal or review" [proposed section 34A of the Taxation Administration Act 2003].

This is a most unusual and concerning development. The legislation will, we fear, leave otherwise charitable organisations potentially vulnerable to being penalised on a political whim. No other State or territory in Australia has any such legislation. Nor does the Federal law seek to penalise charities in this way.