

**Submission to the Consultation on the Definition of a Charity
from the
Australian Institute of Aboriginal and Torres Strait Islander Studies**

Overview

There are a number of issues regarding the Draft Charities Bill that are relevant to Indigenous land councils, native title representative bodies (NTRBs), and prescribed bodies corporate (PBCs) and other Indigenous land trusts and entities.

- Section 8 of the Draft Charities Bill may be redundant where it states that political advocacy, where it is more than ancillary or incidental, is a disqualifying purpose.
- The wide frame of reference of the charitable purpose ‘for the benefit of the community’ is applicable to Indigenous entities. This flexibility in the definition should not be undermined.
- The dominant purpose provision may require further clarification in order to achieve certainty for Indigenous land councils, NTRB’s, PBC’s and trusts.
- The notion of altruism, if adopted should not preclude entities with a relationship to their beneficiaries.
- To avoid current unworkable and costly confusion, the public benefit test should include an exemption for Indigenous entities or entities servicing Indigenous communities

Public Advocacy Issue

Under the Draft Charities Bill 2003, an entity is excluded from the definition of a charity if it engages in a disqualifying purpose. Of particular concern with respect to Indigenous land councils, NTRBs, PBCs and trusts are s8(2)(a) the purpose of advocating a political party or cause and s8(2)(c) the purpose of attempting to change the law or government policy. Purposes are only disqualifying where they are more than incidental to the other purposes of the entity concerned.

Far from increasing the ‘workability’ of the legislative definition, these provisions appear redundant. The common law definition does not prevent an entity from engaging in political advocacy or lobbying activities provided it satisfies the dominant test. So, public advocacy is one of a number of possible ‘disqualifying purposes’ that could prevent an entity from being considered a charity if it was not incidental to its dominant, charitable purpose. It is difficult to see why the proposed legislative definition of a charity requires specific reference to disqualifying purposes – purposes that are essentially political in nature – when it is clear that this would already be a consideration under the ‘dominant purpose’ provision. Although it is unlikely section 8 will amount to a stricter dominant purpose test, the practical result of this provision may be to excessively discourage charities from commenting on government policy where it is the interests of the individuals or groups they seek to help.

This section may be of concern with respect to Indigenous land councils, NTRBs, PBCs and trusts. Although these entities have generally been considered charities, as representatives of local Indigenous interests they often comment on government policy and seek law reform where it affects Indigenous communities. There are limited opportunities and ways in which

Indigenous people can have their opinions heard and interests represented, and these bodies are often an important link between Government policy and community concerns. Land councils and NTRB's may take on a variety of roles in protecting and promoting Indigenous welfare where their predominant purpose, for legal purposes, is charitable.

The representative nature of land councils and NTRB's should not be an obstacle to obtaining charitable status. It has been held that the representative nature of land councils 'reinforces the fact that the appellant is a "public" body, it does not detract from the status of the appellant as a PBI.' (*Northern Land Council v Commissioner of Taxes (NT)* Court of Appeal of the Northern Territory, 28 November 2002, per Mildren J at 34.)

Bearing in mind that flexibility is of "key importance in the legislation" (para. 1.80EM), section 8 is not workable because it fails charities that may concurrently fill a number of different roles.

"For the benefit of the community"

Section 10(1)(g) of the Draft Charities Bill provides that a charitable purpose includes 'any other purpose that is beneficial to the community', in accordance with the common law categorisation of charities. Including a relatively open natured 'charitable purpose' provision in the draft legislation is desirable as it adds flexibility, helping to ensure that the definition does not become rigid and outdated.

Although the scope of the phrase 'beneficial to the community' is still largely undefined at common law, the explanatory material and the *Report of the Inquiry into the Definition of Charities and Related Organisations* provides direction to its interpretation. The primary purpose of such a provision is to give flexibility to a definition that might become caught in a narrow construction of 'charity' (para 1.80 EM). That is, where another purpose is not subsumed under the other charitable heads and is considered to similarly have a significant benefit to the community, then they should be included within this category (para 1.83 EM).

Land councils, NTRBs and PBCs may not fit squarely within the notion of a charitable purpose for the advancement of education or religion, or perhaps for the direct relief of poverty (although it could be strongly argued in the latter case). Nevertheless, the restoration and management of land for Indigenous peoples is clearly a purpose 'for the benefit of the community'.

Land councils, NTRB's and trusts, who are generally responsible for the restoration and management of land, help to rebuild Indigenous communities for the benefit of Indigenous people. Land councils, NTRB's and trusts provide support to social institutions that lead to safe and healthy communities and help to address the Indigenous dispossession and homelessness. These entities also help preserve Aboriginal spirituality, culture and tradition and protect Aboriginal people from the cultural dominance of non-Aboriginal society.

Land councils, NTRB's and trusts, like other Indigenous organisations, provide a link between Indigenous communities and the broader community. In this capacity, land councils provide the support and assistance to traditional land owners and other Aboriginal persons living on Aboriginal land or claiming rights in land necessary to respect and protect their culture, spirituality, traditions and freedom of choice.

Although the meaning of the phrase ‘beneficial to the community’ is open to interpretation within certain guidelines, the restoration and management of Indigenous land could clearly fall within its meaning. Land councils, NTRBs, PBCs and trusts perform functions central to the well-being of a community as well as providing support for the other organisations that perform a variety of functions for the benefit of the community.

Altruism

The Inquiry into the Definition of Charities and Other Related Organisations recommended that the public benefit element of charity would be enhanced if the concept of altruism were to be expressly required. That is, to be regarded as charitable, an entity must have a dominant purpose which is altruistic and for the public benefit. (This is discussed in chapter 13 of the Report http://www.cdi.gov.au/report/cdi_chap13.htm)

The meaning of altruism, as discussed in the report concerns ‘unselfish concern for the welfare of others’ or ‘regard for others as a principle for action. The key elements of these definitions are unselfishness and concern for others. In the context of charity, altruism can also be characterised as a voluntarily assumed obligation towards the wellbeing of others or the community generally.

The Report concludes that ‘it is not necessary to define the term any more precisely for the purposes of clarifying public benefit. In our view the concept of altruism is sufficiently understood within the community.’ (chapter 13)

However, earlier in the report, a somewhat different meaning of altruism is provided. Quoting from the Ontario Law Reform Commission’s 1996 Report, the Inquiry considered that the destination of the benefit must be for ‘others’, or more specifically, ‘strangers’. This, the Report states, requires an ‘emotional and obligational distance’ between the donor and the beneficiary.

This narrower meaning of altruism is particularly concerning to Indigenous charitable entities such as land councils, NTRBs PBCs and trusts as most of these organisations do not have an ‘emotional and obligational distance’ between the donor and the beneficiary. On the contrary, these entities are sometimes comprised of representatives from the beneficiary group and in most cases an emotional relationship exists between the donor and the beneficiary. In this sense they are similar to the ‘self-help groups’ proposed to be exempt from the public benefit test.

If the narrower meaning of altruism is applied it may be problematic for a number of different charitable organisations who have an emotional or functional relationship with their beneficiaries. However, if, as the Report suggests, the ordinary meaning of altruism is used to give clarity to the public benefit test then the recommendation is less problematic. However, if this is the case, it might be worth considering whether any practical advantage achieved by such an addition to the definition.

Dominant Purpose Test

Under the present common law definition and the Draft Charities Bill a charity must have a dominant purpose that is charitable. This requirement has been problematic for Indigenous land councils, NTRBs, PBCs and trusts who over the last two years have been subject to varying interpretations of this provision by the Australian Tax Office.

Although traditionally regarded as a PBI or charity for tax purposes, recent decisions of the ATO and a decision in the Northern Territory Supreme Court have held that two similarly constituted Aboriginal land councils did not have charitable functions as their dominant purpose. The Northern Land Council's successfully appealed against the decision of the ATO, and of Justice Angel at first instance, the Northern Territory Court of Appeal holding that the NLC performed functions designed to provide relief to a disadvantaged and appreciable section of the community. This decision is currently authoritative and reflects the common law position and should be used to clarify recent confusion as to the correct interpretation of the dominant purpose test.

The Explanatory Materials provide (at 1.32) that in determining the dominant purpose of an entity, items that may be considered include, but are not limited to: the constituent documents of the entity, if the entity has such documents; and the activities of the entity.

The problems with recent interpretations with regard to the charitable status of Indigenous land councils, NTRBs and trusts seem peculiar to Indigenous entities. In particular, at issue is whether land councils have primarily a statutory purpose or a charitable purpose. Although land councils, NTRBs, PBCs and trusts have been formed and constituted in different ways, the ATO sought to define their purpose according to the statutory functions they fulfil. It is this feature of land councils that the Australian Tax Office has used as the basis to treat land councils as alike: "As a NTRB, South West Aboriginal Land and Sea Council and Corporation's function is the same as that found of the Northern Land Council..." (ATO decision re: South West Aboriginal Land and Sea Council Aboriginal Corporation, 31 May 2002).

In effect, the ATO sought to apply a 'but for' test to establish the dominant purpose that does not form part of the established common law. That is, the entity would not have been created 'but for' the disqualifying purpose and is hence not a charity for tax purposes, regardless of any other constituent documents or and examination of activities.

The decision in NLC clarifies that the dominant purpose test is not subject to a peremptory disqualifying purpose test. A body created by statute may be considered a charity or a PBI by reference to its constituent documents and charitable or benevolent activities. A land council's status as a NTRB or land council should not necessarily preclude it from being considered a public benevolent institution or a charity if examined using this criteria. Despite the decision in *Northern Land Council v Commr of Taxes (NT)*, the SWALSC remains in litigation over this issue. The Inquiry may wish to consider whether a more useful guide to interpretation in the form of a specific provision in the Draft Charities Bill stating that a body is not precluded from being considered a charity merely by virtue of its statutory functions.

Public Benefit Test

The principal test as to whether an institution is 'public' is whether it confers benevolence upon an appreciable and needy section of the community. (*Lemm v Commissioner of Taxation*

(*Cth*) There are two potential issues of interpretation for Indigenous land councils, NTRBs, PBCs and trusts. The first is where funds may be distributed to recipients, who, although in fact needy, could still receive the payments even if they weren't. The second is whether the recipient group is too small in number to be considered an 'appreciable' section of the community.

With regard to the first problem, it has been successfully argued that it is not necessarily conclusive that some of the people assisted are not needy, in states of distress, or objects of compassion. Instead, it is more conclusive that the section of the public to whom assistance is directed may be described as a class and so long as that class may be described as disadvantaged and appreciable (*Lemm & Ors v FC of T*, *Tangentyere Council Inc v Commr of Taxes*, and *Northern Land Council v Commr of Taxes(NT)*).

In *Northern Land Council v Commr of Taxes (NT)*, the Court of Appeal held that Aboriginal people as a whole were in a disadvantaged position and the fact that traditional Aboriginal owners were a disadvantaged and appreciable section of the community was sufficient to find that the land council was a PBI.

With regard to the second problem, it may still be difficult for smaller land councils, NTRBs, PBCs and trusts to demonstrate that the entity provides benefit or relief to a class that may be described as 'appreciable'. However, using the reasoning from *Northern Land Council v Commr of Taxes (NT)*, a small community of disadvantaged Indigenous people may still be considered an appreciable section of the public on the basis that they form part of the wider disadvantaged class.

Indigenous people are recognised nation-wide as a disadvantaged class in terms of wealth, education, health, access to services, etc. Thus, an entity that provides benevolent assistance or relief to a smaller, but nonetheless recognisably disadvantaged group, is providing benefit and relief to an appreciable section of the community and should satisfy the public benefit test.

A further argument could be made, for example, that Indigenous entities can fall within the definition of 'self-help groups' and thus exempt from the broad public benefit test. However, they may be required to engage in a further complex argument about what constitutes 'discrimination' in terms of membership. In light of the time and cost associated with contested definitions applicable to Indigenous entities, it would seem appropriate to call for a further exemption to the public benefit test for Indigenous organisations or organisations servicing Indigenous communities.

Workability

With respect to a number of issues raised in this submission, it appears that Indigenous entities are at the whim of difficult interpretation issues. Over recent years, a number of Indigenous entities have been denied charitable status based on a variety of grounds because they may not necessarily fit within the narrow interpretation of traditional charitable organisations. As noted, Indigenous peoples in Australia are recognised as constituting the most disadvantaged group in Australian society. When considering the flexibility and workability of the definition of charities, the impact on Indigenous organisation should be at the forefront of these discussions.

Contact officer

Dr Lisa Strelein

Manager, Native Title Research Unit

AIATSIS

02 6246 1155