

Webinar on Public Benevolent Institutions: Reflections on the new Commissioner's Interpretation Statement

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At the end of August, the Australian Charities and Not-for-profits Commission released its eagerly anticipated update to the Commissioner's Interpretation Statement on Public Benevolent Institutions. The statement contains a range of significant changes from the earlier Interpretation Statement, and incorporates reasoning based on the very recent Equality Australia AAT decision.

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Introduction.

I concur with Bridgid Cowling's observations that this new **Commissioner's Interpretation Statement on Public Benevolent Institutions** (new CIS) is easier to follow than its predecessor published in 2016 and provides helpful guidance for characterisation of an entity as a Public Benevolent Institution. A characterization that determines whether an entity will attract more favourable tax treatment than other forms of charity.

The new CIS has been revised in the light of changing understandings of PBI expressed in the cases. The new CIS acknowledges that the meaning of the expression PBI has changed over time and will continue to evolve. [9]¹ This reflects judicial statements in *Ambulance Service*, *Hunger Project* and *Equality Australia* and highlights the need for regular review of guidance—particularly when the ACNC has an ongoing program of reviewing the entitlement of charities to PBI status. There are some charities lamenting expensive restructuring as a result of PBI reviews under the old CIS which would not have been required under the new.

How to discern PBI

The new CIS confirms that discernment of PBI is not merely a mechanical application of judicial statements but a holistic analysis of the purpose and activities of an organization to determine whether it can be properly characterized as benevolent. [80] [67]

This approach reflects the observations of AAT Senior Member Professor Ann O'Connell in *Equality Australia* at [156]

“A characterisation process which does not set out express criteria invites the decision-maker to stand back, review the stated purpose and activities of the organisation, and make a broad evaluative judgment as to that organisation's essential nature. The evaluation must be objective, and it must be evidence-based, but it ultimately involves forming an impression. It is not a question that can be resolved through exact proof: as courts have observed in other contexts, sometimes, one just knows whether something meets a definition when one sees it. The best a

¹ Unless context is otherwise, paragraph references are to Commissioner's Interpretation Statement : Public Benevolent Institutions [Commissioner's Interpretation Statement: Public Benevolent Institutions | ACNC](#)

decision-maker can do is describe the basis of the impression. While that might strike some as being unsatisfactorily vague, it is almost certainly what parliament intended in this case when it used a multi-faceted word like 'benevolent'. "

This in turn echoes the views of Justice Dixon in seminal case of Perpetual Trustees: *"In such matters one must often be guided to a great degree by one's own experience in the use of terms. In the present case little help is provided by dictionaries, statutory usage or judicial decision"*.

As Myles Mc Gregor Lowndes observes in his Commentary on Equality Australia: *"An itemized tick and flick checklist that promotes consistent and timely assessment may not serve as an accurate assessment tool, as a holistic analysis is required"*.

A CIS provides guidance to ACNC analysts, charity law advisers and charities on the Commissioners understanding of characteristics of a PBI. The task is to stand back and ask: *"What's really going on here?"* – This is informed by guidance given in the cases taken in their context- including the era in which they were decided. It requires a decision maker, whether adviser or regulator to have been immersed in the history and contemporary meaning of PBI.

A fluid definition, changing social circumstances and differing points of view means that there will be some matters open for debate. I raise some of those matters here. Within our time constraints I cannot develop the arguments or even cite sufficient authority. However, I trust they will stimulate discussion.

Seriousness

How serious does the need have to be?

Definitions of requisite level of need for benevolence to kick in have had a threshold of seriousness expressed in various ways. As far back as Pemsel (1891) Lord Hershell spoke of need *"which excites the compassion or sympathy of men and so appeals to their benevolence"*. In Perpetual Trustees, Evatt J used the expression, *"a plight which arouses pity or compassion"*. Dixon J and McTiernan J referred to people *"unable to care for themselves"*.

The twin judgments of McGarvie J. in Cairnmillar and Marriage Guidance, argued together and delivered on 29 June 1990 are illustrative of the fine line between the sufferings of everyday life and the distress requiring benevolent institution. Both cases involved marriage counselling (amongst other things). One was a PBI, the other wasn't. The test was whether the condition aroused compassion in the community.

This was the test adopted in the old CIS.

Such a formula was criticised by Professor O Connell in Equality Australia for its *"subjectivity, echoes of welfare and handouts rather than rights including human rights"*.

The new CIS does not reference arousal of compassion but rather *"suffering that goes beyond the pain and suffering of everyday life"* [31].

In my view, this is a helpful way to consider the serious need to be relieved. It still requires discernment to locate the line between trivia and everyday sufferings on the one hand and distress serious enough to require benevolent intervention. Using the O'Connell methodology, you will know it when you see it.

Prevention

Can prevention of distress attract benevolent relief within the rubric of PBI?

As Brereton J. of the NSW Supreme Court put it in Police Citizens Boys Club Case (1957) .."from the point of view of public benefit, prevention is a great deal better than cure...It is difficult to see why prophylaxis should not be regarded as an activity just as benevolent as therapy."

The new CIS is equivocal and in my view is too cautious in approaching the truism that prevention is better than cure. It provides an emphatic "maybe".

In my view, Maughan (1942) and Global Citizen (2021) are clear that prevention alone is a sufficient benevolent response.

The treatment of Prevention in the new CIS is hemmed in with caution: "the ACNC accepts, that in some circumstances, PBIs can engage in activities that might be regarded as preventative"[60].

In each iteration of preventative activities and in the examples, there is an implication that there must be actual relief with added permissible prevention.

In my view, the new CIS lost the opportunity to land unequivocally on the side of prevention of imminent distress.

Registration as a PBI and other subtypes of charity.

In my view there was an error in the 2016 CIS that resulted in the ACNC refusing registration in more than one subtype where the ACNC said that another purpose was independent and not ancillary to a benevolent purpose. The error was expressed in this way:

[5.5.2]: The main purpose of a PBI must be to provide relief to people in need. If an entity has other purposes that are not benevolent, it will be ineligible to be a PBI unless those purposes are ancillary or incidental to the main benevolent purpose".

This approach was criticised by the AAT in Global Citizen where the Tribunal explained:

" that a PBI may have other purposes additional to benevolent purposes. .. Our analysis of the authorities suggests that we should not apply an "exclusivity of purpose" test in relation to PBIs [88]...The ordinary meaning of "main" in relation to an object or purpose does not preclude an entity from having other objects or purposes, provided that the benevolent purpose was predominant." [81]

The example given by the Tribunal of the Hobart City Mission case (at [81]) particularly touches on a typical occurrence of a PBI that also has a religious purpose. The case

concerned an evangelical organisation providing benevolent relief along with a religious purpose of equal importance.

The new CIS indicates that the ACNC does not accept the view expressed in *Global Citizen* that there is no exclusivity of purpose test. The ACNC persists in its view that if an activity is independent of benevolent relief, PBI will be denied. [37] [87]

The distinction is not theoretical. If a purpose is ancillary, it does not qualify for a subtype. Only independent purposes qualify for a subtype. Where there is both an independent purpose of religion and an independent but predominant purpose of benevolence, the ACNC may refuse registration as a religious institution and the gateway to Fringe Benefits exemptions open only to registered religious entities.

In my view, this lack of clarity ought to be addressed.

Directness

The old CIS explained that there was no requirement that a charity must itself directly provide benevolent relief. It may do so through a chain of collaboration or common benevolent purpose as outlined in *Hunger Project*.

Since then, the concept of “sufficiency of connection” between what an organisation does and the benevolent ends it pursues has been raised in *Equality Australia*. Although the concept of sufficiency of connection is not clearly defined, the majority in *Equality Australia* was satisfied that advocacy for reform and change (at least in that instance) was too far removed from traditional concepts of benevolence. In short, there was not enough sufficiently direct relief. The question of what is sufficient remains opaque and will need to be worked out on a case-by-case basis.

The CIS sensibly re-states the observations in the recent cases and, in fairness, cannot go much further at this stage. There is a line somewhere, but we are not sure where it lies.

Mere trusts

The CIS is at pains to exclude “mere trusts” from the concept of PBI on the basis that a trustee investing and distributing for charitable purposes does not come within the rubric of *Mc Adams Case* [1896] of conducting activities in furtherance of a purpose. Although the idea of a mere trust is well entrenched, and rightly referenced in the CIS, I muse whether post *Word Investments* and *Hunger Project*, the participation of a Trustee in a chain of cooperative delivery of benevolence may be a sufficient activity to indicate an institution.

Conclusion

The long-awaited new CIS is welcome. It has been a slow train coming. As we pause at the platform and get on board, we recognise that the concept of PBI is a work in progress. And I for one, would encourage regular reviews and consultation to keep it up to date with contemporary understandings of PBI as expressed in the cases and the world around us.