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Social Inclusion and the Indigenous People of Australia: Achieving a Better Fit Between Social Need and the Charity Law Framework

Kerry O'Halloran[*]

Introduction

A government concerned with building or sustaining civil society may face no greater challenge than fostering the social inclusion of marginalized groups. Consider a particularly acute form of this challenge: the national and international efforts--appropriate or otherwise--to reduce the alienation of minority culture groups. Such alienation is bound to increase as population displacement, driven mainly by economics and conflict, continues to affect all modern western nations. Against the backdrop of the uncertain, still unfolding politics of the post-9/11 world, the process of inclusion must preserve the cultural integrity of minority groups while sustaining the coherence of society. Partnership rather than assimilation must be both the method and the goal.

This challenge is perhaps most readily acknowledged when the minority culture differs substantially from the majority culture. One form of stark contrast arises in post-colonial, modern western nations in which a legacy of suppression remains to be worked through. The Inuit in Canada and the United States, the first nation peoples in Canada, the native Indian tribes in the United States, the Maoris in New Zealand, and the Indigenous people in Australia all represent, in varying degrees, examples of unfinished business in terms of cultural imbalance and social justice. A second form of cultural contrast arises in all modern western societies through such marginalized groups as the mentally ill, the disabled, and disaffected youth. From a charity law perspective, the issues and possible solutions concerning the former groups also arguably apply to the latter ones. For building civil society, sustaining it, or assisting in the transition to it, the meaningful and authentic social inclusion of groups that perceive themselves as marginalized can be crucial; and third-party intervention can be the most effective way to foster it.

The Indigenous people of Australia have long been the object of philanthropic intervention, probably for as long as they have experienced other forms of intervention. Nonetheless, within the modern western society that is now Australia, they remain impoverished, comprehensively disadvantaged, marginalized, and culturally excluded. The poor record of philanthropic intervention demonstrates the failings of the related legal framework and to a large extent explains the growing appeal of a rights agenda.

The experience of the Indigenous people has not been unlike that of some minority cultures in other countries. Recent history provides many examples of countries experiencing debilitating and at times destructive tensions because the government cannot appropriately respond to the needs of a minority culture, which in turn perceives itself as increasingly alienated from mainstream society. When the government fails to address a group's need for separate recognition and affirmation by and within the prevailing social infrastructure, there is every possibility of a drift

from alienation to confrontation--as in Northern Ireland, the Balkans, Africa, and the Middle East. Effective intervention by third parties can help forestall such a drift.

Hence the importance of charity law, with its capacity to license and focus mediation by agencies with immense resources, independently constituted, and driven by the public benefit principle. Charity law is not the only framework for addressing issues of social inclusion; where the drift toward confrontation has gathered momentum, it may not even be particularly relevant. Good charity law, moreover, can never substitute for bad politics. Politics and fundamental human rights must always be allowed clear application, apart from the operations of charitable entities. However, good charity law can promote philanthropic intervention that, supplementing politics and human rights, addresses a nation's particular social inclusion agenda. An essential prerequisite to effective philanthropic intervention is a charity law framework that fits contemporary social needs and facilitates the mediation of organizations capable of aiding marginalized minority groups. Developing such a legal framework is itself, of course, essentially a matter for politics.

As a case study of the role of law in civil society, this article considers the fit between charity law and the needs of the Indigenous people. It begins with a brief sketch of historical background and then profiles the social disadvantages suffered by this marginalized group. The article outlines the present charity law framework and draws attention to specific weaknesses in terms of established precedents, principles, and administration. It shows how the law obstructs the type of philanthropic intervention necessary to foster social inclusion for the Indigenous people as well as such groups as the disabled, the mentally ill, and disaffected youth. The article briefly considers implications of the current charity law review process before concluding with suggestions for adjustments to the revised charity law framework in order to achieve a better fit with the contemporary social inclusion agenda in Australia.

Historical Background

Australia has been inhabited by Indigenous people for at least 40,000 years. In 1788, Captain Cook considered the continent *terra nullius,* "empty land," such that he was entitled to take possession of it and all its creatures and resources in the name of the British Crown. Since then, the concept of *terra nullius* has been a cancer eating at the relationship between the Indigenous and non-Indigenous inhabitants of Australia. It rests on the proposition that the continent was "uninhabited" at the time of its discovery by white Caucasians--"uninhabited" in the sense that the land was not owned and controlled by others; although Indigenous people lived there, they did so in a disorganized fashion, merely living off the land. At the time, a land whose people lacked recognizable social or political systems was considered *terra nullius* under international law, and the "discovering" nation could claim sovereignty. This interpretation was endorsed by the courts.[1]

The history of the Indigenous people since the 18th century is largely one of systematic persecution, giving way in more recent decades to paternalistic management. As a result, their numbers have been depleted, their communities and clan culture dissipated, and their health and well-being eroded. Disenfranchised and

legally defined as non-persons, they were murdered or driven from lands wanted by the continent's new occupiers. Such policies are not wholly matters of some dim historical past; their impact has continued within the living memory of many Australians, and arguably still continues today. The present Prime Minister's observation about past policies, while entirely accurate, fails to consider that the point may also be relevant to current policy:

> "It is true, as was noted recently, that past policies designed to assist have often failed to recognize the significance of indigenous culture and resulted in the further marginalization of Aboriginal and Torres Strait Islander people from the social, cultural and economic development of Australian mainstream society."[2]

Discrimination

The marginalization of Indigenous people is illustrated by the fact that before 1967, they were identified in the census solely to exclude them from official population figures, as required by the Constitution. Disenfranchisement, in other words, was a constitutional requirement. Discrimination against Indigenous people was institutionalized in Australian society. In the 1880s, Indigenous people were removed from traditional homelands and resettled in townships or compounds, which disrupted cultural roots, mixed together incompatible tribes/clans, and traumatized several generations. Once Indigenous people were relocated, systematized discrimination ensured that they were excluded from the residential areas, schools, and public facilities used by the non-Indigenous.

Deaths in Custody

The level of deaths among the Indigenous prison population has long been a matter of public concern. In 1987 the Indigenous death rate in prison was 20 times that of non-Indigenous people, a fact that prompted the creation of the Royal Commission into Aboriginal Deaths in Custody.[3] The Commission considered a number of factors that might have fueled this disparity: the exercise of police discretion at point of arrest, which resulted in a much greater likelihood that an Indigenous person would be detained than a non-Indigenous person guilty of the same offense, particularly alcohol-related behavior[4]; the term of imprisonment, estimated as twice as long for Indigenous as for non-Indigenous people[5]; and mandatory-sentencing judicial procedures.

By the early years of the 21st century, the death rate for Indigenous prisoners had risen to 26 times that of the non-Indigenous prison population.[6]

The Aborigines Protection Board

For the first 60 years or so of the 20th century, each state in Australia had its own Aborigines Protection Board, statutorily charged with supervising family and child-rearing matters among the Indigenous people. In fact, after a misguided racial assimilation policy gave these boards child-removal powers, their main function was to transfer children from their Indigenous parents to non-Indigenous care arrangements. Countless children were removed from Indigenous parents and placed with approved Caucasian foster parents or put in institutional care, a disaster for the many thousands of Indigenous families and the communities involved. The *Bringing Them Home* report by the Human Rights and Equal Opportunity Commission documents this policy and its long-term effects in terms of suicides, mental illness, and family breakdown.[7] The child-removal policy commenced in the early years of the 20th century under the Aboriginals Ordinance 1918 (NT) and continued for some decades, officially ending, at least in New South Wales, in 1967. In recent years it has spawned court cases in which applicants seek damages for the trauma suffered as a consequence of this "philanthropic" policy.[8]

The "Native Title" issue

In due course, the law gave Indigenous people some rights to land if they could show continuous occupation and use of it. Communities were then able to claim "native title" to land that generations had lived or hunted on or had used for sacred purposes. However, the exact legal status of rights conferred through registering "native title" remained uncertain until *Milirrpum v Nabalco,* where the court ruled that “the doctrine of communal native title does not form and never has formed part of the law of … Australia.”[9]

The proposition that Australia was *terra nullius* at the time of the British settlement was rejected by the High Court in its landmark ruling in *Mabo v The State of Queensland (Mabo No. 2).*[10] That decision in effect declared that, though the British Crown had acquired sovereignty over the continent of Australia in the 18th century, it could not acquire ownership of lands then occupied by Indigenous people. The ruling provided firm authority to underpin the legal status of "native title" while also outlining the circumstances in which it could be extinguished, lost, sold or otherwise disposed of. *Mabo* was followed by the case of *Wik Peoples and Ors v The State of Queensland and Ors,* which concerned a "native title claim by the Wik people.[11] In its judgment, the court considered the relative legal standing of "native title" and "pastoral leases" and ruled that the latter did not necessarily extinguish the former; the two could coexist, but where there was conflict the latter would prevail.

The *Native Title Act 1993 (Cth),* drawn up to address the issues raised by the decision in *Mabo 2*, was introduced on January 1, 1994. It provided for the recognition and determination of "native title" rights and for the compensation of those whose rights had been extinguished or impaired. It also introduced Indigenous Land Use Agreements (ILUA)--agreements made between native title holders and third parties as to future use of the land. The 1993 Act was amended in 1998 to take account of the *Wik* ruling. The amendments provided for Federal Court jurisdiction of "native title" disputes, a registration procedure and test, and the extinguishing of "native title" in certain circumstances. In the main, the amendments reduced the negotiating powers of Indigenous people relative to the claims of those with interests

relating to mineral exploration and pastoral leases on traditional aboriginal land, resulting in the dispossession of many Indigenous families.

Indigenous People: The Contemporary Context

Estimating the size and geographic spread of the Indigenous population has been hampered by difficulties of definition.

The Indigenous People

The Commonwealth working definition[12] of an "indigenous person" is one who:

> (a) is either:
>
> > (i) an Aboriginal person, meaning a person of the Aboriginal race of Australia; or
> >
> > (ii) a Torres Strait Islander, meaning a descendant of an indigenous inhabitant of the Torres Strait Islands; and
>
> (b) identifies as an Aboriginal person or a Torres Strait Islander; and
>
> (c) is recognized or accepted by an Aboriginal or Torres Strait Island community as a member of that community.

This incorporates three distinct elements: descent, self-identification, and community acceptance. The Indigenous people of Australia comprise a total of approximately 500 distinct communities from quite diverse cultural groups. The 1996 Census estimated the Indigenous population to be 386,049, or approximately 2.1 percent of the total Australian population. Compared to the Australian population as a whole, the Indigenous population is younger (half are age 20 or younger, compared to a median age of 34 for the population as a whole) and more rural (nearly one in five Indigenous people live in an area classified as "very remote," compared to under one in a hundred Australians overall).

The Health Circumstances of Indigenous People[13]

Aboriginal and Torres Strait Islander people are disadvantaged according to a range of socioeconomic indicators, including education, employment, income, and housing, and are therefore at greater risk of ill health than other Australians.

Recipients of public services: Aboriginal and Torres Strait Islander people are overrepresented in several areas of community services. They are more likely to be

part of the "Supported Accommodation Assistance Program" than non-Indigenous people. Indigenous children are more likely to be placed under care and protection orders or in out-of-home care than their non-Indigenous counterparts. Indigenous people used aged-care services at younger ages and in proportionally lower numbers (because of their shorter life expectancy) than the non-Indigenous population. Indigenous people use disability services at similar rates to the rest of the population.

Housing: The 1999 data indicate that Aboriginal and Torres Strait Islander people are more likely than the non-Indigenous population to live in substandard conditions. Indigenous people disproportionately confront overcrowding, high housing costs relative to income, poorly maintained buildings and facilities, and inadequate infrastructure. Aboriginal and Torres Strait Islander people are also less likely to own their own homes than non-Indigenous Australians.

Health: The available evidence suggests that Indigenous people are less healthy than the rest of the population. Indigenous people suffer from higher levels of many mental and behavioral disorders, and their susceptibility to infectious diseases is 12 times higher than the Australian average. Figures from 1998–99 demonstrate that Indigenous people are more likely to be hospitalized for most diseases and conditions, with hospital admissions for males 71 percent higher and for females 57 percent higher than for their counterparts in the non-Indigenous population. Diabetes is a disease of particular importance, affecting 30 percent of the Indigenous population.

Health services: There are clear differences between the Indigenous and non-Indigenous populations in terms of health services. Overall, Indigenous people have less access to health services than the general population.

Mortality: The life expectancy of Indigenous people is 20-21 years less than that of the general population. Figures from 1997–99 indicate that the life expectancy at birth for an Indigenous male is 56 years, and for an Indigenous female 63 years. Data from national surveys in 1994 and 1995 show that Indigenous people are more likely than non-Indigenous people to smoke, to consume alcohol at hazardous levels, to be exposed to violence, and to be categorized as obese. Babies of Indigenous mothers are nearly twice as likely as babies of non-Indigenous mothers to be of low birthweight, and babies of Indigenous mothers are twice as likely to die at birth and during the early post-natal phase. Indigenous childhood mortality is 3 to 5 times higher than that for the population of Australian children.

The Criminal Justice System and Indigenous People

The criminal justice system has a disproportionate impact upon Indigenous people. Indigenous people constitute only 2.1 percent of the general population but 28.6 percent of the prison population.[14] One in seven Indigenous people is in jail, one in four males. Figures from 1996 indicate that an Indigenous juvenile is 21 times more likely to be imprisoned than a non-Indigenous juvenile. Between 1994 and 1997, the number of detained Indigenous juveniles rose by 20 percent. Data from 1999 indicate that 91 percent of the female prison population in Australia is Indigenous.

The Economic Circumstances of Indigenous People

> According to recent research:
>
> > Indigenous Australians remain the most disadvantaged section of the Australian population.... This has again been made clear from early results from the 2001 Census that again clearly demonstrate that the Indigenous population is growing quickly at over 3 percent per annum and that the ratio of Indigenous to non-Indigenous incomes remains low at 0.67 indicating that Indigenous people remain relatively poor.... The proportion of Indigenous young people who attend post-secondary training is significantly below that of the rest of the Australian population and the employment statistics demonstrate a great disparity between the unemployment rates of Indigenous and non-Indigenous people. There is some variation between the States but the overall picture is that only a small proportion of Indigenous people are in full-time employment and only a small proportion are represented in the professions.[15]

The economic circumstances of Indigenous people clearly reveal continuing and endemic impoverishment. Their unemployment rate is 22.7 percent, compared to 9.2 percent for the general population; and the mean individual Indigenous income is 65 percent of that of the general population.

The Charity Law Framework

The Australian law governing contemporary charities and their activities is derived from the English Charitable Uses Act 1601 (43 Eliz. 1 c. 4) and remains true to its common law origins. As elsewhere in the common law world, the law governing charities and their activities developed as a part of the law of trusts, with a trust as the means for putting a donor's charity into effect, and the trustee required to apply the donor's gift exclusively for charitable purposes. The Preamble to the 1601 Act broadly stated the purposes then regarded as charitable, which in turn were crudely classified by Macnaughten LJ in the *Pemsel* case.[16] Although further broadened by subsequent judicial interpretation, they remained firmly tied to the initial common law parameters and principles. The common law of each state and territory now allows for the creation of charitable trusts, with some modification by the trust legislation of each state. The law of trusts continues to provide the template within which charities operate, though most of them are now constituted as companies rather than trusts.

Charities: Legal Definition

Charities must satisfy the common law test of "charity." There is no federal statutory definition of this term, and the concept of what constitutes charitable

activity draws heavily on traditional English common law dating back several centuries. As the Australian Tax Office (ATO) has explained,[17]

> For a purpose to fall within the technical meaning of "charitable" it must be:
>
> > Beneficial to the community; and
> >
> > Within the spirit and intendment of the Statute of Elizabeth.

The courts in Australia, following the *Pemsel* classification, have generally come to recognize the following categories of charity:

> the relief of poverty,
> the relief of the needs of the aged,
> the relief of sickness or distress,
> the advancement of religion, and
> the advancement of education.

There are also certain other charitable purposes grouped under the general heading "for the benefit of the community," and others may be recognized if they can be shown to come within "the spirit and intendment of the Statute of Elizabeth."

As a federation of states, Australia does not have a unified and uniformly applicable legislative capacity; each state is reasonably free to legislate for itself, though some Commonwealth legislation applies across all state jurisdictions. For the most part, the Australian states and territories have not defined "charity" or "charitable purposes" in legislation but, like the federal government, have left it to the courts to apply common law.[18] Some jurisdictions, however, do have statutory definitions that to varying degrees expand or modify the common law definition.

Legislation

The legislative foundations of contemporary charity law across the continent rest on statutes dealing with charitable trusts and with tax.

Charitable Trusts Legislation

The Charitable Trusts Act 1993 (NSW) and the Charitable Trusts Act 1962 (WA) establish the law of charities in those states. The statutes do not define what constitutes a charity, nor do they differentiate charitable activities from other activities. The legislation derives from common law foundations and remains true to them. For practical purposes, the relevant law is now found in a combination of established common-law-based case law precedents and certain statutes, the latter applied at federal, state/territorial, and local levels.

The Income Tax Assessment Act 1997

Broadly speaking, the main legislation applying to all not-for-profit organizations (NPOs), including charities, across Australia is the Income Tax Assessment Act 1997.[19] Legislation in each state/territory governs such matters as fundraising, collections, and trusts. Division 50 of the 1997 Act, in the "exemption tables," provides income tax exemption for a number of different types of organizations, including charities; these are listed under subject headings derived from the *Pemsel* categories, such as "health," education," "defense," "environment," and "the family." Tax legislation distinguishes between "institutions" and "funds"[20]:

> An institution is an establishment, organization, or association, instituted to promote some objective, especially one of public or general utility. It connotes a body called into existence to realize a defined purpose. It may be constituted in different ways, including as a corporation, unincorporated association, or trust.
>
> A fund mainly manages trust property, and/or holds trust property to make distributions to other entities or persons.

Both entities, if charitable, qualify for exemption under Division 50 and qualify as rebatable employers under s 65J of the Fringe Benefits Tax Assessment Act 1986.

Key Concepts

The concept of "charitable purposes" remained central to the law governing charity until 1914. The Estate Duty Assessment Act 1914 (Cth) then divorced "charity" from gift deductibility and introduced the term "benevolent institution." Subsequently, in *The Perpetual Trustee Co. Ltd. v Federal Commissioner of Taxation,*[21] the High Court defined "public benevolent institution" as an institution organized for the relief of poverty, sickness, destitution, helplessness, suffering, distress, or misfortune. Since then the ATO has had a double-pronged approach to tax liability: a charity is eligible for tax exemption, while a public benevolent institution (PBI) is eligible for donation deduction.

(i) Public benevolent institution

Sections 30–45 of the Income Tax Assessment Act 1997 require any entity applying for status as a recipient of deductible gifts to provide evidence that it is a public benevolent institution. Not every charity, however, is a PBI. The 1997 act does not define "public benevolent institution"; although the term expresses a unitary concept, each of the constituent parts of the term must be met.

- *"Public"*

The class of eligible persons must be sufficiently wide to constitute "the public" in the sense of a substantial, appreciable, extensive, or sufficient section of the community.[22] The principal test as to whether an institution is "public" is that it confers benevolence upon an appreciable needy class in the community.[23]

- *"Benevolent" or "Benefit"*

A public benevolent institution has been defined by Starke J, in a statement that has borne the test of time, as an "institution organized for the relief of poverty, sickness, destitution or helplessness."[24] The component of "helplessness" has since attracted a good deal of judicial attention, usually affirmative. It is well established that "relief" is not synonymous with "benefit."[25]

- *"Institution"*

An "institution" connotes something more than a mere trust. It is a legal undertaking formed to undertake activities that bring benevolent purposes into effect. Gyles J, in *Trustees of the Indigenous Barrister's Trust: The Mum Shirl Fund v FC of T,* reviewed the authorities relating to the interpretation of "institution" and concluded:

> In my opinion, a body cannot be a public benevolent institution unless it can be identified as carrying on activities or providing services relevant to the benevolent purpose. In my view, a trust fund administered by trustees who provide money in order that services provided by others can be availed of is not an institution in this sense.[26]

For that reason, he held that the trust could not be termed a public benevolent institution.

(ii) Public Fund

To meet the definition of a "public fund," a trust must demonstrably satisfy the "public" element, be limited to "necessitous circumstances," and be for the "relief" of those circumstances.

(iii) Relief of necessitous circumstances

In *The Mum Shirl* case, Gyles J stated:

> “Necessitous circumstances" is not a term of art or a defined term, and it is not confined to the relief of poverty in the strict sense … An indigenous person with virtually no assets and with all the social disadvantages shown by the evidence needs help in order to break free of the poverty trap.... Economic, social and cultural barriers exist to successful participation in commercial or administrative life at any level by such persons.

This view enabled Gyles J to conclude that the broad strategic support provided by the fund represented an appropriate means to relieve the necessitous circumstances of such Indigenous persons.

Gyles J significantly broadened "necessitous circumstances" by ruling that the term need not be restricted to the relief of poverty. His ruling endorsed judicial notice of the fact that Indigenous people are *per se* within "necessitous circumstances" and allowed greater strategic leverage for charitable activities. The

ATO subsequently chose not to appeal this ruling, though it commented that it will "seek the earliest available opportunity to test these issues before the court."[27]

Administration

No government body bears particular responsibility for administering the law as it relates to charities, nor does the law impose registration or regulatory requirements on charities, though some associated activities, such as fundraising, are regulated on a state-specific basis.

The Attorney Generals

State Attorney Generals retain their traditional role of *parens patriae* in relation to charities, which in theory gives them responsibility to exercise protective supervision over all charities and to enforce charitable trusts where necessary. However, this role lacks any regulatory functions. For example, an Attorney General does not register or audit charities operating within the jurisdiction.

The Australian Tax Authority (ATO)

The federal government is responsible for the income tax, capital gains tax, fringe benefits tax, customs duties, and Goods and Services Tax (GST). State and territory governments are responsible for such taxes as stamp duties and land and payroll taxes. Local authorities levy rates and charges. At each level of government, NPOs, including charities, are, to varying degrees, exempt from taxation.

The 1997 Act sets forth the complex system for administering the eligibility for tax exemption of not-for-profit organizations, including charities, and the ATO administers it. This government agency does not have a brief to be proactive in recognizing charities that engage in new forms of public benefit activity. Australia distinguishes between organizations and donations in terms of eligibility for income tax exemption. Although the concepts of charitable institution and funds are used to determine income tax exemption, a different classification system is used to determine eligibility to receive tax-deductible donations. In the 1997 Act, Division 50 lists organizations by specific name or by class, including charities, that qualify for income tax exemption; Division 30 lists organizations, including public benefit organizations, that can receive tax-deductible gifts.

The Courts

In Australia, the judiciary alone applies established common law principles and precedents to modern social circumstances. With no equivalent of the English Charity Commission, the task of fitting the law to contemporary social need falls exclusively to the courts. However, it has long been a characteristic of charity law, in this jurisdiction and elsewhere, that the volume of litigation is drying up: charities are increasingly unwilling to tolerate the heavy costs and the unwelcome publicity. As the number of cases before the courts declines, so too does their capacity to exercise a steady influence over the evolution of charity law.

The Australian Securities and Investment Commission (ASIC)

Charities *per se* are not required to register the facts of their existence, location, assets, governance arrangements, or dissolution with any public body. However, many charities choose to assume the legal form of a company limited by guarantee, and all such companies must register with the Australian Securities and Investment Commission (ASIC). This body administers the provisions of the Corporations Act 2001 as it applies to all companies, including incorporated charities, but it has no specific brief in relation to charities as such.

Charity Law in Practice: The Lack of Fit

Law constructed in the main from traditional case law principles and precedents cannot adequately address the complex nature of much contemporary social need. This is particularly true in relation to the extreme and embedded nature of social disadvantage suffered by Indigenous people. Many of the reasons for this legal failure can be traced directly or indirectly to the legacy of the common law.

Outside the Spirit and Intendment of the Statute of Elizabeth

As the ATO has emphasized, “Purposes are not charitable if they lack the required community benefit or are not within the spirit and intendment of the Statute of Elizabeth.”[28] In this jurisdiction, the "spirit and intendment" clause is a crucial common law element of the public benefit test for charitable activity. An organization whose purposes do not fit within the *Pemsel* classification, or are not analogous to those listed there, must show that the purposes fall within the legislative intent of the preamble to the 1601 Act. Four hundred years later, it can require some ingenuity to match the public benefit of a modern activity, such as Internet access, to a preamble activity, such as repair of highways--and such a match can be necessary to qualify for charitable status.[29] This sort of ingenuity is rare in Australia, where the body charged with making such interpretations, the ATO, is primarily concerned with maximizing public revenue.

The Absence of a Forum for Adjusting the Law

For judicial review of principles in the light of practice, the common law requires a continuous case flow. In Australia, judicial review of principles and precedents occurs so seldom and randomly as to provide little capacity for effectively addressing changes in social need. In Australia, no mechanism exists to permit an on-going review and adjustment of the law to ensure an appropriate fit with new or embedded forms of social disadvantage, which amounts to a structural flaw in the charity law framework. This is not to deny that the judiciary makes important rulings with potential to reset the application of the law. As acknowledged by Gyles J in *Trustees of the Indigenous Barristers Trust*: "In my opinion, the undisputed evidence leads to a finding that, at the time the Trust was settled, and for the foreseeable

future, many, indeed most, indigenous persons in Australia could properly be described as 'disadvantaged.'"[30]

Although judicial notice has been taken, in this and other cases, of the fact that Indigenous people are *per se* socially disadvantaged, this has not influenced the approach adopted by the ATO. In the absence of an explicit High Court judgment directing a different interpretation of the law, the ATO is free to continue its conservative defense of exemptions from income tax liability on grounds of an organization's charitable purposes.

Causes and Effects of Poverty

Established case law has confirmed that the effects rather than the causes of poverty must be the focus of a charity's purpose and activity. For example, funding a person's education and helping the person get established in self-employment or in a profession does not constitute the relief of poverty, sickness, destitution, or helplessness.

(i) Compassion and helplessness

The traditional dynamic of benefactor and supplicant remains entrenched in Australian judicial interpretations of "charity." This was illustrated by Hely J's explanation of "benevolence" in *Mines Rescue Board of New South Wales v Commissioner of Taxation*:

> [T]he authorities have basically confined the concept of "public benevolent institution" to institutions whose primary activities are eleemosynary. That is, the authorities import an underlying conception of "charity" or "gratuity" as the fundamental foundation for their understanding of "benevolence" in this context. In short, the authorities propound, and I adopt, a notion of benevolence which involves an act of kindness or perhaps most particularly, the rendering of assistance voluntarily to those who, for one reason or another, are in need of help and who cannot help themselves.[31]

An attitude of discretionary benevolence on the part of the giver, coupled with the reciprocal helplessness of the recipient, is clearly an important component, as was further illustrated by Evatt J in *Perpetual Trustee Co Ltd v FC of T,* when he wrote of recipients: “Those who receive aid or comfort in this way are the poor, the sick, the aged, and the young. Their disability or distress arouses pity, and the institutions are designed to give them protection.”[32] This interpretation endorses the patronizing approach traditionally associated with charity and anathema to contemporary minority groups. It would seem to foreclose any possibility of a more strategic approach intended to tackle structural and embedded causes of social deprivation.

Training

While the advancement of education is a charitable purpose, not all training schemes fit under this umbrella. They may prove unable to satisfy the "public benefit" test. The more tightly drawn the criteria for gaining access to the training, the more likely the scheme will be judged insufficiently "public" to qualify for charitable status. The courts, however, have found that Indigenous persons *per se* qualify as disadvantaged:

> [M]any, indeed most, Indigenous persons in Australia could properly be described as "disadvantaged" generally and, in particular, in relation to education and the ability to take a place in the business and professional world of Australia.[33]

Moreover, training, even when narrowly restricted to a rather elitist profession such as "barrister," would meet the "public" requirement, at least in relation to the needs of Indigenous people:

> Whilst, at one level, assisting persons to become practicing barristers may be seen by some as a luxury, I see it as the grant of assistance to persons to take a place in the world which the ability of the person would warrant but which might be denied without the assistance provided in order to overcome economic and social disadvantage.[34]

The group targeted for training must be large enough to be construed as sufficiently "public" in nature. So, while "Indigenous people" may satisfy the test, any further limitations that restrict access to those of a certain age, clan, or locality will probably prevent the training scheme from being deemed charitable.

Pure Research

Again, while the advancement of education is a charitable purpose, an organization that restricts itself to conducting research will be denied charitable status. Activities must do more than simply increase the quantum of knowledge; they must also disseminate it through teaching. An organization thus cannot gain charitable status by researching the nature and extent of the disadvantage suffered by a group, profiling the causes, and gathering the data necessary to identify the resources required to remedy the situation.

Advocacy or Political Lobbying

The restraints within charity law on the advocacy activities of disadvantaged groups represent a particular obstacle for organizers, who are often impelled to draw public attention to their grievances as a method of leveraging change.

(i) Political lobbying

The ATO maintains that political lobbying and promotional activities, where such are the main purposes, are not charitable:

> Political, lobbying and promotional purposes are not charitable. While promotional purposes may use educational means we do not consider this sufficient to show a charitable purpose.
>
> However, where political, lobbying or promotional purposes are merely incidental to a purpose that is otherwise charitable, they need not prevent that purpose being charitable.[35]

These activities are allowed, even encouraged in some jurisdictions, when they are "merely incidental" to a purpose that is otherwise charitable. An organization established to campaign on behalf of the needs of a minority group, however, would have to forgo charitable status.

(ii) Advocating change in law or government policy

Organizations set up to challenge government policy or to campaign for changing the law will be denied charitable status. The ATO states:

> An institution or fund whose purpose is to change the law or government policy is not charitable. This is so even if the subject matter of the change concerns the relief of poverty, education or religion....
>
> A purpose of seeking changes to government policy or particular decisions of governmental authorities is also not charitable.[36]

Clearly, an organization will not qualify as charitable if it is established primarily to improve the social circumstances of a disadvantaged group by advocating changes in policy or law, or if it chooses to make this its primary activity.

Community Development

The ATO has stated: "A charitable purpose must be for the benefit of the community. Charity is altruistic and intends social value or utility. The benefit need not be for the whole community; it may be for an appreciable section of the public."[37] However, the application of this principle in the context of Indigenous community development projects has not proved to be so straightforward.[38]

(i) Self-help groups

Many community-based projects are initiated by small groups whose members, sharing the same vision, organize the necessary resources and engage in an activity or create a facility for their collective benefit. Such groups will not qualify for charitable status, even if some external access is allowed, because the necessary "public" element will not be met and the activity or facility will be construed as being essentially for member benefit[39] or as being too vague or imprecise.[40]

(ii) Cultural affirmation

Where a group belonging to a minority culture creates an organization to preserve and promote its cultural heritage, the organization probably will not qualify for charitable status: the ATO is likely to regard such activities as essentially social and therefore of insufficient "benefit" to the community.[41] So, for example, a community center established in Melbourne to provide for the cultural and social needs of Latvians was held to be non-charitable on the grounds that the needs addressed were mainly social in nature.[42] Such initiatives may also breach the ATO rule that purposes must not be vague or ambiguous.

(iii) Businesses

Community development schemes often have a business component, because a disadvantaged community usually places a priority on projects that may bring in capital and help lift its members out of poverty. Such schemes may not be overtly run for profit but may involve a private financial contribution and/or generate a surplus. They are often set up solely to train the unemployed in skills appropriate to the needs of local industries. However, the involvement of private funds and the basis for distributing any profits can be fatal to the charitable status of the organization.

Conclusion

Philanthropy has always served an important strategic social function by mediating between the needs of the disadvantaged and the resources of the privileged. This has not always been to the long-term advantage of either group; in particular, philanthropic intervention channeled through trusts existing in perpetuity can perpetuate the dependency and marginalization of recipients while reinforcing the patronizing role of the benefactor. Nor is philanthropic intervention necessarily the answer to inequitable social divisions, which may require redress through a political or rights frame of reference. However, the vast resources and public benefit purposes of philanthropy have enormous potential to address the causes and ameliorate the effects of disadvantage while also facilitating social inclusion. If philanthropy is to fulfill its potential and promote the social inclusion of marginalized groups, a better fit must be found between the law, philanthropic resources, and the needs of the socially excluded.

Philanthropy is governed by law, specifically by charity law, but this no longer provides an appropriate or sufficient means for channeling philanthropic resources to foster social inclusion. The reasons for this are largely to be found in certain aspects of the common law heritage that continue to underpin much of charity law in Australia and many other modern western societies. In this country, the chronically disadvantaged circumstances of the Indigenous people, remaining impervious to generations of philanthropic intervention, graphically illustrate the consequences of a misfit between law and social need. This case study has concentrated on the needs of the Indigenous people, but the findings are relevant for minority culture groups of other nations and for such socially marginalized groups as the mentally ill, the disabled, and disaffected youth in all modern western nations.

Australia and many other common law nations are currently reviewing their charity law frameworks--an unprecedented opportunity for a coordinated adjustment

of the common law chassis that for four centuries has carried much the same body of charity law. This article has indicated the type of adjustments that are necessary. First, a new and independent entity (with a remit corresponding to that of the Charity Commission) should be established to proactively shape the future functions of charity law. The courts are no longer in a position to ensure that principle and practice evolve to meet emerging manifestations of social need, and the overriding brief of the ATO will always be to maximize public revenue--so lead responsibility for ensuring that philanthropic resources promote a contemporary interpretation of public benefit must be vested elsewhere. Second, it is manifestly wrong for the law still to require that charitable purposes focus solely on the effects of poverty and not also on its causes. Charities must be freed to tackle the structural and embedded nature of poverty that so often afflicts socially marginalized groups. Third, the constraints on advocacy and lobbying activities should be removed. Every democratic nation must take all necessary steps to ensure that it hears the voices of dissent and grievance; advocacy and lobbying activities should be encouraged. Fourth, the community development approach offers a new and radical means of affirming and empowering minority groups; all obstacles, such as the restrictions applying to self-help groups, should be removed. The present difficulties associated with setting up local training facilities and perhaps involving venture capital should also be removed; the social and economic regeneration of local communities must be facilitated rather than impeded. Many other common law characteristics of contemporary charity law in Australia as in other jurisdictions could usefully be reappraised but cannot be done justice here.

Above all, this article has sought to reveal the nature of the principal common law constraints and to explain why and how charity law must be adjusted to allow philanthropic intervention to promote the social inclusion of such marginalized groups as the Indigenous people and thereby forestall their alienation. Ensuring a better fit between the law, philanthropic resources, and the needs of the socially disadvantaged is a matter of pressing importance for the Indigenous people, for other marginalized groups in Australia and elsewhere, and for the governments of many modern western nations.

[*] *Assistant Director (Research), Centre for Voluntary Action Studies, School of Policy Studies, University of Ulster, Northern Ireland.* *This article draws from a study undertaken in the capacity of Myer Principal Research Fellow at the Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, Brisbane, Australia. The author acknowledges with sincere thanks the support and many acts of kindness provided by Professor Myles McGregor-Lowndes and the staff of CPNS.*

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[1] See, *Cooper v Stuart* (1889) 14 App Cas 286.

[2] See, Prime Minister Howard, J., Menzies Lecture Series: *Perspectives on Aboriginal and Torres Strait Islander Issues*, December 13, 2000, at p 3.

[3] See, the Royal Commission into Aboriginal Deaths in Custody, *National Report: Overview and Recommendations*, Australian Government Publishing Service, 1991.

[4] See, Royal Commission into Aboriginal Deaths in Custody, at p 228.

[5] See, Royal Commission into Aboriginal Deaths in Custody, at p 288.

[6] See, B. Hunter: *Indigenous Australian arrest rates: Economic and social factors underlying the incidence and number of arrests*, CAEPR Working Paper No 10 (2001), and the Human Rights and Equal Opportunity Commission's *Social Justice Report* 1999.

[7] See, the Human Rights and Equal Opportunity Commission, *Bringing Them Home: A Guide to the Findings and Recommendations of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families,* Australian Government Publishing Service, 1997; also memorably portrayed in the film *Rabbit-Proof Fence.*

[8] See, for example, *Kruger v Commonwealth* (1997) 190 CLR 1 and *Cubillo v Commonwealth* (2000) 174 ALR 97.

[9] (1971) 17 FLR 141, a ruling questioned by the court in *Coe v The Commonwealth of Australia and Ors* (1979) 53 ALJR 403; (1979) 24 ALR 118.

[10] (1992) 175 CLR ALR 1.

[11] (1996) 141 ALR 129.

[12] See, Department of Aboriginal Affairs, 1981.

[13] The Australian Bureau of Statistics (ABS) publication *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples* (2001) provides the main source of information for this section.

[14] See, generally, the report of the Human Rights and Equal Opportunities Commission 1999.

[15] Evidence given during the *Indigenous Barristers"* case, *op cit*, by the Director of the Centre of Aboriginal Economic Policy Research at the Australian National University. This multidisciplinary social sciences research center focuses on indigenous Australian economic policy and economic development issues, including social justice and the socioeconomic status of indigenous Australians. Also, see, B. Hunter *Indigenous self-employment: miracle cure or risky business?*, CAEPR Discussion Paper 176 (1999), CAEPR, ANU, Canberra.

[16] See, *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

[17] See, ATO, *Draft Taxation Ruling* TR 1999/D21, at para 8.

[18] See, *Chesterman v FC of T* (1925) 37 CLR 317; *Incorporated Council of Law Reporting (QLD) v FC of T* (1971) 125 CLR 659.

[19] Building on foundations laid by the Income Tax Assessment Act 1936, which first exempted certain classes of nonprofit organizations from income tax.

[20] See, ATO, *Draft Taxation Ruling* TR 1999/D21, at paras 19 and 20.

[21] [1931] 45 CLR 224.

[22] See, *Maughan v Commissioner of Taxation (Cth)* (1942) 66 CLR 388 at 398.1; *Little Company of Mary (SA) Inc v Commonwealth* (1949) 66 CLR 368, per Rich J at 383-384, citing *Verge v Somerville* [1924] AC 496 at 499; *Commissioner of Taxation (Cth) v Royal Society for the Prevention of Cruelty to Animals Queensland Inc* [1993] Qd R 571 per Fitzgerald P at 577.

[23] See, *Lemm v Commissioner of Taxation (Cth)* (1942) 66 CLR 399 per Williams J at 411, unanimously endorsed by the Court.

[24] See, *Perpetual Trustee Co Ltd* per Starke J at 232.

[25] See, *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney General* [1983] 1 All ER 288 at 295; *City of Hawthorne v Victorian Welfare Association* [1970] VR 205 at 208-209.

[26] *Op cit*.

[27] See, ATO, *Non-Profit News Service* No 0031.

[28] See, ATO, *Draft Taxation Ruling*, TR 1999/D21 at p 7.

[29] See, *Re Vancouver Regional FreeNet Association v Minister of National Revenue* (1996) 137 DLR (4^{th}) 206.

[30] See, *Trustees of the Indigenous Barrister's Trust: The Mum Shirl Fund v FC of T* (2002) ATC 5055. Citing in support: *Re Mathew* [1951] VLR 226 at 232; *Re Bryning* [1976] VR 100 at 101-102; *Aboriginal Hostels Ltd v Darwin City Council* (1985) 75 FLR 197 at 211-212; *Tangentyere Council Inc v Commissioner of Taxes (NT)* (1990) 99 FLR 363 at 369-371 (although cf. *Commissioner of Taxes (NT) v Tangentyere Council Inc* (1992) 102 FLR 470); and *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* at 252-254.

[31] (Cth) (2000) 44 ATR 107 at p 30.

[32] (1931) 45 CLR 224 at p 233.

[33] See, *Trustees of the Indigenous Barrister's Trust: The Mum Shirl Fund v FC of T, op cit.*

[34] *Ibid.*

[35] See, ATO, *Draft Taxation Ruling* TR 1999/D21. Also, see, *Re Boning* [1996] QSC 216.

[36] *Ibid*, at paras 78–85: citing *McGovern v Attorney-General* [1981] 3 All ER 493. Also citing *N.D.G. Neighbourhood Association v Revenue Canada* 88 DTC 6279 which concerned a neighborhood association whose activities involved campaigning on such issues as government cutbacks, transportation changes, conversion of areas into condominiums, and improving roads.

[37] See, ATO, *Draft Taxation Ruling* TR 1999/D21, at para 43.

[38] See, *Aboriginal Hostels Ltd. v Darwin City Council* (1985) 75 FLR 197 and also *Flynn v Mamarika* (1996) 130 FLR 218). Also, see, *Native Communications Society of British Columbia v MNR* [1986] 3 FC 471, which concerned a scheme to develop radio and television programs relevant to native people and training native people as communication workers.

[39] See, *In re Income Tax Acts (No 1)* [1930] VLR 211.

[40] In this context, the ATO relies on the decision in *Inland Revenue Commissioners v Baddeley* [1955] 1 All ER 525, where a gift of land to trustees for the moral, social, and physical well-being of a community was found to be too vague to qualify as a charitable gift.

[41] See, for example, *Attorney-General (NSW) v Cahill* [1969] 1 NSWR 85.

[42] See, *Latvian Co-operative Society v Commissioner of Land Taxes (Vic)* (1989) 20 ATR 3641.