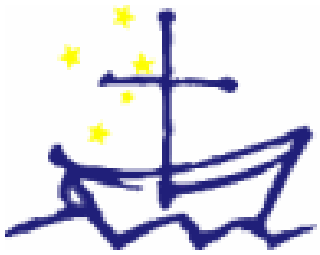
The National Aboriginal and Torres Strait Islander Ecumenical Commission of

The National Council of Churches in Australia's



Submission to
The Board of Taxation's
Consultation on
The Definition of Charity

September 2003

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1. Submission Guidelines

Information that will help the Board frame its recommendations to the Government

1. **What is the name of your charitable organisation? What are your contact details?**

2. **What is the dominant (main) purpose/s of your charitable organisation?**

3. **With reference to the preamble on 'workability' (above), do you have any concerns or issues that you wish to raise about the workability of the legislative definition of a charity proposed in the exposure draft Charities Bill 2003? [Please make your response under 3-4 main bullet points if possible]**

4. **Would the Charities Bill 2003 impose any additional administrative burden on your charitable organisation? How? What additional compliance costs do you anticipate?**

5. **In your assessment, does the Charities Bill 2003 provide the flexibility to ensure the definition can adapt to the changing needs of society?**

6. **If the public benefit test were further strengthened by requiring the dominant purpose of a charitable entity to also be altruistic, would this affect your organisation? If so, how?**

2. Summary

NATSIEC welcomes the opportunity to present the following submission to the Inquiry. It is particularly appreciative of the Board's efforts to consult widely within the charitable sector. While the terms of consultation focused mainly on administrative issues, NATSIEC believes that the Bill also raises crucially important policy questions which must not be neglected. These issues will be addressed within the framework set out in the guidelines above. The need for legislative reform is certainly there, and the Bill is to be applauded for seeking to make the legal doctrines of charity more relevant to contemporary Australian society. However, while the broad intent is positive, NATSIEC regrets that the present Bill does not fulfill this objective.

NATSIEC is concerned about the definition of religion. Defining religion in a statute will always be problematic (and indeed, this submission will recommend that it be avoided), but NATSIEC also has specific concerns about the drafting of the particular definition used in the Bill. For further discussion on this point, see Part **5.2** of this submission.

NATSIEC is also concerned that the Bill is not attuned to how charities operate. First, the use of the expression "dominant purpose," while perfectly suited to commercial law, is too narrow for charities. While some charities have a single identifiable goal (palliative care, for example), other charities (in particular, religious organisations) serve a diversity of purposes. For further discussion, see Part **5.3**. Secondly, the Bill uses various devices to seek to isolate a definition of charities. In doing this, though, the Bill creates a number of problems for existing charities. In prescribing what a charity is and is not; and in prescribing what a charity may and may not do, the Bill constrains their activities to an extent that, in itself, creates an administrative burden. See Part **6** for further discussion.

The best way of achieving the desired flexibility, while avoiding the administrative and policy problems outlined thus far is to provide a space for the role of the courts to continue. Where specific policy issues arise (such as the inclusion of self-help groups, or the advancement of culture), they may be addressed through *inclusive* legislation, ie, legislation which brings those areas within the scope of charity, without attempting an overarching statutory definition of the subject. This is discussed further in Part **7.** To this end, NATSIEC has proposed a model clause which it hopes will assist the Board in its deliberations.

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3. Who is NATSIEC?

The National Aboriginal and Torres Strait Islander Ecumenical Commission (NATSIEC) [formerly the Aboriginal and Islander Commission (AIC)] was established in 1989. It is a Commission of the National Council of Churches in Australia (NCCA). NATSIEC is recognised as the National Aboriginal and Torres Strait Islander ecumenical peak body in Australia. With its guidance, the churches are working together, advocating for equity for Aboriginal and Torres Strait Islander Australians, and for the healing of our nation.

All the members of the NATSIEC are Aboriginal and Torres Strait Islander peoples, the first peoples of this land and sea. They represent a cross-section of church-related Aboriginal and Torres Strait Islander groups from the Anglican Church of Australia, the Churches of Christ in Australia, the Lutheran Church in Australia, the Roman Catholic Church, the Salvation Army and the Uniting Church in Australia.

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4. What Does NATSIEC Do?

NATSIEC Mandate

The National Aboriginal and Torres Strait Islander Ecumenical Commission shall:

- **Provide a forum for Aboriginal and Torres Strait Islander peoples to speak and take action on issues of faith, mission and evangelism; of Aboriginal and Torres Strait Islander spirituality and theology; of social justice and land rights.**
- **Serve as a unified voice for Aboriginal and Torres Strait Islander peoples as they relate to member churches and international ecumenical bodies.**
- **Help rebuild self-esteem, pride and dignity within Aboriginal and Torres Strait Islander communities.**
- **Promote harmony, justice and understanding between Aboriginal and Torres Strait Islander peoples and the wider community.**
- **Provide a basis for further political action by church-related Aboriginal and Torres Strait Islander groups, other Aboriginal and Torres Strait Islander organisations and the member churches of the National Council of Churches in Australia.**
- **Administer all funds of the National Council of Churches in Australia relating to Aboriginal and Torres Strait Islander peoples.**
- **Share in furthering the objectives and promoting the programmes of the National Council of Churches in Australia.**

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5. Workability of the Definition

5.1: Introduction

Statutory reform may greatly assist the invaluable service performed by charities in the Australian community. There is certainly a need for making the law of charity more relevant to Australian society; current doctrines originated in another country several hundred years ago. An indigenous concept of charity that reflects our social conditions is long overdue. Therefore, NATSIEC welcomes the Federal Government's initiative in addressing this issue.

NATSIEC is particularly committed to supporting the spiritual connection between Indigenous people and the land. For this reason, NATSIEC welcomes the draft Bill's innovation in including 'advancement of culture' and 'advancement of the natural environment' within the scope of what constitutes a charity.

NATSIEC's work is not obstructed or impeded by the present legal regime. Because of this, together with concerns about the proposed Bill (discussed below), NATSIEC does not think that the bill will bring greater clarity and transparency.

5.2: NATSIEC's Concerns

The aspects of the draft Bill on which NATSIEC proposes to comment are:

- The Definition of Religion: General Policy Issues
  - Cutural Issues
  - Legal Particularities
- The Use of the Expression "Dominant Purpose"

5.2.1: The Definition of Religion: General Policy Issues

'Workability' includes whether the Definition adequately reflects the ethos of a given charity. In that sense, NATSIEC is unable to endorse the proposed definition as workable. The proposed definition of religion imposes foreign values or ideas, and offers a description that NATSIEC's constituents may regard as inaccurate. In this way, it would impede NATSIEC's pursuit of its charitable purposes.

NATSIEC believes that any statutory definition of religion will be fraught with difficulty. The language of a statute, which is narrow and prescriptive by its very nature, is simply not equipped to deal with this subject. Because it is relatively difficult for a statute to continually engage with community attitudes, it is inappropriate to create a legislative definition of religion. As will be demonstrated in Part 5 of this submission, a common-law treatment of the subject is far preferable.

The proposed definition of religion was, no doubt, drafted specifically to assist Treasury in making determinations on matters of revenue. Yet it's effects cannot be confined to that sphere. The flow-on effects of a Federal statute defining a phenomenon of major social importance cannot be predicted or constrained once the Bill becomes law. It will invariably shape court's decisions in other jurisdictions where the question of 'what is religion?' is raised. For this reason, any legislative treatment of the subject should be approached with careful consideration.

5.2.2: Cultural Issues

NATSIEC has grave concerns about the particular definition's accuracy in describing religion's essential features. Even in a predominantly secular society, our ways of thinking about religion are shaped by the Judaeo-Christian tradition. The danger is that, in reflecting that heritage, other traditions which also merit being described as religious will be excluded, or may have to work much harder to justify their inclusion. NATSIEC is concerned both with traditional christian theology and with Indigenous spirituality. While Christianity clearly falls within clause12, some Indigenous people would not see their beliefs as constituting a religion in the sense defined by that section, and would therefore be at risk of falling outside its scope.

Religion as interpreted by clause 12 is a predominantly Western concept: one that fails to respond adequately to the diversity of traditions within contemporary Australian society. This is not to imply any lack of integrity or consideration on the part of the drafters; rather, it is a product of how culture informs one's approach to the subject. This, to a greater or lesser extent, will surround any legislative definition and, again, adds weight to the argument that relgion should remain the province of the common law.

5.2.3: Legal Particularities

If a definition of religion is attempted, notwithstanding the reservations outlined above, that definition should advance public policy. There should be some discernible progress promised in the innovations contained in the Bill. The present definition does not do this. Instead, it simply transcribes the High Court's decision in the 1983 case of *Church of the New Faith v the Commissioner of Payroll Tax (Victoria)*. The Bill seeks to mirror the common law position outlined in that case. It is this that makes the definition seem redundant. If, as the explanatory material states, the courts will remain the main arbiters of what constitutes a religion; and the definition merely transcribes what the courts said in 1983, why legislate on this point at all?

5.3: The Use of the Expression "Dominant Purpose"

NASTIEC has difficulty with the expression "dominant purpose." Its mission cannot be adequately described by compressing diverse concerns into a single statement of 'dominant purpose'; nor can that dominant purpose be deduced by taking one aspect and prioritising it over all others. In place of 'dominant', with its connotations of exclusion and of hierarchy, NATSIEC prefers the term 'core', which looks to what is essential or integral- what is at the centre.

Second, there is an apparent discrepancy between the Bill and the Board of Taxation's guidelines for submissions. The former speaks of 'dominant purpose'; the latter of 'dominant purpose/s.' The latter is to be preferred, since it does not require the slightly artificial reasoning discussed above while, at the same time, giving some means by which charities can be differentiated from other not-for-profit organisations

5.4: RECOMMENDATION

- That the Bill's definition of Religion be removed
- That the text of the bill be altered to read "core purposes" in place of "dominant purpose"

6. Administrative Implications of the Definition

6.1: Introduction

The existing system does not cause administrative difficulties for NATSIEC. NATSIEC is concerned, however, about a number of ambiguities in the draft Bill relating to charitable status. Because these ambiguities may lead to litigation, they present two principal difficulties.

1) If the proceedings against NATSIEC are successful and NATSIEC is stripped of its status as a charity, a large portion of income will be lost;
2) Even if the proceedings are not successful, NATSIEC will have to invest considerable energy and resources in its legal defence.

The following section canvasses legal arguments that could arise from the bill. It is not seriously contemplated that every case based on these arguments would succeed in court; but these points are arguable and hence, present an administrative burden to NATSIEC.

In general, the proposed regime is too tightly prescriptive of what charities are permitted to do. Charities cannot perform the function expected of them by society if they must continually expend resources on monitoring their programs and policies for the risk of incurring liability.

6.2: NATSIEC's Concerns

NATSIEC's principal concerns are:

- The Definition makes an organisation's charitable status far more vulnerable than is presently the case;

- The Definition excludes advocacy with political implications;
    - This would adversely impact on NATSIEC
    - Impeding advocacy is questionable public policy

- Whether the doctrine of "disqualifying purpose" is necessary at all.

6.2.1: Vulnerability

There is some ambiguity over precisely how Clause 4(c) is to be read. On a sympathetic reading of the Bill, Clause 4 is a kind of 'threshold test': a prospective charity must demonstrate that it's activities and purposes conform to the statute. Once the charity crosses that threshold, it is not overly affected by the current bill's provisions.

On a less sympathetic reading, Clause 4 operates not as a threshold to determine which entities can enter the class of 'charities', but as a continual constraint upon existing charity's activities. Charities' programs and policies can be assessed at any point, with the result that a charity may lose that status if it 'transgresses.' One can only speculate as to what would happen in this case. Would an ex-charity have to apply to the Board to have that status reinstated? Which of these two readings is

accepted depends entirely upon the point at which the assessment is made. This is an issue on which the Bill does not provide adequate guidance.

Lastly, Clause 4(c) is ambiguous as to what level of deviation will put a charity or prospective charity outside the scope of the statute. The proscription cannot be absolute: every charity does things which, strictly speaking, do not further it's core purpose. NATSIEC would find it difficult, for example, to link its annual Christmas dinner to one of the purposes set out in its mandate. Yet the Bill provides not guidance about precisely where the 'cut-off' lies; how much tolerance for deviation is built into the act.

As it stands, therefore, Clause 4(c) is unworkable. The Treasurer has given assurances that the Bill would not threaten the status of existing charities. With all due respect to the Treasurer, however, his assurances in this instance do not have legal force. NATSIEC would prefer that these assurances be explicitly incorporated in the text of the Bill.

6.2.2: Advocacy- NATSIEC and Politics

In all likelihood, Clause 8 was drafted under the assumption that political advocacy constituted engaging with Local, State and Federal Governments. It is at least arguable, however, that 'politics' extends beyond that.

> The Australian Concise Oxford Dictionary defines 'politics' as:
>
> **1 a** the art and science of government **b** public life and affairs as involving authority and government **2 a** a particular set of ideas, principles or commitments in politics **b** activities concerned with the acquisition or exercise of authority or government **c** an organisational process or principle affecting authority, status, etc"

Unless **1 a** alone were adopted, the scope of 'politics' (and, in particular, 'political cause') could extend to include the affairs of church governance. Much of NATSIEC's work involves advocating for Indigenous people within the structures of the church. Of particular concern is the low proportion of Indigenous Australians who are in positions of ministry within the church.

Consider the following scenario, however: NATSIEC campaigns to double the number of Indigenous ministers in Australian churches. A small group takes offence at this and begins legal action against NATSIEC, arguing that they are advocating a "political cause." As NATSIEC's mandate states, it's core purposes are to provide a basis for further political action, and to serve as a unified voice for Indigenous people relating to member churches. Therefore, this form of action cannot be rendered unproblematic by classifying it as merely incidental or ancillary to some charitable purpose.

Should this matter go before the courts, it would be a considerable drain on NATSIEC's resources, whatever the outcome. At present, the Bill leaves room for argument that advocating for change within the church is 'political', and hence, constitutes a disqualifying purpose.

6.2.3: Advocacy and Government

NATSIEC affirms the many submissions to the Charities Definition Inquiry arguing that advocacy is a legitimate charitable activity. Advocacy can address the

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underlying factors that cause disadvantage or impede the advancement of health, education etc. This is a legitimate use of resources, even where some change in government policy may be an incident of advancing charitable causes. Indeed, where that advocacy results in reducing the incidence of disadvantage it is a highly efficient way of bringing an ultimate resolution to the situation.

It is of concern, therefore, that the Bill specifically nominates political advocacy as a disqualifying purpose. In a liberal democracy such as ours, surely charities should be encouraged to participate in debates on public policy. Such participation does not have to be adversarial: this very submission represents the kind of constructive engagement that is possible between Governments and Charities. If, as suggested above, the church and other major social institutions are a legitimate object of advocacy, why should government be exempt?

NATSIEC is conscious that throughout the common-law there is a long history of excluding political activity from the class of charities. There is no sound reason for this state of affairs to continue; indeed, change is essential.

6.2.4: Disqualifying Purpose

The overall impression created by Clause 8 is that of a punitive regime. NATSIEC questions whether this is an appropriate way of dealing with charities. The common-law doctrines of charity are already sufficient to exclude illegal activities and advocating for a political party from the scope of charitable purposes. While the impulse to codify and define contingencies is understandable, it is not helpful in this instance.

6.3: Recommendation

That the doctrine of disqualifying purpose be removed from the Bill.

7. Flexibility of the Definition

7.1: Introduction

The preceding section demonstrates the legal (and hence administrative) problems that can arise when areas of law are excessively legislated. NATSIEC holds that, for reasons demonstrated below, the common-law is far better equipped to respond to social change. This stems from the essential differences between a Common-Law Definition and a Statutory Definition

7.2: Common-Law Definition

To even speak in terms of a "common-law definition" is to use the term "definition" loosely: in the common-law there is no set form of words that must be used. It is the principle that is all-important.

In the common-law, a given principle may be expressed in a number of different ways. The courts may eventually settle on a preferred formulation, but there remains a degree of flexibility as to the words used and the content of the doctrine. The formulation can evolve over time and accrue the benefit of the wisdom of successive courts. Crucially, the courts are also able to receive evidence of changing attitudes or interpretations where that has bearing on the legal issue at hand. In other words, the definition is open.

7.3: Statutory Definition

In a statutory definition, the specific form of words used is all-important. It is to this that a court must refer; those words delineate the boundaries of a court's reasoning, ie, the definition is closed. This can be counteracted to some extent by using open-ended language in the statute (as exmplified by clauses 11 and 12 of the Bill), but the basic framework is rigid. The bill's definition simply provides a 'freeze-frame' of the courts' thinking on religion. There only limited room for movement. Adaptation occurs largely through amendment, which is dependent upon the will of the legislature and the exigencies of the political process.

It is inaccurate to state, as the explanatory material does, that the common-law position is essentially transferred across to the statute. The Bill uses similar words to common-law formulations (particularly with regard to religion), but as the preceding discussion demonstrates, the same text will operate in radically different ways according to its status as legislation or as case-law.

7.4: Case for Reform

NATSIEC would like to emphasise that, despite the criticisms made of the present Bill, it supports legislative reform. NATSIEC proposes a model clause (below), designed to preserve the role of the courts whilst updating the legal doctrines of charity; and to retain the policy innovations of including 'culture' and the 'natural environment.' This clause would allow the courts to continue monitoring and responding to changing social values, an adaptability that is less readily achievable through statute law.

7.5: Recommendation

That a clause based on the following model be adopted:

Without limiting what constitutes a charitable purpose, where reference is made in any Act to ***a charitable purpose***, that purpose includes:

(a) the advancement of health;
(b) the advancement of education;
(c) the advancement of social or community welfare;
(d) the advancement of religion;
(e) the advancement of culture;
(f) the advancement of the natural environment;
(g) any other purpose that is beneficial to the community.

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8. Altruism

NATSIEC has not formulated a policy on this issue. Because there is no reference to altruism in the draft Bill, it is difficult to see what effect its inclusion would have. Therefore, NATSIEC declines to comment at this point.

9. Concluding Remarks

NATSIEC's recommendations in this submission are as follows:

- That the Bill's definition of Religion be removed
- That the text of the bill be altered to read "core purposes" in place of "dominant purpose"
- That the doctrine of disqualifying purpose be removed from the Bill.
- That the model clause in **Part 7.5** be adopted.

Lastly, NATSIEC would like to warmly thank the Board for the opportunity to engage in this consultation. We gladly make ourselves available for further comment or discussion.

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