



Key Note Address by Heather Gray, Partner DLA Phillips Fox (then of Holding Redlich) Changemakers Australia 2008 AGM Event

Well thank you for the invitation and for that build up which is really far beyond what I would hope your expectations will be, but I will do my best. What I was asked to talk about was to go over some of the things that I mentioned about advocacy and not for profits when I spoke at the Advocacy Workshop back in July. I will also go into a lot more detail about the Victorian Women's Lawyers Case and talk a bit about what that case was about and what we learnt from it and what sort of level of confidence that we can have going forward.

I thought I would just start by going through some of the principles about advocacy and setting the scene, and why it is that we are even concerned about that as an issue. Advocacy of itself would seem to be a fine thing and something that we should all be working to engage in when the mood takes us. So why should we be worried about that? What implications might that have for us in what we are doing as part of not for profits and then how confident can you be about what we actually do?

"...advocacy of itself would seem to be a fine thing and something that we should all be working to engage in when the mood takes us."

So I guess first of all the question is what is advocacy? It's not necessarily that straightforward, because there are things that you do that may be directed towards bringing about change that aren't necessarily advocacy per se, and there are other things that you might not even think of in that context but they actually are when the Commissioner or when a Court looks at them.

So the sorts of things that come in (and some of them are fairly evident) are:

Political lobbying Lobbying tends to be seen as a fairly basic sort of activity. Lobbying is actually about speaking to people who are in the position to bring about some legislative change. There is actually some legislation around that and about lobbyists having to register themselves and some of the activities that they get engaged in.

Activities aimed at changing public opinion These are often seen as advocacy and that can take all sorts of forms. It can be something fairly low key and subtle or it can be something absolutely in your face and full on.

Education campaigns An education campaign can be very straightforward. A number of the superannuation funds that I am involved with in the industry funds sector are involved in education campaigns and specifically on women's and men's health issues. A lot of them are very straightforward. It's going out and speaking to people at work places and explaining to them the issues to do with men's health, what signs to watch out for, what you can do. But you can move beyond that and you can start to move into suggesting greater funding for men's health. You can suggest that certain structures in existence around the health system are not appropriate and you can be starting to suggest that there be change around those things. You can see that in the first five minutes you are talking about your health and that is lovely and everybody is enjoying it and before you know it you have skipped over and you might have crossed that line. So we need to be aware of that.

Input into legislation or policy Again that is something that I do from time to time on Committees. The Government comes up with some genius proposal about superannuation law, inevitably when

you look at it it's not quite as genius as it seemed. I would be involved in putting in submissions to the Government. Now is that advocacy? Well sort of yes and no, but I will come to that later on.

Arguing publicly for change - going on the radio, being interviewed, or writing a letter to the editor. Publishing something in a newsletter, talking to people formally and informally.

Organising and participating in actions which are aimed at procuring change. For example, when everybody popped down to Flinders Street Station and took their shirts off - that was fun. The taxi drivers decided to join in, and so did the old age pensioners - but that wasn't quite so much fun! All in all it was still a good thing to do and it got a lot of attention.

You might have something that is low key or something that's extremely well publicised and organised which is aimed to achieve a particular result in terms of social change or legislative change.

All of these things have got the potential to fall into the category of advocacy. So why do we care? Why are we bothered about whether that's what we are engaging in?

“All of these things have got the potential to fall into the category of advocacy. So why do we care? Why are we bothered about whether that's what we are engaging in?”

Being a charity A charity of course has to have charitable purposes and not political purposes. Political purposes by definition are not charitable purposes. Why not? Because they are political, this is something that I will talk about in further detail later.

Funding a charity If you are involved in an organisation which provides grants and funds to charities, then you have probably got some fairly significant restrictions, only being able to pass on your funds to charities for charitable purposes. So that is a restriction and of course you can get into quite a lot of difficulty if you start moving outside of those parameters in terms of what your own status might be.

Then, of course, what is in your Trust Deed or in your Will or in your Constitution? You might have any of those. We sometimes forget a little bit about charities and organisations set up under Wills, but they can be a very significant part of the sector and there are some very substantial charitable funds which operate under the terms of a Will. In terms of a Will, particularly if it's a Will that was drawn up some time ago - I am involved with a couple of these, and they tended to be written very much in terms of "charitable purposes, such as my executors and my trustees select", and that's really quite limited. When you think about the whole universe of good works that you can do, only some of them are charitable.

But before we look at what is a charitable purpose, I want to just draw a distinction between purposes and activities. Purpose is where we are going. So that is what's at the end of the path that we are travelling down. That's our purpose. What we are trying to achieve. Then our activities are very much around how we are going to get there. So our activities are not our purposes. So we might be doing something, but the deed is not the purpose. That is something that children actually understand extremely well and teenagers seem to understand extremely well because they often do things with no purpose at all but there is a lot of activity, which there is certainly a lot of in my household! It's very hard often to discern the purpose, so kids do understand that and it's something that they do extremely well.

Right, so what are charitable purposes? Bearing in mind we have got our activities and we have got our purposes, what are we trying to achieve? We should all be aware that when you look at what are charitable purposes, we go right back to the Statute of Elizabeth and some cases which came out of that a very, very long time ago. (From the Audience: Statute of Elizabeth 1601) So the purposes are; relief of poverty, sickness, distress and needs of the aged tend to get lumped together. Although I think originally that was just known as relief of poverty and it's expanding a bit. Advancement of education, advancement of religion and this is the one that we are going to think about a bit tonight and that's 'other purposes beneficial to the community'.

Then in Australia we have had some statutory additions, so some self help groups, some closed religious orders, not for profit child care. We are not really going to be thinking about those tonight, I am really going to be thinking about 'purposes beneficial to the community' because it is not so hard to work out what's education and what's religion and what's helping the poor.

'Purposes beneficial to the community' is incredibly difficult. Apparently it is impossible to know what is beneficial to the community ahead of time. When we identify purposes you've got to look at what is going on. You need to look at the objects, the purposes and the activities. I have got a lovely quote here which comes out of a case and it tells us that we have to conduct "*an integrated holistic enquiry*". That's actually Justice Allsop having a very rare sensitive new age moment where he just brought that together and it now gets quoted, and now suddenly the laws are on about integrated holistic enquiries which I think is quite lovely. It doesn't actually tell you anything, doesn't advance knowledge at all, but it's more one of those touchy feely things that you can know it when you see it - and you actually can!

When we get to the Victorian Women Lawyers case, we see how that integrated holistic enquiry actually produced the goods.

So your respective lawyers will have done your constituent documents, unless you're operating from a Will that was drawn up back in the 1950s or something. It will have objects, and it will explain what it is that the organisation is trying to achieve and that's really where you start out looking to see what that is for you.

So the next comment that I have got is headed: Purposes of Politics and Change are not charitable. So these are some things which the Courts and the ATO have held and stated are not charitable: supporting a political party or cause. Neither is seeking to change legislation or Government policy - not charitable.

You sort of think, well that could well be beneficial to the community, why is seeking to change some policy that just seems to be stupid and detrimental and hurting everybody, why would that not be beneficial to the community? The reason is, according to the cases, 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 it can't determine whether or not a donation for that purpose is going to be charitable. I am not really convinced of the reasoning of that, because I would have thought a smart person could look at that and actually deduce whether certain changes were going to be beneficial or not, but the Courts say and the Law says no, you can't step in and prejudge that. Policy is policy, Government approach is Government approach, laws are laws, that is what we have got, and that is what we live with, and if you are simply setting out to change that, then that's a political purpose and a change that you are seeking to make, and we are not in a position to say whether that is going to be beneficial or not.

So there're some classic examples around what's been held in terms of looking to change the law that are not charitable because the Courts said they don't know if that's beneficial or not.

Take the Voluntary Euthanasia Society; I suppose it depends on who you are and whether or not that is going to be beneficial! The Universal Cremation Society is one of my personal favourites, because you have got to love people who have devoted their life to making sure that at the end of it we all go up in flames! I like that, but who knows if that's beneficial or not? Some people don't think it is. Actually, what is even better is the Prohibition of Alcohol Society. Their hearts are really in the right place. The Courts have said: No, we don't know if that's good or bad. Even seeking to keep public policy unchanged falls into that category, because again it's all around political activities and you just don't know. If that is what your purpose is, that's not a goer either, that's going to be around politics and advocacy and that's not going to be charitable.

Now, we've got to compare all of this with activities. So again you might have purposes which look fine - it's going to be all around relieving the needs of aged people or all around education or all around religion, or all things that are obviously beneficial. But it's no good just having purposes, you have actually got to act towards bringing those purposes about. So this is where we start to

get into difficulty; where you do something which is in fact political, which does involve trying to make changes, and does involve trying to bring about what you see as social justice.

So the ATO had a reasonable crack at explaining this I think in one of their Tax Rulings, and they say "if the purpose of the institution or fund is charitable, the presence of propagational or promotional programs and activities will not detract from this status, provided they are incidental to the charitable purpose". [ATO, para 114, TR 2005/21] That's really the key to it I think. As long as you are doing things in terms of your activities which are incidental to charitable purposes, the ATO even before the Victorian Women Lawyers case said that's going to be ok, we accept that. So activities that you carry out in furthering your charitable purposes, it can't be your dominant purpose, and if you had a beautifully worded charitable purpose but pretty much all you did was around advocacy-type activities, then the ATO will not accept that actually, even though that is not what you've said your purpose is. This actually is your dominant purpose, and that's not going to be good enough. So it's got to be incidental or ancillary to what your purposes are and in that case you can engage in these sorts of activities and often these are things which you have to do as part of carrying out what your main purpose is. So a couple of examples that actually I think come from the ATO ruling - they say, for example, take an organisation which is providing programs for homeless people, helping them to find accommodation. As part of that, the organisation makes submissions to Government drawing their attention to the problems of homeless people and suggesting particular funding priorities. The ATO says that's ok, that's fine.

By way of contrast, if you formed the organisation specifically to bring that problem of homelessness to the forefront of the debate and to give Parliamentarians and the public and people who have got a lot of influence within the community, information and research and arguments supporting that point of view, hoping to get additional funding and services for homeless people, that would not be ok, because now that's your purpose - as opposed to just simply something that you are doing to facilitate the provision of services for homeless people. And that is the distinction which we can see when we talk in a moment about Victorian Women Lawyers and how that panned out there (but I suspect none of the lawyers were actually homeless!).

How do we draw the line? Well, in order to help you there's a few things. There are the ATO resources and I mentioned that they have got quite a good tax ruling which you can access on their website which you read through, it gives examples and information. They have also got some information sheets which I think are quite useful and always knowing what the ATO's view is on something is incredibly helpful. Even if you don't agree with that view, at least now you know you're going to have a fight on your hands. With the cases, if you feel like reading about universal cremation or voluntary euthanasia or you want to get into the prohibition of alcohol, all of those cases are fairly readily available and often are referred to in the guidelines and rulings that you might read. I don't think you have to read them, but as lawyers we sometimes just go back and refresh our memory of those principles because they really do inform everything that's come since.

Then finally what I call 'the smell test' - which is a great legal principle which we apply far more than we would like you to know! We are able to do this because we develop a bit of intuition and a gut feel for it, once you have done a bit of reading into these issues you actually do develop that ability to exercise that intuition fairly well and people are usually pretty good in the not for profit area about knowing when there is an issue and coming to ask the question.

So the latest word is the Victorian Women Lawyers case, the Victorian Women Lawyers Association v. the Commissioner of Taxation. That's where the Federal Court has I think struck a bit of a blow. They have gone through these issues in a lot of detail and they have really given us a good deal of guidance about what they think of the rules. We were all on tenterhooks for about a month, waiting to see if the ATO was going to appeal that decision, and they decided that they wouldn't because in fact I think Blind Freddy could see that the Court had actually applied the law and what it had done is it had brought those rules together and it had put them out there in the context of a particular case where you could really see all of these things that we've looked at but still felt anxious about. You know it's ok if it's incidental, it's ok if it's ancillary, oh but what if we do

this or what if one of our purposes has a political flavour to it - will we be in trouble? And they dealt with all of those things. So now we really do have some excellent guidance I think.

To talk a bit about Victorian Women Lawyers, it's an incorporated association, incorporated in Victoria, and you won't be surprised to hear it's got some objects. I won't go through them all, but the key ones really for us are encouraging and providing for the entry of women into the legal profession and their advancement within the professions, eradicating discrimination against women in the law and in the legal system and working towards reforming of the law, which was just expressed as a very broad purpose. It didn't say reforming the law as regards to discrimination or as regards to the treatment of women. It just simply talked generally about law reform. It set about carrying out the objects in a very wide array of activities. So it had workshops, it had seminars, it made submissions to Government, it concerned itself greatly with understanding what the barriers were to women advancing in the legal profession. So it did surveys, it spoke to management in law firms; it put together reports which it was able to submit to Government and submit to members of the legal profession. It involved itself in public debate; it involved itself in speaking with people who were in the position to influence some of these things. So it spoke to people at the Bar. It certainly spoke to decision makers at big law firms about how they might better deal with the position of women in their firms and it also had networking functions, it had social functions, it put out a journal and it provided a venue and forum I guess for women to discuss these issues and to get assistance with understanding where these issues were leading, to get information and to provide support to women who were themselves taking action towards trying to eliminate discrimination or trying to improve the structure of the workplace for women in the legal profession.

There was a lot of evidence that the Court had about what they did. In fact, everybody who had been in leadership roles pretty much came along and gave a lot of evidence about what they did, and I have got to say that these women remembered what they were doing 10 years ago. More power to those women, because I don't remember what I did this morning and they knew exactly what had happened at all of those things! I am guessing they had good files but nonetheless they were able to explain very thoroughly what it was that they had been doing.

Anyway, the ATO rejected that and they sort of said, paraphrasing slightly, that advancing the position of women lawyers is not a public benefit. You can see how you can't let that go by, that's just not something that can go through to the keeper! They said that the object of working towards law reform is not charitable. So after a bit of argy bargy with all of that it was agreed that the Women Lawyers would put their returns in on the basis that they felt they were entitled to the tax concessions.

The Commissioner very generously said that he would reject those returns on that basis, and there would then be an ATO-funded test case in the Federal Court. It was to do everybody credit that it was recognised that this was something that really needed a fair bit of time and attention paid to it because nobody was really quite sure what the position was. So the Court set about thinking 'well, what are charitable purposes'? Are these things that the women lawyers are doing charitable?

In dealing with it, Justice French took judicial notice of the fact that the disadvantage suffered by women in the legal profession is a well known social deficit and he didn't require a whole lot of expert evidence about that issue. Not just because it's obvious, but also because he said (not in so many words) "If that wasn't something that was obvious to the community, then why do we have a Sex Discrimination Act? Why do we have all of those State Acts? Why do we have these Commissions that are set up to deal with complaints and to try and stamp this out?" So he said, this is a good. This is a public good that we are working towards. He just pretty much dealt with that one just like that.

Therefore, he said, and this is like three hundred pages of discussion later, the main purpose of Victorian Women Lawyers is therefore charitable because they are trying to do something which in his view, and I think in the view of probably everybody in this room, was going to do a public good and was going to be a public benefit in relieving discrimination as far as possible against women in the legal profession. He also said that ancillary objects or purposes can be non charitable. So

he looked at the issue of work towards law reform and even though that was expressed as one of the purposes of the organisation, and there was actually a chart drawn up which the Commissioner had done which backfired a little bit. It had columns, and it showed how these are all the purposes in order to advance women within the profession, and these are the purposes to help with discrimination against women generally and these are the other ones which are really around law reform. Looking at that chart, even having it expressed in that way you could see that the law reform objective was something that was really incidental to the other things.

He said we are going to look at two things really and he brought in that lovely word again and he had a bit of a holistic look and I'm sure he'll be very holistic on the High Court as well. We can look forward to that. He said - What have you actually said it is that you are going to do? He also said you look at the organisation's formation. Now where did the organisation grow from? Those who put it together, what were they trying to achieve? Because we've had quite a lot of evidence about that, and the people who actually founded Victorian Women Lawyers were able to come forward and say, well, this came out of our discussions about noticing how women were really being prejudiced in their activity within the legal profession.

So he was very open to assessing the purpose as well as what they'd actually written down on paper when they set the organisation up. Then he said, well, we are going to look at the actual activities, and this is going back to the point I made earlier which was even though your purposes might be expressed beautifully, if what you do in practice has diverged, then that's not going to save you even though what's written down on the paper is actually suitable.

So he looked at the activities and this is where there is quite a lot of time spent around what is pursuing the purpose in terms of removing barriers and discrimination, and what are activities which are aimed at achieving that? So he was happy to accept that when they were making submissions to government and when they were evolving the activities that were really aimed to bring about social change, and when they were literally advocating towards Government, they were things that they were doing in order to achieve their goal, which was to remove this discrimination and the barriers. He was able to draw that distinction I think very well and it's quite clear if you get a chance to read the judgement even though we have got to go through many pages of what happened at their networking function in 1998, you can see how there's that distinction to be made.

So I think the story of the Victorian Women Lawyers is very powerful. It's interesting when they went before the Federal Court, Victorian Women Lawyers were represented by two women lawyers and the Commissioner played a very straight bat and brought in two of the chaps. The chaps did their best and they did a good job with the material that they had, but ultimately the women did carry the day because they were able to explain and to bring together these principles.

So the message I think for us is that it's really very simple. If your purpose is charitable you can pursue it using political advocacy. You have to develop an intuition for dividing up what we are trying to achieve and how we are trying to achieve it and I don't think we should be frightened as perhaps we have in the past about getting involved in advocacy and about funding projects that have some advocacy behind them, just because we are just so frightened after many, many years of being told anything political can't be funded, anything political will lose your tax concessions, anything around advocacy is on the wrong side of the line. I think this gives us the confidence to say, no, we do understand the principles, we do know the difference between the purpose and an activity, we can tell when something is incidental, we do know what we are trying to achieve and we do know what we are trying to do in order to achieve it. And we do have that confidence now, that we can draw those distinctions, and we can start getting into advocacy and working towards change with activities with much greater confidence than we did before.