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CHARITY LAW & SOCIAL POLICY

National and International Perspectives on the Functions of the Law Relating to Charities

by KERRY O'HALLORAN, MYLES McGREGOR-LOWNDES AND KARLA W. SIMON

Springer

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Contents

Introduction

Charity Law & Social Policy explores contemporary law, policy and practice in a range of modern common law nations. It does so from the perspective of how this has evolved in the UK. As progenitor of a system bequeathed to its colonies and after centuries of leadership in developing the core principles, policies and precedents, the jurisdiction of England & Wales has been and remains central to charity law as a common law phenomenon. No meaningful analysis of charity law can be attempted in any common law nation without first grasping how it has developed and now operates in the originating jurisdiction.

Part I begins this book with 'An Evolving Social Policy Context for Charity and the Law'. From a starting point that recognises 'charity' as comprising a mix of public and private interests, it explains that disentangling these strands is a prerequisite to identifying and understanding the related social policy. The relevant social policy concerns of government are apparent in the type of need addressed by donors and organisations that qualify for charitable status and tax exemption and are also evident in the mechanics of the law as it relates to charity. The separate sets of interests provide correlating dimensions for the comparative analysis of experience in the common law nations that constitutes the main part of this book.

This Part, therefore, consists of two chapters dealing with the public and private interests in charity law as this evolved in England & Wales. Chapter 1 considers the origins of 'charity' as a common law phenomenon: it identifies the basic concepts and principles, the parties and the legal structures for charitable activity; it explains the nature of the transaction and discusses the 'gift relationship'. Chapter 2 examines the social policy that informed the first statement of government intentions in the Preamble, considers the subsequent judicial interpretation of need as developed through charitable purposes case law and identifies and traces the emergence of issues that have shaped contemporary social policy as it relates to charity.

Defining the need to be met by charity is an issue that has been largely ignored by government and left to a fairly uniform judicial interpretation as guided by *Pemsel* in the common law nations. However, the patterns of need recognised and disallowed in charity law, and the related distribution of donor resources are revealing. The 'how and why' and 'who gets what' approach to the distribution of charitable resources is a social policy by outcomes analysis. By examining the

K. O'Halloran et al., *Charity Law & Social Policy*,

spread of charity against type of need, detecting trends that change over time and differ between countries, we can draw some conclusions about the distinctive pressures in play in a society at a particular point in time. In an obverse relationship, social policy is demonstrated by changing trends in the use of charity.

Part II, entitled 'A Functional Approach to the Law as it Relates to Charity in the UK', deals with the mechanics of the law, that is the legal functions relating to charity, charitable activity and the task of giving effect to legislative intent (as traced back to the Preamble), which have always attracted considerable and varied government attention. The choice of functions, the varying weighting given to each and the actual outcomes achieved, reveal jurisdiction specific social policy objectives. Whether government places a priority on policing the entitlement to tax exemption or on supporting an authentically independent charitable sector, the extent to which it provides protection for donors and the importance it attaches to adjusting the application of charity in the light of changing social need, are social policy choices that will be clearly evident in the balance of authority represented by the different agencies constituting the national regulatory framework for charity. Such a functional analysis approach again provides a clear basis for assessing changes over time and for differentiating between countries in relation to particular configurations of social policy and charity law.

The five chapters comprising this Part together provide an analysis of the main legal functions relating to charity and charitable activity. Chapter 3 considers the jurisprudence underpinning the functional approach to the law, giving particular attention to the more salient principles and their contemporary impact. The legal functions most relevant to charity are then identified, their relative significance assessed and consideration is given to their different application relative to type of need and how this illustrates and gives effect to prevailing social policy. Chapters 4–7 – dealing respectively with 'Protection', 'Policing', 'Mediation and Adjustment', and 'Support' – each focus on what has become a well-established function of the law as it relates to charity and charitable activity. Their origins, in initiatives by government and judiciary, are traced and their effectiveness and policy significance are considered.

Part III, 'International Perspectives', provides case studies depicting use of the legal functions, as they apply to type of need and thereby give effect to policy, in each of the selected common law jurisdictions. The Charitable Uses Act 1601, the first legislative attempt to articulate such a social policy, identified the types of social need and related donor activity then entitled to charitable status. This statutory statement of how the law was intended to govern the relationship between charities and specified social need served as a baseline for the creation of a regulatory environment within all common law nations. In the UK, as elsewhere, it was not until the enactment of nineteenth-century statutes that effective regulatory provisions of a more general nature began to be introduced. Since then, while the balance struck between support and policing has varied across the common law jurisdictions, they have all drawn from the same common law pool of precedents and have mostly moved towards putting in place the same basic institutional components. Where they now differ, primarily, is in the extent to which in constructing

a modern regulatory environment they make provision for mechanisms that protect, support and positively reinforce opportunities for the further development of charitable purposes.

This section outlines and contrasts the exercise of these functions in five common law countries: tracing when, why and how they evolved as they did in each jurisdiction and identifying, weighing and evaluating their distinctive characteristics. A range of common law jurisdictions have been selected, representing very different political contexts, so as to enable this section to highlight the relative significance of the roles played by particular functions e.g. policing in contrast to support. This exercise is facilitated by uniformly applying an especially designed template which permits the systematic gathering of information and the profiling of functions and policy in respect of Australia and New Zealand, the United States, Singapore and Canada.

Part IV, the final section, reflects on the findings of Part III and considers the implications arising for the future relationship between legal functions and social policy as they relate to charity. Entitled 'Re-configuring the Social Policy context for Charity and the Law', it consists of three chapters dealing respectively with problems of definition, interpretation and the regulatory framework. Essentially, this section suggests that the traditional balance between public and private interests, a legacy that shaped the role played by charity throughout the common law nations, will have to be revised if philanthropy is to fulfill its potential and take its place alongside human rights and politics as a respectable means of securing greater equity, nationally and internationally, for the underprivileged in the 21st century. Only by clearly stating the social policy objectives for contemporary philanthropy, differentiating the latter from political and justice frames of reference, can we then with some confidence adjust charity's traditional legal functions to ensure those objectives are effectively addressed. That task – of making philanthropy fit for purpose within modern society – will be better informed by a recognition of the nature of the relationship between legal functions and social policy; a relationship that has determined the meaning of 'charity' in the shared common law legacy of some 53 nations[1] and if appropriately adjusted can provide them with a new and more effective platform for philanthropy in the third millennium.

[1] The Commonwealth consists of some 53 independent sovereign nations each sharing to a varying degree in a common law heritage, a legacy from their experience as former colonies of the British Empire.

Part I
Charity, the Law and Social Policy in the UK

Chapter 1
Charity: Concept, Parties and Governing Principles

Introduction

This chapter deals with the essential elements of 'charity'. It identifies the basic concepts, the principal parties and explores the role they play in 'charity' as this is understood in the common law. It examines the relationship between charity, benevolence and philanthropy and assesses the nature and relevance of the gift relationship.[1] It identifies the principles that govern charities and their activities, noting the extent to which an act of charity represents both public and private interests. It considers the features that differentiate charity from other forms of not-for-profit entities and identifies the range of legal structures that house charitable activity.

The chapter then focuses on the history of charity in England & Wales as the progenitor of this common law social phenomenon. It briefly outlines its historical origins, explains its relationship to the prevailing social context and relates how the role of charity has developed in response to changing social circumstances. It considers the relationship between charity and government, giving particular attention to how this has waxed and waned in conjunction with the Welfare State, while highlighting the characteristics traditionally associated with charity. In this way, the chapter builds a picture of how charity as a common law phenomenon was initially shaped, thereby providing a baseline or perspective from which to view in subsequent chapters the developments in that jurisdiction and others as the concept and social construct of 'charity' evolved in keeping with pressures emanating from its particular cultural context.

Concepts, Parties and the Gift Relationship

The essential elements of charity in a common law context would seem to have been formed in pre-Reformation England when Church and King were the twin institutions governing society. At that time when English society was rigidly structured by

[1] See Titmus, R., *The Gift Relationship: From Human Blood to Social Policy*, Allen & Unwin, London, 1970.

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feudalism and subsequently when this was replaced by religious or class affiliation, with wealth and power distributed accordingly, charity to some extent served to offset the gap between rich and poor, acting as a necessary solvent for maintaining social cohesion. Arguably, over a period of at least four centuries, its role has not greatly changed.

The Key Concepts

Essentially, the conceptual underpinnings of this common law social phenomenon remain much as first articulated in the Statute of Charitable Uses 1601[2] and its accompanying Preamble,[3] and then classified by Lord Macnaughten in *Pemsel*[4] (see, further, below).

Charity

Theoretically, charity is concerned with the fact and effects of poverty and is focused on methods for directly alleviating the suffering of others. This should serve to distinguish charity from philanthropy which is primarily about respect for the civilising effects of human endeavour and is focused on providing and promoting opportunities for bettering the human condition.[5] It should also differentiate charity from public utility provision which deals with the more institutional aspects of social infrastructure that provides generally for the security and wellbeing of the population. Again, it should be clearly different from the activities of religious organisations in which member benefit is essentially pursued as an aspect of worship. The difference is one represented, respectively, by soup kitchens, the Royal Opera House, hospitals and the saying of mass.

'Charity' as a legal concept, however, has managed to accommodate all the above. For four centuries it evaded the constraints of legislative definition and remained a creature of the common law as interpretation of what constituted a charitable purpose was left to the judiciary to determine in accordance with the

[2] Also known the Statute of Elizabeth, 43 Eliz 1, c 4.

[3] The illustrative lists of charitable purposes in the Preamble (e.g. "relief of aged impotent and poore people") continue to provide a focus for modern charities.

[4] *Income Tax Special Purposes Commissioners v. Pemsel* [1891] AC 531.

[5] See for example, Gurin, M.G. and Van Til, J., 'Philanthropy in its Historical Context', *Critical Issues in American Philanthropy, Strengthening Theory and Practice*, Van Til, V. and Assocs. (eds.), 1990 where a distinction is drawn between charity (person-to-person alleviation of need) and philanthropy (strategic approach to social problems).

Pemsel classification and the 'spirit and intendment' rule[6] (see, further, Chap. 2). During this time 'charity' acquired a meaning in law that strayed some way from any interpretation that could otherwise have been logically ascribed to it.

Benevolence

This, it has been said, is not to be construed in law as charity because "the word 'benevolent' is a word of somewhat shadowy meaning",[7] while gifts expressed for charitable or benevolent purposes have often been declared void as they are open to being interpreted in ways that may go beyond what is exclusively charitable.[8] As Picarda has stated:[9]

> A gift simply to 'benevolent purposes' is objectionable:[10] a benevolent purpose may be (but is not necessarily) charitable. The same is true of gifts to philanthropic purposes,[11] utilitarian purposes,[12] emigration,[13] patriotic[14] and public purposes:[15] they all go further than legal charity. Likewise gifts for encouraging undertaking of general utility,[16] for hospitality,[17] for such societies as should be in the opinion of trustees 'most in need of help'[18] and for such purposes, civil or religious, as a class of persons should appoint,[19] are too wide … the permutations are endless.

So, in *Morice v. Bishop of Durham*[20] an estate left to the Bishop for him to dispose of to 'such objects of benevolence and liberality' as he at his discretion should see

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[6] See Sir William Grant, M.R. in *Morice v. The Bishop of Durham* (1804) 9 Ves 405. He then stated that a fixed principle existed in the law of England that purposes deemed to be charitable are those "which that Statute enumerates" and those "which by analogies are deemed within its spirit and intendment".

[7] Picarda, H., *The Law and Practice Relating to Charities* (3rd ed.), Butterworths, London, 1999, pp. 302, 621.

[8] *Houston v. Burns* [1918] AC 337, HL; *Re Jarman's Estate* (1878) 8 Ch D 584; *Re Rilands Estate* [1881] WN 173; *Chichester Diocesan Fund and Board of Finance Inc v. Simpson* [1944] AC 341, HL; *A-G for New Zealand v. Brown* [1917] AC 393, PC.

[9] Picarda, *op. cit*., p. 221.

[10] *James v. Allen* (1817) 3 Mer 17; *Re Barnett* (1908) 24 TLR 788; and *Lawrence v. Lawrence* (1913) 42 NBR 260.

[11] *Re Macduff* [1986] 2 Ch 452; *Re Eades* [1920] 2 Ch 353.

[12] *Re Woodgate* (1886) 2 TLR 674.

[13] *Re Sidney* (1908) 1 Ch 488.

[14] *A-G v. National Provincial Bank* [1924] AC 262.

[15] *Re Da Costa* [1912] 1 Ch 337; *Vezey v. Jamson* (1822) 1 Sim & St 69; *Blair v. Duncan* [1902] AC 37; *Houston v. Burns* [1918] AC 337; and *Re Davis* [1923] 1 Ch 225.

[16] *Kendall v. Granger* (1842) 5 Beav 300; *Langham v. Peterson* (1903) 87 LT 744.

[17] *Re Hewitt* (1883) 53 LJ Ch 132; *A-G v. Whorwood* (1750) 1 Ves Sen 534.

[18] *Re Freeman* [1908] 1 Ch 720.

[19] *Re Friends Free School* [1909] 2 Ch 675.

[20] (1804) 32 ER 656, 9 Ves. J. 399.

fit was found not to be charitable as the terms of the gift allowed for the possibility of it being used for both charitable and non-charitable purposes. As Sir William Grant then declared:

> Do purposes of liberality and benevolence mean the same as charity? That word in its widest sense denotes all the good affections men ought to bear towards each other: in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in this court.

Where the gift for benevolent purposes is expressed as being additional, rather than as an alternative, to charitable purposes then it will be construed as charitable.[21]

Philanthropy

Just as 'benevolent' fails the technical definition of 'charity' in law, so too does 'philanthropic' even though it is "no doubt a word of narrower meaning than 'benevolent'."[22] As has been explained "an act may be benevolent if it indicates goodwill to a particular individual only, whereas an act cannot be said to be philanthropic unless it indicates goodwill to mankind at large".[23] Where gifts are expressed as being for charitable or philanthropic purposes they invariably fail as was the case with: 'to such religious charitable and philanthropic objects' as three named persons might select;[24] 'for charitable, religious educational or philanthropic purposes';[25] 'for such charitable, religious philanthropic educational or scientific institution or institutions';[26] and for 'charitable benevolent religious and educational institutions associations and objects'.[27] The rationale for adversely discriminating against philanthropy puzzled Lord Sterndale MR:[28]

> I confess I find considerable difficulty in understanding the exact reason why a gift for the benefit of animals, and for the prevention of cruelty to animals generally, should be a good charitable gift, while a gift for philanthropic purposes, which, I take it, is for the benefit of

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[21] *Re Best* [1904] 2 Ch 354; *Caldwell v. Caldwell* [1921] 91 LJPC 95.

[22] Picarda, *op. cit*., p. 621.

[23] See *Re Macduff*, *op. cit*., *per* Stirling J., p. 481 (cited by Picarda, *op. cit*.).

[24] *Re Eades*, *op. cit*.

[25] *Brewer v. McCauley* [1955] 1 DLR 415. Also, *Re Young* (1907) 9 OWR 566 ("needful and worthy institution or institutions, or any needy and worthy individual or individuals"); *Re Street* (1926) 29 OWN 428 ('benevolent institutions"); and *Planta v. Greenshields* [1931] 2 DLR 189 ("to aid and help any worthy cause or causes"). *Re Metcalfe* [1947] 1 DLR 567 ("religious, charitable and benevolent purposes").

[26] *Re White* [1933] SASR 129 and also *A-G for New South Wales v. Adams* (1908) 7 CLR 100; *Re Cole's Estate* (1980) 25 SASR 489.

[27] *A.-G. for New Zealand v. Brown* [1917] AC 393.

[28] See *Re Tetley* [1923] 1 Ch 258 at 266–7, as cited in Sheridan. L.A., Keeton & Sheridan's, *The Modern Law of Charities* (4th ed.), Barry Rose, Chichester, 1992, pp. 4–5.

> mankind generally, should be bad as a charitable gift. The gift for the benefit of animals, apparently, is held to be valid because it is educative of mankind, it being good for mankind that they should be taught not to be cruel but kind to animals, and one would quite agree with that. But if the benefit of mankind on that particular side makes that a good charitable gift it is a little difficult to see why any philanthropic purpose to benefit mankind on all sides is a bad one. But it is so.

Where the gift is expressed to be for both charitable and philanthropic[29] purposes then it will be a good charitable gift because the object to be benefited must possess both characteristics (although in recent years the law relating to charity in England & Wales has begun to relax its approach towards policing these distinctions[30]).

Need

While this has become a more relative and complicated term with the passing of the centuries, it remains the crux of the charitable relationship and continues to be defined within the common law parameters as set by the Preamble,[31] the 'spirit and intendment' rule[32] and the charitable purposes originally identified in *Pemsel* and subsequently extended by the judiciary. The degree and range of need implied by the reference in the Preamble to the 'releife of aged impotent and poore people' has particularly exercised the judiciary with varying results in different jurisdictions. These parameters reflect traditional social values and, as will be explored in later chapters, impose constraints on the type of need that can now be addressed by charitable activity.

The Parties

Charity in the common law rests on a transaction that involves the interests of donor, charitable organisation, recipient and the State in an amalgam of private and public law concerns. Arbitration on any conflict arising between the interests of these parties has traditionally been left to the courts but in England & Wales that responsibility has now largely passed to the Charity Commission.

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[29] *Re Huyck* (1905) 10 OLR 480.

[30] See for example, the Charities Act 1992 where a 'charitable institution' is defined as 'a charity or an institution other than a charity which is established for charitable or philanthropic purposes'.

[31] *Op. cit*., f/n 3.

[32] *Op. cit*., f/n 6.

The Donor

The basis for exempting a charitable trust from certain tax and other financial impositions rests on the fact that, in deciding to make a gift, a donor has chosen not to confer a private benefit upon a personally selected recipient but to instead make an altruistic gift for the public good. The right to dispose of personal property, an important aspect of private law, has long been upheld as a key attribute of democracy. When that right is exercised so as to voluntarily redistribute private wealth for the public benefit then that together with the ancillary need to protect the value of that gift, makes the transaction more a matter of public law. This is reinforced by the fact that the right of donor choice, if it is to be exercised in the form of a charitable gift, is subject to certain constraints imposed by public law.

The Charitable Organisation

An organisation established and registered as dedicated to the pursuit of charitable purposes provides the conduit for channeling a donor's gift to the recipient. Such an organisation, by virtue of its charitable status as dedicated to public benefit activities and thereby supplementing or displacing the need for State service provision, will be eligible for tax exemption. Charities, being exempt from the rule against perpetuities,[33] may in theory exist forever. Many have existed for centuries and in the process accumulated vast assets, data banks of irreplaceable worth and close bonds of mutual understanding with those socially disadvantaged whose interests they were established to serve.

The Recipient

Being in need does not itself qualify a person to be a recipient of charity within the common law.

The latter, particularly through application of the public benefit test and the limitations of the charitable purposes classification, has long imposed restrictions on eligibility for charitable gifts. For example, a recipient must be a stranger to the donor and there must be no legal or moral obligation or any form of personal nexus (subject to the poor relations anomaly) between them. The 'public' requirement

[33] The rule dates from the statute of *Quia Emptores* 1290 when the judiciary and legislature set limits on the ability of persons to impose alienation constraints on their property to take effect after their death. It requires ownership to vest within the 'perpetuity period'; fixed at life or lives in being plus 21 years or just 21 years where there is no life in being. Once vested a charitable trust enjoys the considerable legal privilege that it may continue in perpetuity.

will not be satisfied if a proposed recipient is a member of a closed class such as the employee of a particular company or of any organisation with a fixed membership or is one of a designated group linked by any form of relationship to the donor. In some jurisdictions, the 'benefit' requirement will exclude a proposed recipient who is a member of a closed religious order or who cannot otherwise show that their circumstances fit within the *Pemsel* classification or come within the 'spirit and intendment' of the Preamble (see, further, below).

The State

The State's interest in the charitable sector is mainly to ensure that by facilitating the involvement of charities in public service provision, that it would otherwise be obliged to fund, it gets good value to compensate for lost taxes. That regulatory aspect of its role has traditionally been entrusted principally to the tax collection agency (other government bodies such as Customs & Excise have also been involved) which has arbitrated on entitlement to charitable status and consequent tax exemption and has exercised ongoing supervision. In addition the State has a protective role in respect of donors and charities, a concern to prevent abuse. In England & Wales this responsibility was initially undertaken by the Attorney General but has since become largely vested in the Charity Commission. Identifying and differentiating between various aspects of the role of the State in relation to charities and assessing their relative significance is a primary task of this book and is explored later in some depth (see, Chap. 2 and following chapters).

The Gift Relationship

Charity involves the above parties in a complex set of transactions governed by common law and legislation (other interests such as business, politics and international Conventions are of course also represented). The moral and sociological intricacies thus generated have been explored by Titmus in what he has called 'the gift relationship'. He examined the act of 'giving', seeing it as the voluntary and altruistic act of an individual, and compared it with a commercial system in a study which focused on blood donors. The contrast, as he saw it, was between ethically based behaviour and behaviour motivated by self-interest. In the former instance, the National Blood Transfusion Service in the UK provided a service to which blood donors made anonymous contributions without financial or other reward and from which recipients took according to need, incurring no cost and without knowing the identity of the donor. In Titmus's view, this free gift of blood left the relationship between giver and recipient uncompromised by any: "contract of custom; legal bond; functional determinism; situations of discriminatory power; nor by domination, constraint or compulsion". On the other hand, he considered that the alternative approach to the same service in the US reduced people's willingness to

donate blood because the transaction had become tarnished by commercialism causing such adverse consequences as the repression of expressions of altruism and an erosion of a sense of community.

The gift relationship, it has been argued, is something that can bond us as a society.[34]

The Giver

Titmus considered that the reason why people donated blood without direct reward, at a cost of their own time and effort, to another with whom they have no direct contact, was altruism. A regard for the needs of others was the principle that motivated their action. Donors showed a high sense of awareness of belonging to a community and of social responsibility. It followed that it was important for the State to provide the opportunity for individuals to express their commitment to the community in which they lived; indeed, he developed this theme in his final chapter 'The Right to Give'. He argued that the submersion of such opportunities within a market economy inhibited the freedom to give or not to give, that material incentives destroyed rather than complemented moral incentives. The freedom of choice, enabling an individual to select the class of persons or type of cause to benefit from his or her gift, and to do so on a basis that may discriminate on grounds of country, religion, gender, locality etc., was to be valued in a democracy both for its own sake and, because it demonstrated altruism, it would thereby encourage others to become givers. The act of giving modeled ethical conduct and generated a sense of shared morality and civic responsibility in communities.

Titmus acknowledged that the altruistic motive of the giver could also be accompanied by a degree of self-interest. The fact of anonymity in the blood donation process removed the possibility of donors being motivated by the desire for social approval; though clearly this could be a factor in other forms of giving. The concern to help another, however, may, to a varying extent, be attributable to a desire to see that person lead an independent and useful life and relieve the giver of further concern for their welfare. Whether utility or unalloyed altruism was the driving factor for a particular giver in relation to the equally particular gift and recipient was not a significant issue for Titmus. They were compatible, conducive to promoting socially responsible behaviour and at risk of negation by blanket market forces.

The Gift

The gift is twofold: from the donor and from the State. The first is uncontroversial: in a democracy, any person of sound mind (subject to the rights of dependants) is

[34] It was de Tocqueville who perhaps first identified the 'moral tie' between giver and receiver as a means of the creating the bonds to build a more cohesive and caring society.

free to give their property to whomsoever they choose; this can, but need not be, by way of charity. The second, when the charity vehicle is used and the State adds considerably to the value of the gift by exempting it from tax, is hedged about with conditions that can give rise to controversy (see, further, below). The gift, intended to meet a need, also provides a measure and social confirmation of the recipient's inadequacy while its nature and the manner of giving are clearly matters that ultimately affect its utility. However, by addressing the need of an individual or community the gift relieves the government of the necessity and cost of doing so and to that extent makes a welcome contribution to augmenting public service provision. Determining what type of gift qualifies for charitable status and thus for tax exemption is clearly a matter of importance to any government and the different arrangements made for this decision to be taken are explored in some detail throughout this book.

The Recipient

The position of the recipient is complicated. The gift is always an acknowledgement of deficit. The fact that the recipient recognises and is comforted by the inherent virtue of the giver, who may well have given anonymously, and values and uses the gift as intended, does not necessarily mean that they thereby become any better equipped to cope. For the recipient, the psychological dynamics of the gift relationship can all too often serve to confirm their inadequacy and enduce long-term compliant dependency. It does, however, provide at least encouragement, short-term relief from pressing need and may possibly generate a momentum for further progress while also relieving the State of the cost of equivalent service provision.

The Charitable Organisation

The infinite variety of not-for-profit organisations together represent the collective moral strength of a sector that makes a non-exploitive contribution to society. Within that range of organisations, charities are distinctive because they cleave to the public benefit principle as their raison d'etre and have the capacity to channel the value of donors gifts to their intended purposes across many generations (see, further, below). The trust and specialist knowledge that charities build up in the process of mediating between giver and recipient places them in a crucially important strategic position between State and citizen. Their registration as such confirms the special status of charities as organisations dedicated to furthering the public benefit of the disadvantaged and in the eyes of society confers upon them a stamp of virtue.

Free from the exigencies of government, and to some extent also from the competitive pressures of the commercial marketplace, unaccountable to shareholders or constituency, while entrusted with funds from private donors and the public purse, the responsibility rests squarely with a charitable organisation to promote the interests and publicly champion the cause of those they represent. In theory the independence,

resources and knowledge of a charitable organisation operating from within a centuries old charitable sector of enormous wealth should enable it to effect change but in practice, as will be seen in the following chapters, the constraints of social policy inhibit the capacity for strategic intervention.

The State

For the State, endorsing the gift relationship comes at a price, as it has to forego both the considerable tax revenue that it would otherwise be entitled to and the right to choose which areas of social need should benefit from that tax quotient. In circumstances where health services are suffering from lack of government funding while charitable donations make animal refuges among the wealthiest charities in the State, this can be a very real dilemma.

The State therefore has a definite stake in the gift relationship: in determining the rights and responsibilities of donor, recipient and charitable organisation; in defining, or at least influencing, what constitutes a gift and who is entitled to receive it; in protecting the value of the gift; and in supporting and regulating the proper and efficient functioning of the relationship. It is the policies informing the State's role in the gift relationship as analysed in different social contexts that are of central importance to this book.

Principles

The core principles governing the common law evolution of charity are well established and recognised as such, with some differences in emphasis, throughout the jurisdictions concerned. The constancy of their adherence to principles resting on foundations laid by the Court of Equity, has enabled the common law nations over the centuries to draw from much the same pool of judicial precedents, develop a similar approach to fiduciary duties and maintain a shared understanding of 'charity'. Equally, it also makes them amenable to comparative analysis on the basis of the social policy themes revealed by jurisdictional differences in that understanding.

Charitable Intent

The charitable intent of the donor is always important. Where that intention is malicious, illegal[35] or against public policy then the gift is not charitable. Where the

[35] See for example, *National Anti-Vivisection Society v. IRC* [1948] AC 31 and *Re Pinion* [1965] Ch 85.

intention is charitable but the gift has no intrinsic merit,[36] is given for non-charitable purposes or could possibly be so used, then again the gift is not charitable.[37] Where uncertain language is used as where a purpose or object has been described as 'philanthropic', 'benevolent' or 'for a worthy cause' etc. it will be denied charitable status. The retrospective assessment of a donor's intention can give rise to difficulties. Where the terms of a gift are expressed unambiguously in favour of a specified charity then charitable intention is clearly stamped on the face of the gift but otherwise the court may need to determine donor intent.

Objective/Subjective Test

In most but not all common law jurisdictions the judiciary apply an objective test to determine donor intent. In Ireland, the test is subjective.[38] There the courts will pose the question 'Did the donor believe that the purpose to which he or she was directing a gift was of a charitable nature?' As explained by Keane J in *In re the Worth Library*:[39]

> In every case, the intention of the testator is of paramount importance. If he intended to advance a charitable object recognised as such by the law, his gift will be a charitable gift.

This is quite different from the more restrictive approach of the judiciary in the UK and most other common law jurisdictions where, in similar circumstances, the focus is firmly on deducing the purpose of the gift from an objective appraisal of the facts.

Benignant Construction

As an aid to discerning charitable intent the courts developed a principle of 'benignant construction' whereby, as stated in Tudor, "the courts seek to save gifts where there is a charitable intention, although there are no clearly defined objects."[40] For example, in *Re White*[41] a testator left a gift 'to the following religious societies viz. to be divided in equal shares among them'. No societies were named. The court was able to save the gift by effectuating the donor's charitable intention. It was clear that his intent was charitable; he had merely failed to name the actual objects of charity.

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[36] *Re Pinion, ibid.*

[37] See for example, *Anglo-Swedish Society v. Commissioners of Inland Revenue* (1931) 16 TC 34.

[38] The leading Irish case in this context is *In re Cranston, Webb v. Oldfield* [1898] 1 IR 431.

[39] [1994] 1 ILRM 161.

[40] See Tudor, *Charities*, London, Sweet & Maxwell, 1995, p. 9.

[41] (1893) 2 Ch 41.

In upholding the gift as charitable, Lindley J explained that "a charitable bequest never fails for uncertainty … the nomination of particular objects is only the mode and not the substance of a gift to charity."[42] This was reiterated by Lord Eldon in *Mills v. Farmer*[43] who noted that "in all cases where the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely, and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by this court".

The rule will also be applied if property is left for dispersal among charities selected at the discretion of a specified person.[44]

If the wording of a charitable gift permits an interpretation which may save it, that construction will be adopted. In *Weir v. Crum-Brown*[45] the difficulty was how to construe a trust for the benefit of aged and indigent bachelors who had 'shown practical sympathies either as amateurs or professionals in the pursuits of science in any of its branches'. It was argued that such a phrase was so uncertain that the whole gift must be void for uncertainty. The House of Lords adopted the benignant approach and held that the trustees would be able to identify beneficiaries using a common-sense approach. The principle of 'benignant construction' was not always sufficient to save a gift. In a line of cases from *In re Harwood; Coleman v. Innes*[46] to *In re Spence dec'd; Ogden v. Shackleton*[47] the UK courts have held that no charitable intent could be inferred from a testator's will.

Exclusively Charitable

Case law in the common law jurisdictions has long established that for a trust to be charitable its purposes must be confined exclusively to charitable purposes. The courts look for an exclusive charitable intent and have resolutely declined to save gifts as charitable where the donor had failed to unequivocally and unambiguously state such intent or had expressed mixed intentions, some charitable and some not. If a donor's gift included both charitable and non-charitable purposes, and allowed for the possibility of trustees using at their discretion some or all of the gift for non-charitable purposes, then the courts would refuse to recognise it as charitable. In *Att.- Gen. Of the Cayman Islands v. Wahr – Hansen,*[48] for example, the Privy Council determined that a trust the income from which was paid to "any one or more religious

[42] *Ibid*., p. 53.

[43] (1815) 1 Mer. 55.

[44] See *Moggridge v. Thackwell* (1802) 7 Ves. 360, *Re Hill* (1909) 53 SJ 228.

[45] [1908] AC 162.

[46] [1936] 1 Ch 285.

[47] [1979] Ch 483.

[48] [2000] 3 All ER 642.

charitable or educational institution or institutions operating for the public good", was in breach of the exclusivity rule and therefore void. The term 'public good' was wider than public benefit for charitable purposes and like 'philanthropic' and 'benevolent' could not therefore be construed as exclusively charitable.

The attendant difficulty in distinguishing between a purpose that is merely ancillary to the charitable purpose as opposed to one that is itself a main purpose (e.g. fees for hospitals/schools) has attracted considerable judicial attention. The exclusivity of charitable purposes, however, continues to be a necessary component of charitable status and in some jurisdictions such as Ireland the rule has been embodied in legislation.[49]

Public Benefit

The singular characteristic of a charity is that it is established for the public benefit. The public benefit test, serving to differentiate between private and charitable trusts, has always been a fixed common law principle.[50] In England & Wales this principle has received statutory recognition[51] and until the Charities Act 2006, in common with other jurisdictions, the burden of proof in relation to the 'benefit' requirement varied across the four *Pemsel* heads; being presumed satisfied under the first three. In Ireland it is statutorily exempted from having any application to trusts for the advancement of religion. Unlike all other jurisdictions, however, in England & Wales the responsibility for determining what activities constitute a contemporary interpretation of public benefit sufficient to justify the conferring of charitable status lies with a non-revenue driven government body, the Charity Commission.

Both arms of the public benefit test must be satisfied; i.e. it must both confer an objectively verifiable 'benefit' and it must do so in favour of sufficient members of the 'public'. Essentially, it is the nature and application of this test that makes charity a matter of public law.

Public

While it is certain that a gift conferred on a very limited number of identifiable people is private and therefore not charitable it is less certain what number of

[49] See the Charities Act 1961, s. 49.

[50] See *Attorney General v. Pearce* (1740) 2 Atk 87, *per* Lord Hardwicke LC who declared that it was extensiveness that constitutes a public charity.

[51] See for example, s. 1(1) of the Recreational Charities Act 1958 '…the principle that a trust or institution to be charitable must be for the public benefit' and now, under s. 3 of the Charities Act 2006, charitable status in all cases and under all heads will in future be dependent upon compliance with the public benefit test.

persons or other criteria would be sufficient to satisfy a definition of 'public' and justify charitable status. It will not be justified where the gift is to a closed class such as the employees of a particular company, any organisation with a fixed membership or where potential beneficiaries are linked by a personal nexus (subject to the poor relations anomaly). It is well established that this component of the test will not be met where the gift is solely for member benefit; a restriction which can compromise the status of self-help groups or localised community development projects.[52] Such organisations will not be compromised, however, if the private benefit is a necessary and incidental consequence of bona fide charitable activity, is not disproportionate in amount and no other criteria unrelated to the purpose are imposed to further limit potential beneficiaries.[53]

- *The 'poor relations' exception*

The 'poor relations' rule constitutes an exception to the general requirement that there must be a public dimension where a gift is made to a class of persons and that it will be non-charitable if made to a group of individuals. However, the legal definition of a charitable gift to 'poor relations' will not be satisfied by a donor who simply leaves a gift for a relative who happens to be poor. The law requires the gift to be in favour of a broad class of relatives, identified by degree of relationship (e.g. all nieces and nephews of the donor and spouse) rather than a specific group of individuals. So, for example, in *Re Compton*[54]a trust stated to be for the purpose of providing for the education of three named individuals was held not to be charitable.

As was explained by Evershed MR in *Re Scarisbrick*:[55]

> The 'poor relations' cases may be justified on the basis that the relief of poverty is so altruistic a character that the public element may necessarily be inferred thereby; or they may be accepted as a hallowed, if illogical, exception.

In *Issac v. Defriez*[56] the court upheld gifts to beneficiaries required to be a poor relation of the testator and a poor relation of his wife selected by the trustees. In *White v. White*[57] Grant MR upheld as charitable a trust established for the purpose of providing apprenticeships for the poor relations in two specified families despite the obvious absence of any possible public benefit to the poor in general. The case law was further extended in the 19th century to include the descendants of a named uncle,[58] members of a theatrical society,[59] members of a mutual benefit society[60] and

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[52] *Re Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] Ch 194.

[53] See for example, *Springhill Housing Action Committee v. Commissioner of Valuation* [1983] NI 184.

[54] [1945] Ch 123.

[55] [1950] Ch 226.

[56] (1754) Amb. 595.

[57] (1802) 7 Ves 423, 32 ER 171.

[58] *Gillam v. Taylor* (1873) LR 16 Eq 581 (Wickens VC).

[59] *Spiller v. Maude* (1881) 32 Ch.D. 158.

[60] *Re Buck* [1896] 2 Ch 727.

the employees of a banking firm.[61] While the courts have in the past paid particular attention to the rules governing such extensions, the modification of the 'public' aspect of the test in relation to this category of charitable trust is now well established[62] and shows every sign of being relaxed further[63] (see, further, Chap. 5).

Benefit

The benefit must be one that is recognised as charitable within the *Pemsel* classification or can be found to be so on the grounds that it comes within the 'spirit and intendment' of the Preamble. A gift to a closed religious order, for example, was found not to be charitable because intercessory prayers and the example set by leading pious lives were viewed as being too vague in terms of their benefit to the public.[64] Benefit has been found to exist in relation to gifts for the purpose of providing homes for lost dogs or cats, which are held to be charitable not for their sake but on the grounds that such animals are useful to man.[65]

Independent

A charity is required under common law to be a free-standing, independent entity founded by and bound to fulfill the terms of the donor's gift. The duty resting on trustees to honour the terms of their trust and ensure that the objects of the charity prevail has always been seen as the primary means whereby the integrity of the donor's gift could be protected. Fulfilling this duty has required trustees to be resolutely committed to the charity's objects and free from any influence which may deflect from that focus: most clearly represented in the endowed foundation which, with its present and future funding secured and its management legally required to pursue certain charitable objectives, has the capacity to act independently. The rule

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[61] *Re Gosling* (1900) 48 WR 300.

[62] See *Gibson v. South American Stores* (Gath & Chaves) Ltd. [1950] Ch 177; *Re Scarisbrick, op. cit*.; *Dingle v. Turner* [1972] AC 601; *Re Cohen* [1973] 1 WLR 415.

[63] See for example, *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue* [1999] SCR 10, *per* Gonthier J.

[64] *Gilmour v. Coates* [1949] AC 426. Also, see *Trustees of the Congregation of Poor Clares of the Immaculate Conception v. The Commissioner of Valuation* [1971] NI 114 at 169, *per* Lowry L:

> "an Order which has no other purpose other than to achieve its own sanctification by private prayer and contemplation is not an association with charitable objects".

[65] In *Re Wedgewood* [1915] 1 Ch 113 it was held that alleviating the suffering of animals is charitable because of the benefit to the public rather than the animals. See also, *Re Douglas* (1887) 35 Ch.D. 472, CA and *Adamson v. Melbourne* [1929] AC 142.

is most often confined to trust law and can give rise to inflexibility – the traditional problem of the dead hand of the donor ruling from the grave.

Non-governmental

The distinction between the public benefit activities of government and charities is not always clear-cut. The above rule, regarding the need for charities to maintain their independence does, however, require that they do not become merely 'an arm of government'. Different jurisdictions have developed different methods of managing this interface. In England & Wales the Charity Commission has advised that:[66]

> … it is not a bar to charitable status that a new body has been created with a view to discharging a function of central or local government, provided that the new body was established for exclusively charitable purposes (which may coincide with a governmental authority's function) and not for furthering the non charitable purposes of securing and implementing the policies of any governmental authority.

Also that:[67]

> … trustees cannot normally use a charity's funds to pay for services that a governmental authority is legally required to provide at the public expense. However, trustees might use a charity's resources to supplement what a governmental authority provides.

As government policy in this jurisdiction and others continues to promote the partnership ethos (based upon the UN 'social pillars' model), whereby governments and charities forge formal alliances to progress mutually agreed programmes of social reform, there is good reason to believe that this distinction will become increasingly blurred and if the latter allows itself to become merely the agent of the former then it may forfeit its right to charitable status. Such partnership arrangements now pose a real threat to the independence of the charities involved unless specific allowances are made for genuine autonomy and mutual criticism.

Non-profit Distributing

A charity does not compromise its standing by making a profit. Entering fully into the commercial marketplace by engaging in trading, competitive practices, mergers and management takeovers etc., has become a modern necessity for many charities. The recent emergence of social entrepreneurs in the field of charitable activity owes much to the available profit making margins. It is, however, a crucial and well-established principle that any profit gained must not accrue to the benefit of individuals but be

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[66] Charity Commission RR7, *The Independence of Charities from the State*, London, 2001.

[67] See Charity Commission CC37, *Charities and Contracts*, London,

directed towards the fulfillment of the charity's objects. The benefit must be for the community or a section of the community and within the 'spirit and intendment' rule.[68]

Non-political

A common law characteristic of charities is the restraint on their freedom to engage in political advocacy. Its origins derive from the legal nature of charities, being 'trusts' enforceable by the courts which have traditionally regarded changing the law and government policy as the responsibility of parliament, not the courts. Initially interpreted as an embargo on party political campaigning by charities, this characteristic has developed to the point where it is now no longer certain to what extent, if any, charities may lobby for change in the law and/or government policies without compromising their charitable status. In England & Wales, as in other common law jurisdictions, the continuing inhibiting effect of this traditional constraint on charitable activity has been illustrated in a number of leading cases[69] with the result that it is now certain that an organisation may not acquire charitable status and highly probable that it will be unable to retain it if one of its primary purposes is to campaign for such changes.

Distinction Between Charities and Other Not-for-Profit Organisations

Charities may be differentiated from other types of not-for-profit organisations on the basis of certain principles and the legal form or structure chosen to give effect to their activities.

Types of Organisation

The most distinctive characteristic of charities, distinguishing them from the range of not-for-profit bodies, is their adherence to the public benefit principle. Other principles (see above) are also distinctive.

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[68] In *Commissioners of Inland Revenue v. Oldham Training and Enterprise Council* (1996) 69 TC 231, the Council provided various services to businesses, persons intending to set up businesses and trainees. Its purposes were not wholly charitable because they extended to promoting the interests of individuals engaged in trade, commerce or enterprise and providing benefits and services to them. See also *Pigs Marketing Board (Northern Ireland) v. Commissioners of Inland Revenue* (1945) 26 TC 319.

[69] See for example, *National Anti-Vivisection Society v. IRC* [1948] AC 31 and *McGovern v. A-G* [1982] Ch 321, *per* Slade, J., pp. 336–337.

A Charity

This is a public benefit, non-government organisation which in the UK is established exclusively for a charitable purpose and is required to ensure that gifts received are used exclusively for the benefit of those defined by that purpose. Charitable purposes are those now listed in the Charities Act 2006. A charitable trust is uniquely constituted in that it is governed by an independent board of trustees upon which rests the responsibility to protect the donor's gift, give effect to the charity's objects and ensure that the benefit reaches the beneficiaries. It is also unique in that its status is accompanied by a public recognition of virtue which attracts the commitment of volunteers, financial donations, tax exemption privileges and other resources.

Charitable status confers eligibility for tax exemption, it allows for existence in perpetuity and it attracts the protection of the Attorney General. There are, however, legal restrictions on trading and advocacy activities by charities.

An Industrial and Provident Society

This is a member benefit type of non-government organisation, usually a commercial organisation and is required, under the Industrial and Provident Societies Acts 1893–1978, to be registered in the Industrial and Provident Societies Register; the principal legislation being the Industrial and Provident Societies Act 1965. It must be formed "for carrying on any industries, businesses or trades" which includes agricultural producers, group water schemes and housing co-operatives. The Industrial and Provident Societies Act 2002 modified the 'public benefit' test to be applied in relation to such bodies.

A Friendly Society

This is a member benefit type of non-government organisation, a mutual assurance association, established under the Friendly Societies Act 1896. These include mutual insurance and assurance bodies, benevolent societies and other societies formed for purposes such as the promotion of science, literature and education. There are three types of Friendly Society, as identified in the 1896 Act: the friendly society; the cattle insurance society and the benevolent society, which is the type relevant to non-government organisations.

Although an Industrial and Provident Society and a Friendly Society are quite different both were established under the Friendly Societies Acts 1875 and 1896 (as amended), and the Registrar of Friendly Societies must register both.

Co-operatives etc.

Co-operatives and community benefit societies provide an alternative to corporate structures regulated under the Companies Acts and until comparatively recently had been registered under the Industrial and Provident Societies Act 1965. The Co-operatives and Community Benefit Societies Act 2003 enabled such entities, whose business is conducted for the benefit of the community, to provide that its assets are dedicated permanently for that purpose.

Hybrids

In recent years the increasing interest in notions of social ventures, social enterprise and social entrepreneurship has spawned calls for legal frameworks other than the traditional charitable trust. Such frameworks seek to bring attributes of stakeholder financial investment limited by capped investment income, achievement of social objects through the commercial process but with asset locks and purposes wider than those determined for charity but limited to community interests. The UK has the newly created Community Interest Company (CIC) and to a lesser extent the proposed Charitable Incorporated Organisation (CIO). The United Sates,[70] Canada[71] and Australia[72] are showing varying levels of interest in the hybrids which is likely to grow rather than diminish as social enterprise grips the imagination of the sector and politicians alike.

Structures

The evolution of charities within a common law context has been shaped by their purposes. The starting point has always been – to what legally recognised charitable purpose is this organisation seeking to give effect? While the *Pemsel* classification has, for the most part, defined the range of possible purposes, judicial precedent and

[70] The Institute, for example, has explored the question of whether there should be a new legal form in the U.S. for these Fourth Sector ventures. (A summary of Aspen's September 2006 round-table on 'Mixing Mission and Business: Does Social Enterprise Need a New Legal Approach?' is available at: http://www.nonprofitresearch.org/usr_doc/New_Legal_Forms_Report_FINAL.pdf)

[71] See further, at http://www.canadabusiness.ca/servlet/BlobServer?blobcol = urldata&blobheader = application/pdf&blobkey = id&blobtable = MungoBlobs&blobwhere = 1189090276630

[72] See http://www.ucwesleyadelaide.org.au/publications/resources/Social_Enterpse_Part1_2.pdf Also, Talbot, C., Tregilgas, P. and Harrison, K., *Social Enterprise in Australia*, 2002.

legislative provision have permitted a degree of variation between the common law nations. Consequently, charitable activity is now housed in a range of different structures. Government agencies, religious organisations and foundations as well as the more traditional trusts, incorporated and unincorporated associations, Royal charters, other bodies and eleemosynary corporations are now all likely to be claiming tax exemption on the grounds of their charitable activities. Industrial and Provident Societies, Friendly Societies and corporations may also, though infrequently, provide structures for charitable activity.

Charities are required to be properly constituted with appropriate governing instruments but can take a variety of different forms: some may be informal having no legal status separate and distinct from the relationship between its members; others can adopt quite formal, legal structures which provide clearly for such a distinction. Charities are public benefit organisations as distinct from mutual benefit bodies such as Industrial and Provident Societies (occasionally an Industrial and Provident Society will also be a charity), Friendly Societies and co-operatives and other bodies such as trade unions and political parties. In the UK this differentiation between charitable structures is particularly important and determines the jurisdiction of the Charity Commission and the Attorney General.

The following are structures for charities with no legal personality or juridical status.

A Trust

This is an arrangement whereby one or more persons operating under the authority of a 'deed of trust' hold/s funds or property on behalf of other persons. The three essential components of a valid trust are: certainty of words; certainty of subject; and certainty of objects or beneficiaries.[73] The governing instrument is a trust deed or will and its executive power rests with trustees appointed under the terms of the trust. It has no legal personality and it is the trustees rather than the body, which must enter into legal relations and accept personal liability. It is to be noted that Lord Macnaghten when classifying charitable purposes in *Pemsel* referred only to trusts – "Charity in its legal sense comprises four principal divisions: trusts for … etc." The implication perhaps being that he considered this legal structure as having attributes uniquely suited to give effect to charitable purposes. Certainly the plausibility of this interpretation gains some strength from the subsequent development in England & Wales of the trust as the primary legal structure for charities, as opposed to the equivalent reliance upon incorporated structures in the US and Australia.

In England & Wales, unlike some other countries, there is no legal difference between a charitable trust and a charitable foundation. Although the word *foundation*

[73] *Knight v. Knight* (1840) 3 Beav. 148, 172.

is more likely to imply permanent endowment, the legal structure is usually still a trust.

An Unincorporated Association

This is not a legal entity and its creation rests on an agreement, oral or written, between identified members; usually its governing instrument is its constitution or rules.[74] An unincorporated association has no legal personality and therefore no capacity, independent of its members, to enter into legal relations with other bodies. It is usually the structure of choice for small charities. As explained in Tudor:[75]

> The use of unincorporated associations as a legal structure for charities gained popularity in the 18th century with the rise of voluntary societies and reflected the change from individual to associated philanthropy.

Other Structures

Charities may, alternatively, assume one of the following incorporated structures and thereby acquire a legal personality:

- *A company limited by guarantee*

A limited company is a body, incorporated under the legislative provisions regulating companies, the memorandum and articles of association of which are registered in the designated registry office for companies. Many charities, as they grow in size and complexity, become incorporated and must then comply with statutory registration requirements and have their names entered in the appropriate registry. This has become an increasingly popular structure.

- *An incorporated foundation*

The term 'foundation' most usually refers to a body established by an initial endowment which may or may not be dedicated to charitable purposes. A charitable foundation acquires legal personality on incorporation although the charitable purpose to which the endowment is addressed will always remain as stated by the founder in the governing instrument. The endowed charitable foundation has traditionally been established by a successful business and most often served as a grant making body providing financial assistance to projects that came within its designated purposes (e.g. Ford, Rowntree, Nuffield, Carnegie and Rockefeller).

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[74] *Re Koeppler's Will Trusts* [1985] 2 All ER 869.

[75] See Warburton, J., et al., *Tudor on Charities, op. cit*., p. 163, citing Owen, *English Philanthropy 1660–1960*, p. 71.

Brief History of Charity and Its Social Role in England & Wales

The legislative foundations for the development of charity and its social role were laid with the introduction of the Statute of Charitable Uses 1601.[76] For four centuries the 1601 Act facilitated a similar judicial approach towards charities within the jurisdictions of the UK and, to a greater or lesser extent, throughout all common law nations. A resulting body of precedents and related principles, largely shared among those countries, continues to inform the contemporary relationship between law and charities. Tracing the origins and subsequent evolution of the law relating to charities in England reveals the distinctive characteristics that have shaped its role in society across the common law world.

The Elizabethan Poor Law

Parish based relief systems for the poor were developed in many local English communities during the latter half of the 16th century in response to the collapse of the care facilities established and maintained by the Catholic Church until their removal by the Protestant Reformation. This system was extended by the Elizabethan legislation of 1597–1601 which secularised Church facilities, provided for the appointment of parish overseers to work with local churchwardens and raise the funds to assist all classes of destitute persons. This was a time when the hold of the Church on charity had been broken and the objects of charity became more secular as the majority of Englishmen "reflected less on their souls and became more concerned with the worldly needs of their fellow men".[77] In 1598 the earliest form of State public service provision for the socially disadvantaged in Europe was introduced by the Elizabethan Poor Law Act and amended by the Act for the Relief of the Poor 1601. This, as has been explained:[78]

> … codified and extended throughout the country the best practices that had emerged during the past two generations within particular urban settings. The statutes required that every parish henceforth provide basic food, shelter and clothing for the legitimately needy who lived within it, financed by compulsory taxation of wealthier residents. Yet these laws did not force English people to extend poor relief to anyone other than members of their own local communities … only those people who displayed appropriate moral behaviour and deference and who remained in a given community for some years qualified for assistance. The Poor Laws also specified the forms of punishment or coercion to be used against the idle or vagrant poor.

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[76] (43 Eliz. I, c.4); a modified version of the Statute of Uses 1597 (39 Eliz. I, c.6).

[77] Jones, G., *History of the Law of Charity 1532–1827*, Wm. W. Gaunt & Sons, Inc., Holmes Beach, FL, 1986, p. 10. Also, see Leonard, E.M., *The Early History of the English Poor Relief*, Cambridge University Press, Cambridge, 1900, p. 9 and more generally Chesterman, M., *Charities, Trusts and Social Welfare*, Weidenfeld and Nicolson, London, 1979, pp. 11–111.

[78] See McIntosh, M.K., 'Poverty, Charity and Coercion in Elizabethan England', *Journal of Interdisciplinary History*, XXXv: 3, 2005, p. 458. Also, see further, Bromley, B., 'The 1601 Preamble: the State's Agenda for Charity', *Charity Law & Practice Review*, vol. 17, London, 2002.

The Statute of Charitable Uses 1601

In addition to introducing the first national system of public benefit provision, subject to entitlement criteria, the State simultaneously sought to control the private abuses associated with charities and ensure that funds were not misused or left to become dormant. Entitled '*An Acte to redresse the Misemployment of Landes, Goodes and Stockes of Money heretofore given to Charitable Uses*' the Statute of Charitable Uses 1601 was a reforming statute driven by a twofold legislative intent. Firstly, in order to fill the social care gap left by the dissolution of the monasteries and solicit the funds necessary to repair the damage caused by the ravages of war, it sought to channel philanthropic gifts towards priority areas of social need as identified by government. This initiative, enlisting the goodwill and assets of donors to assist government in addressing contemporary social need, became a formative strand in the evolving social role of charity and continues to at least strongly influence government social policy in England & Wales and in other common law nations (see, further, Chap. 2). Secondly, it aimed to reform the abuse of property donated to charities by listing the type of purposes which would thereafter be recognised as charitable and by establishing a body of Commissioners with powers to supervise and inspect charitable trusts (see, further, Chap. 5).

The Preamble

The declaration of purposes to be construed as charitable is in the Preamble rather than the main body of the statute. The following specific charitable purposes are listed:

> Releife of aged impotent and poore people, some for Maintenance of sicke and maymed Souldiers and Marriners, Schooles of Learninge, Free Schooles and Schollers in Universities, some for Repaire of Bridges Portes Havens Causwaies Churches Seabankes and Highwaies, some for Educacion and prefermente of Orphans, some for or towardes Reliefe Stocke or Maintenance of Howses of Correccion, some for Mariages of poore Maides, some for Supportacion Ayde and Helpe of younge tradesmen Handicraftesmen and persons decayed, and others for reliefe or redemption of Prisoners or Captives, and for aide or ease of any poore Inhabitantes concerninge paymente of Fifteenes, setting out of Souldiers and other Taxes ….

Thereafter the courts would not regard a purpose as charitable unless it was recognised as such in the 1601 Act or could be defined as coming within 'the spirit and intendment' of the Preamble and disclosed an element of 'public benefit'.

Judicial Classification of Charitable Purposes

During the next two centuries and more, as neither statute nor judiciary intervened to classify the charitable purposes listed in the Elizabethan statute, the Court of Chancery developed its own separate body of charitable trust jurisprudence. When

such classification came it ordered the judicial approach to charities and to charitable activity thereafter.

A first judicial attempt to classify charitable purposes was undertaken by Sir William Grant MR in *Morice v. The Bishop of Durham*.[79] He then stated that a fixed principle existed in the law of England that purposes deemed to be charitable are those "which that Statute enumerates" and those "which by analogies are deemed within its spirit and intendment".[80] He suggested four heads: the relief of the indigent; advancement of learning; advancement of religion; and the advancement of 'objects of general public utility'.

Sir Samuel Romilly's classification was subsequently accepted by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v. Pemsel*[81] with some significant refinements. He classified all recognised charitable purposes under four heads and added that to be charitable, a gift must be "beneficial to the community".[82] He ruled as follows:[83]

> 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts beneficial to the community not falling under any of the preceding heads. The trusts last referred to are not any the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do directly or indirectly.

To be considered charitable in law a trust had to fall into one of these four separate but not necessarily mutually exclusive categories. The Macnaghten ruling has been followed in all common law jurisdictions, including England & Wales where it was further extended by the Charities Act 2006 (see, further, Chap. 2).

Development of a Modern Role for Charities

In the UK, from at least the time of the Reformation until local authorities were established in 1929, the responsibility for meeting the needs of the poor, the ill and disabled and those otherwise disadvantaged fell mainly to charities. Government provision under the Poor Laws for the ill, the destitute and those otherwise in dire need was rudimentary and coupled with a regime intended to discourage malingering. Hospitals, the care services of nurses and almoners and the long-term support needed by the impoverished ill, unmarried mothers, abandoned children etc. were provided by charities. This arrangement of shared responsibility, resting on locally

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[79] (1804) 9 Ves 405.

[80] See also, *Kendall v. Grainger* (1842) 5 Beav 302, *per* Lord Langdale MR and *Dolan v. MacDermott* (1868) LR 3 Ch App 678.

[81] [1891] AC 531 at p. 583.

[82] See the caveat entered by Lord Cave in *AG v. Nat Provincial & Union Bank Ltd.* [1924] AC 262.

[83] *Op. cit*., p. 583.

based public service utilities manned and often provided by charities but managed by State officials, was developed in the Poor Law legislation of the 18th century and ultimately regulated by the Poor Law Amendment Act 1834 which defined the roles of government and charity until the introduction of the Welfare State. In the meantime the responsibilities of charity were also being broadened in other directions that grew to become important aspects of its modern role in society.

Health Care

In mediaeval England a parish based system of residential provision for the ill, wounded soldiers and those otherwise destitute was in place with government and charity (in the form of the Church as distributor of alms and pastoral care) working in loose partnership. By the second half of the 16th century, taxes were being levied by the municipal authorities of towns and parishes on the wealthier citizens to raise revenue to be spent on providing food and shelter for the poor who resided within the immediate locality. In 1552 Parliament introduced a statute requiring those who refused to pay to appear before their local bishop and in 1563 a further statute described the assessments as obligatory and involved Justices of the Peace and in 1598 Overseers of the Poor were appointed to manage the system. Not all those in need were entitled to assistance and various forms of punishment were inflicted upon any who refused to work, squandered their resources or were vagrants.

This was a time when both State and Church viewed the care of the needy as being primarily the responsibility of the families concerned. When government provision was more formally introduced under the Poor Laws for the ill, the destitute and those otherwise in dire need it was rudimentary and coupled with a regime intended to discourage malingering.[84] Charities were left to provide the hospitals, the care services of nurses and almoners and the long-term support needed by the impoverished ill, unmarried mothers, abandoned children etc. This arrangement of shared responsibility, resting on locally based public service utilities manned and often provided by charities but managed by State officials, was developed in the Poor Law legislation of the 18th century.

Subsequently, provision was extended to include more specialised health care facilities such as asylums. Gifts for the 'sick and wounded',[85] for a home of rest for persons in a condition of strain[86] and for the maintenance of aged persons in a nursing home were all held to be charitable. The range of providers of charitable relief also broadened as individual philanthropists and charitable societies emerged to

[84] See further, Chesterman, M., *Charities, Trusts and Social Welfare*, Weidenfeld and Nicolson, London, 1979, pp. 11–29.

[85] *Re Hillier*, *op. cit*.

[86] *Re Chaplin* [1933] Ch 115.

initiate intervention on behalf of abandoned children and others in need.[87] One such was Thomas Coram who in 1739 established a hospital for foundling children which survived into modern times.[88] The present social and health care infrastructure, particularly hospital provision, owes a great deal to the earlier contribution of the Church, the philanthropic endeavours of individuals and to religious groups such as the Quakers. Together they provided a charitable foundation for the modern State system of health, education and welfare services.

Education

The history of the development of education in England is one in which the separate provision made by Church and the wealthy initially prevailed at the expense of a State system. State intervention into traditional charity areas such as education to introduce public secular education for young children in England began in the late 19th century and continued with the National Insurance Act 1911. Private education had been available to those who could afford it at least a century earlier and the Church maintained a patchwork of schools for poor children.

For most of the 19th century, the State contribution took the form of grant aiding the education provided by Church based and nonconformist schools. The 'public school' system, educating the children of a wealthy elite, was established during this period and consolidated in the early decades of the 20th century. Until the latter half of the 19th century, such schooling as existed for all others was provided by the Church and other charitable organisations. The education and preferment of orphans, being within the terms of the Statute of Elizabeth, allowed the care of orphans in Ireland[89] and children's homes in England[90] to be charitable. In 1856 a Dept of Education was established and the Education Act 1870 finally laid the foundations for a system of mandatory primary education which was to be secular and freely available to poor children.

Housing

Providing a place of shelter or refuge for the destitute, the homeless and for abandoned children was perhaps one of the first and most basic acts of charity and

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[87] See for example, Bean, P. and Melville, J., *Lost Children of the Empire*, London, Unwin Hyman, 1989 and Platt, A., *The Child Savers*, Chicago, IL, University of Chicago Press, 1969.

[88] Followed in due course by Dr. Barnardo who established his first home for orphans and abandoned children in Stepney in 1870 and the National Society for the Prevention of Cruelty to Children which was founded in 1884, both still providing services in respect of children orphaned, abandoned or abused.

[89] *Jackson v. Attorney General* (1917) 1 IR 332.

[90] *Re Sahal's Will Trusts* (1958) 1 WLR 1243.

traditionally available from religious organisations. In due course this provision extended to include specialist accommodation for the insane, the disabled, the elderly and infirm and for single mothers. As the era of the Poor Laws gave way to the Welfare State, a number of charities developed an interest in housing provision in general and residential care facilities in particular. In more recent years, when the government began privatising the public housing sector, a range of charities assumed responsibility for local general and specialist housing projects.

Community Solidarity

The Elizabethan Poor Laws introduced a State system whereby local communities were required to know who their deserving poor and needy were and to raise the taxes necessary to provide for their care. Alongside State aid, private donors were also encouraged by the terms of the 1601 Act to direct charitable assistance towards relief of the poor. As has been pointed out:[91]

> In social terms, donors helped create a community that was both more fully Christian and less likely to be troubled by unrest or violence among the poor. If they were employers, they profited from having a trained workforce able to weather temporary hard times. Furthermore, everyone knew about their generosity. Elizabethan England had little hidden charity.

This paternalistic and very localised system of care and assistance helped to build strong coherent communities; perhaps foreshadowing the social capital similarly generated by the role of volunteers in contemporary society.

Public Utilities

The government intention that charities should play a role in the provision and maintenance of public utilities was clearly stated in the Preamble (repair of bridges, ports, highways etc.), recognised by Sir William Grant as coming within the legal definition of charitable ("objects of general public utility")[92] and thereafter it formed a distinct strand in the social policy governing their relationship (see, further, Chap. 6). There being no requirement for either poverty or necessity on the part of prospective users, this interpretation of 'charity' has attracted considerable controversy over the centuries but has also made an important contribution to the physical infrastructure and to enriching the texture of modern society. It has been the means

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[91] See McIntosh, M., 'Poverty, Charity and Coercion', *Journal of Interdisciplinary History*, XXXV: 3, 2005, pp. 457–479, 467 where she also refers to the punishment of the 'undeserving' poor.

[92] *Morice v. Bishop of Durham* (1804) 32 ER 656, 9 Ves. J. 399.

for erecting or restoring not just facilities for general public use such as bridges but also those such as concert halls, art galleries etc. which serve a more narrow and, arguably, more privileged sector of the public.

New Forms and Functions for Charities

Eighteenth century England saw trade and commerce flourishing and an empire expanding, bringing prosperity and a degree of enlightened social awareness. However, as has been said:[93]

> Essentially, the institutions of early eighteenth-century charity were still those first set in place after the sixteenth-century Reformation. The structures established then and the functions they performed were based on locality; and inherited from the medieval parish system.

By the end of the 19th century, as with so many other social institutions, the role of charities in a newly industrialised and urbanised England had changed quite radically.

- *Charitable associations*

The traditional legal vehicle for giving effect to a charitable gift, usually in the form of a bequest, was the charitable trust which required a named trustee or trustees to carry out the instructions of the donor, honour the terms of the trust and do so without taking any personal advantage from their appointment. Although to be charitable a trust had to have a public benefit dimension, the process of appointing a trustee made its implementation mainly a matter of private law.

The 18th century saw the emergence of innovative legal structures for organising collective enterprises which were to provide a new basis for philanthropy. The introduction of joint stock companies for furthering commerce offered a model for channeling philanthropic effort. Entrepreneurial philanthropists, such as Thomas Coram in 1739 and the founders of the Philanthropic Society in 1788, established charitable associations that adopted the form, the management systems and the funding mechanisms of the new trading companies. Charitable associations,[94] like joint stock companies, were collective social entities that relied upon public subscription, required professional systems of governance and the functions of which were similarly subject to public law.

- *Advocacy*

Charities did not necessarily confine their activities to poverty relief and the provision of public utilities. It is unlikely that there was any government pressure on them to do so. In the Victorian era, many important initiatives resulting in social

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[93] See Deakin, N., *In Search of Civil Society*, Palgrave, London, 2001. See also, Chesterman, M., *Charities, Trusts and Social Welfare*, *op. cit*., pp. 40–53.

[94] Unlike mutual benefit associations that were established for member benefit: see for example, *Nuffield (Lord) v. Inland Revenue Commissioners* (1946) 175 LT 465.

policy changes by government were led by charities. The protests against the conditions suffered by children employed in factories or as chimney sweeps etc. were led by charities such as Dr. Barnardo's and the NSPCC. The Infant Life Protection Society, founded in 1870, provided such support as was then available for the protection of newly born babies in workhouses and campaigned for the introduction of the Infant Life Protection Act 1872. The Charity Organisation Society, established in 1869, was a good example of reflective philanthropy at work; mixing provision for the poor with a sociological analysis of the causes of poverty.

Then as now it was not necessary to be poor to be socially disadvantaged and this was reflected in the activities of charities. They were to the fore in the rallies against the slave trade, the lobbying to halt the practice of 'baby-farming' and in support of the suffragette movement.

- *Overseas aid*

In the late 19th and early 20th centuries, UK based religious organisations established their practice of distributing charitable aid alongside the dissemination of Christianity in the underdeveloped countries of Africa and elsewhere. It was a requirement of charitable status that such missionary bodies should have the advancement of religion as their primary purpose.[95]

Leaders of Voluntary Action

By the end of the 19th century charities were the primary providers of health, social care and education services for the socially disadvantaged. The State provided facilities such as workhouses in the towns and funds and officials to manage care facilities such as hospitals. However, the role of charities was diminishing. Partly this was due to the State gradually assuming more responsibility (see, further, below) but it was also due to the emergence in England of myriad forms of voluntary action that were to flower prolifically in the early decades of the 20th century.

- *Social cohesion*

Following revolution in France and America, socialist principles had begun to mix with philanthropy in England giving rise to both theoretical and very practical expressions of a new liberal activism. Collectivism as a basis for organised mutual support became evident in initiatives such as those that launched the Friendly Societies. Prominent liberal activists, such as Mary Wollstonecraft[96] and Mary Carpenter,[97] generated public awareness of contemporary issues of social inequity.

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[95] See for example, *Re Clergy Society* (1856) 2K & J 615 which concerned the Society for Promoting Christian Knowledge and the Church Missionary Society.

[96] See for example, Gordon, L., *Mary Wollstonecraft: A New Genus*, Little Brown, London, 2004

[97] See Carpenter, M. *Reformatory Schools for the Perishing and Dangerous Classes and for the Prevention of Juvenile Delinquency*, published in 1851.

Leadership for a new approach was provided by 'chocolate philanthropists' from the Quaker families of Fry, Cadbury and Rowntree. Their construction of model villages enabling whole communities to be self-sufficient and mutually supportive offered a new challenging interpretation of philanthropy. While this resonated with the socio-economic paternalism of some Elizabethan employers it otherwise contrasted sharply with the previous centuries of alms, the workhouse and ignominious dependency. It was an ethos that saw the birth of organisations formed to provide sustained economic security for its members such as co-operatives, mutual benefit associations and the Credit Union movement.[98] This was the era that first saw the emergence of 'social economy' a concept developed by writers such as Herbert Spencer,[99] Kirkman Gray[100] and the Fabian socialism of the Webbs.[101]

The turn of the century was a period in which the traditional role of charity came to be viewed by some as unsatisfactory, as a pernicious corollary to persisting structural divisions in society, complicit with and ultimately serving to reinforce the position of the wealthy.[102] However, not until this perception firmed up into a new political frame of reference with the advent of the first 'labour' government in the UK did the role of charity become redefined. Two World Wars later, the value system that had for generations supported the class divisions in English society was no longer accepted unquestioningly. A new willingness to consider responsibilities for addressing the needs of the poor and for the provision of public utilities found expression in the creation of the Welfare State which reset the roles of government and charity in respect of such matters.

The Welfare State

The Welfare State was launched in 1948 when the National Health Service Act 1946 came into effect. Beveridge, its chief engineer, concluded in his eight point plan that for reasons of principle as well as expediency the government should make room for the continued involvement of voluntary organisations in public service provision.[103] To some this partnership policy was merely formalising an arrangement first recognised in the Preamble when, as was noted in the Nathan

[98] Organisations set up for the mutual benefit of members have, of course, consistently been refused charitable status: see for example, *Nuffield (Lord) v. Inland Revenue Commissioners* (1946) 175 LT 465.

[99] See Spencer, H., *Man v. the State*.

[100] See *Philanthropy and the State*, 1908.

[101] See Webb, S. and Webb, B., *The Prevention of Destitution*, Longmans, London, 1911.

[102] See for example, observations made by G.B. Shaw.

[103] See Beveridge, W.H., report to Parliament, *Social Insurance and Allied Services*, 1942 and *Full Employment in a Free Society*, 1944.

Report,[104] "a partnership was established in which the State filled in gaps left by charity rather than charity filling in gaps left by the State; and this has continued down to the changed situation of our own day".

The Realities of Partnership

Public benefit provision during the first 50 years or so of the Welfare State was based on a firm and relatively clear understanding between government and charity.[105] The State largely absorbed and augmented the existing patchwork of charitable health care provision and undertook to ensure a nation wide framework of services freely and uniformly accessible to all on a need basis. Where leading charities were already well established or had developed services that supplemented State provision, the State would then support the continuation of that role through a programme of grant aid.[106] Such grant aided charities maintained their independence while being valued for their capacity to innovate and showcase new services and delivery models that could ultimately be taken over and run by the State. This balanced relationship suited both parties and by and large worked well, subject to the anomalies accommodated in relation to 'private' schools and health care facilities (see, further, Chap. 2).

Recreation and Social Welfare

An important legislative initiative (subsequently replicated in other common law nations) was the introduction of the Recreational Charities Act 1958[107] which confirmed the charitable status of "facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare".[108] As explained in Tudor:[109]

> Facilities which are likely to meet such an objective test are those whose dominant feature is that they reduce social exclusion and encourage public participation or improve education or health where previously no, or no adequate, facilities existed.

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[104] See *Report of the Committee on the Law and Practice Relating to Charitable Trusts* (Cmd. 8710), 1952, p. 8 as cited in Keaton & Sheridan, *The Modern Law of Charities* (4th ed.), Barry Rose, Chichester, 1992, p. 2. The Nathan Report describes past charitable efforts as "one of the magnificent failures of our history".

[105] See Home Office, *Efficiency Scrutiny of Government Funding of the Voluntary Sector, Profiting from Partnership*, HMSO, London, 1990.

[106] See Beveridge, W.H., *Voluntary Action: A Report on Methods of Social Advance*, Allen & Unwin, London, 1948. Also, see Wolfenden, J., *The Future of Voluntary Organisations*, Croom Helm, London, 1978 and the Home Office, *The Government and the Voluntary Sector*, London, 1978.

[107] Following the House of Lords decision in *IRC v. Baddeley* [1955] AC 572.

[108] As stated in the memorandum accompanying the draft Bill.

[109] See Warburton, J., *Tudor on Charities* (9th ed.), Sweet & Maxwell, London, 2003, p. 122, citing RR4 *The Recreational Charities Act 1958*, 2000, para A8.

The beneficiaries must be young, old, infirm, disabled or otherwise socially marginalised and be unable to provide such facilities for themselves. For example, in *Springhill Housing Action Committee v. Commissioner of Valuation*[110] a community centre serving a housing estate qualified, and community associations or recreational organisations for specific minority groups would similarly do so, where it can be shown that the group has a need for that type of facility. The concept of 'social welfare', with its potential to allow for a considerable broadening of service provision for the socially disadvantaged, signified a government willingness to both lower the legal threshold for charitable status in relation to health and social care and extend the interpretation of 'welfare' to encompass facilities that assisted the prevention of illness and social isolation while also promoting healthy lifestyles. This initiative generated a prolific investment in leisure centres and community facilities in many common law nations.

Conclusion

There are public and private dimensions to the meaning of 'charity'.

The private dimension, as illustrated in the Titmus 'gift relationship', is one that rests in the main on altruism as directed by the whim of a donor and certainly predates its assimilation within the common law. The latter provided that if the gift fits within the *Pemsel* terms of reference and is compatible with the public benefit and ancillary principles, a donor has pretty much total discretion to select beneficiaries and the law will endorse this gift as charitable. The roles of all other parties, including the State and the relevant charitable organisation and the possible involvement of many volunteers, are clearly subordinate to donor choice. The right of an individual to freely divest themselves of their property as and when and to whom they wish (subject to the rights of dependants and to the legality of the purpose) is among the distinguishing hallmarks of a democracy.

The relationship between charity and government, however, is a matter framed by public law and dates back to at least the Statute of Charitable Uses 1601 when the Preamble set out the government's expectations as to the contribution that should be made by charity to furthering the public benefit. Essentially government then sought to direct charities towards bearing some responsibility for health and social care, education and housing, the provision and maintenance of public utilities and for certain aspects of social control and related facilities. Implicit in the government's approach to charities at that time was the assumption that both were jointly engaged in the task of maintaining the social fabric and shared a common concern to uphold the values and institutions of contemporary society. There was a presumption that charities would be supportive of government efforts to maintain social order and ensure the continuation of the status quo in society. By and large,

[110] [1983] NI 184.

this proved to be the case and the track record of the government/charity relationship shows a willingness to provide a level of mutual support that amounted to an implied partnership (see, further, Chap. 6).

Charity law within the common law tradition has since come under considerable strain, due in part to the growing lack of fit between the legal framework and contemporary patterns of social need but also to the severe and wide ranging contraction of public services. In all developed common law nations, the mutuality of government/charity interest in such service provision and the balance between the public and private dimensions of charity law are now being tested. As can be seen in the following chapter, this is now presenting serious challenges for social policy.

Chapter 2
Charity, the Law and Politics: The Emergence of Contemporary Social Policy Issues in England & Wales

Introduction

This chapter begins by identifying, tracing and discussing the evolving legal definition of charitable purposes and the *Pemsel*[1] categories. It deals first with the social policy that informed the initial statement of government intentions in the Preamble.[2] This is followed by a consideration of the issues and themes, emerging over the centuries almost exclusively as a consequence of judicial precedents, that have shaped the meaning of 'charity' as understood in the common law and determined the related social policy. In so doing, the ground is prepared for a detailed examination in subsequent chapters of the legal functions and their relative importance as these came into play to give effect to the different themes (see, further, Chaps. 3–7).

The chapter then broadly considers the relationship between charity and politics and suggests that the public benefit principle, always central to that relationship, has now assumed a position of strategic legal significance as government reform of charity law furthers its social policy objective of sharing or transferring the responsibility of public service provision to charities and the voluntary sector. It then focuses more particularly upon the relationship between government and charity within a contemporary social policy context in England & Wales. The chapter concludes by briefly assessing the extent to which the provisions of the Charities Act 2006 further the convergence between charitable purposes and the government's social policy.

Charity, the Law and Evolving Social Policy in England and Wales

In retrospect we can see in the Preamble, the original legislative statement of matters constituting charitable purposes in a common law context, an outline of what was to later become the core of the government's social policy agenda for its relationship

[1] *Income Tax Special Purposes Commissioners v. Pemsel* [1891] AC 531.

[2] Preamble to the Statute of Charitable Uses 1601.

K. O'Halloran et al., *Charity Law & Social Policy*,

with charity (see, also, Chaps. 1, 6). We now recognize the listed charitable purposes as expressing the joint concern of government and charity to ensure the provision of public benefit services and facilities appropriate to meet contemporary social need (however incongruous the transference of such language to 17th century social circumstances). It was a presumption that reflected the original and fundamental governmental approach to charity: charities should be devoting their resources to purposes both beneficial to society and on which the government's revenues would otherwise have to be spent. The resulting implied partnership, as viewed by government, has endured for four centuries and in many different cultural contexts across the common law world. However, during that period, judicial mediation on the balance to be struck between government interest in acquiring value for granting tax exempt privileges and the right of individuals to freely dispose of property in accordance with their particular altruistic wishes, has steadily broadened the range of purposes deemed to be charitable; the vagaries of donor choice often prevailing over government interest in acquiring value for tax exemption.

The Preamble and the Foundations of Government Social Policy

The charitable purposes comprising the social policy agenda of the 'government' (however imperfectly manifested as such) for its relationship with charity at the dawn of the 17th century in England are clearly listed in the Preamble:

> "Releife of aged impotent and poore people, some for Maintenance of sicke and maymed Souldiers and Marriners, Schooles of Learninge, Free Schooles and Schollers in Universities, some for Repaire of Bridges Portes Havens Causwaies Churches Seabankes and Highwaies, some for Educacion and prefermente of Orphans, some for or towardes Reliefe Stocke or Maintenance of Howses of Correccion, some for Mariages of poore Maides, some for Supportacion Ayde and Helpe of younge tradesmen Handicraftesmen and persons decayed, and others for reliefe or redemption of Prisoners or Captives, and for aide or ease of any poore Inhabitantes concerninge paymente of Fifteenes, setting out of Souldiers and other Taxes …".

Thereafter neither government or court would regard a purpose as charitable unless it appeared on that list or could be defined as coming within 'the spirit and intendment' of the Preamble and disclosed an element of 'public benefit' (see, further, Chaps. 3 and 6).

Judicial Development of Charity Under the Four Pemsel Heads

The common law heritage, with its origins in the Preamble and consolidated by the Macnaghten classification of charitable purposes[3] as subsequently enlarged under

[3] See *Pemsel*, *op. cit*.

the 'spirit and intendment' rule,[4] continues to provide the basic legal framework for charities and their activities. The relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community not included under the previous three heads still constitute the principal heads of charitable purposes across the common law world; though now significantly extended in the UK jurisdictions (see, further, at Chap. 6). Their judicial interpretation over the centuries has resulted in charity law as a body of jurisprudence acquiring its own sense of direction on matters that also lie at the heart of good government.

The 'Spirit and Intendment' Rule

Broadly speaking, this rule holds that even if a purpose cannot be defined as coming under one of the established heads of charity, it will nonetheless be construed as charitable if it can be interpreted as falling within the 'spirit or intendment' of the Preamble to the 1601 Act.[5] If it could be shown that the new purpose sufficiently approximated an established charitable purpose, so that it could be viewed as an extension of it or as analogous to it, then the court would hold the new purpose to be charitable on the grounds that it lay within the broad intention of the initial legislation. For four centuries this rule underpinned the development of charity law and while it remained the case that for a purpose to be charitable it had to correspond to one mentioned in the Preamble or broadly come within its 'spirit and intendment', the judiciary were thereby provided with a means whereby they could to some extent broaden the legal interpretation of 'charity' to meet new manifestations of social need (see, also, Chaps. 4 and 6).

The Relief of Poverty

Charity law has its origins in trusts for the relief of poverty. As was explained in *Pemsel* "the popular conception of a charitable purpose covers the relief of any form of necessity, destitution or helplessness".[6] Poverty, however, and the means

[4] See Sir William Grant, M.R. in *Morice v. The Bishop of Durham* (1804) 9 Ves 405. He then stated that a fixed principle existed in the law of England that purposes deemed to be charitable are those "which that Statute enumerates" and those "which by analogies are deemed within its spirit and intendment".

[5] *Ibid*. Also, see *London University v. Yarrow* [1857] 1 De D & J 72 where in reference to the Preamble, Cranworth, L.C. stated that the "objects there enumerated are not to be taken as the only objects of charity, but are given as instances".

[6] *Op. cit*., p. 572. This approach was endorsed in *McGovern v. Attorney General* (1982) 1 Ch. 321 where Slade, J. commented that "this relief includes the relief of human suffering and distress", p. 333.

of providing for its relief, is not as readily susceptible to definition, classification and regulation as was the case when the foundations of charity law were first laid down;[7] the 'poor relations' case law, for example, has introduced some uncertainty. There is also a view[8] that in this context the law in the UK has become curiously ossified: that it has taken little account of the emergence of the Welfare State and the nationalisation of education, health and welfare; nor of its subsequent demise. This is illustrated by the example of educational charities which gained their charitable status at a time when they provided the only means available for educating the poor. The advent of State education for all led to the transformation of such schools to exclusive fee paying establishments but they nevertheless retained their charitable status.[9] Medical care raises similar problems. Following the nationalisation of health services, private insurance schemes were declared charitable as they relieved the burden on State facilities but membership fees effectively excluded and continue to exclude the poor from their benefits.[10] Again, although access to justice is facilitated by statutory schemes for legal aid and assistance, in practice charities find it prohibitively expensive to seek judicial guidance.

- *The effects rather than the causes of poverty*

Established case law confirms that it is the effects rather than the causes of poverty which must be the focus of a charity's purpose and activity. The common law would not permit charitable status for an organisation that might undermine the authority of government by seeking to change law or policy. Alleviating the effects of poverty was philanthropic but to question its cause was sedition.

- *The poor*

Poverty is not an absolute concept but is relative to the circumstances of each individual poor person. When *Re Coulthurst*[11] was appealed to the Court of Appeal, Evershed MR attempted a partial definition "it may not unfairly be paraphrased for present purposes as meaning persons who have to 'go short' in the ordinary expectation of that term, due regard being had to their status in life and so forth".[12] As explained by Viscount Simonds in *IRC v. Baddeley*[13] "there may be a good charity for the relief of persons who are not in grinding need or utter destitution" and a trust to provide for persons of limited or reduced means may come within the ambit of this category. The relative nature of poverty is illustrated by the wide range of cases

[7] See Charity Commissioners, CC4, *The Public Character of Charities for the Relief of Financial Hardship*, London, 2003.

[8] See Hackney, J., p. 119.

[9] *The Abbey Malvern Wells Ltd. v. Ministry of Local Government and Planning* [1951] Ch. 728.

[10] *Re Resch's Will Trusts* [1969] AC 424.

[11] (1951) Ch. 661.

[12] [1951] 1 TLR 651, CA, p. 666.

[13] *Op. cit*.

associated with persons of professional standing such as out of work actors as in *In Re Lacy*[14] and *Re de Carteret*.[15]

Being poor will not itself be sufficient to justify intervention that is charitable in law. Moreover, the definition of 'poor' has also carried with it some connotations of 'the deserving poor'. For example, in 1904 ladies in reduced circumstances (defined as having an income of not less than £25 nor more than £55) were objects of poverty relief[16] while in 1914 employees (earning £39) were not.[17] Also, for the purposes of charity, 'poverty' did not include an object to relieve unemployment unless the unemployed person was additionally both poor and in need.[18]

- *Implied poverty*

A gift need not expressly state that it is for the poor, "such intention on the part of the donor may be implied from the nature of the gift looked at as a whole".[19] In *Re Dudgeon* it was stated that "it is not absolutely necessary to find poverty expressed in so many words"[20] which conforms with the view in *Re Lucas* that "the court will look at the whole gift, and it if comes to the conclusion that the relief of poverty was meant, will give effect to it, although the word poverty is not to be found in it".[21] The court will look at the identity of the intended beneficiaries to see if it can imply poverty into their circumstances as in *Re Coulthurst* where "the status of 'widows and orphaned children' suggests the possibility, or perhaps the probability of impecuniosity".[22]

- *Gifts to the poor*

The 'public' dimension to the 'public benefit' test has always had little relevance when applied to determine eligibility of the poor or impotent. The class of poor may be appropriately defined by reference to a locality, to members of a particular religious faith/profession/nationality or to a particular line of descendants. Similarly, gifts made to the poor of a specified town[23] or city[24] or of a particular religious denomination[25] have been upheld in the courts. So also have gifts to the poor in a particular parish;[26] a gift to a parish itself, the poor of the parish being

[14] [1899] 2 Ch 149.

[15] [1933] Ch 103.

[16] See *Trustees of Mary Clarke v. Anderson* [1904] 2 KB 645.

[17] *Re Drummond* [1914] 2 Ch. 90.

[18] See Bright, S., p. 34. An interpretation adjusted by the Charity Commission in recent years (see further, Chap. 4).

[19] *Attorney General* v. *Forde*, p. 25.

[20] *Re Dudgeon* 74 LT (NS) 613.

[21] *Re Lucas* (1922) 2 Ch. 52, p. 58.

[22] *Op. cit*., p. 197, but see below on gifts for widows.

[23] *Russell v. Kellett* (1855) 3 Sm & G 264; also, see *Jones v. Williams* (1767) Amb 651, 27 ER 422.

[24] *Attorney-General v. Corporation of Exeter* (1827) 2 Russ 45.

[25] *AG v. Wansay* (1808) 15 Ves 231; *Dawson v. Small* (1874) LR 18 Eq 114; *Re Wall* (1889) 42 Ch D 510.

[26] *Woodford v. Parkhurst* (1639) Duke 70 (378); also, see *AG v. Price* (1810) 17 Ves 371, 34 ER 143.

intended[27]; and a gift to the poor maintained in a hospital.[28] Gifts which are gender or status specific such as for the benefit of spinsters,[29] widows,[30] working-men[31] or debtors[32] have all been upheld as charitable trusts. The poverty component, however, must be satisfied unless the identified class can be construed as coming within the alternative category in the 1601 Act of 'impotent' rather than 'poor'.[33] In *A-G for Northern Ireland v. Ford*,[34] for example, a gift to widows who were not necessarily poor was found not to be charitable while in *Re Lewis*[35] a gift in similar terms to blind girls and boys was charitable because the latter were classed as 'impotent'. A gift will not fail to be construed as charitable solely because the intended recipients were identified only in very general terms[36] or by reference to a personal nexus.[37]

A gift to provide for the relief of poverty must be made with a charitable intent if it is to come within the definition of charity.[38] Usually the purpose is stated with such clarity that there can be no doubt about the donor's charitable intent.[39] Where problems arise this is often due to an ambiguous or non-explicit use of language.[40] As Picarda explains:[41]

> The word 'deserving' on the other hand does not necessarily connote poverty so that, whatever else it is, a trust to provide dowries for deserving Jewish girls is not for the relief of poverty.[42] Nor is a trust to advance deserving journalists a trust to relieve poverty.[43]

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[27] *Attorney-General v. Webster* (1875) LR 20 Eq 483.

[28] *Corporation of Reading v. Lane* (1601) Duke 81 (361).

[29] *Re Dudgeon* (1896) 74 LT 613.

[30] *Re Coulthurst* (1951) Ch. 661.

[31] *Guinness Trust (London Fund) v. West Ham Borough Council* [1959] 1 WLR 233.

[32] *A-G v. Painter-Stainers' Co* (1788) 2 Cox Eq Cas 51.

[33] Note that in *Re Courtauld-Thomson Trusts* (1954) *The Times*, December 18, the gift of Dorneywood estate for use "as an official residence for the Prime Minister or a Minister of the Crown nominated by him" was almost certainly wrongly held to be charitable. As explained with admirable brevity in Keeton & Sheridan "There is no public benefit in free housing for well-to-do-people or for one minister rather than another" (4th ed.), p. 188.

[34] [1932] NI 1.

[35] [1953] Ch 115.

[36] See for example, *Attorney-General v. Matthews* (1676) 2 Lev. 167 where a gift 'to the poor generally' was held to be valid.

[37] See for example, *Dingle v. Turner* [1972] AC 601.

[38] Charitable intent being itself exposed to an objective test; see for example *Re Pinion* [1965] Ch 85 where such an intent did not prevent the court from objectively viewing the gift as non-charitable.

[39] See for example, *Re Owens* [1929] 37 OWN 97 and 'very poor people'.

[40] See for example *Gibson v. South American Stores (Gath and Chaves) Ltd*. 1950] Ch 177, CA where the form of words 'necessitous and deserving' was interpreted as disclosing the donor's primary objective to confer a benefit upon persons in a 'necessitous' state.

[41] See Picarda, H., *The Law and Practice Relating to Charities* (3rd ed.), Butterworths, London, 1999, p. 36.

[42] *Re Cohen* (1919) 36 TLR 16.

[43] *Perpetual Trustee Co Ltd v. John Fairfax & Sons Pty Ltd* (1959) 76 WN NSW 226.

The Advancement of Education

As explained by Buckley LJ[44] 'educational' entails an "…improvement of a useful branch of human knowledge". The usefulness, or possible prospective usefulness, and to whom, of particular knowledge can be difficult to determine.

- *General educational purposes*

A gift for the advancement of education in a general manner will usually be recognised as charitable. So, for example, a bequest for 'educational …purposes'[45] or a gift 'for the benefit, and advancement, and propagation of education and learning in every part of the world'[46] or to finance 'a body of persons established for the purpose of raising the artistic state of the country'[47] will be upheld. Similarly, a gift to schools,[48] or to colleges, either generally, or to found a scholarship[49] will be recognised as charitable under this heading. But if the purpose is expressed too generally then charitable status will be denied.

- *Specific educational purposes*

The list of judicially approved charitable purposes in the context of trusts for the advancement of education is extensive. There has never been any doubt, for example, that a charitable trust would be for educational purposes if it provided for the study of subjects such as languages,[50] law,[51] medicine,[52] natural history,[53] archaeology,[54] economics,[55] theology,[56] religious instruction,[57] comparative religions,[58] agriculture,[59] mechanical sciences and engineering[60] or shorthand typewriting and book-keeping.[61]

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[44] See *Incorporated Council for Law Reporting for England and Wales v. Attorney General* [1972] 1 Ch 73, p. 102.

[45] *Re Ward* [1941] Ch 308.

[46] *Whicker v. Hume* (1858) 7 HLC 124.

[47] *Royal Choral Society v. IRC* [1943] 2 ALL ER 101.

[48] *Incorporated Society v. Richards* (1841) 4 Ir Eq R 177.

[49] *R v. Newman* (1684) 1 Lev 284.

[50] See *A-G v. Flood* (1816) Hayes and Jo App xxi at xxxviii.

[51] *Smith v. Kerr* [1902] 1 Ch 774, CA.

[52] *Royal College of Surgeons of England v. National Provincial Bank, Ltd*. [1952] AC 631.

[53] *Re Mellody* [1918] 1 Ch 228.

[54] *Yates v. University College London* (1873) 8 Ch App 454; (1875) LR 7 HL 438*; Re British School of Egyptian Archaeology* [1954] 1 WLR 546.

[55] *Re Berridge* (1890) 63 LT 470, CA; *Re Corbett* (1921) 17 Tas. LR 139.

[56] *Reagan* (1957) 8 DLR (2d) 541.

[57] *A-G v. Sepney* (1804) 10 Ves 22.

[58] *Corrymeela Community* v. *Commissioner of Valuation* VR/1/1967.

[59] *Lylehill Young Farmers Club* v. *Commissioner of Valuation* VR/7/1981, *Trustees of the Agricultural Research Institute* v. *Commissioner of Valuation* VR/81 + 82/1967.

[60] *Institution of Civil Engineers v. IRC* [1932] 1 KB 149; *Re Lambert* [1967] SASR 19.

[61] *Re Koettgen's Will Trusts* [1954] Ch 252.

However, the less vocational the subject the greater the judicial scepticism regarding its intrinsic educational value. So, for example, literature of no literary merit will not be viewed as educational and a trust to protect a testator's manuscripts will not be upheld as charitable[62]; though a biographical study may be viewed more positively.[63]

- *Aesthetic educational purposes*

Providing aesthetic education is charitable. No firm definition has been given of what precisely constitutes aesthetic education. It would seem to encompass the appreciation, promotion and development of art of a certain calibre, the cultivation of skills such as play and the imparting of civilised values. It has been stated that "the education of artistic taste is one of the most important things in the development of a civilised human being".[64]

A gift to provide for the upkeep of ancient cottages so that modern craftsmen could learn from them is charitable.[65] Establishing art galleries and museums is charitable.[66] Exhibiting a collection of arms and antiques can be charitable.[67] Advancing or promoting literature is charitable.[68] A choral society can be charitable[69] as can music generally.[70] Gifts to promote the training of singers of 'serious music' have been held charitable[71] as has a gift to promote interest in a particular composer (Delius).[72] Theatres can be valid educational charities[73] but it will depend upon the quality of their productions. In most cases concerning aesthetic education, the courts will need to be satisfied of the artistic content of a particular purpose.

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[62] *Re Elmore* [1968] VR 390.

[63] *Re Hamilton-Grey* (1938) 38 SRNSW.

[64] *Royal Choral Society v. Inland Revenue Commissioners* (1943) 2 All ER 101, p. 104.

[65] *Re Cranstoun* (1932) 1 Ch. 537.

[66] *Re Holburne* (1885) 53 LT 212 and see *Re Town and Country Planning Act 1947, Crystal Palace Trustees v. Minister of Town and Country Planning* [1951] Ch 132;and *Abbott v. Fraser* (1874) LR 6 PC 96.

[67] *Re Spence* (1938) Ch. 96.

[68] *Re Hamilton-Grey* (1938) 38 SR (NSW) 262 and *Re Hopkins' Will Trusts* [1965] Ch 669.

[69] *Royal Choral Society* v. *Inland Revenue Commissioners* (1943) 2 All ER 101.

[70] *IRC v. Glasgow Musical Festival Association* [1926] SC 920*; Shillington v. Portadown Urban Council* [1911] 1 IR 247.

[71] *Re Levien* [1955] 3 All ER 35.

[72] *Re Delius, Emmanuel v. Rosen* [1957] Ch 299.

[73] *Re Shakespeare Memorial Trust, Earl Lytton v. A-G* [1923] 2 Ch 398, *Associated Artists* v. *Inland Revenue Commissioners* (1956) 1 WLR 752.

The Advancement of Religion

Religion has been defined as "the promotion of spiritual teaching in a wide sense, and the maintenance of the doctrines on which it rests, and the observances that serve to promote and manifest it."[74] Judicial defence of religion and religious organisations is embedded in the common law.

It is clear from the cases that an essential prerequisite has been a belief in the existence of a god.[75] The view that the legal definition of religion could be satisfied by a system of belief not involving faith in a god was explicitly rejected by Dillon J in *Re South Place Ethical Society*.[76] English case law stresses that the "two essential attributes of religion are faith and worship: faith in a god and worship of that god".[77] Worship is defined as "conduct indicative of reverence or veneration for that supreme being".[78] Worship is not regarded as merely any lawful means for formally observing the tenets of a cult.[79]

The exclusivity rule applies and a trust will fail if it contains a mix of both charitable and other purposes.[80] The basic rule was set out by Sir William Grant nearly two centuries ago, "the question is not whether the trustee may not apply it upon purposes strictly charitable, but whether he is bound so to apply it".[81] Gifts to ministers are charitable as being for the advancement of religion[82] as are gifts for building and maintaining churches, the maintenance of tombs and for missionary purposes.

- *Equality of religions*

The law holds that all religions are to be treated equally. It will not inquire into the inherent validity of any particular religion nor will it examine the relative merits of

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[74] *Keren Kayemeth Le Jisroel v. Inland Revenue Commissioners* (1931) 48 TLR 459, p. 477. But also see *Thornton v. Howe* (1862), 54 ER, 1042, 31 Beav 14 where, in a doubtful ruling, the court held that a trust for the printing, publishing and probagation of the sacred writings of the late Joanna Southcote (who claimed to have been made pregnant by the Holy Ghost and was to give birth to the second Messiah) was a valid charitable trust for a religious purpose.

[75] Until this common law interpretation was replaced in England & Wales and Scotland, though not in Ireland, with a statutory declaration that such a belief was no longer required.

[76] *Re South Place Ethical Society, Barralet v. Attorney General* [1980] 1 WLR 1565; (1980) 124 SJ 774; [1980] 3 All ER 918.

[77] *Re South Place Ethical Society, Barralet v. Attorney General* (1980) 3 All ER 918, 924.

[78] *Application for Registration as a Charity by the Church of Scientology (England and Wales)*, Charity Commissioners Decision, 17th November 1999, p. 24.

[79] *Fellowship of Humanity v. County of Almeda* 153 Cal. App. 2d673 (1957), formally rejected in the *Church of Scientology* Case *op. cit*.

[80] See the ruling of the House of Lords in *Farley v. Westminster Bank* (1939) AC 430 where a trust for 'parish work' was denied charitable status because the form of words was too all encompassing.

[81] *Morice v. Bishop of Durham* (1805) 9 Ves 399.

[82] *Re Foster* [1939] 1 Ch 22.

different religions.[83] Even if the gift deliberately discriminates against particular religions it may still be charitable.[84] As has been said "although this court might consider the opinions sought to be propagated foolish or even devoid of foundation, it would not, on that account declare it void".[85] The Church of Scientology was refused charitable status by the Charity Commissioners because its core practices of training and auditing (counselling) did not constitute worship of a supreme being,[86] even though it had been deemed charitable in the USA and in Australia.[87]

In *R v. Registrar General ex parte Segerdal*,[88] it was held that Buddhism was a religion despite a lack of belief in a supreme being. The judicial view then being that for a religion to be charitable it must be founded on a belief in and reverence for a god or gods.[89] In line with a progressive and evolving approach to religion, faith healing has also been deemed to be charitable where it was open to members of the public.[90]

Beneficial to the Community, Not Falling Under Any of the Preceding Heads

This fourth *Pemsel* head is a residual one, of charitable objects that cannot be conveniently fitted under the other three heads, though no longer so in England & Wales where the number of heads have now been statutorily increased to 13 (see, further, Chap. 5). In order to qualify for charitable status under this head it was unnecessary that a gift should be directed solely towards relief of the poor. It was becoming increasingly anomalous to refer to this body of case law as a category when often the only factor the cases had in common was that they did not readily fit under any of the other three headings. The flexibility permitted by this *Pemsel* head has also, however, allowed the judiciary across the common law world some room for manoeuvre in the struggle to align charity law with contemporary and local manifestations of social need (see, further, below).

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[83] *Thornton v. Howe* (1862), 31 Beav 14. Also, see *Re Michael's Trust* (1860) 28 Beav 39 when Sir John Romilly MR expressly ruled that no distinction could be made in law between the status of Jewish and Roman Catholic charities.

[84] See *Re Lysaght; Hill v. Royal College of Surgeons of England* [1966] Ch 191, [1965] 2 All ER 888 which concerned a trust to establish a medical scholarship unavailable to both Roman Catholics and Jews.

[85] *Ibid*., p. 20.

[86] *Application for Registration as a Charity by the Church of Scientology (England and Wales)*, Charity Commissioners Decision, 17 November 1999, p. 24.

[87] *Church of the New Faith v. Commissioner for Pay Roll Tax* (1983) 49 ALR 65.

[88] (1970) 2 QB 697.

[89] The Charities Act 2006 removes the requirement that, in England & Wales, religion be based on a belief in God or Gods.

[90] *Funnell v. Stewart* (1996) 1 WLR 288.

Emerging Social Policy Themes and Dilemmas

The broad social policy themes discernible in the Preamble still retain their currency at the dawn of the 21st century. The lack of legislative interference over the intervening 400 years (excepting the recent statutes in the UK jurisdictions, New Zealand and Australia) has reinforced government's initial objectives for channeling charitable purposes and resources. It has also allowed the judiciary to apply the public benefit principle, in accordance with current circumstances and within the parameters of the 'spirit and intendment' rule, so as to expand the meaning of charitable purposes.[91] However, the abdication of legislative responsibility has not always worked to the advantage of either charity or government. In addition to legal distortions such as the 'poor relations' anomaly and the profuse creation of quixotic charitable causes to do with animals, flora and fauna etc., a number of more serious flaws have been left to develop into constraints on the effectiveness of modern charities.

Consolidation of Preamble Themes

The provision of health and social care services, training for employment, various aspects of public utility provision and the physical maintenance of social infrastructure are still very much the business of charities as are education, housing and the general alleviation of those in impoverished circumstances. Never wholly displaced by the Welfare State, though often consigned to a specialist role, charities in all these areas are now becoming more prominent as State provision recedes. The Preamble concern that charities should contribute to the protection of citizens has been revived by the increased threat from international terrorism: ironically, however, this is more likely to be to their detriment as government increases its surveillance of all non-government organisations on the basis that some may be instrumental in assisting terrorists. Again, although not mentioned as such in the Preamble, religious organisations have retained if not extended the prominence they then had as providers of charity.

Four centuries and more of shared responsibility for public benefit provision has convincingly demonstrated to government the merit of cultivating a partnership with charity and confirmed the main areas on which they can best work together (see, also, Chap. 6). As has been said, the Statute of Charitable Uses 1601 "set the course for the evolution of philanthropy as a voluntary partnership between the citizen and the State to fund and achieve social objectives".[92] This enduring relationship has also

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[91] See for example, *Vancouver Regional FreeNet Association v. Minister of National Revenue* [1996] 137 DLR (4th) 206 where the court held that the provision of a free publicly accessible internet service to a particular community was a charitable purpose.

[92] See Bromley, B. and Bromley, K. 'The Historical Origins of the Definition of Religion in Charity Law', paper presented to ISTR conference, Dublin, July 2000; cited by Deakin, N. *op. cit*., p. 26.

perpetuated the dominant Preamble theme: the overriding concern of government to ensure that charities operate within a regulatory framework that prevents or restricts opportunities for abuse. Of all legal functions that have evolved to give effect to aspects of social policy none has displaced the consistent government priority given to policing charitable status and determining consequent eligibility for tax exemption.

The Doctrine of Precedent

The common law is judge made law and charity law is therefore very much governed by the weighting given to judicial precedents (see, also, Chap. 3). The creation of totally new charitable purposes is not within judicial discretion, remaining as it does a legislative prerogative, and although the courts have occasionally creatively employed the 'spirit and intendment' rule to extend the reach of charity this has been a very incremental and empirical process. As Brady has rightly pointed out:[93]

> … it would run counter to the strongest tradition of our judiciary for the courts to consciously assume the responsibility of charting the areas of social need into which private benefaction might usefully be channelled and thus, to act as arbiters of social policy at any given time. The courts would rightly take the view that it is the business of the legislature to mediate social policy and it is not without significance that our law of charity remains firmly rooted in the last legislative attempt to do so in the early seventeenth century.

Creation of New Charitable Purposes

The fact that any initiative to broaden the meaning of a charitable purpose has been left to the judiciary or with a body vested with equivalent powers has generally, in the common law world, operated as a serious constraint. For various reasons the opportunities for judicial enlargement of charitable purposes have steadily decreased (see, further, Chap. 4). In England & Wales, however, this constraint has been offset by the transfer of jurisdiction for adjudication on the definition of charitable purposes from the courts to the Charity Commission and, to some extent, remedied by the specifying of new purposes in the Charities Act 2006 (see, further, below and Chap. 6).

Emerging Social Policy Dilemmas

The expanding breadth of charitable purposes and the evermore rapidly changing nature of social need, occurring in a context in which government was increasingly

[93] See Brady, J., 'The Law of Charity and Judicial Responsiveness to Changing Need', *Northern Ireland Legal Quarterly*, 27: 3, 1976, p. 201.

eager to negotiate a transfer of responsibility for public service provision to charities, gave rise to certain well-recognised dilemmas with social policy implications.

- *The public benefit test*

The traditional constraints on charitable status debarring organizations with purposes such as the prevention of poverty, the promotion of justice and the advancement of peace and reconciliation had become starkly incongruous. The misfit between established charitable purposes and newly emerging forms of social need had become impossible to ignore. A more contemporary interpretation of this test was clearly required. The marrying of quantity and quality in the public benefit test had also attracted controversy: there were those who took the view that the quality element (e.g. the restoration of a quixotic work of art) broadly enriches the public domain even when the actual quantity of people who directly benefit are very few. An argument that plays out in the fields of 'public schools',[94] private hospitals,[95] concert halls etc.

- *Poverty*

The landscape provided by 400 years of charity case law practiced in many common law jurisdictions is one filled with a rich spread of examples of man's humanity to man and indeed to animals. Given the continuing levels of poverty in those jurisdictions, however, questions were arising as to whether such a large proportion of total charitable resources should be restricted to causes such as promoting the welfare of animals and birds. In addition, there was also the pressing issue as to whether charities should not be directing their resources towards the causes as well as the effects of poverty.

- *Efficiency and effectiveness*

The common law has never had an interest in ascertaining whether the resources of donor or charitable organisation are being prudently invested (beyond ruling that some causes are too absurd to merit charitable status).[96] The numbers of charities providing overlapping services, or replicating existing services (e.g. cancer research) or with resources greater than the need to be addressed had grown considerably and often represented a misuse of resources.

- *Legal structures*

The legal structure of an organisation could also cause problems. Even if a gift is undoubtedly beneficial to a large part of the community it may still be denied charitable status because of the legal structure or nature of the organisation designated

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[94] *Campbell College v. Commissioner of Valuation* [1964] NI 169, HL.

[95] *Re Resch's Will Trusts* [1967] 3 All ER 915.

[96] See for example: *Re Grove-Grady* [1929] 1 Ch 557 (a sanctuary or reserve for 'animals, birds or other creatures not human' was not charitable as they would only "be free to molest and harry one another" *per* Lord Hanworth, M.R.); *Thellusson v. Woodford* (1799) 4 Ves 227 (a hospital for hedgehogs was too irrational and absurd); and *Re Pinion* [1965] Ch. 85 ("I can conceive of no useful object to be served in foisting upon the public this mass of junk" *per* Harman, L.J.).

to give effect to it: self-help organisations, advocacy agencies, mutual benefit organisations and other types of bodies were considered too inherently compromised to qualify as charities. As hybrid arrangements sprang up between government bodies, non-profit organizations and commercial entities the inflexibility of the charity as a legal entity became more evident; the CIC, CIO and social entrepreneurship school posed a serious challenge to the adequacy of existing legal structures.

The reliance upon trusts rather than incorporated structures as the main vehicle for giving effect to charitable purposes has been a constraint on charitable activity in England & Wales and some other common law jurisdictions.

- *Advocacy/political activity*

The restrictions on advocacy/political activity by charities, though as old as the common law, were becoming increasingly incongruous in the modern environment characterised by a high awareness of human rights issues and where openness, transparency and accountability had become accepted as the appropriate benchmarks for conduct in public life.

Charity, Public Benefit and Politics

At the turn of the century, in many of the common law jurisdictions, the contraction of public service provision led to much uncertainty as to what in such circumstances might be an appropriate balance to be struck between the State, business and the voluntary sector that would be compatible with the principles of liberal democracy. In England & Wales, under a labour government with a strong socialist history, this was a particularly forceful challenge. How to disengage from the role of sole public service provider, while distancing itself from the over zealous enthusiasm with which the previous conservative government had set about dismantling and privatising public services, was an acute political problem for a government that swept to power on a tide of anti-Thatcherite sentiment with a mandate to restore and defend the Welfare State. The public/private balance in relation to social services provision had to be politically reconfigured and in that context the public benefit principle lying at the heart of charity law proved to be of strategic significance.

Politics, Rights and Charity Law

The extent to which a society, at any point in time, allows or relies upon philanthropic activity reveals a great deal about where it is then located on the political spectrum from democracy to totalitarianism. At both extremes there is an acceptance that social need will always exist and will require a social policy response. However, whereas one values independent discretionary acts of the individual as a means of addressing social need and legislates to protect and encourage the right to do so, the other subordinates or suppresses this in favour of structural intervention

by government. Many modern democratic nations have developed sophisticated systems of charity law to identify and regulate approved philanthropic activity, to ensure that it contributes to meeting contemporary social need and to provide preferential tax status and other financial benefits for the organisations concerned. Totalitarian States have tended to view this hallmark of democracy with suspicion. It is seen as an area of voluntary activity with potential to undermine approved values and policies, established social priorities, strategies for social and economic development and ultimately the authority and control of the State. But there is now no denying the central importance of charity law for democracy, as evidenced by the scale and vigour of philanthropic activity in all modern democratic nations, coupled with the enthusiasm with which it has been embraced by the many East European States newly emerged from under their blanket of totalitarianism.

Charity Law

Charity legislation is a useful means of orchestrating the relationship between the voluntary sector and the State (though not the only one: service agreements and contractual relations rather than legislation can achieve the same ends). By providing a mediating mechanism for adjusting the respective remits of the voluntary and statutory sectors, such legislation sets out the rules for managing the interface between the two. The nature and extent of regulations governing charities and their activities provide a revealing indicator of the terms on which a government has chosen to share its social economy responsibilities with non-government organisations. It also structures activities within the voluntary sector: differentiating between informal and formal voluntary organisations and between the latter on the basis of their charitable status; classifying charities by purpose; and providing such authority as there may be for regulating their affairs. The government shapes the statutory basis of charity law to strike the balance between voluntary and statutory sectors, and adjust the relationship between for-profit and not-for-profit economic activity, that it considers most appropriately reflects its position on the socialist/liberal/conservative political continuum. The legal mechanics available for achieving the desired balance are examined in some detail in the following chapters and their actual application in practice is analysed in Part II.

Legal Rights and Charity

The states of eastern Europe, together with others that in total doubled the size of the European Union to a membership of 27, joined a democratic polity in which philanthropy plays a role alongside a recently constructed, multi-layered framework of laws providing for equity, equality and respect for the fundamental human rights of all citizens (see, further, Chap. 3). This rights regime is also typical of most other modern developed nations and is particularly true of those sharing the common law tradition

where charity law has consistently and almost uniformly governed a philanthropic repository of compassionate values and considerable resources both to be applied for the public benefit. Within that tradition, legal rights and charity, which once functioned in an obverse relationship similar to justice and mercy, have gradually assumed roles that now present as mutually complementary rather than as alternatives.

A context in which basic needs are increasingly left to be addressed in accordance with the capacity, vagaries and profit margins of the open market is one in which the protection of fundamental human rights and assertion of legal rights to equitable and non-discriminatory access to basic social services must assume a greater salience.

Public Benefit Provision

Poverty had never been a necessary pre-condition for acts of charity as defined by the common law and the case law of recent years (see above) illustrates just how far its development has been dictated by a much broader interpretation of matters judicially held to constitute the public benefit. Many charities now have no relationship whatsoever with poverty and indeed, it could be argued, some of those associated with facilities accessed by the wealthy (fee paying schools, clinics, hospitals, opera houses etc.) exacerbate its effects.

The Broadening of Public Benefit Provision

In England & Wales, the broadening of public benefit provision in recent decades is directly attributable to the work of the Charity Commission (see, further below and Chaps. 5, 6). The results of its endeavours could be seen in the extension of charitable status to organisations established for purposes such as the relief of unemployment, the promotion of urban and rural regeneration, rehabilitation and for the benefit of particular localities. The type of need brought within the reach of charities by such means would seem to reflect the contemporary concerns of government and furthered the decentralisation approach it had adopted towards community care.

Public Benefit Provision: The Roles of Government and Charity

The dividing line between the public benefit service provision of government bodies and that of charities has often been uncertain but has now become quite difficult to draw with any certainty.[97] The Charity Commission has advised that:[98]

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[97] It has for some time been recognized that a charity providing a service that relieves local or general taxation is pursuing a legitimate charitable purpose provided it is for the benefit of the public; see for example, *AG v. Bushby* (1857) 24 Beav 299.

[98] Charity Commission RR7, *The Independence of Charities from the State*, London, 2001.

> … it is not a bar to charitable status that a new body has been created with a view to discharging a function of central or local government, provided that the new body was established for exclusively charitable purposes (which may coincide with a governmental authority's function) and not for furthering the non charitable purposes of securing and implementing the policies of any governmental authority.

Also that:[99]

> … trustees cannot normally use a charity's funds to pay for services that a governmental authority is legally required to provide at the public expense. However, trustees might use a charity's resources to supplement what a governmental authority provides.

As government policy in this jurisdiction continues to promote the partnership ethos there is good reason to believe that this distinction will become increasingly blurred. Complicity between government and charities in addressing social need is an attractive and often effective proposition for both parties but if the latter allows itself to become merely the agent of the former then it may forfeit its right to charitable status.

A Charity Commission has emphasised that the governance of the charity must, as a matter of practice, be independent from governmental authority. It advises that any charity planning to deliver public services must continue to comply with the following key legal principles[100]:

- Charities must only undertake activities that are within their objects and powers. This is essential. Charities must not stray from their objects in pursuit of funding.
- Charities must be independent of government and other funders. An organisation must be a separate and independent legal entity to be eligible for charitable status.
- Trustees must act only in the interests of the charity and its beneficiaries.
- Trustees must make decisions in line with their duty of care and duty to act prudently.

Government and Charity in a Contemporary Policy Context

There has been a marked shift in recent years from a position that the State should own and maintain national resources, institutional infrastructure etc. to one that it should, to some degree, settle for controlling service provision and access to services and for monitoring delivery standards by regulatory legislation and inspectoral bodies. Personal responsibility – the 'user pays' philosophy – is slowly displacing

[99] See Charity Commission CC37, *Charities and Contracts*, London.

[100] See Charity Commission, *Policy Statement on Charities and Public Service Delivery*, June 2005, p. 2. Also, see Charity Commission RR7, *ibid*., in which, however, there is a notable lack of cited case law. The case of *Construction Industry Training Board v. A-G* [1973] Ch 173 suggests that Ministerial control is not incompatible with charity status (the authors are grateful to Paul Bater for drawing this to their attention).

public taxes as the basis for funding a growing proportion of our health and social care services. Private utility companies have taken over from government energy and transport departments. The policy presumption that public benefit provision is wholly the responsibility of government has long gone.

Government Policy

The steady contraction of State responsibility for provision or delivery of public services and the devolving of that responsibility to private business, charities, other non-government organisations or varying combinations of such bodies has not been governed by any obvious principles or strategy other than the selective introduction of market forces to ease the costs of public service provision while ostensibly also broadening consumer choice and raising standards by forcing competition upon service providers. The process has resulted in a more confident voluntary sector and has centre-staged charities as the preferred government partners in programmes for the future delivery of services in health and social care, education and housing.[101] The effects of government policy are clearly evident in the UK as elsewhere among the western developed nations.

Reduced Government Spending

The acute need to reduce government spending has led to a retraction of State provision not only in health, education and social care but across many sectors regarded until recently as the heartland of public services. Across the common law world, the move towards privatisation of social utilities has enabled the State to leave the market to provide, at a price, services such as water, sanitation, transport, housing, prisons, electricity, gas, etc. and it is demonstrating an increasing enthusiasm for similarly shedding responsibility for nursing home care, residential care of the elderly etc. A proliferation of private finance initiatives has resulted in responsibility for the future provision of such services being devolved to or now being shared with charities, other not-for-profit bodies and commercial organisations.

For many in the UK, the privatisation of water services in the late 1980s, followed by the disconnection of thousands of families from running water for failure to pay, provided stark evidence of a new public/private balance being struck in the distribution

[101] See the Commission on the Future of the Voluntary Sector in England, *Meeting the Challenge of Change: Voluntary Action into the 21st Century*, NCVO, London, 1996 and Kendall, J. and Knapp, M., *The Voluntary Sector in the UK*, Manchester, Manchester University Press, 1996. More recently, see HM Treasury, *The Future Role of the Third Sector in Social and Economic Regeneration: Final Report*, London, July 24, 2007.

of responsibility for public benefit service provision.[102] A lesson driven home by the policy, currently evident in some hospitals and HSS Trusts, to manage resources and waiting lists by unilaterally ceasing to provide core components of what had hitherto been regarded as standardized public health and social care services. All modern democracies are now wrestling with the implications arising from privatising the delivery of essential services and working through the considerable challenges for sustaining civil society that flow from the consequent reshaping of relationships between governments, business and charity.

Increased Supervision of Non-government Organisations

From at least the introduction of the Statute of Charitable Uses 1601 the State has had a particular interest in regulating charities to protect donor gifts, prevent financial abuse and limit further erosion of its tax base. The Charity Commission was first established to provide the necessary scrutiny and this continues to be one of its main statutory functions. More recently, following the 9/11 terrorist attacks and the subsequent global war on terror, this interest in the affairs of charities has been extended to provide more generally for State surveillance of the activities of non-government organisations.

Paradoxically, government strategy for managing its contraction of public service provision has itself proven to be a process that required increased regulatory controls. The delegation of service delivery responsibility has led to increased centralisation, in terms of government strategic management and in terms of reducing the authority and resources available at local authority/county council level. Most obvious, however, has been the positioning of regulatory government bodies to supervise ease of access, quality, costs and delivery of the services that government no longer provides.[103] For example, it may well be the case that the annual volume of low cost, new, social housing is no less now than in earlier decades but to avail of that provision will require a proactive assertion and proof of individual entitlement in accordance with the regulatory criteria governing access, degree of need and grants. Provision could be by a charity, acting independently or in consortium with other agencies, available in a range of different forms and from a number of competing providers. Much the same could now be said of access to many services in health, education and social care.

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[102] A policy since exported by the World Bank to the developing nations: international aid being conditional upon privatisation of national resources such as water and electricity; leading to greater hardship for those already below the poverty line and more emphatic social inequity in countries such as Ghana, Indonesia and Argentina.

[103] See for example, Foster, C. and Plowden, J., *The State Under Stress*, Oxford, Oxford Union Press, 1996 for an assessment of the strategic significance of government policy at this time.

Facilitating the Building of Social Capital

For the State, developing the capacity of the charitable sector is an investment in social stability. In all the developed nations governments are now demonstrating an enthusiasm for encouraging the use of volunteers and involving faith based organisations in community work. In addition to engaging a growing proportion of the population in community care activity and being a catalyst for a more civil and morally based society, the encouragement of altruistic conduct also has the happy consequence of reducing State expenditure (see, further, Chap. 6).

Increased Involvement of Private Finance

While sharing the responsibility for public benefit service provision with charities and other not-for-profit bodies and involving volunteers in service delivery could be readily defended on the above grounds, the government strategy of enlisting the assistance of commercial organisations has aroused considerable controversy. Allowing the profit motive to determine provision of or access to essential services has for some constituted a serious compromise to the principles if not also to the mandate underpinning a labour government. Nonetheless, in recent years room has been made for private finance initiatives to contribute towards the funding of much new social infrastructure including roads, bridges, schools, hospitals, health centres etc. Where the straightforward privatisation of public utilities has not succeeded in sufficiently lightening the financial burden of government then it has resorted to complex long-term leasing arrangements and the use of various forms of consortia. The end result being that a mixed economy now generally prevails in public benefit service provision not just in the UK but in many western developed nations.

Promoting Partnership Arrangements

Government has concluded that the sharing or transfer of service provision responsibilities would be best facilitated through a policy of establishing the necessary partnership arrangements with the private and the voluntary sectors. This approach is apparent in such developed common law countries as Ireland, Canada, Australia and New Zealand.

In the UK, following the recommendations of the Deakin report,[104] four separate compacts (for England, Scotland, Wales, and Northern Ireland) were introduced.[105]

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[104] See the Commission on the Future of the Voluntary Sector in England, *Meeting the Challenge of Change: Voluntary Action into the 21st Century*, NCVO, London, 1996.

[105] The *Scottish Compact* was published in October 1998, the English Compact *Getting it Right Together* and the *Compact for Wales* were both published in November 1998. In Northern Ireland, *Building Real Partnership – Compact between Government and the Voluntary and Community Sector in Northern Ireland* was laid before Parliament in December 1998.

While they relate to the wider voluntary and community sector not only to charities, and while there is always the danger that they will function as aspirational declarations of intent rather than as an enforceable code of conduct, the compacts do represent a further stage in the development of the centuries old relationship between government and charities in their mutual commitment to promoting the public benefit. However, it remains the case that the partnership and the compacts are driven more by the interests of government than charities (see, further, Chap. 6).

The Charitable Sector

Charities form a part of the voluntary (or not-for-profit, or voluntary and community) sector in England & Wales and "with total asset value calculated at £33.3 billion, grant-making charitable trusts and foundations are major funders of the UK voluntary sector, providing about 10% of its income, or £2.7 billion,"[106] they contribute substantially to the economic health of the sector. The National Council of Voluntary Organisations in a recent report noted that the sector's total income was £26.3 billion in 2003/04, an increase of just over £1 billion since 2002/03. This growth in income was mainly due to a 40% increase in the number of general charities since 1995 of which those with incomes of over £1 million have more than doubled in number in the last decade.[107] The Charity Commission report[108] noted that at the end of June 2005, there were 167,022 "main" charities on its Register which in total had an annual income at the 2nd quarter of the financial year of £37.099 billion. It profiled the wealth of charities as follows:

- The majority of registered charities had an income of £10,000 or less. They represented nearly two-thirds of registered charities but had less than 1% of the total income recorded.
- Under 8% of charities received 90% of the total annual income recorded.
- The largest 546 charities (0.33% of those on the register) attracted over 46% of the total income.

There were also some 100,000 charities that were either exempt or excepted from registration with the Charity Commission. The level of charitable giving in the UK in 2000 has been estimated at between 0.63% and 0.77% of GDP (compared with 2.1% of GNP in the United States) but:[109]

> Unlike the United States, both giving levels and participation in giving declined in Britain during the later 1990s, despite an increasingly strong economy. Total charitable donations in 1997 were £4.51 billion, down from £5.3 billion in 1993, a fall of 31% in real terms.

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[106] See Seddon, N., *Who Cares*, Civitas, London, 2007, p. 151, citing Pharoah, C., Walker, C., Goodey, L. and Clegg, S., *Charity Trends 2006*, pp. 101–102.

[107] See NCVO, *The UK Voluntary Sector Almanac 2006: The State of the Sector*, London, February 2006.

[108] See Charity Commission, Annual Report, 2005.

[109] See Wright, K., in 'Generosity vs. Altruism: Philanthropy and Charity in the United States and United Kingdom', *Voluntas: International Journal of Voluntary and Nonprofit Organizations*, 12: 4, 2002, p. 401.

In broad terms, the charitable sector is clearly prosperous, thriving and is now making a significant contribution to social infrastructure in the UK.

Government Grants and Contracts

The increasing dependency of charities on government funding, whether in the form of direct grants or contracts for service provision, is threatening to erode their traditional claim to be in the vanguard of non-governmental organisations. In the UK it has been noted that:[110]

> "In the mid-1980s, about 10% of overall charitable revenue came from government sources.[111] By 1991, government funding accounted for 27% of the sector's income,[112] and that figure is now at least 38%."[113] The State is now undeniably 'the largest single contributor to philanthropic causes'.

The independence of charities is also being compromised by their need to engage in the 'contract culture', develop 'brand driven' strategies and to compete with commercial organisations for market position. Mostly this is evident in the growth of partnership arrangements with government bodies which has been criticised by some as resulting in charities becoming more compliant as a 'muting of dissent' culture envelops those who need to prioritise their ongoing contractual arrangements.[114] The increasingly close relationship between some charities and public authorities, particularly through service contracts, has prompted the Charity Commission to issue guidance about maintaining independence:[115]

> As independent regulator of charities, the Commission's position on whether charities engage in public service delivery is neutral; we neither encourage nor discourage it. We are concerned with ensuring that charities retain their independence, remain focussed on their objects and properly meet the needs of their beneficiaries.

In a recent and landmark decision[116] the Commission would seem to have reviewed and adjusted its position somewhat on the above guidance. Having come to the view that charities can deliver public services which public authorities have a statutory duty to provide but have chosen to 'hive off' to voluntary associations, it then

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[110] Prochaska, F., *The Voluntary Impulse: Philanthropy in Modern Britain*, London, Faber & Faber, 1988, p. 4.

[111] Seddon, N., 2007, p. 28, citing *The Times*, 17 December, 1984.

[112] *Ibid*., citing NCVO, *Voluntary Sector Almanac*, 2004.

[113] Seddon, N., *Who Cares?*, Civitas, London, 2007, p. 28.

[114] See for example, the Deakin report, *op. cit*.

[115] Charity Commission, *Policy Statement on Charities and Public Service Delivery*, June 2005, p. 2. Also, see Charity Commission RR7, *The Independence of Charities from the State*, London, 2001 and *Charities and Contracts* (CC37).

[116] See Charity Commission and Applications for Registration of (i) Trafford Community Leisure Trust and (ii) Wigan Leisure and Culture Trust (21 April 2004).

permitted the Trafford Community Leisure Trust and the Wigan Leisure and Culture Trust to be registered as charities. Its decision was based on evidence that in both cases the charities were sufficiently independent from the respective local authorities and that the trustees retained their discretion to use charitable funds to provide/subsidise a government service if they judged this to be in the best interests of the charity and complied with its objects.

The National Lottery

In England & Wales, the difficulty in drawing a line between the responsibilities of government and charity is well illustrated by the current controversy surrounding the use of Lottery funds for child care and health care services instead of promoting the arts, culture and national heritage; the latter being statutorily designated as appropriate recipients. The 'additionality principle', intended to govern disbursement of funds by ensuring that projects funded would be supplementary to government services, has been undermined and instead a considerable proportion of annual funds are now being channeled towards subsidising the running costs of mainstream government services such as health care.[117] This results in less money being available for charity determined purposes.

Social Policy and Charity Law Reform in England & Wales

In recent years the governments of many common law nations have launched law reform processes as they consider whether statutory provisions might offer the best means of adjusting charity law so as to achieve a closer alignment between law and emerging patterns of social need. Coming as this does at a time of general State withdrawal from traditional areas of public service provision, it is an initiative that is also open to being construed as a bid by government to use legislation to redefine the public benefit principle so as to achieve the strategic objective of facilitating a shifting of the public service burden to charity. Both parties recognise that charity law reform will set the future parameters and terms of reference for any partnership arrangement between them. In England & Wales the long awaited new charity legislation now expresses and consolidates government social policy with regard to the charitable sector and presents the latter with both opportunities and formidable challenges.

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[117] See for example, Reith, G., 'The National Lottery and the Individualisation of Gambling in Britain', European Association for the Study of Gambling, 2002, where it is pointed out that:

"Gradually, more and more services are being re-defined as 'good causes' which are therefore by definition, desirable or voluntary, but not essential. It also means that individuals are essentially paying for these services when they buy a lottery ticket. At the same time, we're starting to see a decline in government funding in these areas".

The Process

In England & Wales, the protracted process of charity law reform, which began with publication of a report by the National Council of Voluntary Organisations in 2001,[118] has now drawn to a close. The recommendations initially proposed in the review of the legal framework for the voluntary sector[119] were after a period of public consultation, accepted by the government.[120] The resulting draft Charities Bill[121] was introduced to the Houses of Parliament in May 2005, received the Royal Assent in November 2006 and the first part of the Charities Act 2006 duly came into force on 27 February 2007. Of the Act's three Parts, two deal with regulatory provisions for fundraising and with definitional matters.

Changes to Definitional Matters and Legal Structures

In keeping with the recommendation made in the Deakin report,[122] for the first time a general statutory definition of charity has been introduced for the purposes of the law in England and Wales.[123] The intention, essentially, is to preserve the existing meaning of charitable purposes as developed by the courts while permitting the development of new ones to the extent that they are analogous to those already in existence. Henceforth, a 'charity' is defined as an organisation with exclusively charitable purposes which falls within the list of 13 purposes that are held to be for the public benefit.

Charitable Purpose

The new legislation extends the current classification of 'charitable purposes' from 4 to 13 categories. Under s 2 of the Charities Act, a 'charitable purpose' is one that is for either —

(a) the prevention or relief of poverty;
(b) the advancement of education;

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[118] See NCVO, *For the public benefit? A consultation document on charity law reform*, Charity Law Reform Advisory Group, London, January 2001.

[119] See Cabinet Office Strategy Unit, *Private Action, Public Benefit: A Review of Charities and the Wider Not-for-Profit Sector*, London, 2002.

[120] See Home Office, *Charities and Not-for-Profits: A Modern Legal Framework*, London, 2003.

[121] See Home Office, *Charities Bill*, London, 2004 and revised bill introduced in House of Lords, 18 May 2005; now the Charities Act 2006.

[122] See *The Report of the Commission on the Future of the Voluntary Sector*, National Council for Voluntary Organisations, London, 1996.

[123] Contrary to the position taken in the previous government White Paper *Charities: A Framework for the Future* (Cmnd 694), 1989.

(c) the advancement of religion;
(d) the advancement of health or the saving of lives;
(e) the advancement of citizenship or community development;
(f) the advancement of the arts, culture, heritage or science;
(g) the advancement of amateur sport;
(h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
(i) the advancement of environmental protection or improvement;
(j) the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;
(k) the advancement of animal welfare;
(l) the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services; and
(m) other purposes that are currently recognized as charitable or are in the spirit of any purposes currently recognized as charitable.

The additions are essentially a restatement of the purposes that in recent decades have come to be recognised as charitable. The main exception is the promotion of amateur sport as a charitable purpose in its own right rather than as a means of advancing other existing charitable purposes.[124]

Public Benefit

The key change is the removal of the public benefit presumption applicable to the first three *Pemsel* heads of charity. This is in keeping with the NCVO recommendation in 2001 that the single criterion for charitable status should be the public benefit test as under existing common law. Under s 3 of the Charities Act, charitable status in all cases and under all of the above heads will in future, therefore, be dependent upon an ability to establish that the purpose of the organization not only fits under one of the now statutory 13 heads but specifically also meets the public benefit test.

Legal Structures

The Charities Act 2006 introduces a new legal structure specifically for charities – the Charitable Incorporated Organisation (CIC) – this can be established with limited or unlimited liability[125] but only for charitable purposes. The Charity Commission will

[124] The provision of recreational facilities in the interests of social welfare will continue to be recognised as charitable under the Recreational Charities Act 1958.

[125] Structures which have been available to charities in the US, New Zealand, Australia and Canada since the 1850s.

be solely responsible for the incorporation and registration of the CIO and for assisting existing charitable companies limited by guarantee or industrial and provident societies to convert to a CIO. In addition, a new investment vehicle – the Charity Investment Company – and a vehicle specifically designed to channel resources towards local communities – the Community Development Foundation – will also be introduced while further legal structures can be anticipated in response to the growth in hybrid bodies and social entrepreneurship.

Primary Regulatory Body

The legal status of the Charity Commission has been changed. In future it will be a statutory corporation with the following new objectives:

- Increasing public confidence
- Increasing compliance with legal obligations
- Encouraging the "social and economic impact" of charities
- Enhancing accountability

In furtherance of these objectives the Commission is to have the following general functions:

- Determining charitable status
- Facilitating better charity administration
- Identifying, investigating and remedying abuse
- Obtaining, evaluating and disseminating information
- Giving information, advice and proposals to ministers

The Commission's dual role as regulator and facilitator of charities is to continue.

Social Policy and Charity Law Reform

A number of changes introduced by the 2006 Act will have far reaching implications for the future of the charitable sector. Some aspects of the government's social policy agenda are clearly evident in the new provisions but others will only make their impact felt over time.

The Legislative Broadening of Charitable Purposes

The *Pemsel* categories are restated and the associated body of case law will therefore continue to keep alive the established social policy strands identified earlier. Legislation has now succeeded in introducing change in certain areas where 400 years of judicial intervention has failed.

- *The prevention of poverty*

While this includes preventing those who are poor from becoming poorer and preventing persons who are not poor from becoming poor, it remains to be seen how or to what extent it will facilitate organisations dedicated to eradicating the causes of poverty. Whether it will permit a different approach to the established prohibition on charities tackling the causes of existing poverty, particularly where this entails working to change existing laws or government policy, is open to question. Nonetheless, this provision represents a definite government commitment to focusing charity activity and resources on reducing poverty levels, which in the light of recent reports regarding child poverty in the UK[126] is an important social policy development. The new focus should increase the numbers benefiting from localised schemes for dealing strategically with embedded poverty within the jurisdiction and in underdeveloped countries.

- *The advancement of health or the saving of lives*

The specific recognition now given to this charitable purpose must again give a particular boost to those organisations involved in mass child inoculation programmes and in combating AIDS and other diseases in underdeveloped countries.

- *The advancement of citizenship or community development*

This new charitable purpose reflects government awareness of the capacity for the charitable sector to generate social capital and of past difficulties experienced by local community organisations in attaining charitable status. It can be seen as an acknowledgement that opportunities for civic engagement and for forming localised participative democratic forums are of value to government because of their capacity to contribute to the building of a more cohesive and civil society. Encompassing as it does activities that promote urban and rural regeneration, community capacity building, civic responsibility and good citizenship this provision should serve to encourage those organisations working with ethnic minorities and other deprived communities in this jurisdiction.

- *The advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity*

On the face of it this new composite charitable purpose marks an important development in charity law: it reflects a social policy commitment to making that law compliant with the principles of human rights and equality. In particular, it plainly indicates that government wishes to encourage the involvement of charities with ethnic and other minority groups so as to promote multiculturalism. The reference to promoting 'religious or racial harmony or equality and diversity' has a particular resonance in the present global context of a growing estrangement between Islam, or some of its followers, and the western democracies. It is a reference that also

[126] See Barnardos, *Then and Now*, 2005. Note, also, the End Child Poverty Now coalition of charities claim that 3.6 million children are still living in poverty and that infant mortality rates are 70% higher in low income areas than in more affluent areas.

encourages mediatory activity on behalf of those who in a more domestic context feel discriminated against for reasons of race, disability, age, sexual orientation etc. In addition, it would seem to accommodate activities intended to identify and address causes as well as effects of alienation or mutual estrangement. It has a strong preventative dimension.

However, clearly this new charitable purpose sits uneasily alongside the traditional and conspicuously unaltered common law constraints on political activity by charities and until we see how the tension between the two is resolved it is difficult to estimate the potential for this purpose to effect change in social policy.

- *The relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage*

This charitable purpose maintains the very traditional focus of charity on those in need for reasons that have attracted compassion, protection and resources throughout the duration and extent of the common law. It accommodates relief in the form of specialist advice, equipment, care or accommodation and specialist housing, care centres, drop-in centres, etc. While legislative specificity has its attractions it is difficult to see what, in this instance, it brings to the law when these groups have for some time been recognised as meriting charitable status. Possibly, the only advantage gained is political: a clear social policy statement that charity must direct its resources towards the needs of the most vulnerable in our society; and opening wide the door for further contractual arrangements with government to provide the necessary health and social care services.

- *Other purposes currently recognised as charitable or are in the spirit of any purposes currently recognized as charitable*

Finally, this default provision continues the function provided by the fourth *Pemsel* head although any extension is now statutorily tied to the rule that a new purpose must be analogous to one already existing and, by implication, the 'spirit and intendment' rule is discontinued. This purpose also carries over into the new legislative era the established capacity for partnership between government and charity by allowing for the continuation of charitable status in respect of those organisations that make a public service type contribution. So, the provision of public works and services and the provision of public utilities (such as the repair of bridges, ports, havens, causeways and highways, the provision of water and lighting, a cemetery or crematorium, as well as the provision of public facilities such as libraries, reading rooms and public conveniences) are all thereby endorsed as charitable. Organisations and gifts for the relief of unemployment, for the social relief, resettlement and rehabilitation of persons under a disability or deprivation (including disaster funds) and for the benefit of a particular locality (such as trusts for the general benefit of the inhabitants of a particular place) will similarly continue to be entitled to charitable status.[127]

[127] See also, Charity Commissioners, RR1a, *Recognising New Charitable Purposes*, London, 2001.

The Public Benefit Test

Removal of the public benefit presumption in respect of the first three *Pemsel* heads now requires bodies such as public schools, independent hospitals, religious organisations and those established under the rules relating to 'poor relatives' and 'poor employees' to demonstrate that their services are also to some meaningful degree accessible to the poor or otherwise socially disadvantaged if they are to acquire or retain charitable status. The meaning of public benefit as developed by the courts remains unchanged but all charities now have to pass that test.[128] It is difficult to predict at this point how such a strategic adjustment to the application of charity law will effect the future determination of charitable status. It would seem to confer a wide ambit of discretion on the Charity Commission to require, in its dealings with bodies such as the above, hard evidence of 'benefit' gained by the 'public'.

Conclusion

In the modern world, the law regulating charitable activity has become a significant measure for differentiating not only between totalitarian and democratic States, but also for differentiating between the latter on the basis of their relative values and social policy priorities. The particular such values and concerns of a government will inevitably be reflected in the legislative framework provided by it to define and regulate charitable activity and to justify related tax exemptions and other concessions. Charity law is among the more significant means whereby a government can orchestrate the public/private balance deemed to be politically appropriate in its management of social need. It is clear from the Preamble provisions and the enduring currency of the themes then addressed that the government in England & Wales has long been aware of this. The changes now introduced by the Charity Act 2006 will ensure that the government can continue to do so.

Charity law reform has served to accelerate the process of convergence between charitable purposes and the government's social policy agenda in this jurisdiction. It has realigned the basis of a partnership arrangement between government and charity that has subsisted, with varying degrees of emphasis as government responsibility for public benefit provision has waxed and waned, for at least the past 400 years. The realignment is evident in the balance struck between the different sets of legal functions that have for an equal length of time given effect to social policy aims and objectives (see, further, Chaps. 3–6). As will be seen in Part II, much the same social policy themes have transferred to other common law nations where not dissimilar processes of realignment between charity, the law and politics are also underway.

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[128] See Charity Commissioners, RR8, *The Public Character of Charity*, London, 2001 as revised in *Public Benefit – The Legal Principles*, 2005.

Part II
A Functional Approach to the Law as It Relates to Charity in the UK

Chapter 3
Law and Its Functions

Introduction

Having considered in Part I the concepts, the relationship between the parties and the politics of charity, this chapter prepares the ground for the detailed examination of individual legal functions that constitutes the bulk of Part II. It is of central importance to the book as it explains the thinking behind the classification of a set of legal functions that form the template subsequently used to conduct a comparative analysis of the correlation between charity law and social policy in selected jurisdictions.

The chapter begins with a broad exploration of the role of law in society and the means whereby it acquires validity and confers authority. It examines the principles that inform the law, the precedents that underpin it, the rules that express it and the institutions and agencies that give effect to it. It reflects on the inter-relationship between legal system and social policy purpose. The focus then moves to the sources of law where the emphasis falls more on the common law than on the statutory origins of the law as it relates to charity. It considers in some detail the relevant core rights in the European Convention and the implications arising from this added international dimension for charity law. This leads into the main section which deals more precisely with the different functions of the law as it relates to charity: the agencies that apply those functions and the intended outcomes are identified, introduced and explained as a precursor to the more detailed analysis that follows in chapters 4, 5, 6 and 7. This chapter provides the material for a template of legal functions which grounds the research and collation of data upon which the book is based (see, Appendix).

Law and Its Role in Society

Much has been written about law and its relationship with society.[1]

[1] See for example, Durkheim, E., *Rules of Sociological Method*, 1895, Free Press, New York, 1982.

K. O'Halloran et al., *Charity Law & Social Policy*,

Authority

The source of formal legitimate authority for all modern developed nations, such as those that constitute the case studies in Part III, lies with the legislature, the executive and the judiciary; albeit in varying degrees. The law expressing that authority becomes accepted currency for society only if it derives from at least one of these sources but, in the countries studied, it emanates from or is endorsed by all three.

In common with the duality in approach adopted by evolutionary theorists, academic lawyers tend to focus either on: the technical and empirical aspects of law, adopting a reductionist outlook that seeks to explain law as essentially a body of inter-related rules,[2] enforced with penalties by designated agencies for the common good; or on principles, drawn from religious belief, that are held to inform and govern the law which is in turn enforced and adjusted by agencies and rules to ensure compliance with those principles. These two camps, the schools of 'legal positivism' and 'natural law' respectively and their variants, which have produced able adherents and much controversy over a considerable period, are separated mainly by their differing views on the source of authority for law.

For all practical purposes, however, the validity of law comes from the source that promulgated it and from its endorsement thereafter by the courts and other authorised bodies that administer and enforce it. Whether that authority is in some sense inherent or whether it is conferred by habitual obedience, it only functions as law if endorsed and enforced through the courts.

Legal Positivism and Natural Law

The school of 'legal positivism' is based to some degree on the political philosophy of Thomas Hobbes,[3] of which Jeremy Bentham[4] and John Austin[5] have been leading advocates. Legal positivists hold that the validity and authority of law derives wholly from, is a technical response to and is explicable only in terms of, actual social circumstances. They argue that law in itself does not necessarily equate with morality or, as Simmonds comments, "the concept of law, for positivists, is a concept with no intrinsic moral import".[6] The 'natural law' school is more ideological and based upon early Christian teachings with such eminent exponents as St

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[2] See for example, Simmonds, N.E., *Central Issues in Jurisprudence: Justice, Law and Rights* (2nd ed.), Sweet & Maxwell, London, 2002, where he observes that "law is viewed by many as basically an exercise in rule-application", p. 2.

[3] See for example, Hobbes, T., *Leviathan*, 1668.

[4] See for example, Bentham, J., *Introduction to Principles of Morals and Legislation* (printed for publication 1780, published 1789).

[5] See for example, Austin, J., *The Province of Jurisprudence Determined*,1832.

[6] *Op. cit*., p. 5.

Thomas Aquinas,[7] Aristotle,[8] John Locke[9] and Emile Durkheim.[10] Natural law scholars maintain that validity and authority originate in moral principles that transcend the confines of any set of social circumstances and cannot be subject to or explained by wholly temporal terms of reference.

For present purposes, however, it is unnecessary to delve too deeply into the schisms and doctrinal disputes that have long enlivened traditional jurisprudence scholarship. Law, its application and contemporary effects, can perhaps be adequately explored without too much reference to scholarly debate on the sources of its validity.

Justice

The contention between the two above schools as to whether or not there is, necessarily, a connection between law and morality is at its most heated in relation to the concept of 'justice'. For natural law theorists the concept is inexplicable without an acknowledgement that a set of moral imperatives lie at its core with the corollary, as encapsulated in that often quoted dictum of Saint Augustine, '*lex iniusta non est lex*' (unjust law is not law). For legal positivists, as might be expected, justice is a more pragmatic affair often amounting to little more than adherence to the rule that like cases should be treated alike. This, of course, requires a common understanding of and agreement with the basis for making any such differentiation and a consensus that circumstantial factors should either play no part in mitigating the outcome or the part played will be strictly in accordance with accepted rules.

Arguably, both approaches depend on a common acceptance of the values employed to identify 'justice occasions' and measure the significance of a breach. To that extent justice functions as an attribute of its social context and is prone to variations from society to society and from time to time within the same society (e.g. acceptance of capital punishment). For present purposes it is the administration of justice with its focus on standards such as 'objectivity', 'impartiality', 'no one being above the law' etc. that is of importance. These standards and other contemporary interpretations of 'justice' currently find expression and enforcement across many societies through the rulings of the ECHR (see, further, below).

Law and Society

Both the above approaches are equally valid for the proposition that law is an important, perhaps the most important, means of promoting social cohesion, order

[7] See for example, St Thomas Aquinas, the *Summa Theologiae* (written 1265–1274).

[8] See for example, Aristotle, the *Corpus Aristotelicum*, 2nd century AD.

[9] See for example, Locke, J., *Two Treatises of Government*, 1689.

[10] *Op. cit*.

and continuity while also being a means for facilitating social change. The role of law and the mechanisms of the legal system for applying it have remained in place, conforming to much the same pattern throughout the common law world.

Social Cohesion

The identity of a society – meaning its culture, values and all other attributes that give it a sense of coherence and continuity, allow its members to share a common experience of 'belonging', and distinguishes it from all others – is crucial to its integrity and ultimately to its survival as a distinct entity. Acquiring that sense of identity, as in the case of most modern western democracies, is usually by gradual and complex developmental progression, although in other countries it is often imposed and maintained by force. However acquired, the law then plays a crucial role in legitimising the particular institutions, bodies, officials and processes that bind together the constituent elements of a society and enable it to function as a coherent entity. In a common law context, that law is based on principles of social justice, is intimately linked to the democratic political process and is increasingly governed by the provisions of fundamental human rights and other international conventions. No matter how respectable the genesis of a society, this does not prevent the law from being used by government as an expedient tool, which is now the case in most modern countries, for social control purposes and for managing the implementation of social policy objectives.

The law supports and sustains social cohesion by asserting and protecting a nation's culture and associated emblems, icons, language and traditions, by reinforcing its values and principles, by policing its boundaries and by setting the terms for negotiation with other societies. It can also do so by virtue of its integrative effect. The law facilitates pluralism by affording recognition and protection for the interests of minority groups through equality and non-discrimination legislation and the use of human rights provisions to accommodate diversity and achieve a balance in circumstances of competing rights.

Order

Maintaining order is the business of law. Given a prevailing political consensus, whether grounded on broad public support or repressive use of power, that the goals and institutional infrastructure of society are suitable, it then falls to the law to ensure the orderly working of the mechanics necessary for their continuance. The law establishes and maintains order through the enforcement of values-compliant conduct, by authorising judicial and other forums to arbitrate and mediate disputes and by establishing the related rules, processes and procedures.

There are those who claim that the net impact of the law is to levy sanctions to ensure predictability of future values-compliant conduct and that this therefore is in

reality its purpose.[11] Hart, however, counters by arguing that this interpretation confuses cause and effect and "obscures the fact that, where rules exist, deviations from them are not merely grounds for prediction that hostile reactions will follow.… but are also a reason or justification for such reaction and for applying the sanctions".[12] Either way it would seem that law inculcates a common habit of obedience, thereby providing and helping to preserve a level of social cohesion and order.[13]

Continuity

Every society, however established, has a vested interest in ensuring its own continuity. A key determinant of present social cohesion for any society, again regardless of how it was established, is the prevalence of a shared confidence that it will continue in much the same form into the foreseeable future. The absence of grounds for a shared belief in continuity is inherently destabilising.

Maintaining social cohesion requires the law to project its functions to some degree into the future. This it does by proscribing rules and procedures and by imposing related penalties. Together these increase the probability of values-compliant conduct and the predictability of social conformity in politically designated areas of social functioning. Rules operate to give society clearly understood common parameters for present conduct and a basis for confidence that such conduct will be similarly provided for in the future. As has been observed, it's not possible to "contemplate continuity without taking account of the factors relating to origin and continued existence and those relating to function (purpose) and functioning (operation)".[14]

- *Precedents*

An important means of facilitating continuity of principle and practice is through the doctrine of precedent whereby justification for a contemporary decision can be found in a similar one taken at an earlier date (see, further, below). This entrenched aspect of the law has an extensive history. Indeed, the validity of judicial precedent as a means of ordaining future action, was noted by Richard Fitz-Nigel in the 12th century who said "there are cases where the course of events, and the reasons for decisions are obscure; and in these it is enough to cite precedents".[15] For all common law societies, the doctrine of precedent is a crucially important means of providing continuity (see, also, Chap. 2).

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[11] See for example, Austin and Bentham.

[12] Hart, H.L.A., *The Concept of Law* (2nd ed.), Oxford University Press, Oxford, 1994, p. 82.

[13] *Ibid*., pp. 51–61.

[14] Dias, R.W.M., *Jurisprudence* (5th ed.), Butterworths, London, 1985, p. 21.

[15] Fitz-Nigel, R., *Dialogues de Scaccario*, 1177–1179; cited by Dias, *ibid*., p. 56.

- *Institutions*

Society aims to secure continuity partly through its institutional infrastructure: Parliament promulgates legislation prescribing for the government's unfolding social policy agenda; such legislation requires a range of government agencies to give effect to this policy; and the courts, tribunals, commissions, boards, registrars etc. are equipped with the powers predicted to be necessary to deal with any breaches. In this way the legal system, including its law reform bodies, serves to perpetuate society's established structures and policies in an ordered and coherent fashion but always subject to further change introduced by Parliament (see, further, below).

- *Principles*

The capacity of law to provide social continuity is greatly facilitated by the role of principles, whether elucidated and benchmarked by established precedent or prescribed by statute. For the purists of legal positivism, however, this was not the case. In their view law was concerned simply with applying the rules accompanied by sanctions for enforcement. The technical administration of rules was not to be obscured by matters of purpose or outcomes as the authority for determining those matters lay elsewhere; presumably in the field of moral philosophy or politics. A principle may provide a broad rationale for a judicial decision but would itself be given little judicial weight, as that decision could only be determined by adding up the facts of the particular case.[16] For legal positivists, principles with their connotations of moral imperatives were redolent of the natural law approach and therefore untenable.

However, the better view is that principles do have a most important role to play in guiding the application of law and in providing the underpinning necessary to extend that application beyond prescribed circumstances and so allow for continuity in legal practice. This is particularly the case with 'grundnorms', or overarching norms which command wide acceptance and are powerful enough to govern other principles, as posited by Kelsen (e.g. the 'public benefit' principle in charity law).[17] The moral content of a principle may justify its use in relation to a certain set of circumstances but its validity as a component of law comes from repeated judicial endorsement, through the doctrine of precedent, and institutional acceptance. Principles inject an added dimension to the law lifting it beyond being merely a technical response to a particular set of circumstances and setting standards for future conduct. As has been said "Solving recurrent and multiple coordination problems, setting standards for desirable behavior, proclaiming symbolic expressions of communal values, resolving disputes about facts, and such, are important functions which the law serves in our society, and those have very little to do with law's coercive aspect and its sanction-providing functions".[18]

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[16] See Dworkin, *Law's Empire*, p. 225.

[17] See for example, Hans Kelsen, *Pure Theory of Law*, 1934.

[18] Berman, H.J., Greiner, W.R. and Saliba, S.N., *The Nature and Functions of Law*, University Textbooks, 1996, p. 11.

Social Change

Law cannot remain impervious to social change whether triggered by technological development, population swings, environmental change, the acquisition or collapse of resources, the ideological shifts of politics or any other significant impact. Societies are constantly evolving by micro and macro steps and the law adjusts accordingly or, instead of being merely responsive, law may itself be the instrument for effecting social change as, for example, when used to change attitudes towards racism and other forms of discrimination and inequality.[19]

The capacity of law to remain synchronised with social change depends very much on the pace and extent of that change together with the availability of forums to mediate the application of law to a new set of facts. There will always be a tension between the role of law to maintain the status quo through rules, processes and institutions that aid predictability and its role as independent guardian of principles of justice which require it to be open and responsive to the unpredictable. In the latter case, whether this occurs as a consequence of a shift in government policy or in circumstances, the law has a role in providing a bridge for social change followed by legitimising that adjustment and then establishing the new rules, etc. necessary for a new process of integration.

Legal System and Social Policy

Why the law relates to its subject as it does, and how it gives effect to that rationale, are clearly politically determined. While applying the law is a matter for the judiciary, its content and the machinery for its application are the responsibility of government. The latter's social policy agenda will be evident in the laws it makes and in the manner and means whereby it gives effect to those laws. Over time, the accumulation of legislation produced by successive governments comes to constitute a repository of laws retained by the legislature and deployed by it to set parameters for the creation of new statutes which, unless explicitly repealing them, must conform with established legislative provisions. Similarly, over time, the body of accumulated law and the machinery for its application reflect the continuing social policy concerns of government.

Leaving aside the clear differences between democratic and non-democratic nations in priority, prescription and enforcement of policy provisions, the main strands of social policy and the matching legal machinery for their implementation, largely survive the attention or inattention of successive governments and legislators. The pace and spread of regulatory intervention has, however, changed considerably in recent years. In modern developed nations, the law has come to be used

[19] For example, the Race Relations Act 1976 in England & Wales.

by government as a powerful management tool to regulate at many different levels an ever-increasing slice of social life.[20] Legal system and social policy are now, more than ever, intimately linked.

Legal System

Law both authorises and operates within a system that exists to give effect to its functions. A legal system[21] comprises a body of law drawn from different sources – including the common law, the legislature and international treaties and Conventions – the institutions authorised to implement that law, and the formal processes, procedures, forums and officials for applying it. For all societies – whether primitive, theocracies, collectivist, or modern democracies – a legal system has an integrative effect: ordering the relationships between government and the governed, validating the institutional framework, balancing and adjudicating between different sets of interests and structuring that society's internal and external relationships for the present and foreseeable future. More simply, "a modern legal system is thus understood as a distinct set of mechanisms of government, employing rationally developed doctrine, created, interpreted and applied by State agencies".[22]

- *Set of mechanisms*

For the purposes of the common law nations surveyed in Part III, the set of government mechanisms giving effect to the law relating to charity is formed by an institutional framework that includes the judiciary, the Attorney General, the tax collecting agency etc. For these component parts to operate as a system, however, there has to be clarity and consistency of role in the institutions involved and a level of co-ordination, but in both respects there is considerable jurisdictional variation. For example, the "relative independence of the judiciary from both executive and legislative organs of the State"[23] noted by Parsons as a characteristic of developed western nations, makes the legal system susceptible to a lack of cohesion which varies in accordance

[20] For examples of attempts to use law to effect social change see: the prohibition laws in the US in the 1920s and 1930s, which failed to change alcohol abuse; *Brown v. Board of Education of Topeka* (1954) 347 US 483 a decision which was successful in outlawing racial segregation in US schools; and the Fair Employment (Northern Ireland) Act 1976 which created equality of employment opportunity for Catholics and Protestants.

[21] See further, Hart, H.L.A., *The Concept of Law* (2nd ed.), Clarendon Law Series, Oxford University Press, Oxford, 1994, pp. 100–123.

[22] Cotterrell, R., *The Sociology of Law: An Introduction*, Butterworths, London, 1984, pp. 48–49.

[23] Parsons, 1960, p. 144.

with the level of judicial involvement in it; with corresponding jurisdictional variation in the law as it relates to charities. Where the responsibility for determining charitable status is vested in the tax collecting agency, the consequent tension between its duty to maximise tax revenue and its obligation to facilitate a contemporary interpretation of charitable purpose can also be a source of uncertainty. For all common law nations, the fact that a fresh judicial precedent established outside the jurisdiction can have a capacity to change the law within it introduces potential for disruption.

- *Doctrine*

Internal consistency for a legal system is provided by the body of law it draws from, by the standards, principles and unifying concepts that guide administration, by the judicial precedents created and by the custom and practice of the professionals that operate within it. For charity law, the concepts of equity, the definitional concepts of 'public benefit' and 'charitable purpose' and the cross-jurisdictional acceptance of most past judicial precedents and some present applications of the 'spirit and intendment' rule offer a doctrinal basis for such consistency. As with the application of the legal system in any other subject area (e.g. family law), consistency is greatly enhanced by the manner in which law is mediated through the knowledge and experience of a specifically trained cohort of professionals. As regards the legal system as it relates to charities, however, there are relatively few professionals and they tend to have indifferent and varied training.

- *State agencies*

Charity law is largely administrative law. This requires the legal system to rely heavily upon State agencies to establish and maintain a consistent and co-ordinated regulatory framework. The number of such agencies is often considerable with some jurisdictional variation. In England & Wales, for example, the following may all have some involvement: the Charity Commission; Inland Revenue, Customs and Excise; the Office of Wills and Probate; the Rates Dept.; the Companies Office, and others. Moreover, the legal system also relies to a varying degree in different jurisdictions on the self-regulatory mechanisms of the charitable sector: voluntary rather than State agencies may often carry responsibility for ensuring efficient practice and procedures, issuing guidance and developing effective systems of governance and administration. The number and range of agencies involved are not conducive to facilitating a co-ordinated legal system for regulating charities.

Social Policy, Law and Legal Function

In theory, the social policy priorities of government should be evident in substantive legislation and be given effect through legal functions that assign appropriate powers and duties to State agencies. Government social policy, legislative intent and legal function would then form a hierarchical, coherent and seamless sequence with

the outcome of State agency decision-makers reflecting the government's stated social policy priorities. A logical and fully intended correlation between the primacy of a legal function and the particular aspect of social policy addressed by that function could thus deliver on a government's stated objective. Such a theoretical model, however, seldom if ever translates into practice.

Rendering legislative intent into appropriate and effective legal function can be problematic. New legislation has to operate in conjunction with a plethora of other statutes, becomes quickly outdated, is mediated through a legal system that may well re-interpret that intent and it can be operationally governed by authority drawn from other sources of law (see, further, below) or become subject to ideology. The effectiveness of modern legislation very often depends not so much on its provisions, which can be brief and broadly stated, but on the accompanying bulky ancillary rules and regulations in which the intended legal function can be dissipated. Legislation, in whole or part, can be negated by rulings of the ECHR, be simply ignored or, being unenforced, be allowed to lapse. The courts or other forum may – by responsible use of discretion, or by error or willfulness – subvert legislative intent by misinterpreting key provisions. One legal function can be fatally undermined by the operational weighting given to another.

In the context of charity law, the relationship between the legal system and social policy is on the face of it a good deal less complicated than in the many other areas of law. Some of these (e.g. family law) have now become so swamped with legislation, fragmented by separate sets of rules and procedures and colonized by different species of professionals that they have lost all coherence. Centuries of legislative inertia coupled with adherence to fixed definitional benchmarks, governing principles and analogous judicial precedents have, for better or worse, served to keep the legal system as it relates to charity anchored largely on addressing the social policy agenda as initially stated in the Preamble (see, further, Chap. 1). The continuity is evident also in the role played by the legal functions of charity law as they give effect to that agenda (see, further, below).

Sources of Law: The Common Law and Statute Law

The common law nations retain and share, to a varying degree, a legacy of law inherited by virtue of their participation in the British Empire. On these foundations each has since built towering legislative edifices which in some cases have assumed a life of their own and for contemporary operational purposes have lost touch with their common law origins. Certain areas of law, however, including charity law, have virtually escaped legislative attention and survived into the 21st century with a relatively intact body of law shaped by the principles established by judicial precedent over the past four centuries. Until the recent series of national law reform programmes, charity law continued to be almost entirely dependant upon its common law sources. To a considerable extent, due to the weight of accumulated judicial precedent, this is likely to remain the case despite the statutory statementing

of definitional matters, the introduction of more stringent regulatory provisions and the codification of charitable purposes.

The Common Law

Established by judicial precedent in the courts of England & Wales over many centuries, the common law traveled with the armies of the Crown throughout the world to take root in the countries that came to constitute the British Empire. In these nations, most core areas of law such as contract, tort and property now exist not in statute, except in terms of periodic modifications, but are to be found primarily in the common law.[24] Unlike the civil law, which was adopted by the countries of mainland Europe and to a varying degree by many other countries, the common law was derived not from statute but from tradition, custom and judicial precedent as embodied in rules and interpreted and applied by the judiciary adopting an inquisitorial approach on a case-by-case basis. It continues to form the legal context for charity law in the main developed nations, including those examined later in this book, and retains the following hallmark characteristics.

Judge Made Law

The common law was referred to as 'judge made law' in recognition of the fact that when traveling on 'assizes' and dealing in the main with law and order issues, the judiciary often had to administer justice in an ad hoc fashion. This distinguished it from the prescriptive approach required by statutory law which relied mainly on an adjudication of the facts in accordance with relevant legislative provisions. The expression also refers to the weight placed on the value of precedent, the hallmark of the judiciary in the common law courts. Any development of the law in the common law courts was required to be in accordance with established cases.

Following the amalgamation of equity and the common law,[25] with the requirement that the principles of the former should have priority, the judicial approach balanced the common law reliance on precedent with equitable principles and in particular made use of judicial discretion as practiced by the Court of Equity (see, further, Chap. 6). Thereafter, in the absence of specific legislative provisions, any progressive development to ensure that the law was adjusted to fit the circumstances of the presenting case relied entirely on judicial decision-making.

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[24] See Sir William Blackstone, *Commentaries on the Laws of England*, first published in 1765–1769.

[25] The Supreme Court of Judicature Act 1873 unified the court systems of equity and the common law.

Emphasis on Rights and Duties of the Individual

The common law has always placed an emphasis on the rights and duties of the individual. This, perhaps the single most distinctive common law characteristic, found expression in the catch phrase 'no writ no action'. A petitioner could only succeed in lodging a plea in court if he could fit his complaint within the narrowly defined terms of a particular writ; the range of standard form writs available was limited. On conclusion of the hearing, the range of judicial disposal options was again tightly constrained. Should the plea succeed and the court find in his favour, it quite often lacked the authority necessary to ensure that the plaintiff's rights were enforced.

This approach, coupled with a fixed reliance on precedent has, in some parts of the common law world, resulted in a bar on class actions; rights and duties fall to be determined by the courts on a case-by-case basis.

Extension of Status by Analogy Rather Than Principle

In the common law any extension of status is by analogy rather than by principle. This approach of listing subjects for legal redress, permitting subsequent empirical extension by analogy, has itself proved to be problematic. A grindingly logical approach led to the law being constrained by the rigidity of the specified where case law developments could only be accommodated by painstakingly distinguishing the facts of new cases from the old. Most importantly, it prevented the emergence of unifying principles which could have brought more cohesion. The result can be seen in a reliance on endless lists and categorisation, with a consequent patchwork effect rather than a coherent body of law built around definitional statements and governed by clear principles.

Respect for Social Institutions

The common law would seem to be predicated on maintaining the status quo in society: most particularly it embodies a respect for social institutions and sources of authority by giving recognition to the government of the day, the place of religion, the role of the Church and the powers and duties of the judiciary. It is not concerned with matters of public policy or contemporary politics but requires an almost feudal respect for king and country and for the institutions of the land.

Enforcement by Financial Penalties

The common law preoccupation with rules abstracted from precedents led to an intricate classification system that matched offences with penalties enforced by a

tariff of fines. The business of levying and collecting fines required law enforcement to be concerned as much with administrative matters as with justice and adjudication. The role of the law in applying rules, collecting funds for the Exchequer and doing so by means of a complex administrative system, has a considerable common law history (see, further, Chap. 5).

Statute Law

Unlike the essentially ad hoc approach, occasioned at random by the facts of a case, with which the common law addressed contemporary social issues, statute law has always been more precisely targeted and politically directed. In all modern democratic common law nations, the will of Parliament as expressed by the government of the day and embodied in legislation is usually proscriptive rather than enabling and intended to advance a particular social policy. The independence of the judicial system together with the discretionary exercise of judicial powers, however, results in that will being interpreted by the courts in the light of existing law. Except in those areas where a statute prescribes specific rules, the common law approach prevails requiring the statute to be strictly interpreted subject to existing established precedents. Moreover, the will of Parliament is now further circumscribed by international conventions (see, below).

Formative Legislation

Statute law consists, in the main, of seemingly endless pieces of legislation each of which comprise provisions directing a technical adjustment of the regulatory framework in respect of a designated social activity. Occasionally the pace or extent of change in that area of activity is such that it requires a legislative response which is more fundamental than technical in nature. Such formative legislation tends to constitute a body of provisions that by consolidating existing law and comprehensively addressing both pressing and predicted issues establishes a new baseline for the relationship between law and its subject matter.

Formative legislation may well include provisions that state governing principles. By incorporating common law principles (e.g. the ‘public benefit’ test in charity law) or by overriding them (e.g. removal of the rule that a trustee must not derive any fiduciary advantage from their appointment, also in charity law) such legislation establishes or denies the continued authority of associated case law. The Charities Act 1960, for example, was such a landmark piece of legislation for the law relating to charity not just in England & Wales but in many common law countries where it was taken as the model for a similar domestic statute.

Vesting Authority

Legislation performs the important role of empowering the agencies designated to give effect to the law. It provides the source of authority, circumscribing the powers and duties of the courts, tribunals, officials and various agencies charged with administering statutory provisions. In relation to charities, for example, the roles and responsibilities of Inland Revenue, the Charity Commissioners and the courts are assigned by statute. The type and distribution of authority variously vested is crucial and clearly reflects the social policy priorities of government. For example, the fact that in England & Wales the power to determine charitable status rests not with the Inland Revenue but with the Charity Commissioners, who in turn share jurisdiction with the High Court, represents government policy that the State should relate to the charitable sector primarily through a developmental rather than a policing legal function, unlike the position elsewhere in the common law world where the role of the revenue agency continues the traditional primacy of the policing function (see, further, below).

Sources of Law: Fundamental Human Rights and Charity Law

The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the 'European Convention') provides for the recognition and protection of most basic civil rights. It is automatically binding on all signatories to the Treaty of European Union (i.e. on all 27 members of the EU) and on all others that have opted to become signatory nations, is enforced by the European Court of Human Rights (the Convention's dedicated court) and by the European Court of Justice. It has an important role as a stopgap for deficiencies in the domestic law of signatory nations, providing a safety net of imprescriptible fundamental legal rights to catch those victimised by the fault or default of their public bodies. These rights include: the right to life; freedom from torture; freedom from arbitrary arrest; the right to a fair trial; the right to respect for private life; freedom of religion; freedom of expression and; freedom of association and assembly.

The Convention brings an added and internationally applicable dimension to the largely adjudicative role of national public bodies, which are usually limited in their practice and procedures to adducing facts and applying the prescribed remedies as required by legislative provisions. This core body of rights cross-cuts all civil and criminal law, generating principles and standards that have an equal bearing on both judicial and administrative forums. Gradually, over time, as practice across all signatory nations conforms to the stratifying effect of governing principles established by the ECHR, a level of harmonisation is being achieved between the laws of those nations. This in turn is having the

knock-on effect of introducing a degree of conformity on related social policy matters.[26]

Moreover the Convention is not just an inert safety net, activated only in response to a breach of rights. The ECHR has ruled that the public authorities of signatory nations, in keeping with the Convention ethos and principles, must also act proactively to prevent possible breaches of rights and to promote opportunities for their enjoyment. Convention awareness is beginning to generate a culture of respect for rights which transcends the initial minimalist approach that focused on avoiding or identifying and then responding to breaches of Articles. A more positive developmental approach is emerging whereby public authorities are now examining their policies and procedures to Convention proof them so as to pre-empt the circumstances giving rise to a potential breach. In short, among the consequences of Convention influence on the shaping of national law is the development or reinforcement of a preventative legal function.

For present purposes, the relevance of the Convention is threefold. Firstly, some rights in themselves carry particular implications for charity law. Secondly, the differentiation in weighting accorded to these rights – some freestanding and mandatory others conditional – represents a corresponding differential in the importance attached to the legal functions being given effect and provides a model for similar treatment by signatory nations. Thirdly, the Convention impacts upon charity law by introducing standards as benchmarks for the operation of legal functions. In all three respects, the rulings of the ECHR have brought additional clarity, direction and emphasis to challenge and shape the domestic law of signatory nations.

Charities and the European Convention

Charities, by virtue of their public benefit dimension, are required to be Convention compliant as also is the application of charity law, which within signatory nations must accord with Convention rights and the principles and benchmarks established by the ECHR.

Public Bodies

The public benefit criterion for charitable status, within a common law context, brings charities within the definition of ‘public bodies’ and therefore, to the extent

[26] For example, ECHR rulings on the rights of the parties involved in the adoption process (e.g. entitlement of a child to family life and the rights of same gender adopters) are having significant and uniform consequences for how signatory nations define ‘family life’ and for related social policy adjustments to family support services etc.

that they perform public functions, they are subject to the Convention.[27] That such bodies come within the jurisdiction of the European Court was clearly stated by it in *Foster v. British Gas*:[28]

> A body, whatever its legal form, which has been made responsible pursuant to a measure adopted by the State, for providing a public service under control of the State and has for that purpose special powers beyond those which resulted from the normal rules applicable in relations between individuals is included among the bodies against which the provisions of a Directive capable of having direct effect may be relied upon.

Moreover, as charities increasingly assume or share responsibilities that were previously borne by government bodies, so they are also increasingly liable to scrutiny to ensure their activities are fully Convention compliant. There are no definitive means of establishing which charities, or which of their activities, come within the 'public authority' umbrella as each case turns on its own facts though, as noted in Tudor, "the activities of the charity may be so enmeshed with those of a public authority as to be public functions".[29] However, there are some guidelines. Most obviously any body established by statute or Royal prerogative, or vested with statutory powers or to which such powers have been delegated, or is performing a public function or service or the actions of which are amenable to judicial review is within the definition. The extent to which a charity is dependent upon funding from a government department will also, to that extent, indicate that it is controlled by and is functioning as an arm of that public authority.[30]

The Public Benefit Test

In the common law tradition, application of this test differentiates between those bodies (and gifts/activities) entitled to charitable status and those that are not. The test, however, has neither been amenable to a standardised definition nor has it been applied uniformly in relation to all charitable purposes: it has had a more rigorous application to the fourth *Pemsel*[31] head than to any of the other three; in some countries, such as Ireland, there are statutory provisions preventing its application to organisations (gifts/activities) under the third head. The application of this common law test has now been affected in some jurisdictions, but not in others,

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[27] For a fuller discussion, see Warburton, J. and Cartwright, A., 'Human Rights, Public Authorities and Charities', *The Charity Law Practice Review*, 6: 3, 2000.

[28] [1990] 3 All ER 897.

[29] See, Warburton, J., *Tudor on Charities* (9th ed.), Sweet & Maxwell, London, 2003, p. 393.

[30] See, *National Union of Teachers v. Governing Body of St Mary's Church of England (Aided) Junior School* [1997] 3 CMLR 630 and also see *R v. Panel on Take-overs and Mergers, ex p Datafin plc* [1987] 1 QB 815.

[31] *Income Tax Special Purposes Commissioners v. Pemsel* [1891] AC 531.

by the introduction of new statutory definitions of 'public benefit' and 'charitable purpose' (see, further, Part III). In addition, there is a problem in relation to those anomalous classes of case where the test is held to be satisfied even though the beneficiaries are strictly confined by locality or by a private nexus such as 'founder's kin', employer's dependants etc. which essentially rest on discriminatory decisions.

Any such discriminatory application of a test, capable both of a broad and uncertain range of interpretation while favouring some charitable purposes over others, will be non-Convention compliant unless sufficient justification for its preferential application can be adduced. Arguably, the only sure way of achieving compliance is for each signatory common law nation to follow the example set in England & Wales, and embed similar provisions in its statutory law framework for charities, defining the test and requiring it to be applied objectively and equally in relation to all charitable purposes.

Convention Rights and Charity Law

For the present purpose of exploring the role of legal functions in the relationship between charity law and social policy the rights that seem most relevant are those to freedom of association and assembly, of expression, of religion, of access to justice and the right to family life.

Freedom of Association

The Convention provides in Article 11 that:

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests …

The right of citizens to form, join or not to join associations constitutes a hallmark of democracy,[32] indeed the very existence of non-government organisations is conditional upon this right. Its significance has been recognised by the legislatures of democratic States for centuries and the constitutions of most countries in the world contain articles

[32] The International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights both guarantee freedom of association internationally, as does the Helsinki Accords of the Organisation (former Conference) on Security and Cooperation in Europe (OSCE). Also, see, the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

protecting freedoms of association and assembly.[33] The Convention requires all laws and practice not only to be compliant with this right but that governments also ensure they positively promote it[34]; they must 'both permit and make possible'[35] opportunities for citizens to enjoy this fundamental right.

The ECHR in *Sidiropoulos and Others v. Greece*[36] pointed out that the right to form an association is an inherent part of the right set forth in Article 11, even if that Article only makes express reference to the right to form trade unions. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is "one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning".[37] The ruling of the court was important on an international basis because it emphasised that the existence of minorities and different cultures in a country was an historical fact that a "democratic society" had to tolerate and even protect and support according to the principles of international law. This principle has clear application both to indigenous minority culture groups (e.g. the Aboriginal people of Australia) and to the more prevalent socially marginalised groups (e.g. the disabled, mentally ill etc.) within modern democratic countries.[38]

The right to freedom of association, of fundamental importance to charities and a necessary precondition for civil society, attracts powerful support from the ECHR which requires signatory states to be proactive in preventing circumstances arising that could cause a breach. It may be subject to lawful limitations imposed by the State but as the ECHR stated in the *Sidiropoulos* case the exceptions in Article 11(2) are to be construed strictly. The case law illustrates the particular vigilance and stringency of the court as it polices Article 11 rights.

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[33] See for example: Canada and the Canadian Charter of Rights and Freedoms where the freedom of association has become an entrenched right (see, further, Chap. 13); the USA and the First Amendment to the US Constitution which reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances" (see, further, Chap. 12).

[34] *Wilson and Palmer v. United Kingdom* (2002) 35 EHRR 20.

[35] See *National Union of Belgian Police v. Belgium* (1975) 1 EHRR 578, para 39.

[36] *Sidiropoulos and Others v. Greece* (26695/95) 27 EHRR (1998).

[37] *Ibid*., para 40.

[38] See also, *The Socialist Party of Turkey and Others v. Turkey* (1998) 27 EHRR 51, *Partidul Communistilor (Nepeceristi) and Ungureanu v. Romania* (application no. 46626/99) (2005), *Refah Partisi v. Turkey* App. Nos 41340/98 and 41342/98, 13 February 2003 and *RSPCA v. Attorney General and Others* [2002] 1 WLR 448.

Freedom of Expression

Article 10 of the Convention states that:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers …[39]

Again, this right is one of the hallmarks of a democratic society and is particularly important for the socially disadvantaged who need to present their case and argue for the resources necessary to improve their circumstances. Access to the leverage provided by media exposure is an essential means of courting public sympathy in contemporary society. The traditional common law constraints on political activity by charities are therefore of considerable interest in the context of this right. Certainly, the promotion of human rights is now a charitable purpose and by logical extension, in the absence of evidence that such activity is incompatible with the values of a democratic society, the presumption may be that advocacy on behalf of the socially disadvantaged for a change in law or social policy is to be construed as a legitimate charitable purpose.[40]

The ECHR has upheld both the right to lobby for a political party by distributing leaflets prior to an election[41] and the right to receive information relating to birth control[42] as protected by Article 10. In *Steel and Morris v. the United Kingdom*,[43] which concluded the longest running court case in English history (generally referred to as the "McLibel Case"), the ECHR ruled that two environmental activists (members of London Greenpeace) convicted of defaming the McDonald's Corporation in 1997 were denied freedom of expression (Article 10) by the British government and did not receive a fair trial (Article 6). The court expressed the view that in a democratic society even small and informal campaign groups, such as London Greenpeace, had to be able to carry on their activities effectively. There existed a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment. The free circulation of information and ideas about the activities of powerful commercial entities, and the possible "chilling" effect on others were also important factors to be considered in this context. The ECHR ordered Britain to pay the campaigners a total of €35,000 and offer them a retrial. This case is an important benchmark for the rights of individuals and small groups to actively campaign for peaceful change and to disseminate their views through the media.

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[39] See also, Article 19 of the International Covenant on Civil and Political Rights.

[40] The debate as to whether *McGovern v. Att-Gen* [1982] Ch 321 would now be decided differently, in the light of the Human Rights Act 1998, continues.

[41] *Bowman v. United Kingdom* (1998) 26 EHRR 1.

[42] *Open Door and Dublin Well Woman v. Ireland* (1992) 15 EHRR 244.

[43] (application no. 68416/01) (2005).

Article 10 is the most heavily qualified provision in the Convention. This, presumably, reflects the intent of those who framed it that it should not have the clear unequivocal weighting ascribed to other rights as it must be enjoyed subject to and balanced against the similar rights of others. This balancing exercise is apparent in the discretionary element evident in the case law which reveals the ECHR adopting a mediating/adjustment approach rather than a strictly policing role in relation to enforcement. A test frequently applied by the ECHR, when considering restrictions placed on an aggrieved party's entitlement under Article 10, is whether they could be 'justified in a democratic society'.

Freedom from Discrimination

Article 14 of the European Convention provides that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[44]

The right not to be discriminated against, traditionally associated with religious differences, is a most important aspect of life in a democratic society. Its wide social policy significance is demonstrated by its general extension to afford protection from discrimination on the grounds of gender, age, race and from differences arising from other such status designations.[45] However, this provision has no independent validity as it comes into play only after a substantive Convention right has been breached.

It must be shown that an applicant is: subject to a difference in treatment from others in a similar situation; in the enjoyment of one of the rights protected by the Convention; which difference cannot be objectively and reasonably justified, having regard to the concepts of legitimate aim, proportionality and margin of appreciation.[46] The effects of indirect discrimination were examined in *Thlimmenos v. Greece*[47] where the ECHR considered the effect of a blanket ban, imposed by a professional body, on the employment of anyone with a criminal record. The case concerned an applicant who had such a record due to his objection, on religious and conscientious grounds, to military service. The court ruled that the ban had a disproportionate effect on the applicant and could not be justified. For minority groups, this is an important decision as it recognises that Article 14 also operates to afford protection

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[44] See also Article 26 of the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women.

[45] See for example, the ongoing case of *D.H. and Others v. the Czech Republic* in which the applicants, 18 Roma children forced to attend racially segregated schools in the Czech Republic, challenged the practice of educational discrimination – widespread throughout Central and South East Europe – in which Roma children are routinely placed in schools for the mentally disabled, regardless of their actual intellectual abilities.

[46] See for example, *Lithgow v. United Kingdom* (1986) 8 EHRR 329, *Fredin v. Sweden* (1991) 13 EHRR 784, *Abdulaziz, Cabales and Balkandali v. United Kingdom* (1985) 7 EHRR 471.

[47] *Ibid*.

from legal provisions that, although applied equally to all, have an adverse effect and discriminatory consequences for a few.

- *Religion*

Within the common law tradition the advancement of religion has long been a most important charitable purpose carrying at least an implicit presumption (explicit in the statute law of some countries such as Ireland) that gifts to and the activities of religious organisations are for the public benefit and therefore, ipso facto, they are charitable. The interpretation of 'religion' within this tradition has suffered from being construed in narrow terms, has often been applied inconsistently and has tended to exclude non-theistic religions. The Convention now requires that any interpretation of 'religion' be applied objectively, have reasonable justification[48] and be non-discriminatory; any differential treatment must comply with strict standards.[49] This legal benchmark for non-discrimination in matters of religion is underpinned by Article 14 and supported by Article 9 (the right to freedom of thought, conscience and religion) and by Article 1 of the First Protocol (the right to peaceful enjoyment of property). It has the effect of requiring governments and other public bodies to give parity of recognition to Christian and non-Christian religions such as Buddhism and Hinduism.

Again, this right is severely compromised. The fact that it has no independent validity, becoming operative only after a substantive Convention right has been breached, does impose a serious restriction upon unilateral enjoyment and places the ECHR in the position of having to conduct more of a balancing exercise rather than a straightforward policing of possible breaches.

Freedom of Thought, Conscience and Religion

Article 9 of the European Convention states:

> 1. Everyone has the right to freedom of thought, conscience and religion …[50]

The first time this Article was invoked to limit State action with regard to freedom of religion was in 1993[51] and, except for two cases, until 1995 the European Commission on Human Rights has always denied applications from religions that

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[48] See for example, *Tsirlis and Kouloumpas v. Greece* (1997) 25 EHRR 198. Also see, the *Belgian Linguistic Case* (1968) (No 2) 1 EHRR 252 where the ECHR held that there must be an objective and reasonable justification for differential treatment and this will only exist where there is a 'legitimate aim' for the action and where the action taken is 'proportionate' to that aim.

[49] For a fuller discussion, see, Quint, F. and Spring, T., 'Religion, Charity Law & Human Rights', *The Charity Law & Practice Review*, 5: 3, pp. 153–186, 1999.

[50] See also, Article 18 of the International Covenant on Civil and Political Rights.

[51] See Gunn, T.J., 'Adjudicating Rights of Conscience Under the European Convention on Human Rights' in Van der Vyver, J.D., & Witte, J.D. (eds), *Religious Human Rights in Global Perspective: Legal Perspectives*, Martinus Nijhoff, The Hague, 1996.

could be called "new", "minority", or "nontraditional".[52] However two important cases have recently raised the profile of Article 9: *Kokkinakis v. Greece*[53] and *Manoussakis v. Greece*.[54]

In the *Kokkinakis* case it was held that the Greek anti-proselytism law, as applied to Mr. Kokkinakis, impermissibly interfered with his freedom of religion. In the *Manoussakis* case the court stated: "The right to freedom of religion … excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate".

These cases affirm the significance of freedom of religion for modern democratic states and indicate the nature and extent of its implications for future social policy. Given that many contemporary socially disadvantaged groups, communities (e.g. in Northern Ireland) and cultures (e.g. Islam) coalesce around a set of religious beliefs, it is clearly a matter of considerable importance that all public bodies are required to impartially facilitate the right to practice in accordance with religious beliefs. The increase in population displacement from underdeveloped to developed nations will itself almost certainly be accompanied by an increase in occasions when migrants seeking cultural affirmation will need to have recourse to Article 9. However, Article 9 offers only weak protection for this right and has rarely been invoked, suggesting that it only equips the ECHR to deploy it in a supportive rather than a policing role.

Access to Justice

This is a composite right that addresses such matters as that: relevant information is available and can be readily understood; appropriate processes and proceedings exist and are accessible; there is an opportunity to avail of such resources as may necessary for effective representation; the proceedings are conducted independently, fairly, with a right of appeal; and that the outcome is fully and fairly enforced. Access to justice is central to the rule of law and a prerequisite for the recognition and enforcement of other rights. It is a right of fundamental importance for the socially disadvantaged with widespread implications for social policy.

- *The right to a fair trial*

Article 6 of the European Convention states:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ….[55]

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[52] *Ibid*., p. 311.

[53] (A/260-A) (1994) 17 EHRR 397.

[54] (18748/91) (1996) 21 EHRR CD3.

[55] A similar provision exists in Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

For the socially disadvantaged, the right to a fair hearing of grievances relating to their civil rights is crucially important. The ECHR has warned that there can be no justification for taking a restrictive approach to this right.[56]

Due process

An essential element of a 'fair hearing' is the provision of appropriate legal representation which may include access to legal aid.[57] The concept of 'equality of arms', introduced by the ECHR, "implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent".[58] These and such other requirements as 'access', 'impartiality', 'lack of delay' and 'public hearing' ensure that the process (whether judicial or administrative) does not add further to the disadvantage suffered by those attempting to assert their civil rights. In *Steel and Morris v. the United Kingdom*[59] (see, also, above), it was held that cost can be an obstacle to accessing justice. The ECHR found that the denial of legal aid to the applicants had deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with McDonald's. There had, therefore, been a violation of Article 6(1). This decision clearly provides an international benchmark for the right of those who are championing a social cause to access the State resources necessary for them to represent their cause and have a fair hearing. The principle applies equally to the decision-making processes of all public bodies be they courts or administrative bodies.

Article 6 rights are deemed to offer essential protection for all citizens and the ECHR is empowered to effectively police any breach.

The Right to Respect for Private and Family Life

Article 8 of the European Convention states:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence. …[60]

Essentially this right aims to provide protection for an individual against arbitrary action by public authorities[61] but it has been applied and upheld in a wide variety

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[56] *Moreira de Azevedo v. Portugal* (19990) 13 EHRR 721.

[57] *Airey v. Ireland* (1979) 2 EHRR 305.

[58] See *Dombo Beheer BV v. Netherlands* (1993) 18 EHRR 213, para 33.

[59] (application no. 68416/01) (2005).

[60] See also, Article 14 of the International Covenant on Civil and Political Rights 1966.

[61] See *Kroon v. Netherlands* (1994) 19 EHRR 263.

of diverse circumstances. It places an obligation on the court to ensure that the rights of an individual are properly secured and are protected against infringements by other individuals[62] while also requiring that public authorities exercise fairness in their procedures. Article 8 of the Convention, together with Article 6, are construed as imposing on a court not only a duty of watchful vigilance, to ensure that the rights enumerated are properly taken into account when determining proceedings, but also as imposing an obligation to be satisfied that any orders then made are given effect in a manner which continues to satisfy those rights.[63] This combination of Articles, arguably, places a positive obligation on the State, once it is made aware of a breach, to intervene and secure the safety of the subject. In effect it has no discretion, once it is put on notice it must follow through with proactive steps.

The prohibition on public authority interference is permissible where to do so is: (a) in accordance with the law; and (b) is necessary in a democratic society[64] (i) in the interests of national security, public safety or the economic well-being of the country, (ii) for the prevention of crime and disorder, (iii) for the protection of health or morals, or (iv) for the protection of the rights and freedom of others.

- *Procedural fairness*

Article 8 carries an inherent requirement that States ensure their public authorities have and implement procedures that provide citizens with a fair hearing on matters concerning them. For example, Article 8 rights will be breached where a public authority has failed to sufficiently involve the subject in a decision-making process affecting his or her interests[65] or failed to disclose information that may have had a material bearing on the outcome of their case.[66]

- *Sexual orientation*

Managing the tension between protecting the traditional legal position of the heterosexual, monogamous, marital family unit while accommodating the rights of same gender couples has grown to become a high profile social policy issue for many common law nations as with other modern western societies. It is increasingly evident in the context of adoption. The ECHR case law relating to Article 8 has developed an unequivocal approach to this matter: the definition of 'family' is not to be restricted to one based on marriage, it may include unmarried couples, non-marital

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[62] See *Airey v. Ireland* (1979) Series A No 32, 2 EHRR 305.

[63] See *Re W and B; Re W (Care Plan)* [2001] EWCA Civ 757, as reported in 31 Family Law 581.

[64] See *Olson v. Sweden (No 1)* (1988) 11 EHRR 299 where it is explained that to be justifiable such interference must be "relevant and sufficient; it must meet a pressing social need; and it must be proportionate to the need".

[65] See for example, *Buchberger v. Austria*, Application No. 32899/96, December 20, 2001.

[66] See for example, *TP and KM v. United Kingdom* [2001] 2 FLR 549. Also, see *Re M (Care: challenging decision by local authority)* [2002] FLR 1300.

children and lesbian or homosexual relationships depending as a matter of fact on the existence of actual close family ties.[67]

- *State surveillance*

The protection that Article 8 affords to private life extends also to curbing unwarranted and intrusive State surveillance techniques which can be deployed to monitor the activities of the socially marginalised as well as suspect criminals.[68] The defence of 'justification' for conduct that would otherwise constitute a breach of human rights is restricted to situations where that conduct is governed by clear and specific regulatory provisions.

Article 8 rights are of great importance for socially marginalised groups and individuals, generate a high proportion of total applications heard by the ECHR and have a broad social policy application. The principles applied to the circumstances of those prevented from enjoying rights of privacy and family life because of their sexual orientation apply also to those unable to do so for reasons associated with, for example, disability, mental health, learning disability etc. This Article may well in time also be brought to bear on the circumstances of those such as 'asylum seekers' who are consigned by public authorities to living conditions that do not respect their rights to a private and family life. It provides the ECHR with effective powers for policing the public service provision of government bodies.

Convention Benchmarks and Legal Functions

Certain benchmarks of social justice are emerging from Convention case law as key building blocks for international human rights jurisprudence. They are being gradually absorbed into the practice and procedures of public bodies and are assuming a governing influence on the functions of the law, as these relate to charity and other matters, in all signatory states. In addition, the Convention gives permission not just to challenge State institutions but also to access and use those institutions in order to increase the effectiveness of that challenge.

Benchmarks

Convention benchmarks include, for example, the key standards of 'necessity', 'proportionality' and 'equality of arms' against which relevant national legislative provisions and decision-making processes of all democratic signatory States can be tested. They have potentially far-reaching implications for the socially disadvantaged and more broadly for social policy.

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[67] See for example, *Smith and Grady v. United Kingdom* (2000) 29 EHRR 548 and *Goodwin v. United Kingdom* (2002) 35 EHRR 447.

[68] See for example, *Malone v. United Kingdom* (1984) 7 EHRR 14 *and Halford v. United Kingdom* (1997) 24 EHRR 523. Also, see, *Niemietz v. Germany* (1992) 16 EHRR 97.

- *Necessity*

The ECHR in *Olson v. Sweden (No 1)*[69] explained that to be justifiable, State interference in family life must be "relevant and sufficient; it must meet a pressing social need; and it must be proportionate to the need". Frequently the ECHR can be seen applying the test – is this form of State intervention necessary in a democratic society?

- *Proportionality*

The ECHR looks at the interference complained of in the light of the case as a whole to determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". An application of the proportionality test to the third of the four *Pemsel* heads, the advancement of religion, might conclude that it is breached by the narrow common law interpretation of what constitutes a 'religion' (the exclusion of non-theistic religions such as Buddhism[70]).

- *Equality of arms*

The principle that the State should ensure that those presenting or defending a case are not disadvantaged, relative to the opposing party, by inadequate resources is clearly of considerable importance to the socially disadvantaged.[71]

Relevance for Legal Functions

The ECHR responds to applicants affected by the actions or inactions of public bodies by protecting, asserting and balancing those rights provided for in the European Convention. Its main impact, however, remains largely undetected: by modifying the decision-making processes of national public bodies, particularly the courts, the rulings of the EHCR operate to embed Convention compliant conduct within signatory states and obviate the need for it to hear further applications on that subject.

- *Re-balances the weighting of legal functions*

It is probable that over time the influence of the ECHR will be seen in an adjustment of the common law weighting differential accorded to the legal functions of charity law. The protection function in relation to rights (e.g. to freedom of association, of speech and right to non-discrimination), for example, is being steadily ratcheted up relative to national assertion of the police function (e.g. in respect of restricting the ability to establish an association to represent a region's cultural identity).[72] Also, the

[69] (1988) 11 EHRR 299.

[70] *R v. Registrar General Ex p. Segerdal* [1970] 2 QB 697.

[71] See for example, *Steel and Morris v. the United Kingdom* (application no. 68416/01) (2005).

[72] See *Sidiropoulos and Others v. Greece* (26695/95) 27 EHRR (1998).

repeated references in ECHR rulings to the proportionality principle indicates its preference for giving an increased weighting to the mediation/adjustment function.

- *Broadens the range of charitable purposes*

Convention rights together with the principles established by ECHR rulings have broadened the role of legal functions in relation to charity, as it has in other areas, resulting in an extended list of charitable purposes. That purposes such as the advancement of justice etc., previously denied charitable status, have now been recognised as charitable by common law nations (sometimes by legislative provision) is directly attributable to Convention influence.

Functions of the Law as They Relate to Charities

Law relates to charity in many different ways. Criminal law, civil law and international Conventions may all have a bearing on some aspect of a charity's activities while often it is the intricacies of company law that are of most pressing interest. The primary source of regulatory authority, however, lies with charity law. The legal functions of this law, clearly evident from the outset, have held fast over the past 400 years though the emphasis now given to each varies somewhat from country to country while the general tendency towards government and charity partnerships is having a broadly destabilising effect on functional balance and in some cases is threatening to erode functional effectiveness. A central task of this book is to examine the jurisdictional variation in emphasis given to these functions and their methods of application, and to explore the extent to which any such variation may correlate with national social policy objectives.

Charity and the Role of Legal Functions

Charity law relates to charities through a set of core functions. These legal functions are a mix of those developed through centuries of exercising the wardship jurisdiction for the support and protection of charities (and such other vulnerable subjects of the King as children and lunatics) and those required to provide a level of scrutiny and deter abuse within the tax regime. The institutional infrastructure for applying charity law functions is crucial to their effectiveness and national variations in type of institution and distribution of agency responsibilities reveal a great deal about the differences in jurisdictional priorities.

In short, the present functions of charity law, though derived largely from a common law heritage of judicially forged principles and precedents also owe a good deal to statute law, are intimately linked into the institutional infrastructure and are increasingly making important concessions to Convention law – as outlined above.

Protection

This, the original legal function, had its beginnings in the law of trusts and in the concern of the Court of Equity to ensure that the value and purpose of a donor's gift was respected after his death; both for the encouragement of future donors and because of the sacred nature of a trust with its initial strong religious associations (see, further, Chap. 4).

- *Principles*

The law has leant protection to charities by measures such as exempting it from the rule against perpetuities and building in rules such as the requirement that a charitable gift be exclusively for charitable purposes.

- *Agencies*

The special protection accorded to charities in law was recognised at a very early stage by entrusting responsibility for safeguarding charitable trusts to the Attorney General. The High Court, the Charity Commission and trustees also had and continue to have a role in protecting charitable interests. By establishing through important precedents, the particular characteristics that came to define 'charity' and distinguish it from other types of associations and organisations, the judiciary made a significant contribution towards protecting the integrity and autonomy of charities.

- *Effective application of function*

As charitable status became more attractive, carrying as it did a prestigious hallmark of social respectability and an accompanying entitlement to generous tax exemptions, so this legal function has become more sophisticated in terms of guarding the distinction between charity and other non-profit models. However, the effectiveness of the protective function has generally tended to diminish in all common law nations as court involvement in charitable matters has steadily eroded, the number and range of non-profit entities other than charities have proliferated and as more charities become incorporated and thus move outside the reach of the Attorney General. In the absence of an agency such as the Charity Commission, this legal function can only be given effect by agencies for which it is at best a secondary concern.

- *Balance with other functions*

The spectrum of activities qualifying for charitable status is rapidly increasing as governments everywhere seek to share responsibility for public service provision with organisations that are equally keen to assist if by so doing they can acquire charitable tax exemption. Moreover, equality and human rights legislation and other social justice provisions are gradually extending the range of activities qualifying as contemporary charitable purposes. The weight now given to this function, however, in relation to its capacity to protect the integrity and independence of charities, is declining. Arguably, this may be attributable to a lack of political will to impede a process that lessens the public service burden on government.

Policing

The legal function of policing, which from at least the introduction of taxation[73] has existed alongside protection, plays a prominent role in preventing abuse in relation to charities (see, further, Chap. 5). The loss of tax revenue occasioned by an award of charitable status ensured that all governments placed policing at the heart of their regulatory framework and in all countries, except for England & Wales, responsibility to police any entitlement to charitable exemption was vested almost exclusively in the tax collection agency.

- *Principles*

The public benefit test – coupled with the *Pemsel* ruling, the usual definitional matters, the body of established precedents and, where relevant, the 'spirit and intendment' rule – have for centuries formed the basis of the policing function, applied to determine eligibility for charitable tax exemption and detect abuse, throughout the common law world.

- *Agencies*

In all countries, except for England & Wales, the tax collection agency is and always has been the lead body vested with statutory responsibility for applying this function and does so through rigorous application of the 'public benefit' test, 'spirit and intendment' and 'exclusively charitable' rules. In that jurisdiction the Charity Commission, as gatekeeper to charitable status, is the agency for determining whether organisations and their activities comply with the definition of 'charity' and in doing so tends to rely less on a defensive application of rules and more on a broad interpretation of contemporary 'public benefit'. Other agencies – such as Customs & Excise, the Rateable Valuation Office, the Registrar of Companies, the Probate Office, etc. (or their national equivalent) – may also carry responsibilities for determining entitlement to charity related relief.

- *Effective application of function*

The existence of a register of charities, whether on a voluntary or statutory basis, criteria for registration and a designated government agency charged with responsibility for monitoring/supervising the activities of charities, are essential preconditions for an effective policing function. Its effective application hinges on matters such as the existence of powers available for regulating modern fundraising and ensuring standards of transparency, accountability and human rights compliance. Also relevant are the existence of any restrictions imposed on extra-charitable activity (e.g. trading, political activity, contract culture, profit distribution etc.) and the extent of any anti-terrorism measures (tracking funds, surveillance etc.).

- *Balance with other functions*

The primacy of the policing function is generally demonstrated by the statutory coupling of eligibility for charitable status with eligibility for tax exemption and the

[73] Introduced in England & Wales by the Income Tax Act 1799.

vesting of responsibility for determining both solely with the tax collecting agency. Again, the strategic and statutory separation of these responsibilities in England & Wales (also presently in Scotland and forthcoming in Ireland and Northern Ireland) and their allocation to the Charity Commission and the Inland Revenue respectively, provides an exception to this approach.[74] The principles and case precedents generated by the relevant agencies, illustrate national differences in the priority given to the policing function as does the spectrum of activities qualifying for charitable status and the taxes/rates/donation incentives qualifying for exemption.

Mediation and Adjustment

This legal function, a legacy of the approach developed in the Court of Equity with an ameliorating effect on the more traditional adjudicative focus of the common law, has in recent centuries become an extremely important operational aspect of charity law (see, further, Chap. 6). The varying extent to which jurisdictions provide for this function, as apparent from institutional arrangements and case law, demonstrates the corresponding political will to facilitate the capacity of charity to address contemporary social issues.

- *Principles*

In a common law regulatory environment, it is only when principles such as the 'public benefit' test and the 'spirit and intendment' rule are employed to introduce a contemporary interpretation of charitable purpose that pressing social policy issues such as the causes of poverty and cultural affirmation for minority groups can be addressed. Without this capacity, charity law tends to ossify around traditional established precedents. Charity law reform is, in some countries and then to a varying degree, extending the definition of 'charity'. The extent and type of extension made to the *Pemsel* classification of charitable purposes indicates national social policy concerns and provides a means for conducting the comparative analysis of jurisdictional differences in Part III. Of similar significance is the varying degree of flexibility with which the doctrine of *cy-près* is applied to save and redirect the resources of failing or defunct charities.

- *Agencies*

The availability and willingness of relevant agencies (e.g. the Charity Commission) to broaden the interpretation of charitable purposes to meet emerging patterns of social need is critical in terms of the potential impact of this legal function.

- *Effective application of function*

This depends primarily on whether or not the courts or a specific agency have responsibility and capacity to provide ongoing intervention in charitable practice

[74] Also, see Singapore (Chap. 10) and New Zealand (Chap. 11) where a distinction approximating the UK approach has been made.

and a decision-making ability to develop charitable purposes. Other factors, such as the existence of a range of appropriate legal structures able to provide a flexible means of channelling charitable resources and mechanisms for giving effect to donor's intent when objects cannot be achieved (e.g. saving gifts using *cy-près* and other schemes), also increase effectiveness. The capacity and willingness of relevant agencies to develop new methods of charitable intervention (e.g. community development) is evidenced in national case law.

- *Balance with other functions*

In general terms, the importance attached to the mediation/adjustment function is predetermined by the political priority given to the policing function. In the absence of a specially designated agency (e.g. the Charity Commission) to offset the traditional revenue driven concerns of charity law, it is improbable that much weight can be given to the mediation/adjustment function.

Support

In modern democracies the coercive, or rule enforcing, effect of law tends to be balanced by supportive or enabling provisions (e.g. in family law, social welfare law, human rights law etc.). This being 'soft' law, however, such enabling statutory provisions are often expressed in general and discretionary terms and are inadequately resourced. The same supportive dimension, always evident in the law relating to charity, has in recent years found expression more in policy statements, administrative arrangements and in the representation provided by umbrella non-governmental organisations than in the formalities of law.

- *Principles*

The courts have traditionally leant their support to charities and the common law contains many examples of supportive case law precedents and principles (e.g. the 'benignant construction' rule).

The recently forged principle of partnership between government and charity has in many countries been underpinned by formal arrangements that set out the supportive principles and policy framework for ongoing relations between both parties.

- *Agencies*

The existence, as in England & Wales, of a supportive statutory framework with explicit provisions and a named agency dedicated to specified support services provides the most incontrovertible evidence of a commitment to this legal function. In other jurisdictions, such as Ireland, the primary agency with statutory responsibility for charities and their activities can by default be largely supportive due a lack of power to give effect to any other approach. Very largely it is the existence or otherwise of a supportive network of umbrella non-governmental organisations that determines whether charities operate in a supportive environment.

- *Effective application of function*

An explicit statutory duty requiring a named and appropriately resourced, independent agency, such as the Charity Commission in England & Wales, to provide specific services (e.g. assisting with administration, educating professionals and the general public, disseminating information, providing operational advice, promoting good governance and other measures to encourage the efficiency of charities and permit the development of innovative methods of charitable intervention) gives the best assurance of effective support being available for charities. More generally, support for the sector finds expression in fundraising, the contribution of volunteer effort and government grants, all of which are dependant upon public confidence in the sector and therefore require a healthy and pervasive sense of civic responsibility coupled with a transparent and accountable regulatory system. Statutory measures that facilitate charitable fundraising by establishing a National Lottery, regulate the role of professional fundraisers and provide a range of generous tax concessions for charities and donors, all increase the effectiveness of this legal function. Similarly, the availability of a range of appropriate legal structures (unincorporated associations, trusts, companies) and modern bespoke incorporated entities, provide flexibility and increase effectiveness.

- *Balance with other functions*

The clear statutory separation of the support and policing function (in accord with the *audi alteram partem* principle)[75] is, arguably, the only way to ensure that political concerns for the latter's effectiveness do not detract from the need to construct an appropriate policy and resource framework for the former. The weight given to this function is also evident in the persistence of provisions, such as the common law restraints on political activity and addressing the causes of poverty, that inhibit effective philanthropic intervention.

A Template of Legal Functions

Drawing from the above material, a template has been compiled of core legal functions (see, further, Appendix). This research tool is employed to examine, in Part III, the correlation between charity law and social policy and to undertake a comparative analysis of selected common law jurisdictions on that basis.

Conclusion

Legal system and social policy do not necessarily operate in harmony, effectively nor as intended. The role of law in society, however, does have some attributes that provide enduring consistency: establishing the rules that bring order, infuse a sense

[75] Let no one be a judge in his own cause, or the conflict of interest rule.

of social cohesion, facilitate continuity and bridge social change. Charity law, because of its unique origins and developmental history shared with many of the world's leading nations, is not only vested with the capacity of such attributes but has also been shaped by the legal system and social policy that prevailed at the time of its gestation. This has allowed its legal functions, as initially defined by that system and policy, to survive relatively intact.

Across all common law nations, both legal system and social policy as they relate to charities, retain the imprint of England at the time of the ascendancy of Charles I to the throne. Charity law itself, by remaining true to its common law origins in that jurisdiction and by accreting layers of judicial precedent shared with all similar jurisdictions has, over the intervening centuries, survived to impart a degree of contemporary uniformity in content and in the application of its legal functions. Equally, this has served to also perpetuate the related strands of social policy together with their respective prioritization and mechanisms for enforcement. The tension between legal functions, fixed to give effect to a social policy agenda stated in the Preamble, continues to be evident.

The absence of any formative legislative initiative that might have disrupted the shared common law heritage readily permits recognition of that set of legal functions and allows the compilation of a template to be applied to examine jurisdictional differences in their application in selected common law nations. In the following chapters that constitute Part II, the individual functions and their respective roles in giving effect to distinct strands of social policy will be examined in more detail.

Chapter 4
Legal Functions: Protection

Introduction

Ensuring protection has been a fundamental function of the law relating to charity since mediaeval times when the Crown assumed responsibility for charities, lunatics and wards. It was then recognised that a gift dedicated for the public benefit was especially vulnerable to abuse or misuse by those to whom it was entrusted for that purpose after the donor's death. The need to supervise charities and provide protection for the value and purpose of a donor's gift remained a prominent concern of judiciary and legislators for most of the history of charity law. Particularly in England & Wales, this concern centred on developing trust principles and on reinforcing the duties of trustees. In more recent years, as a range of administrative agencies absorbed aspects of the protection function and the exclusivity of the trust as a legal form for charity has gradually given ground to corporate structures, other legal functions have become more important. Protection, however, for gifts selflessly dedicated for the benefit of the public, continues to require enforcement.

This chapter focuses on the concern in charity law to ensure protection for a charity. It begins by examining the origins of this function in the *parens patriae*[1] responsibilities of the Crown and traces its subsequent development in the context of trust law where the role of trustees played an important part in clarifying the nature of protective duties. It then considers the emergence of a contemporary protective framework in which the *parens patriae* responsibilities devolved to the Attorney General and assesses the extent to which that office, the High Court and the Charity Commission have been able to give effect to them. It notes the fact that the protection afforded to charities through the offices of trustees and Attorney General is tied to trusts and consequently their availability to offer protection has been linked to the prevalence of the trust in the common law world as a legal form for charities: in jurisdictions such as England & Wales where the trust form has been dominant, the reliance on protection from such sources has been strongest;

[1] See Seymour, J., '*Parens Patriae* and Wardship Powers: Their Nature and Origins', *Oxford Journal of Legal Studies*, 14: 2, 1994, pp. 159–188.

K. O'Halloran et al., *Charity Law & Social Policy*,

elsewhere, such as Australia, this has not been the case. The practice implications arising from this are later tracked in Part III while the resulting interpretational differences are further considered in Chap. 14.

Attention is then given to the judicial development of the protection function both in the national courts and in the European Court of Human Rights. The chapter concludes with a brief review of the charity law reform process in England & Wales, considers the outcomes and their implications for the future of the protection function and the related social policy issues.

Origins of the Protective Function

The roots of the protective jurisdiction of the courts in relation to charities, their property and activities, lie in the ancient *parens patriae* responsibilities of the Crown.

Parens Patriae

The powers of *parens patriae* are best understood as the paternal rights and duties of the King in respect of those of his subjects who, being without legal capacity and therefore unable to defend their interests, had a right to his protection. This jurisdiction, as exercised by the Lord Chancellor on behalf of the Crown, came to be administered by the Court of Chancery[2] and was used to determine issues relating to trusts, charitable and otherwise, long before the introduction of the 1601 Act.[3] The essentially protective nature of the *parens patriae* jurisdiction, illustrated most clearly in the exercise of wardship, has consistently characterised the judicial approach throughout many centuries and continues to colour the contemporary relationship between law and charities.

Origins of Powers

It seems probable that the ancient *parens patriae* powers originated as an incident of the feudal system of tenure. From perhaps the 14th century, the monarch – as ultimate landlord to whom all lords, yeomen, serfs and others owed allegiance and paid fealty – was responsible for those declared *sui juris* and who because they lacked the necessary capacity could neither protect their own interests nor fulfill their feudal duties. As Lord Somers LC in *Falkland v. Bertie* explained:[4]

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[2] See for example, Hackney, J., 'The Politics of the Chancery', *Current Legal Problems*, 1981.

[3] The Statute of Charitable Uses 1601 (Statute of 43 Eliz. 1 Chap. 4.).

[4] (1696) 2 Vern 333 *per* Lord Somers LC, p. 342; 23 ER 814, p. 818.

> In this court there were several things that belonged to the King as *Pater patriae*, and fell under the care and direction of this court, as charities, infants, idiots, lunatics, etc., afterwards such of them as were of profit and advantage to the King, were removed to the Court of Wards by the statute; but upon the dissolution of that court came back again to the Chancery.

This assertion that the *parens patriae* powers were in time transferred to the Court of Chancery finds support in subsequent case law[5] (see, further, Chap. 4).

Nature of Powers

The jurisdiction of the Crown "as *Pater Patriae*, as a Father over his Children" was noted in *Shaftesbury v. Shaftesbury*[6] and subsequently explained by Lord Esher MR in *R v. Gyngall*:[7]

> That was not a jurisdiction to determine rights as between a parent and a stranger, or as between a parent and a child. It was a paternal jurisdiction, a judicially administrative jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent.

While there has been much debate as to whether the powers of *parens patriae* were originally parental or protective in nature, it is beyond doubt that it became a protective jurisdiction with the capacity to sanction exercises of authority that can be much broader than that of a parent and can override parental authority.

Parens patriae is not limited to powers of protection it also provides powers of control. The wardship jurisdiction, exercised mainly in respect of children who are made wards of court, is the most common manifestation of *parens patriae*.

Subject of Powers

In practice it was the property rights of those defined as "charities, infants, idiots, lunatics, etc" that attracted an exercise of the *parens patriae* powers: protecting property from abuse or misuse by officials entrusted to safeguard it was the main concern.

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[5] See for example, *Eyre v. Shaftesbury* (1723) 2 P Wms. 103; 34 ER 659. Between 1540 and 1660 the Court of Wards and the Court of Chancery operated in parallel and thereafter, following the abolition of the former, it would seem that its jurisdiction was subsumed within that of the latter. In the words of Lord West "… all wardships which are beneficial for the wards must return to this Court, as to their original fountain" (*Morgan v. Dillon* (1724) 9 Mod 135, p. 139; 88 ER 361, p. 364).

[6] (1725) Gilb Rep 172, p. 173; 25 ER 121.

[7] [1893] 2 QB 232, p. 239.

Extent of Powers

The extent of the *parens patriae* powers, like its origins, are uncertain, but it is clear that they extend beyond the parental duty of care and protection to warrant the taking of positive steps to safeguard the interests at risk. Nor, it would seem, are these powers and duties limited to those of a responsible parent. This jurisdiction derives from the prerogative powers of the Crown and constitutes the court's broad inherent jurisdiction. As Lord Mackay LC has pointed out "in the Government's view wardship is only one use of the High Court's inherent *parens patriae* jurisdiction."[8] Inherently vested in the monarch, exercised by the Chancellor, delegated to the Court of Chancery and then administered by the High court and the Attorney General, these powers have been described as "theoretically limitless"[9] because they "spring from the direct responsibility of the Crown for those who cannot look after themselves".[10]

Parens Patriae and Chancery

The *parens patriae* responsibilities of the Crown, as exercised by the Lord Chancellor, came to be administered by the Court of Chancery[11] and were used to determine issues relating to trusts, charitable and otherwise, long before Parliament first legislated on such matters (see, also, Chap. 6). Following the abolition of the Court of Wards by the Tenures Abolition Act 1660, it would seem that the *parens patriae* powers were then wholly vested in Chancery; a fact alluded to by Lord Hardwicke LC in *Butler v. Freeman*[12] when he noted that "this Court … has a general right delegated by the Crown as *pater patriae*, to interfere in particular cases, for the benefit of such who are incapable to protect themselves." Probably the jurisdiction of this court in relation to trusts was an extension of its established remit over uses which it had exercised from at least the 15th century. It had also developed the administrative machinery and expertise necessary to resolve, or sometimes supervise, matters relating to financial and property disputes. By the 18th century the Court of Chancery had an established protective jurisdiction in respect of matters involving children, lunatics and fraud.

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[8] See Lord Mackay LC, 'Joseph Jackson Memorial Lecture – Perception of the Children Bill and Beyond' *139 NLJ*, 505, 1989, p. 507.

[9] *Re W (a minor) (medical treatment)* [1992] 4 All ER 627, p. 641, *per* Donaldson, L.J. Also, see, *Re X (A Minor) (Wardship: Restriction on Publication)* [1975] 1 All ER 697 "no limits to that jurisdiction have yet been drawn", *per* Denning, L.J., p. 705.

[10] *Ibid*., p. 411.

[11] *Falkland v. Bertie* (1696) 2 Vern 333 *per* Lord Somers LC, p. 342; 23 ER 814, p. 818. Also, see *Eyre v. Shaftesbury* (1723) 2 P Wms. 103; 34 ER 659.

[12] (1756) Amb 301, p. 302; 27 ER 204.

The Law Relating to Trusts, Charitable Trusts and Trustees

Trust law is essentially concerned with the protection of rights in property or, more accurately, with protecting the simultaneous exercise of rights held by different persons in the same property.

Origins

Feudal England was a society based on land ownership. Established in the years following the Norman conquest, feudalism structured hierarchical social relations; determined the rights and services of citizens; and, by allowing for estates to devolve to descendants, it perpetuated that society. The orderly and predictable devolution of private property, in accordance with male primogeniture, was then essential for maintenance of public order. For centuries, land tenure underpinned feudalism and provided the basis for ordering society.

Feudalism ensured that land could not be wholly and absolutely owned by anyone; every 'owner' held their rights as tenant to their lord. All such ownership was vested in the King as the ultimate lord and sovereign of his people and territory. Fealty to a lord and ultimately to the King, were tied to an estate in land. Estates could be either freehold or leasehold. Several variations of the former were possible: an estate in 'fee simple' conferred a good title in perpetuity; a 'life estate' limited the title to the life of a particular person; an estate '*pur autre vie*' gave title to one person 'for the life of another; and an estate in 'fee tail' restricted inheritance to the linear descendants of a particular person. Leasehold estates were defined and differentiated by length of tenure; weekly, monthly, yearly etc. Estates in land formed an ascending hierarchy, consisting of gradations of title from serf to lord, with final authority of ownership and disposal being vested in the King. This feudal system of land tenure provided the basis for imposing taxes and dues.

Mortmain

The concept of a 'use' rather than an estate in land was developed in response to the rigidity of feudal land taxes. The transference of land to another for the latter's 'use' was intended to avoid the liability that attached to actual ownership. It was employed not only to circumvent tax liability but also to facilitate gifts to religious bodies which, prior to the Statute of Mortmain 1391, would have been prohibited. Gifts of the latter variety were commonly made by landowners in return for masses being said for the salvation of their souls. It was a technical device, much abused and unenforceable through the common law courts, and of great concern to the

lords who saw the basis for the feudal system being eroded and for whose protection the mortmain statutes were introduced.[13]

From the perspective of the rulers, the growing practice of mortmain posed a significant threat to the feudal system. This Norman French term *morte meyn* or 'dead hand' referred to the practice whereby a donor would tie-up his lands in perpetuity by gifting them to the Church. It was customary for a penitent donor to make such a gift to the Church for a pious use coupled with a request that prayers or masses be offered for the salvation of the donor's soul. Such gifts for pious uses were recognised as charitable gifts in the years prior to the Reformation. As Coke has explained:[14]

> The lands were said to come to dead hands … for … by alienation in mortmaine they lost wholly their escheats and in effect their knights services for the defence of the realme; wards, marriages, reliefes and the like; and therefore was called a dead hand, for that a dead hand yeeldeth no service.

Once property passed into the 'dead hand of the Church' it remained there as the latter prohibited any alienation of its property. Much land came to be owned by the Church on the basis of 'tenure by frankalmoign'; the gift of property having been made subject to a condition that it be held for the use of specified persons, usually the donor and/or his family. The fact that perpetual corporations such as the Church could hold large tracts of feudal land in perpetuity had consequences for feudalism and wealth creation and from the time of Magna Carta in 1215 had attracted State prohibition.[15] Feudal rulers regarded a grant of land to the Church by a subject as incompatible with the latter's feudal duties and sought to curtail this practice through successive statutes.[16] The systematic avoidance of statutory constraints allowed the Church and particularly the religious orders to acquire power, land and political influence. The growing breach between Church and State culminated eventually in action by Henry VIII against the Catholic Church and its powerful land-owning religious orders. Among the consequences of the ensuing Reformation was the ending of any possibility of making inalienable grants of property to the Church in exchange for spiritual benefits.

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[13] See for example, the Statute of Mortmain 1279 (7 Edw 1, St 2), the Statute of Westminster III 1290 (18 Edw 1) and in particular the Statute of Mortmain 1391 (15 Ric 2, c 5).

[14] See Coke, Co. Litt. 2B.

[15] Clause 43 of Magna Carta provided:

> "It shall not be lawful from henceforth to any to give his lands to any religious house and to take the same land again to hold of the same house: nor shall it be lawful to any house of religion to take the lands of any and to have the same to him of whom he received it. If any from henceforth give his lands to any religious house, and thereupon be convict, the gift shall be utterly void, and the land shall accrue to the lord of the fee."

[16] *Op. cit*., n. 4.

The Rule Against Perpetuities[17]

The law relating to property has always sought to facilitate freedom of disposition. This emphasis has often been in conflict with the intentions of landowners to ensure that their estates are preserved intact within the family for future generations. The rule against perpetuities expresses this tension. It was formulated by the courts to constrain the practice whereby some settlors contrived to tie up their estates indefinitely by providing for gifts of property to vest at some distant time in the future.

The Rule Against Inalienability[18]

This rule also deals with settlor attempts to circumvent the same perpetuity period. It provides that a trust comprising property which might remain inalienable for the duration of the perpetuity period will be void. It is concerned with the duration of an interest already vested rather than with the time at which vesting occurs. The common law would not tolerate any legal contrivance designed to render property inalienable from the rightful descendants of owners because "they are against the reason and policy of the law and therefore not to be endured".[19] Since the Statute of Quia Emptores 1290[20] the judiciary set limits on the ability of property owners to impose constraints on future holders of that property. As Maudsley observed:[21]

> There was no need to ask why inalienability was evil. It had always been so treated. And it is reasonable to accept that a society in which property was inalienable would be stagnant and unproductive.

The Law Relating to Trusts and Charitable Trusts

The evolution of the feudal concept of the 'use'[22] into its subsequent manifestation as a 'trust' was hastened by the Statute of Uses 1535[23] which gave statutory authority

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[17] See for example, Morris, J.H.C. and Leach, W.B., *The Rule Against Perpetuities* (2nd ed.) and Gray, *The Rule Against Perpetuities* (4th ed.).

[18] See, Delany, H., *Equity and the Law of Trusts in Ireland* (2nd ed.), Round Hall Sweet & Maxwell, Dublin, 1999, pp. 271–273

[19] See *Duke of Norfolk's Case* (1863) 3 Cas in Ch 1 at 31, *per* Lord Nottingham.

[20] 18 Edw. I cc.1–3.

[21] Maudsley, R.H., *The Modern Law of Perpetuities*, Butterworths, London, 1979, p. 220.

[22] It was Maitland who first remarked that 'the modern trust developed from the ancient use'.

[23] For further information, see Holdsworth, *History of English Law*, IV, pp. 438–439; also, see, Keeton & Sheridan, 'The Development of the Law of Trusts' *The Law of Trusts*, *op. cit*., pp. 21–35.

to the approach developed in the Court of Chancery where the transaction involved freehold land. Trust law provides the means whereby property may be held by one person for the benefit of another. As explained a century ago

> "… if I give an estate to A upon condition that he shall apply the rents for the benefit of B, that is a gift in trust to all intents and purposes"[24]

and more recently by Keeton and Sheridan:[25]

> A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit accrues, not to the trustee, but to the beneficiaries or other objects of the trust.

This recognition that property can be divided into two components – the legal ownership and the beneficial ownership – is essentially a legal device providing for two different types of ownership in the same property. The trustee is the person who legally owns the property while the beneficiary is the person who benefits from the property. Legal recognition and enforcement for such a separation – of responsibilities vested in those controlling property from the rights of those ultimately entitled to enjoy the value of that property – has become extremely important and is now extensively used in many different forms.

The Charitable Trust

A charitable trust is a species of trust. There are a number of different species within that genre. Each is therefore, to a greater or lesser extent, governed by characteristics common to all. A basic point of distinction between all trusts rests on a public/private division. With the exception of charitable trusts, all trusts are private in nature as they are established for the benefit of specific individuals or for small and well-defined classes of persons. Primarily, it is the fact that charitable trusts are established for purposes rather than for persons which sets them apart from other forms of trust. As has been observed:[26]

> …trusts for purposes rather than for human beings are rarely valid. They are regarded as difficult, perhaps impossible, to enforce, uncertain in their ambit and generally beyond the capacity of the court to control. In addition, they will very often contravene legal rules against creating perpetuities and inalienability … To this general doctrine the great exception is *charitable trusts* … the distinctive feature of the charitable trust is that it is *for the public benefit*.

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[24] *Attorney General* v. *Wax Chandlers Co*. (1897) LR 6 HL 1, p. 21.

[25] See, Keeton & Sheridan, *The Law of Trusts* (12th ed.), 1993, p. 3; a definition first formulated in a much earlier edition. Also, see: Hart (1899) 15 LQR 294; Underhill and Hayton, *The Law Relating to Trusts* (14th ed.), 1987, p. 1; and Pettit, *Equity and the Law of Trusts* (7th ed.), 1993, p. 24.

[26] *Ibid*., p. 131.

The fact that charitable trusts are an exception to the rule against perpetuities, and often to the rule against inalienability, is a characteristic as old as the common law itself.[27] Following the Statute of Charitable Uses 1601, Chancery adopted and applied the Preamble as its guide in determining charity law cases. If a donor's gift or bequest could be defined as coming within the parameters of this 17th century statute then Chancery would grant it charitable exemption from the rule against perpetuities. For the next two centuries and more the courts of Chancery developed a body of charitable trust jurisprudence (see, further, Chap. 6).

Charitable Trusts and Charitable Corporations

In England the abiding suspicion with which government regarded charitable corporations, whether lay or secular, was such that for centuries trusts remained the preferred legal structure for charities. Among the consequences of this high dependency upon trusts in England & Wales, unlike other jurisdictions such as the US and Australia, was that the role and responsibilities of trustees, particularly as regards the protective function, assumed a correspondingly higher profile in charity law. Also, initially and for several centuries, the jurisdiction of the High Court and the Attorney General in respect of charities was presumed to be specific to charities in trust form. For most of its existence, therefore, charity law and the body of related jurisprudence has been governed by trust principles; pretty much exclusively so in England & Wales but also, though to a lesser extent, in jurisdictions such as the US and Australia.

Trusts and Other Non-profit Models

The commitment to the trust as the preferred legal form for charity was accompanied by judicial determination to protect the distinction between charity and other non-profit models (mutual benefit associations, co-operatives, friendly societies etc.). The 'public benefit test', established as the distinguishing hallmark of a charity, was rigorously applied to protect the status of 'charity' and confine eligibility for related tax exempt privileges (see, further, Chap. 2).

Trustees

It has long been recognised that a particular strength of the trust as a legal structure for charity is the responsibility firmly vested personally in the trustees to protect the

[27] *Howse v. Chapman* 4 Ves. 542, 1799.

value and purpose of the donor's gift. The "irreducible core of obligations owed by the trustees",[28] as noted in Tudor, gives confidence to donors.

Duties of Trustees

Honouring the terms of the trust is the fundamental responsibility resting on a trustee. This duty is placed upon the trustees but in the final instance it falls to be upheld by the courts. For centuries the courts, exercising their equity jurisdiction, have been attentive to the manner in which trustees give effect to their duties in respect of donors' wishes. A wealth of case law exists to illustrate the principles forged in the courts of equity to govern the duties of trustees; these largely apply to all trustees including those appointed in respect of charitable gifts.

- *To execute the terms of the trust*

In order to give effect to the purposes of the trust it is essential that the trustee first locates and becomes familiar with the trust governing instrument and all ancillary documentation.[29] The trustee then has little scope for discretion, he or she is bound by the donor's directions. Insofar as the directions are realisable they must be followed to the letter. Instances when the actions of trustees have failed to meet this standard include: the substitution of a more practical site for a hospital instead of the location specified by the donor[30]; the broadening of a donor's gift of a chapel to a school to permit the conferring of revenues upon villagers who were accustomed to the use of the chapel[31]; and the destruction of a church the maintenance for which the donor had left funds.[32] Where the trustee does have discretion then this must be exercised fairly.[33] When a discretionary decision is taken jointly by a majority of trustees this will be binding on the remainder.[34]

Two broad principles govern all trustee duties. In executing the terms of the trust the trustee is required to demonstrate both loyalty to the objects as set out in the governing instrument and impartiality when negotiating between the interests of trust beneficiaries. These can be seen in the duties of trustees as outlined below.

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[28] *Charities*, *op. cit*., p. 249.

[29] See *Hallows v. Lloyd* (1888) 39 Ch D 686 and the judicial comment:
"I think that when persons are asked to become new trustees, they are bound to inquire of what the property consists that is proposed to be handed over to them, and what are the trusts. They ought also to look into the trust documents and papers to ascertain what notices appear among them of incumbrances and other matters affecting the trust" *per* Kekewich, J., p. 691.

[30] *Re Weir Hospital* [1910] 2 Ch 124.

[31] *Attorney-General v. Earl of Mansfield* (1827) 2 Russ 501.

[32] *Ex parte Greenhouse* (1815) 1 Madd 92; on appeal (1827) 1 Bligh NS 17.

[33] *Re Beloved Wilkes Charity* (1851) 20 LJ Ch 588.

[34] *Re Whiteley* [1910] 1 Ch 600, 608.

- *To manage trust assets*

The essence of a trust is that the appointed trustee should exercise good stewardship in respect of the funds or other assets entrusted to him or her. This requires, in the first instance, that the trustee gather in and account for all trust property, inspect all relevant documents, ensuring that they are in order, and ascertain whether the trust property is subject to any form of liability.[35] As stated by Christian J in *Macnamara v. Carey*:[36]

> The principle which stands out distinct and clear upon those authortities[37] is this: that it is not enough for a trustee to keep within the four corners of the deed, and perform literally what is there set down. The very first point to which he must direct his thoughts is the placing of the trust property in security; and, above all, the making it impossible that it shall ever fall under the control of unauthorised persons. If he, even by mere inaction, suffer a state of things to exist or to continue, which, however apparently at the time natural and harmless, results in the course of future events, in the fund getting under unauthorised control, even though it be *that* of a co-trustee only – still more that of the settlor himself – and loss follows, the trustee must make it good.

The warning is clear, a trustee must be pro-active from the moment of taking up appointment in taking such steps as may be necessary to satisfy himself that all documents are in order, all trust property is accounted for and is secure.

Where the trustee is a replacement appointee, taking up office some time after the trust was established, then he or she should also ensure that no breach of trust occurred prior to their appointment. Thereafter, subject to any directions in the trust instrument, the trustee must conserve and manage the property in such a way as to promote the best interests of the intended beneficiaries. Trustees have a duty to manage trust funds so as to ensure an equitable distribution of proceeds among all beneficiaries. Where a fund is intended to subsist for future generations of beneficiaries, this will entail taking such measures as may be necessary to avoid first generation beneficiaries benefiting at the expense of those with a future entitlement. The duty of a trustee to give effect to the purposes for which the trust was established can sometimes conflict with the more pressing obligation to be prudent in their management of trust assets. The standard rule is that no trustee should allow a situation to develop where their personal interests are in conflict with their duties as a trustee.

The obligations of a trustee may entail investing or re-investing trust funds. The statutory framework governing trustee investments is accompanied by an onus resting on any trustee to exercise due care when investing trust funds.

- *To maintain proper records*

The courts have long recognised that a legal obligation to maintain proper accounts rests on all trustees;[38] these need not be audited. A trustee is also under a more general obligation to provide the beneficiaries with such information concerning the affairs

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[35] See for example, *Hallows v. Lloyd op. cit*.

[36] [1867] IR 1 Eq. 9.

[37] Citing, *Fenwick v. Greenwell* 10 Beav. 412, *Ghost v. Waller* 9 Beav. 497 and *Matheus v. Brise* 6 Beav. 239, among others.

[38] *Crawford v. Crawford* (1867) LR 1 Eq 436.

of the trust as may be reasonably required by them.[39] Such a beneficiary may inspect the records relating to the management of trust assets.[40]

However, in *Re Londonderry's Settlement*[41] the court held that trustees were not obliged to reveal those documents, of a confidential nature, which related to the exercise of their discretionary powers. The general principle of disclosure, being applicable to all trusts, has a bearing also on a charitable trust, though in that context it may be more difficult to realise.

- *To apply trust assets for the benefit of beneficiaries*

In addition to prudent stewardship of trust assets, the trustee must also make appropriate arrangements to distribute those assets, and/or the resulting proceeds, to the intended beneficiaries. This distribution must be both in keeping with the donor's intentions and in accordance with the law; a failure on either count will amount to a breach of trust. As noted in Tudor[42] "it is an obvious breach of trust for trustees to occasion the destruction of the trust property,[43] to alienate it improperly[44] or negligently to permit others to misappropriate it".[45]

- *Not to profit*

A characteristic feature of the office of trustee is an acceptance by the latter that the appointment is one of honour carrying an obligation to serve the interests of the trust in a selfless manner.

The equitable rule that a trustee must act gratuitously is long established: a trustee is not allowed to make any profit from that office and, unless there is an express or implied direction in the trust instrument to the contrary, or an express stipulation has been made with the beneficiaries before accepting the trust or under an express order of the court, there is no right to charge for their time and trouble.[46] Arguably, this fiduciary duty is accentuated in the context of a charitable trust. Acceptance of appointment brings with it a duty that the trustee will not place his or her self in a position where a conflict might arise between their personal interests and those of the trust.[47] There is a presumption that any acquisition by a trustee of benefits from

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[39] *Low v. Bouverie* [1891] 3 Ch 82 and *Moore v. McGlynn* [1894] 1 IR 74, 86 *per* Chatterton V.C.

[40] *O'Rourke v. Darbyshire* [1920] AC 581.

[41] [1965] Ch 918.

[42] See *Charities*, *op. cit*., p. 274.

[43] *Ex parte Greenhouse* (1818) 1 Madd. 92, reversed on technical grounds, 1 Bli. (N.S.) 17, where trustees of a chapel had pulled down the chapel, sold the materials and converted a burial ground to other uses: "It is a breach of trust such as could not be expected in a Christian country", *per* Plumer, V.-C., p. 108.

[44] *Att.-Gen. v. East Retford Corporation* (1838) 3 My. & Cr. 484; *Att.-Gen. v. Wisbech Corporation* (1842) 11 L.J. Ch 412.

[45] *Att.-Gen. v. Leicester Corporation* (1844) 7 Beav. 176.

[46] See 48 *Halsbury's Statutes* (4th ed.), p. 277 and see generally 48 *Halsbury's Laws of England* (4th ed.), para 799.

[47] See for example, *Bray v. Ford* [1896] AC 44.

beneficiaries will be presumed to derive from the former exercising undue influence over the latter.[48] However, the Charities Act 2006 does now allow trustees to be paid, under specified circumstances, for providing goods or services to a charity.

- *Not to delegate*

A delegate must not delegate or *delegatus non potest delegare*. It is in the nature of an appointment to the office of trustee that the latter undertake their responsibilities on the basis of trust personally vested in him or her. The trustee is honour bound to personally assume and give effect to their duties. This principle has been expressed by Lord Langdale in *Turner v. Corney* as follows:[49]

> [T]rustees who take on themselves the management of property for the benefit of others have no right to shift their duty on to other persons; and if they employ an agent, they remain subject to the responsibility towards their *cestius que trust*, for whom they have undertaken the duty.

However, this principle is not inflexible and the courts have conceded that delegation may occur in circumstances of 'legal necessity' or 'moral necessity'[50] when, as Kay J explained in *Fry v. Tapson*[51] "trustees acting according to the ordinary course of business and employing agents, as a prudent man of business would do on his own behalf, are not liable for the default of an agent so employed".

Giving Effect to the Protective Function: Bodies, Powers and Application

In general, charities in most common law jurisdictions must survive in revenue driven, fiscally oriented environments. There is seldom any special treatment for charities. The typical common law jurisdiction does not provide a naturally nurturing environment conducive to promoting a healthy charitable sector. The growth and development of charities requires the normally tax dominated, fiscal culture to be counterbalanced by agencies, principles and policies designed to safeguard their interests.

A Protective Legal Framework for Charities

In all common law jurisdictions the protective function of the law as it relates to charity has traditionally vested in the office of Attorney General. All other bodies

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[48] *Provincial Bank of Ireland v. McKeever* [1941] IR 471.

[49] (1841) 5 Beav 515, p. 517 and also, see, *Re O'Flanagan and Ryan's Contract* [1905] 1 IR 280 where a wife, appointed as trustee, was not allowed to delegate her responsibilities.

[50] *Ex parte Balchier* (1754) Amb 218.

[51] (1884) 28 Ch D 268, p. 270. *See, also, dicta* to similar effect in *Re Weal* (1889) 42 Ch D 674 *per* Kekewich J and in *Re Chapman* [1896] 2 Ch 763, *per* Lindley LJ, p. 776.

including the tax collection agency have at best an incidental protective role, although ultimately and in all cases this function falls to the courts. In England & Wales the presence of the Charity Commissioners lends distinctive additional weight to what is in effect a protective framework as there is in place a statutory mechanism for linking their responsibilities with those of the Inland Revenue and Attorney General and with the jurisdiction of the High Court. In other common law jurisdictions the absence of any agency vested with specific responsibility solely for charities and lack of equivalent inter-agency coordinating mechanisms means it would be inaccurate to refer to a 'protective framework' as such.

The Attorney General

The ancient *parens patriae* jurisdiction of the Crown in relation to charities, and the right to bring proceedings in respect of them, has long been vested in the Attorney General.[52] As explained in Tudor:[53]

> The Attorney-General's function in relation to charities is to represent the Crown as *parens patriae* and thus to act as the protector, both of charity in general and of particular charities. Historically, the Attorney-General's role in this respect has been unlimited in theory and wide-ranging in practice.

Indeed, a distinguishing characteristic of charitable trusts is that because such a trust is by definition for the public benefit, it thereby acquires an entitlement to protection and enforcement by the Attorney General. The corollary of this special entitlement is that it operates to prevent any person who might benefit from such a trust from taking any action to enforce it. When so acting, the Attorney General must be separately advised from the State so as to avoid any possible conflict between the interests of the State and the specific interests of the charity.

Proceedings and the Attorney General

The Attorney General has a special *locus standi* in respect of proceedings: he or she may initiate proceedings; is a necessary party in certain circumstances; and has a right to intervene in any proceedings where the prerogative or statutory powers of the Crown are at issue. In keeping with the inherent powers of the *parens patriae* jurisdiction, the Attorney General may initiate proceedings to redress the 'misemployment of land and money heretofore given to charitable uses' and can do so in any circumstances where the interests of a particular charity need protection. This

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[52] *Potts v. Turnley* (1849) 1 Ir Jur (os) 57, *AG v. Carlile* (1850) 2 Ir Jur (os) 249 and *Re Kelly's Will Trusts* (1862) 7 Ir Jur (ns) 273.

[53] *Op. cit*., p. 381.

may be necessary, for example, where there is evidence that trustees have failed in their duties.[54] It is most likely to be activated where direct intervention is urgently required to prevent or remedy damage to a particular charity. As noted in Tudor:[55]

> Such proceedings are likely to be brought in the Chancery Division of the High Court and the relief sought may include the restitution of charity property, the award of damages[56] and interest for breach of trust, injunctive relief[57] to prevent a breach of trust or its repetition, the appointment or removal of trustees or officers, the appointment of a receiver and manager,[58] the establishment of a scheme or the determination, by means of a declaration or otherwise of questions arising in the administration of the charity or the application of its property.

In practice, throughout the common law nations, the traditional protective role of the Attorney General has faded and proceedings are now seldom initiated from this office. In England and Wales a growing proportion of the above proceedings are now likely to be instituted by the Charity Commission.

The Role of Amicus Curiae

The ancient common law role of *amicus curiae* or 'friend of the court' has been recognised since at least the time of Edward 1.[59] It has not changed with the passing of the centuries and remains essentially that of "one who assists the court, upon a case already before it, by acting as an adviser, or by calling the court's attention to law, or to facts or circumstances that may have escaped consideration."[60] In addition to the above standing of the Attorney General in relation to proceedings he or she may also appear before the court as an *amicus curiae* and may do so in respect of proceedings affecting charitable matters. In that capacity, the Attorney General would have considerable scope to draw from the experience of that office as 'protector of charities' and offer guidance to the court, with its leave, on matters of principle. There would be similar scope to do so on a cross-jurisdiction basis and thereby promote knowledge transfer with the ability to creatively extend, for example, the international development of charitable purposes. This potential role for the Attorney General has yet to be explored.

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[54] *Attorney General v. Brown* (1818) 1 Swan 265, *per* Lord Eldon, p. 291.

[55] See Tudor, *Charities* (9th ed.), Sweet & Maxwell, London, 2003, p. 383.

[56] The word "damages" is sometimes used, but this is a misnomer and the remedy is more properly described as restitution, or equitable compensation: *Bartlett v. Barclays Bank Trust Co. Ltd.* [1980] Ch. 515, *Hulbert v. Avens*, The Times, February 7, 2003.

[57] *Baldry v. Feintuck* [1972] 1 WLR 552.

[58] *Attorney General v. Schonfeld* [1980] 1 WLR 1182.

[59] See Pollock and Maitland, *History of English Law* (2nd ed.), 1898, Bk., 1, p. 216.

[60] O'Leary, K.F., 'The Attorney-General and the Role of *Amicus Curiae*', *The Australian Law Journal*, 54, 1980, p. 559.

Revenue and Other Agencies

While the Inland Revenue and its counterpart in other common law jurisdictions have an obligation to explicate the rulings made on contentious issues for the guidance of the charitable sector as a whole, as well as a duty to detect and protect in instances of abuse of donors' gifts, there is no specific onus on this agency nor on others involved in regulating fiscal matters (including Customs and Excise, Land Registry, Companies Registry, Family Societies Registry, Rates etc.) to protect charities. While it may perhaps be argued that in all common law jurisdictions where the tax collecting agency has the responsibility for determining charitable status (i.e. all except England & Wales) it does so by assiduously protecting the *Pemsel* definition of charitable purposes, this may be countered by the argument that the agency is actually defensively deploying *Pemsel* as a means of policing boundaries to prevent any further erosion of the tax base.

Charity Commissioners

The assumption of primary responsibility for all legal functions by the Commissioners is of central importance to the development of charity law in England & Wales. The fact that it shares jurisdiction for charities with the High Court and Attorney General and is empowered to make rulings on charitable status that are binding on the Inland Revenue places the Commissioners at the heart of a legal framework which is unique among the common law nations. However the modern role of the Commissioners, as legislatively assigned and self-developed, no longer places a particular emphasis on protection.

Determining Charitable Status

Charitable status provides a passport to the tax exempt privileges and/or other entitlements that are vital for the growth and development of charities but its acquisition can be problematic in the revenue driven, fiscally oriented environment that typifies most common law jurisdictions. Where, as in almost all cases, status determination lies with the tax collection agency then a heavy onus rests on any organisation claiming to engage in public benefit purposes and activities if it is to displace the tax liability presumption and deflect the agency from its primary objective of maximising tax returns. In England & Wales the determination of charitable status falls to the Commissioners who are able to apply the public benefit test more flexibly and creatively that the Inland Revenue would, with regard for but without necessarily being rigorously bound by established precedents and the spirit and intendment rule. This they may do in a strategic fashion when reviewing the status of registered charities (see, further, Chap. 6).

Maintaining Charitable Status

Having acquired charitable status an organisation may require ongoing protection if its independence is not to be compromised by the interests of commerce or government and again in most common law jurisdictions it will most usually find itself left with the responsibility to protect its own interests. In England & Wales, however, the Charity Commissioners take a proactive role in protecting the integrity of the status of 'charity' by, for example, advising charities as to the measures they may need to adopt to safeguard their independence in the context of partnership arrangements with government (see, further, Chap. 6).

The High Court

The decline in the rate of court proceedings on charitable matters coupled with the statutory assignment of aspects of its jurisdiction to the Charity Commissioners have diminished the capacity of this court to exercise its traditional role in respect of charities. Such aspects of the protection function as are exercised by the court now occur on foot of proceedings initiated by the Charity Commissioners or, more rarely, by the Attorney General (see, also, Chap. 6). Otherwise the High Court simply responds to the random and infrequent issues presented by applicants such as charities or, most usually, on appeal by the Inland Revenue.

Judicial Development of the Protection Function

As noted above, the traditional role of the judiciary in relation to charity has been eroded in recent years. Responsibility for giving effect to the protection function, as with other functions, has largely passed to the Charity Commissioners. This, however, does not detract from the important role played in the past by the judiciary in protecting charities and does not preclude the possibility of further landmark rulings with enduring precedent value. Ultimately, it is for the judiciary to determine how particular aspects of this body of common law are to be shaped to fit contemporary circumstances.

National Courts and the Protection Function

The essentially protective *parens patriae* responsibilities of the Crown eventually devolved to the courts and formed the foundation for their current jurisdiction in relation to charities. The body of equitable principles cultivated by the Court of Chancery passed with the Supreme Court of Judicature Act 1873 to the unified court systems

of equity and the common law and became the basis for determining the judicial approach to charities (see, further, Chap. 6). This approach has been described as one of 'benevolent discretion'[61] whereby the judiciary would exercise flexibility rather than blindly follow precedent to achieve as fair an outcome as possible. The fact that in England & Wales the jurisdiction in respect of charities has remained consolidated in the Chancery Division of the High Court facilitated the development of a unitary and characteristically broadly protective judicial approach to charities.

Judicial Protection of Charitable Trusts

The law governing charitable trusts is distinctive in that it has grown up around the central concern to identify the charitable intentions of donors and then ensure legal protection for their charitable donations. Once confirmed as charitable then a trust automatically qualifies for protection from the Attorney General and may also attract the protection of the *cy-près* doctrine, neither of which would be available to other forms of trust.

Judicial Protection of Charitable Status

The history of charity law in England & Wales has from time to time witnessed the effects of tension between government intentions to prevent or control the misuse of charity and judicial determination to defend its status and privileges. For example, government efforts to prevent deathbed dispositions in favour of charity that disinherited the next-of-kin by using the provisions of the Mortmain and Charitable Uses Act 1736 (see, also, Chap. 5) were often undermined by "a number of cases adopting a generous interpretation of what amounted to a charitable purpose".[62] Again, the judiciary have on occasion adopted a lenient approach towards applicants who were clearly intent upon using charity primarily as a means of tax avoidance (e.g. under the Variation of Trusts Act 1958).[63] The same concern to protect charitable status, by breathing new life into it by analogy[64]

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[61] Seymour, J., '*Parens Patriae* and Wardship Powers: Their Nature and Origins', *Oxford Journal of Legal Studies*, 14, 1994, p. 173.

[62] See Tudor, *Charities* (9th ed.), Sweet & Maxwell, London, 2003, p. 3; citing *Thornton v. Howe* (1862) 31 Beav. 14, *Trustees of the British Museum v. White* (1826) 2 Sim & St. 594, *Tatham v. Drumond* (1864) 4 De G.F. & Sim 484 and also Jones, G.H., *History of the Law of Charity 1530–1827*, Chap. 9.

[63] *Re Weston's Settlement* [1969] 1 Ch. 223, p. 245. See further, Hackney, J., 'The Politics of the Chancery', *Current Legal Problems*, 1981.

[64] *Scottish Burial Reform and Cremation Society v. Glasgow Corporation* [1968] AC 138; extension of charitable status to crematorium.

or through use of the spirit and intendment rule[65] or by employing the *cy-près* doctrine,[66] is also evident in the case law.

Judicial Protection of Charitable Purpose

Arguably, however, one consequence of leaving the protection function and indeed the development of charity law as a whole to the judiciary has been the failure to safeguard what might be seen as the 'central mission of charity' viz. to tackle the causes and effects of poverty. The many and varied judicially sanctioned ramifications of 'charitable purpose' have been such as to deflect from any recognition of 'poverty' as the primary objective of 'charity' and allow four centuries of precedents to accumulate fairly randomly, if loosely pinned to the public benefit principle, rather than aggregate in a coherent fashion around addressing social disadvantage. This outcome makes an interesting contrast to the fate of the other subjects of the *parens patriae* jurisdiction. The wards and the lunatics, initially judged equally *sui juris* as charities, subsequently attracted considerable legislative attention that has had little difficulty in parsing rights and duties in respect of identified needs, has established bodies and governing principles to ensure their protection and has produced a body of coherent jurisprudence. The protection function of the law as it relates to children is now, for example, a great deal more prominent, purposeful, focused and demonstrably beneficial than is the same function in respect of charities. Legislative intervention could account for the difference.

The European Convention and the Protection Function

The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the 'European Convention'), currently signed by 46 nations, is by far the most influential of the raft of international and multi-national legal instruments that now add to the legal protection available for individuals and organisations. It is automatically binding upon all 27 member States of the European Union, many of which have legislated to incorporate all or most of the rights into national law, and is enforced by the European Court of Human Rights and in the courts of the nations concerned. Other countries outside Europe have chosen to either endorse the Convention or to introduce legislation replicating its provisions. Some of the enumerated rights lend significant weight to the protection function as it

[65] *Re Vancouver Regional Free Net Association and Minister of National Revenue* (1996) 137 DLR (4th) 206 Federal Court of Appeal; recognition of internet access as a charitable purpose.

[66] *Att-Gen v. City of London* (1790) 3 Bro.C.C. 171; gift to convert infidels in America, but a finding of no infidels, with the result that the gift was saved to charity for a purpose in keeping with the general charitable intention of the donor.

relates to charities and have been judicially applied in rulings that serve to strengthen the bedrock of principles upon which charity law rests.

Freedom of Association

The Convention provides in Article 11 that:

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests …

A principal hallmark of any democracy is the right of its citizens to form, join or not to join associations. The very existence of charities and all other non-government organisations is conditional upon this right. In *Sidiropoulos and Others v. Greece*[67] the ECHR pointed out that the right to form an association is an inherent part of the right set forth in Article 11, even if that Article only makes express reference to the right to form trade unions. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is "one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning".[68] Only convincing and compelling reasons can justify restrictions on the freedom of association.[69] The ECHR does not have to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it also looks at the interference complained of in the light of the case as a whole to determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.

In *The Socialist Party of Turkey and Others v. Turkey*[70] the ECHR ruled that Turkey had once again violated Art. 11. The ruling emphasised that freedom of speech, assembly and association, as well as pluralism, were the key elements of democracy. The protection function is strengthened by a provision in the Article requiring governments to ensure that laws and practice positively promote this right[71]: they must 'both permit and make possible'[72] opportunities for citizens to enjoy this fundamental right.

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[67] *Sidiropoulos and Others v. Greece* (26695/95) 27 EHRR (1998).

[68] *Ibid*., para 40.

[69] See for example, *Young, James and Webster v. the United Kingdom* (1982) 4 EHRR 38 where the court stressed the importance of ensuring "the fair and proper treatment of minorities" and held that the 'closed shop' was a violation of Art 11.

[70] (1998) 27 EHRR 51.

[71] *Wilson and Palmer v. United Kingdom* (2002) 35 EHRR 20.

[72] See *National Union of Belgian Police v. Belgium* (1975) 1 EHRR 578, para 39.

Freedom of Expression

Article 10 of the Convention states that:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers …

Again, this right is one of the hallmarks of a democratic society. In *Steel and Morris v. the United Kingdom*,[73] which concluded the longest running court case in English history (generally referred to as the "McLibel Case"), the ECHR ruled that two environmental activists (members of London Greenpeace) convicted of defaming the McDonald's Corporation in 1997 were denied freedom of expression (Article 10) by the British government and did not receive a fair trial (Article 6). McDonald's had launched its libel action against the two campaigners 15 years earlier, alleging that they were involved in the production of a leaflet asserting that McDonald's exploited children, harmed the environment, and its food was unhealthy. McDonald's won the original verdict in 1997. In 2000, the defendants went to the European Court which upheld their complaint and expressed the view that in a democratic society even small and informal campaign groups, such as London Greenpeace, had to be able to carry on their activities effectively. There existed a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment. The free circulation of information and ideas about the activities of powerful commercial entities, and the possible "chilling" effect on others were also important factors to be considered in this context.

Freedom from Discrimination

Article 14 of the European Convention provides that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The right not to be discriminated against, traditionally associated with religious differences, is a most important aspect of life in a democratic society and is now generally extended to afford protection from discrimination on the grounds of gender, age, race and from differences arising from other such status designations. This Article 14 provision has no independent validity as it comes into play only after a substantive Convention right has been breached.

[73] (Application no. 68416/01) (2005).

The Convention now requires that any interpretation of 'religion' be applied objectively, have reasonable justification[74] and be non-discriminatory; any differential treatment must comply with strict standards.[75] This legal benchmark for non-discrimination in matters of religion is supported by Article 9 (the right to freedom of thought, conscience and religion) and by Article 1 of the First Protocol (the right to peaceful enjoyment of property). It has the effect of requiring governments and other public bodies to give parity of recognition to Christian and non-Christian religions such as Buddhism and Hinduism.

An applicant will have established direct discrimination and a breach of Article 14 if he or she can show that: other persons in a similar or analogous situation, as evidenced by the set of facts governing each situation, are being treated differently to the applicant; and there is no justification for the difference in treatment.[76] The effects of indirect discrimination were examined in *Thlimmenos v. Greece*[77] where the ECHR considered the effect of a blanket ban, imposed by a professional body, on the employment of anyone with a criminal record. The case concerned an applicant who had such a record due to his objection, on religious and conscientious grounds, to military service. The court ruled that the ban had a disproportionate effect on the applicant and could not be justified.

The Outcome of the Charity Law Reform Process and Implications for the Future of the Protection Function and Social Policy

The charity law reform process in England & Wales, as in other common law jurisdictions, has involved a good deal of questioning as to 'what is charity for?' The outcome has been a configuration of provisions that conserve the established common law parameters while allowing room both for significant deviations from precedent and for fresh growth within specified new categories of matters statutorily defined as charitable. The new provisions in the most important charity legislation for four centuries serve mainly to licence a further expansion of charitable activity (see, Chap. 6). Apart from the strengthening of the public benefit test, there is no indication of any legislative intent to specifically reinforce or refocus the protection function.

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[74] See for example, *Tsirlis and Kouloumpas v. Greece* (1997) 25 EHRR 198. Also, see, the *Belgian Linguistic Case* (1968)(No 2) 1 EHRR 252 where the ECHR held that there must be an objective and reasonable justification for differential treatment and this will only exist where there is a 'legitimate aim' for the action and where the action taken is 'proportionate' to that aim.

[75] For a fuller discussion, see, Quint, F. and Spring, T., 'Religion, Charity Law & Human Rights', *The Charity Law & Practice Review*, 5: 3, 1999, pp. 153–186.

[76] See for example, Abdulaziz, Cabales and Balkandali v. United Kingdom (1985) 7 EHRR 471.

[77] *Ibid*.

The Common Law Parameters

The Charities Act 2006 clearly provides for the prevention or relief of poverty, the advancement of education and the advancement of religion. It also categorises as new charitable purposes many activities hitherto listed under the fourth *Pemsel* head. To that extent, it must be acknowledged that the new legislation will protect and continue the established definitional basis of charity law.

Giving Effect to Social Policy Through the Protection Function

The mandatory application of the public benefit test as determinant of charitable status, now required under the 2006 Act, will not just lend a sharp edge to the policing function (see, Chap. 5) and greatly enhance the scope for applying the adjustment/mediation function (see, Chap. 6), it may also provide a means of revitalising the protection function by allowing, over time, some of the more questionable interpretations of charitable activity to be stripped away and permit a concentration of resources on the authentic core business of charity. While diversification is a necessity for most enterprises that hope to grow and remain engaged with their constituencies in a modern constantly changing environment, there is a danger of charitable drift further threatening the coherence, purposefulness and the value base of charity. If it is to retain its distinctiveness in the field of non-profits, the protection function will need to be applied to reassert the primacy of charity's initial and fundamental agenda. The new legislation may provide such an opportunity.

Poverty

The fact that the relief of poverty, extended to include prevention, heads the 13 charitable purposes listed in the Charities Act 2006 is an indication of a possible legislative intent to renew the historical commitment of charity to address poverty. Indeed, it will now, as a matter of law, be a requirement that charities ensure they do not deny the poor access to their services; with unavoidable implications for the charitable status of private schools and health care facilities. However, the deliberate non-inclusion of any reference to the need to also deal with the causes of poverty and absence of any reference to poverty in the developing nations gives rise to a question as to whether this is a genuine legislative reassertion of charity's primary goal. It leaves open the possibility that this charitable purpose may continue to be treated as being of less than central importance and as justifying a continuing focus on its effects rather than warranting a more strategic approach.

Education

The advancement of education and religion has been retained in the Charities Act 2006 without any embellishment to their traditional *Pemsel* interpretation which clearly demonstrates the deployment of the protection function to preserve these core charitable purposes. In the context of education, the application of the public benefit test should in due course clarify the longstanding issues in relation to the charitable status of Eton and the other elite English fee-paying facilities. Again, there is now potential for a return to the more basic *Pemsel* interpretation of this charitable purpose.

Health Care

Although not explicitly stated as such in *Pemsel*, there can be little doubt that health care has long been a core charitable purpose and much the same observations apply in this context as above in relation to education. The new statutory purpose of 'advancing health or the saving of lives' may, however, signal an intention to encourage and channel charity to commit resources towards government designated priorities.

Other Core Charitable Purposes

The advancement of animal welfare, while hardly a prominent social policy theme, is a traditional magnet for donors that has over time acquired more resources than most charities dedicated to the relief of human welfare, and is now to become a charitable purpose in its own right. The statutory recognition of the importance of animal welfare again represents a falling back onto the safe ground of well-established charitable activity. Much the same could perhaps be said of the recognition now given to the advancement of amateur sport, though the absence of any reference to 'recreation' may signal a government intention to require charitable status in this context to be evidenced by skill and achievement.

Conclusion

In recent years the protection function, with its powerful *parens patriae* antecedents, has diminished in importance relative to the other legal functions that relate to charity. Whether this is a cause or effect of, or is otherwise related to the fading role played by the Attorney General and the High Court in charitable matters is difficult

to say. Possibly the increasingly sophisticated legal context within which charities currently operate has been a significant contributory factor. Protection is now to be found: in a spread of ancillary legislation including trust and company law, fund-raising statutes, human rights and social justice provisions; among the myriad of accompanying bodies such as the Companies Registry and the Charities Commission; and in the umbrella bodies that have sprung up within the sector to provide representation and support. The government's policy of partnership with the sector must also be taken into account: as shared responsibility for public benefit provision narrows the traditional distance between government and charity so the latter is encouraged to believe that its interests will be safeguarded by its partner. Again, and more simply, it may be that a mature charitable sector has developed a confident base where protection is now less of a priority as the emphasis shifts towards the exercise of positive legal functions.

For social policy, the diminution of the protection function in charity law has perhaps been of greater significance than is generally realised. The absence of a strong body dedicated to protecting the core business of charity, as represented in the four *Pemsel* heads, may help account for the fact that as the sector grows in size, wealth and spread, the effects of poverty continue to impair lives in the developed nations as well as crippling whole nations in the developing world. The modern aggrandisement of charity has seen its activities and resources spill over into areas well beyond the *Pemsel* heartland. It is now encouraged to penetrate further into general public benefit activity, forge alliances with private finance initiatives and is channeled by the national lottery and other proxy government bodies to spread ever more expansively into health, education and social services provision. The rate of growth and the disparate variety of charities accommodated under the fourth head has come to defy logic. The need to protect charity from the predations of government and commerce, from straying too far from its origins in dealing with poverty and from the temptation to abandon its equitable principles in favour of expertise in the marketplace has perhaps never been greater. There is little indication in the outcome of the charity law review process in England & Wales of a political will to restore the protection function in the law as it currently relates to charity.

Chapter 5
Legal Functions: Policing

Introduction

The law relating to charity has always been focused mainly on the use of regulatory powers to prevent the abuse or misuse of funds. The predominance of the policing function can be seen in the legislative history, the judicial precedents and in the nature and range of agencies with an involvement in the exercise of supervisory powers. The gift relationship underpinning charity, resting on the altruistic gesture of a donor in response to the need of others, remains governed by a long established and formidable body of regulatory law.

This chapter begins by tracing the origins of the policing function and outlining its legislative development through the centuries. It considers the registration and regulatory systems, identifies the numerous agencies involved and explains their powers and duties. It gives particular attention to the role of the Charity Commissioners in ensuring the propriety of charitable practice, monitoring/supervising the activities of charities and promoting proper standards of transparency and accountability. It assesses the important developmental part played by judicial precedent in forming the milestones that determine matters such as the nature and applicability of the public benefit test, the appropriateness of charitable purpose and exclusiveness of charitable gifts. It considers the restrictive judicial approach to aid, trade, profit distribution and political activity etc. The chapter concludes by briefly assessing the outcome of the recent charity law reform process in England & Wales and its implications for social policy and for the future of the policing function.

Origins of the Policing Function

The law regulating charities is of ancient origin. Its roots are deeply enmeshed in rules relating to the alienation of property which is probably among the earliest preoccupations of civil law. One legacy of the long struggle between Church and State that culminated in the Reformation was the abiding government wariness with which it thereafter regarded charities. The memory of much of the land of England being swallowed up by the Church, as a charitable corporation, resulting in the

K. O'Halloran et al., *Charity Law & Social Policy*,

denial of the tax revenues needed for the defence of the realm, haunted subsequent governments. Some, indeed, have attributed the ease with which William the Conqueror subjugated England after the battle of Hastings in 1066 to the fact that so much land was then in the hands of the Church that too little was left to raise the taxes or the knights services needed to challenge the invader.[1]

Policing charities and the charitable sector, ensuring that charity does not subvert the agenda of government and does contribute value in public benefit terms that is at least equivalent to the defrayed taxes, has been the driving concern of government since well before the Statute of Charitable Uses 1601. A number of statutes testify to an enduring government intent that charities be subject to some restraint. In the main, however, the responsibility for policing charities has been left to the tax collection agency (the Inland Revenue) and exercised principally by rigorous application of threshold criteria to determine charitable status, reinforced by annual accounting requirements and periodic inspections. In England & Wales during the past four centuries, if somewhat intermittently, certain aspects of this policing function have been assigned to an agency that operates independently of tax concerns (the Charity Commissioners) although their focus has been less on fulfillment of status requirements and more on detection of abuse and neglect and the encouragement of greater effectiveness. Other agencies have also played their part in maintaining a regulatory environment for charities.

Legislative Restraint

While it is true that charity law in the common law world is comprised of a rich legacy of judicial precedent, virtually untouched by legislative attempts to introduce definitional provisions, when statutory intervention did occur it was important and explicit. Invariably, the early legislative history is one which reveals government efforts to rein in charity.

The Statute of Mortmain 1391

The legislative intent behind the mortmain legislation[2] was to prevent land from being removed from the feudal economy. As this was largely caused by gifts of landholdings to the Church (see, further, Chap. 4), the earliest attempt in 1006 to exercise

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[1] Radford, M.F., 'The Case Against the Mortmain Statute', *Georgia State University Law Review*, 8, 1992, pp. 313–361, p. 317. Also, see *Attorney-General v. Day* (1748) 1 Ves. Sen. 218, "… the clergy got almost half the real property of the kingdom into their hands, and indeed I wonder they did not get the rest", *per* Chancellor Hardwicke, p. 223; and Bomes, S.D., *op. cit*., p. 352, where it is noted that some estimate the landholdings held by the Church in the latter half of the 13th century as one-third to one-half of England.

[2] Including the Statute of Mortmain 1279 (7 Edw. I, St 2) and the Statute of Westminster III 1290 (18 Edw. I) and in particular the Statute of Mortmain 1391 (15 Ric. 2, c. 5).

control was in the form of special licences granted only at royal discretion and which had to be obtained prior to making any such gift. This restraint received specific reinforcement in the Magna Carta 1215 and in a number of ensuing statutes.[3] The Statute of Mortmain 1391 extended the restraint to lay corporations including guilds and other forms of civil corporation that were beginning to emerge.

The Statute of Uses 1535

Evasion of the effects of mortmain legislation gave rise to many creative legal devices of which the 'use' proved to be the most effective.[4] As has been explained "the clergy did not employ the use to any great extent until the statute of mortmain gave them a good reason for preferring it".[5] The Statute of Uses 1535 was an attempt to prevent the evasion of feudal dues by the creation of uses. It simply legislated that all equitable owners were also the legal owners. This restored to the Crown all feudal incidents with Parliament being persuaded by a provision which protected all current titles. Subsequently, the Statute of Wills 1540 gave landowners the ability to devise by will their land (which had previously been denied) but not to a corporation. Thereafter, the corporation was never the preferred vehicle for charitable gifts and instead trusts became the dominant legal form for charities in England (see, further, Chap. 4).

The Statute of Charitable Uses 1601

The overriding legislative intent behind the Statute of Charitable Uses 1601 was to assert the right and duty to hold to account those entrusted with gifts to be used for designated charitable purposes. This, the foundation stone for charity law in all common law nations, aimed to reform the abuse of property donated to charities by listing the type of purposes that would thereafter be recognised as charitable and by establishing a body of Commissioners with powers to supervise and inspect charitable trusts. By setting out the terms of reference for the Commissioners the 1601 Act defined the parameters for the modern jurisdiction in respect of charities.

The Preamble explains that gifts to charitable purposes have been the subject of fraud and abuse:

> Landes Tenementes Rents Annuities Profitts Hereditaments Goodes Chattells Money and Stockes of Money nevertheles have not byn imployed accordinge to the charitable intente

[3] *Ibid*., and also Provisions of Westminster 1259 (c. 10), the Mortmain Act 1285 (13 Edw. I, c. 32) and the Forfeiture of Lands Act 1285 (13 Edw. I, c. 33).

[4] See Simpson, A.W.B., *A History of Land Law* (2nd ed.), Clarendon, Oxford, 1986, pp. 174–175 where four main reasons are given for the rise of the 'use': to assist in fraud; avoid feudal dues; gain power of devise over land; and to facilitate the settlement of land.

[5] Barton, J.L., 'The Medieval Use', *The Law Quarterly Review*, 81, 1965, pp. 562–577, p. 565.

> of the givers and founders thereof, by reason of Fraudes breaches of Truste and Negligence in those that shoulde pay delyver and imploy the same …

The 1601 Act then sets out provisions intended to restrict these abuses. Instead of continuing to rely upon the judiciary as the means for regulating charities,[6] it establishes a body of Commissioners with powers to supervise and inspect charitable trusts. The overriding legislative intent to assert the right and duty to hold to account those who have been entrusted with gifts to be used for charitable purposes is very clear.

> Be it enacted, That the saide Commissioners, or any Fower of more of them, shall an may make Decrees and Orders for recompense to be made by any person or persons whoe, beinge put in Truste or havynge notice of the charitable Uses above mentioned, hathe or shall breake the same Truste, or defraude the same Uses, by any Conveiance Gifte Graunte Lease Demise Release or Conversion whatsoever, and againste the Heires Executors and Admynistrators of hym them or any of them, havynge Assettes in Law or Equitie, soe farre as the same Assettes will extende.

Concern is focused on: protection for donors; prevention of deliberate abuse, careless inefficiency and misuse of status by charities; and provision for the removal of charitable status from bodies found by Commissioners to be in breach of stated standards. The 1601 Act provided for Commissioners to hear complaints against any charitable trustees suspected of breaching the terms of their trust; an appeal lay against a decision of the Commissioners to the Chancellor. Commissioners were usually the Bishop (Ordinary), the Chancellor of the diocese and other persons of "good and sound character". They had the power to order the rectification of defaults by trustees or others and cure defective gifts to charitable trusts.

The statutory terms of reference of the present Charity Commissioners for England and Wales, although more extensive and sophisticated, clearly originate from this initial bare outline of regulatory powers. The role of the judiciary was to be restricted to providing the function of an appellate court, while the burden of regulating the affairs of charities would be borne by an administrative agency.

The Mortmain and Charitable Uses Act 1736

The legislative intent behind this statute was the government's concern to protect the inheritance rights of descendants from the efforts of the dying to safeguard their souls in the next life by gifting their property to the Church in this one. As has been explained: "… the raison d'etre of the Act of 1736 (Statute 9 Geo. II) was the protection of heirs from death-bed dispositions in favour of charity".[7] It required dispositions

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[6] See Gray, B.K., *A History of Philanthropy: From the Dissolution of the Monasteries to the Taking of the First Census*, Frank Cass & Co., London, 1967, p. 35. Also, see Jordan, W.K., *Philanthropy in England 1480–1660: A Study of the Changing Patterns of English Social Aspirations*, Allen & Unwin, London, 1958, p. 83 and Jones, G., *History of the Law of Charity 1532–1827*, Wm. W. Gaunt & Sons, Holmes Beach, FL, 1986, p. 16.

[7] See Brady, J., 'The Law of Charity and Judicial Responsiveness to Changing Need', *Northern Ireland Legal Quarterly*, 27: 3, 1976, p. 202.

to be made by deed indented, sealed and delivered in the presence of two or more credible witnesses at least 12 calendar months before death. The 1736 Act resulted in many creative case precedents as the landed gentry, from which stock the judiciary were drawn, challenged testators' dispositions by claiming that legacies fell within the terms of the Mortmain Act. Arguably, charity law suffered considerable distortion throughout the 18th and 19th centuries as the judiciary expanded their interpretation of charitable purposes in order to make dispositions subject to the mortmain legislation and thereby enable them to be invalidated on the grounds of procedural irregularities.

Charity Commissioners' Scrutiny

The regulatory role and powers of the Charity Commissioners for England & Wales were first statutorily assigned to such a non-judicial body in 1601. In the following years, many commissions were appointed which had substantial success in detecting abuses and dormant trusts. In the first year of the Act, 45 decrees were issued[8] and over 1,000 were sealed before the death of King James.[9] This activity gradually waned until the last commission, held in the reign of Queen Anne, ended in 1803.

Registration of Charities

In the late 18th century the first registry of charities was introduced and Parliament passed the Returns of Charitable Donations Act 1786[10] which decreed that charities benefiting the poor were to lodge returns sworn on oath to Parliament but, as has been noted, this was "honoured more in breach than in observance"[11] and "the outcome must have been a disappointment because nothing was done with the returns".[12]

The Charitable Donations Act 1812 required the registration of charitable trusts with the Chancery Inrolement Office and although there were some 400 registrations in the first year these dwindled due to lack of enforcement. This was a period when, in the absence of roving commissions, the policing of charities was left to the judiciary. The judicial process, resting on management by the courts of equity as memorably caricatured in Bleak House,[13] caused interminable delays and expense which wasted

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[8] See Gray, B.K., *A History of English Philanthropy*, Frank Cass & Co., London, 1967, p. 38.

[9] See Jones, *op. cit*., p. 52.

[10] Also known as Gilbert's Act after the Poor Law reformer Sir Thomas Gilbert whose nine year campaign to bring such a bill had been repeatedly defeated in the House of Lords.

[11] See Owen, D., *English Philanthropy, 1660–1960*, Belknap, Harvard University, Cambridge, MA, 1964, p. 183.

[12] See Thompson, R.T., *The Charity Commission and the Age of Reform*, Routledge & Kegan Paul, London, 1979, pp. 83–84.

[13] Dickens, C., *Bleak House*, 1852/3. This parody of the slow, arcane, judicial process in the Chancery courts possibly contributed to the reforms of 1870.

charitable assets. As Sir Samuel Romilly noted at that time "continuance of these abuses did not proceed from ignorance of the nature of the charitable institution, for the nature of the institutions and the abuses committed with respect to them, were notorious; but from the difficult and expensive nature of the remedy provided by the law".[14] An Act sponsored by Romilly was passed to address the problem of judicial delay by providing for a summary form of redress against abuses of charitable trusts. Legislative intent, however, was subverted by the House of Lords which, in a series of cases,[15] chose to strictly confine its provisions with the result that the legislation fell into disuse.

The Brougham Inquiry

It was not until the Brougham Inquiry of 1819–1837, resulting in the prosecution of some 400 charities and thereby demonstrating the value of independent scrutiny, that the modern form of the Commission emerged. This Commission lasted for two decades, it traveled throughout England categorising and investigating charities, making regular reports on abuses and on schemes to reform charitable trusts and referring a total of 400 charities to the Attorney General for prosecution.[16] By the time it finally completed its mammoth investigation into the abuse of charitable donations the Commission had cost nearly four million pounds, produced 40 volumes of reports, scrutinised some 29,000 charities and had recovered at least 13 million pounds in misused or under utilised assets.

This Royal Commission proved its worth: it had been efficient in seeking out charitable abuse; had demonstrated that it was possible to reform charities; and the process of identifying cases for referral to the Attorney General to be dealt with by the judiciary had been effective. The Commission's work resulted in the Charitable Trusts Act 1853, amended in 1855 and 1860, to establish a permanent Commission to supervise charitable activity. Government had removed the policing function from the judiciary and placed it largely in the hands of the Commission.

The Permanent Charity Commission

This standing Commission was an important step forward in establishing a regulatory regime for charities but its procedures were cumbersome: it investigated chari-

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[14] See Romilly, S., *Memoirs of the Life of Samuel Romilly*, London, 1840, pp. 385–386, as cited in Jones, G., *op. cit*., p. 165.

[15] *Attorney-General v. Green* (1820) 1 Jac & W 303; *Re Matter of Bedford Charity* (1819) 2 Swanst. 470; and *Re Lawford Charity, ex parte Skinner* (1817) 2 Mer 453.

[16] See Thompson, R.T., *op. cit*., p. 182. The ability of the Commission to refer charities to the Attorney General was very limited and this figure does not accurately represent the extent of abuse. Informal pressure of investigation and publicity proved sufficient in many cases to curb charitable abuses.

ties and recommended reform of individual cases to the Attorney General who in turn sought the approval of Parliament to impose the necessary changes. This process proved to be even slower and more expensive than that of the Court of Equity so Parliament introduced the Charities Act 1860 which granted the Commission the power to devise schemes; a jurisdiction it shared with the Court of Equity.

During the next century little investigatory work was undertaken apart from the work of the now permanent body of Charity Commissioners. In 1948 Lord Beveridge, financed by English nonprofit organisations, published his report *Voluntary Action: A Report on Methods of Social Advance*[17] in which he called for a Royal Commission to be established for the purpose of examining charitable trusts, in particular their ability to respond to changing circumstances; this in effect was a call to review the doctrine of *cy-près*[18] (see, also, Chap. 4). In January 1950, accepting his recommendation, the government appointed a committee of inquiry to be led by Lord Nathan.

The Report of the Committee on the Law and Practice Relating to Charitable Trusts (the Nathan Report)[19]

The Nathan report, published in 1952, provided a thorough assessment of English charities and their regulation. The report's introduction acknowledged its origins in the Beveridge report and in the concern that "financial difficulties have led to a widely-felt need to obtain the greatest advantage from the funds available and to adjust and develop the relationship between voluntary action and the government and local authorities".[20] The law, particularly the doctrine of *cy-près*, had remained unchanged since 1860, and the report found that the provision for registering trusts was a "dead letter"[21] while "hundreds perhaps thousands of trusts need revision".[22] Less than one-third of the charities listed in the very incomplete register had submitted accounts. The committee identified the reasons for this state of affairs as a shortage of Commissioners, trustee ignorance and the lack of a specific penalty for non-lodgement of accounts. The pace of social and economic change had again diminished the effectiveness of supervision and also, therefore, the effectiveness of charitable trusts while the doctrine of *cy-près* was failing to reform trusts[23] (see, also, Chap. 4).

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[17] Lord Beveridge, *Voluntary Action: A Report on Methods of Social Advance*, London, 1948, funded by the Nuffield Foundation and the National Deposit Friendly Society.

[18] '*Cy-pres'*, a Norman French expression, has generally been interpreted by the courts to mean "as near as possible". See Tudor, *op. cit*., p. 444 and *Re Lambeth Charities* (1853) 22 LJ Ch. 959.

[19] *The Report of the Committee on the Law and Practice Relating to Charitable Trusts* (Cmnd. 8710), HMSO, London, 1952.

[20] *Ibid*., p. 1.

[21] *Ibid*., p. 27.

[22] *Ibid*., p. 46.

[23] *Ibid*., pp. 26–27.

The committee found that the powers exercised by the Charity Commissioners were sufficient and that no new powers were necessary.[24] Instead it recommended that stricter regulatory attention be given to the weaknesses noted above so as to ensure a prompt referral to the Commissioners of matters requiring reform. Trusts were to be recorded by the Charity Commissioners and such records were to be made available for public inspection.[25]

The Nathan Committee was informed by the Chief Charity Commissioner that "trusts are now almost without exception honestly administered".[26] The Attorney General gave evidence that there were "not more than half a dozen cases a year involving alleged irregularity, of which half came from the public and usually concerned small matters such as disagreements between trustees".[27] Despite the lack of much evidence of abuse of charities, the committee recommended that accounts be audited (using a standard form of financial accounting), that there be a sanction for failure to lodge accounts, that accounts be subject to a random scrutiny and that Charity Commissioners be given expanded investigatory powers.[28] The report also recommended the repeal of many outmoded statutes such as the law of mortmain and the Charitable Donations Act.[29]

The Nathan Committee had again highlighted the recurring themes of an unresponsive Attorney General and judiciary. It had also portrayed an understaffed administrative agency presiding over a chaotic register in which there were a large number of charities requiring drastic reform. No substantive measure had been made of the task that needed to be undertaken to remedy this state of affairs. In essence, the Nathan Report found an agency that was not performing its legal function of policing charities.

Inland Revenue Assessment

The primary legal function of this agency remains as it has always been to identify and collect all revenues payable to the State by way of taxes. Since the Income Tax Act 1799 and the decision a century later in *Pemsel*,[30] charities have been exempted from tax liability. Where an organisation claims exemption on the grounds that it is a charity then evidence is required as to eligibility for charitable status and it may, like any other organisation, be subsequently monitored and subject to possible investigation by the Inland Revenue. However, whereas initially and for most of the

[24] *Ibid*., p. 48.

[25] *Ibid*., p. 41.

[26] *Ibid*., p. 47.

[27] *Ibid*., p. 47.

[28] *Ibid*., pp. 51–52.

[29] 52 Geo. III, c.102.

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

past two centuries, the Inland Revenue bore exclusive responsibility for determining both charitable status and any consequent eligibility for tax exemption, in recent years these functions have been separated and the agency has shed its powers and duties in respect of determining an organisation's charitable status.

Giving Effect to the Policing Function: Bodies, Powers and Application

From its common law origins and growth in the courts of equity, its statutory recognition in the Statute of Charitable Uses 1601 and subsequent judicial classification in *Pemsel*, the law relating to charities and their activities developed in accordance with much the same body of principles across all common law nations. This was accompanied, though to a varying degree, by a charity specific regulatory framework quite unlike that of non-common law jurisdictions where the law tends to be applied in an undifferentiating fashion to all not-for-profit bodies. Subject to some important qualifications with regard to the significance of trusts and administrative structures, the lead set in England & Wales by the judiciary and to a lesser extent by the legislators transferred, with the armies of the Crown, to the nations that formerly constituted the British Empire and now largely comprise the Commonwealth (see, further, Part II). The agencies comprising a regulatory framework, with the exception of the Charity Commission, were largely replicated throughout the common law world with the centerpiece being the tax collection agency which bore the brunt of the responsibility for policing charities. Reserved for the courts, then as now, are matters referred by the Attorney General and/or by the Charity Commissioners where the issues are complex, involve a fine point of law, require interpretation or where a *cy-près* scheme concerning property above a certain value is needed.

While in England & Wales the gateway to charitable status is guarded primarily by the Charity Commissioners other agencies may also play a role. So, an organisation's application for tax exemption on grounds of charitable activity will call for a ruling by the Inland Revenue as to whether the activities satisfy its eligibility criteria for charitable exemption. Similarly, an application for rates exemption on such grounds will require an equivalent ruling from a valuation officer. Other bodies such as the Companies Registry or Family Societies Registry may be involved. Consequently, most issues affecting charities never reach the courts as they are filtered out and determined by one of the relevant administrative bodies.

A Regulatory Environment for Fiscal Affairs

The common law was always a law based on rules, employing the well-established rules and precedents of the common law tradition that remained rooted in the

Preamble and the ruling in *Pemsel*, and accompanied by a complex system for levying and collecting fines. This led to a natural emphasis on administration rather than adjudication and to a fundamental concern with financial matters. In many ways the development of charity law has been driven primarily by a concern to supervise charity finances as reflected in the range of agencies with associated responsibilities (including Customs and Excise, Land Registry, Companies Registry, Family Societies Registry, Rates etc.). The priority given to regulating fiscal affairs, together with the substance and judicial precedents of charity law, constituted the basis of the inheritance England passed on to its colonies. The related administrative structure (notably the role of the Charity Commissioners), however, did not necessarily form part of this legacy.

Regulating Tax Exemption

Charity law has its origins in legislative and judicial attempts to maximise tax revenues by establishing agencies and processes designed to regulate practice, detect abuse and restrain the availability of exemption on grounds of charitable status, as clearly illustrated by both the 1601 Act and the *Pemsel* case. The deep-rooted preoccupation of charity law with tax, rates, trading and more recently with the contract culture and the intricacies of profit distribution illustrates this aspect of its common law heritage. The present day role of the Inland Revenue in the UK in relation to charities, and of other such government bodies in all common law countries, grows from this very basic traditional concern.

The Inland Revenue (now called Her Majesty's Revenue and Customs (HMRC) following the April 2005 merger with Customs & Excise but, for ease of reference, referred to hereafter as the Inland Revenue) responds to applications from any organisation claiming exemption from tax liability on grounds of charitable activity. Such an organisation may be investigated by the Inland Revenue, which can then direct the submission of records etc. for scrutiny.

In the UK, since so empowered by the Finance Act 1986, the Inland Revenue has been working closely with the Charity Commissioners by referring to it those cases where it has reason to believe that a charity is engaging in non-charitable activities or is applying income for non-charitable purposes. The Inland Revenue refers to the register of charities maintained by the Commissioners. The fact that this agency applies established common law principles but is statutorily required to follow the case law precedents set by the Commissioners marks an important point of difference between its role and that of equivalent bodies in other common law jurisdictions.

- *Tax and rates*

There is no general exemption from tax. Charities can qualify for exemption from income tax and corporation tax under the Income and Corporation Taxes Act 1988 (Schedules A, C, D and F), from capital gains tax under the Taxation of Chargeable

Gains Act 1992 and may also be eligible for exemption from inheritance tax and stamp duty. The Value Added Tax Act 1994 governs charitable exemption from VAT (a European Union tax imposed by the EC Sixth VAT directive which the UK is obliged to implement). The Local Government Finance Act 1992 provides charities with limited exemption from rates liability.

- *Donation incentives*

The Income and Corporation Taxes Act 1988, as amended by the Finance Act 2000, entitles a company or an individual to tax relief on donations made by way of a gift aid scheme to charities. Gift aid by individuals is much more significant in scale and practical impact because the charity reclaims the tax paid by the donor; payroll giving is also significant. Total tax relief to charities on donations has been estimated at £1 billion for 2004/05.[31]

Other Agencies

The contemporary policing function in respect of the fiscal environment for charities in England & Wales is also shared amongst a number of other agencies.

- *The Registrar of Companies*

Charitable companies have to file an annual report and accounts and make an annual return under the Companies Act 1985 (in most cases, this is the same document that they file with the Charity Commission). The ancient common law office of 'visitor',[32] which allows for the appointment of a person to undertake the supervision of an organisation's internal affairs, is most often associated with companies.

- *Customs and Excise (now HMRC)*

The Commissioners of Customs and Excise may exercise their powers under the Value Added Tax Act 1994 to carry out investigations for the purpose of establishing whether a charity is attempting to evade liability for VAT payments.

Regulating Legal Matters

In England & Wales the traditional common law powers of the High Court and the Attorney General – to protect, supervise and where necessary to amend charitable trusts – have now been largely statutorily transferred to or assumed by the Charity

[31] See *A Generous Society*, the Home Office, 2005.

[32] See *A.-G. v. St Cross Hospital* (1853) 17 Beav. 45, where it was held that the office of 'Visitor' had become nominal.

Commission; the consent of which is required, under s 33 Charities Act 1993, to any proceedings concerning the administration of a charity. Although the court can and does hear cases where proceedings are initiated by or against a charity, involve complex legal issues or are on appeal from the Commission and continues to exercise its powers to make *cy-près* schemes or schemes for the administration of charities, it now does so very rarely. This applies equally to the role of the Attorney General who traditionally represented the Crown's *parens patriae* jurisdiction (see, further, Chap. 3) and continues in most cases to be made a party to proceedings involving a charity but would now seldom initiate proceedings for the protection of trusts. Nowadays neither the High Court nor the Attorney General any longer make a significant contribution to the policing function in respect of charities. Unlike other jurisdictions, however, in England & Wales that role has instead been transferred to another agency equipped with the powers and responsibility to be proactive in giving effect to it.

The High Court

The traditional, inherent or equitable, jurisdiction of the High Court has always been available to allow it to determine issues relating to the validity of dispositions and the administration of trusts for charitable purposes. Under the Judicature Acts of 1873 and 1875 statutory jurisdiction in respect of charitable trusts was assigned to the High Court. Initially this jurisdiction depended upon the existence of a trust but this has since been extended to accommodate issues affecting all charities. In addition to hearing proceedings arising under the charities legislation, the High Court also has an appellate jurisdiction. The role and powers of this court in relation to charities is broadly similar in all common law nations (see, further, Part II). In practice, however, the modern role of the court as regulator of legal matters affecting charities has faded considerably.

The Attorney General

The ancient *parens patriae* jurisdiction[33] of the Crown in relation to charities, and the right to bring proceedings in respect of them, devolved from the Lord Chancellor to become vested in the Attorney General. These powers have been described as

[33] It seems probable that the ancient *parens patriae* powers originated as an incident of the feudal system of tenure. From perhaps the 14th century, the monarch – as ultimate landlord to whom all lords, yeomen, serfs and others owed allegiance and paid fealty – was responsible for those declared *sui juris* and who because they lacked the necessary capacity could neither protect their own interests nor fulfill their feudal duties and therefore "belonged to the King as *Pater patriae*, and fell under the direction of this court, as charities, infants, idiots, lunatics, etc" (*per* Lord Somers LC in *Falkland v. Bertie* (1696) 2 Vern 333, p. 342; 23 ER 814, p. 818).

"theoretically limitless"[34] because they "spring from the direct responsibility of the Crown for those who cannot look after themselves".[35] A distinguishing characteristic of charitable trusts is that it acquires an entitlement to protection and enforcement by the Attorney General while a non-charitable trust is void because it is without any enforcement mechanism. In practice, little if any regulatory intervention is now initiated by the Attorney General (see, further, Chap. 3).

The Probate Office

The Probate Office is of ancient lineage being a descendant of the common law court of Probate with its jurisdiction in matters relating to wills. Until the Chancery Amendment Act 1858 ('Lord Cairn's Act') and other mid-19th century legislative reforms to the courts of Chancery and common law, the granting of probate in respect of wills and letters of administration of the estates of intestates remained the prerogative of the ecclesiastical courts. In 1857 the Prerogative Court was abolished and in 1958 the Court of Probate replaced it.

Regulating Fundraising

In England & Wales, where endowed foundations have never played quite such a prominent role as in the US, there has been a strong tradition of reliance upon public fundraising. This has been accompanied by a separate and distinct legislative interest in regulating matters associated with the raising of funds from the public, whether by street collections or door-to-door collections, for charitable causes.[36]

Fundraising has tended to attract two forms of regulatory regimes: statutory provisions to maximise probity and minimise fraud when funds are solicited; and the application of common law principles to determine eligibility for tax exemption on the funds raised. The former has in the past been largely left to self-regulation by the organisations involved (whether charitable or otherwise) and administered by the police through the issue of licences. The latter arises in the normal way when the organisation provides the Inland Revenue with evidence that it complies with the *Pemsel* definition of charity and then also demonstrates that the funds raised are to be applied exclusively for charitable purposes. Fundraising, which in recent years

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[34] See *Re W (a minor) (medical treatment)* [1992] 4 All ER 627, p. 641. Also, see *Re X (A Minor) (Wardship: Restriction on Publication)* [1975] 1 All ER 697 "no limits to that jurisdiction have yet been drawn", *per* Denning, L.J., p. 705.

[35] *Ibid*., p. 411.

[36] See for example, the Police, Factories, etc (Miscellaneous Provisions) Act 1916 that dealt with street collections and the House to House Collections Act 1939.

been transformed into a sophisticated and often multi-national activity involving professional fundraisers, has now also attracted a more modern regulatory regime (see, further, below).

The Charity Commissioners and Legislative Development of the Policing Function in the late 20th Century

The recommendations of the Nathan committee, such as the need for a relaxed application the doctrine of *cy-près* and the annual lodging of returns, were mostly accepted and duly incorporated in the White Paper eventually issued by the government[37] which was followed by the Charities Act 1960. This was a period in which there was pressure to ensure that appropriate changes were made following the calls made in the Beveridge and Nathan reports for a more efficient and better regulated charitable sector that worked closely with government in public benefit provision. In that context, the role of the Charity Commissioners in policing standards and enforcing accountability in the sector was seen as of central importance.

The Charities Act 1960

This statute repealed the last vestiges of the 1601 Act together with the law of mortmain and the Mortmain and Charitable Uses Act 1888, extended the responsibilities of the Charity Commissioners and emphasised their duty to investigate and check abuses. By providing for the continuation of the common law interpretation of 'charity' and 'charitable purpose', the 1960 Act ensured continued reliance on established principles and did nothing to change the substantive law.[38] This statute provided a new legislative platform for regulating charities in England and Wales; it was virtually replicated by legislation in Scotland and Northern Ireland[39] and to a large extent also in the Republic of Ireland;[40] though the law continued on a somewhat different path in Scotland.[41] The 1960 Act provided a template for similar legislative initiatives in other common law nations.

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[37] *Government Policy on Charitable Trusts in England and Wales* (Cmnd. 9538), HMSO, London, 1955.

[38] Despite recommendations made in the Nathan Report, *op. cit*., that the time had come to introduce a statutory definition of 'charity', albeit along the lines of the *Pemsel* classification.

[39] See the Charities Act (NI) 1964.

[40] See the Charities Act 1961.

[41] See Ford, P., 'Public Benefit Versus Charity: A Scottish Perspective', Mitchell, C. and Moody, S. (eds.), *Foundations of Charity*, Hart Publishing, Oxford, 2005, pp. 205–248.

In a notable exception to the recommendations of the Nathan committee, which was later blamed for the ineffectiveness of parts of the new regulatory measures, the 1960 Act failed to make provision for the committee's recommendation in respect of additional Commissioners:[42]

> Probably any reform of the Charity Commission and the Ministry would need more staff. In present times it is not easy to envisage a large increase of staff in any office, and this must be a factor in determining the pace at which reforms can be carried out. But it is plain that, to the extent that a new task is undertaken, staff must be provided to carry it out.

However, the powers of the Commissioners were extended by the Charities Act 1960 which also established the Central Register of Charities.[43] The register made the purpose and constitution of charities publicly available, together with annual reports of activities and accounts to the prescribed form. All charities in England & Wales not specifically exempted or excepted from registration were required to register with the Commission and registered charities with an income over £10,000 were also required to lodge a set of their latest accounts and the trustees' annual report.

The Expenditure Committee Report 1974–1975[44]

This report examined the Charity Commissioners and their accountability. It cited, as the reason for the investigation, public concern "that the effects of charity law and its administration were restricting the work and development of the voluntary movement".[45] It found that there were delays with the Charity Commission registration procedures and default in checking charity financial returns. To this the Commission pleaded lack of resources and staff.[46] The Royal Commission recommended that the register of charities should be computerised, standard financial reporting forms developed together with model trust deeds to guide new charities.[47] The Committee heard evidence that the Charity Commission was being overly legalistic and inflexible in the scheme making powers that they possessed.[48] The report also noted that there had been an "ossification of the law as a result of the scarcity of appeals to the High Court"[49] due to the high litigation costs that faced charitable trustees.

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[42] *Ibid*., p. 10.

[43] Continued under the Charities Act 1993, s 3(1).

[44] The Tenth Report from the Expenditure Committee, 1974–1975, *Charity Commissioners and their Accountability*, HMSO, London, 1975.

[45] *Ibid*., p. v.

[46] *Ibid*., p. xxiv.

[47] *Ibid*., p. xxviii.

[48] *Ibid*., p. xix.

[49] *Ibid*., p. xxxi.

The NCSS Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations (the Goodman Report)[50]

Shortly before the Tenth Report of the Expenditure Committee, the Goodman Committee had been convened by the National Council of Social Service as an inquiry into the effect of charity law and practice on voluntary organisations. They echoed the findings of the report of the Expenditure Committee but went further in recommending that small local charities be compulsorily amalgamated into neighbourhood trusts for the purposes of the welfare of the local community.[51] They also recommended that the *cy-prés* powers of the Commission should be streamlined and be able in appropriate cases to fundamentally alter the purpose of the trust.[52] The Committee found that there was little or no scrutiny of prospective charity applications for registration as a charity.[53]

The Wolfenden Committee was contemporaneously commissioned by other English charitable trusts "to review the role and functions of voluntary organisations in the United Kingdom over the next 25 years."[54] The committee grappled with the place of voluntary organisations in an increasingly welfare orientated state. It endorsed the recommendations of the Goodman Committee, and concluded that, "… we do not believe that accountability is a real difficulty for the great majority of voluntary organisations."[55]

These post Nathan inquiries drew little response from the Government but are illustrative of past themes. The notable exception is that empirical evidence was beginning to emerge that the Charity Commission registry was characterised by gross regulatory failure both on the part of charities complying with regulations and the Commission in enforcing such requirements. The recourse to the judiciary is noted as infrequently occurring and this is identified as having a detrimental effect on the development of common law. The lack of interest by mainstream legal discourse is evidenced by the English Law Reform Committee in 1982 that only briefly touched on charitable trusts when they prepared a report on the powers and duties of trustees.[56] It had few submissions from lawyers on charitable trusts and dealt only briefly with minor technical matters such as the retirement of a charity trustee, power of charity trustees to borrow and appointment of charity trustees by

[50] NCSS Committee of Inquiry, *The Effect of Charity Law and Practice on Voluntary Organisations*, *op. cit*.

[51] *Ibid*., p. 92.

[52] *Ibid*., p. 95.

[53] *Ibid*., p. 68.

[54] Wolfenden, *op. cit*., p. 1.

[55] *Ibid*., p. 161.

[56] Law Reform Committee, *The Powers and Duties of Trustees*, 23rd Report, HMSO, London, 1982.

deed.[57] It was largely concerned with the provision of appropriate trust structures to facilitate the use of the trust for private and commercial purposes.

The later stages of the Thatcher Conservative Party Government spawned a series of inquiries that were to show again that the regulatory compliance and scrutiny of charities were grossly deficient. That government's policies, driven by a different vision of the State's role in English society, accompanied by economic decline and social upheaval, provide a backdrop to an inquiry into charity regulation that bears remarkable resemblance to many other inquiries dating from the time of Elizabeth I.

In 1987 the Comptroller and Auditor General prepared a report on the Charity Commissioner's monitoring and control of charities.[58] The findings of the report were to trigger a rapid succession of inquiries leading to substantial legislative and administrative changes to the environment of English charity regulation. It conducted an empirical study into the lodging and scrutiny of charity accounts by the Charity Commission which revealed extensive irregularities in the Commission's ability to effectively apply the policing function. The survey of the Charity Commission register found that 63% of registered charities had not submitted an account within the last five years. Letters to those charities on the register that had not lodged accounts revealed that 47% of the defaulting charities were still operating and the remaining 53% had ceased or could not be located.[59] Only 32% of these accounts had been audited and the Charity Commission annually examined only 4% of the lodged accounts.[60] Out of the Commission's 330 staff only 8 staff were employed on the examination of accounts and the investigation of abuse.[61] None were qualified accountants. In 1991 the situation appeared to be improving slightly as it was expected that 37% of charities would lodge accounts as compared to 11% in 1989.[62] In 1988 the House of Commons Committee of Public Accounts examined that report and evidence of the Charity Commissioner.[63] The Commission argued a lack of staff resources[64] but, the Committee noted, "we cannot accept this as sufficient justification for its failure to take more active steps to monitor and investigate charities failing to submit accounts, for example by publishing lists of defaulters".[65]

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[57] *Ibid*., pp. 51–52.

[58] *Monitoring and Control of Charities in England and Wales*, National Audit Office, HMSO, London, 1987.

[59] *Ibid*., Appendix 1, p. 13.

[60] *Ibid*., p. 7.

[61] Committee of Public Accounts, 7th Report, HMSO, London, 1991, p. vii.

[62] *Ibid*., p. viii.

[63] *Monitoring and Control of Charities in England and Wales*, The House of Commons, Sixteenth Report from the Committee of Public Accounts, HMSO, London, 1988.

[64] Minutes of Evidence taken before the Committee of Public Accounts, 28 October, 1987, p. 1.

[65] *Ibid*., p. viii.

Report on the Efficiency Scrutiny of the Supervision of Charities (the Woodfield Report)[66]

This report on the supervision of charities answered the frequent question of the "small government" conservatives as to whether there was any need for the regulation of charities. It found that the Commission saved on legal costs and delays, aided the Inland Revenue in supervising charity exemptions, serviced the public's right to know about the existence of charities, their objects and beneficiaries, while being a source of guidance and advice on the definitions of charity to charities.[67]

The White Paper produced on charities as a result of the Woodfield Commission adopted most of the Woodfield recommendations.[68] It dealt extensively with the doctrine of *cy-prés* that was also the subject of comment by a Panel of British Parliamentarians formed to discuss the report.[69] It considered further amendments to *cy-prés* and the scheme making powers of the Charity Commission.[70]

The recommendations of the Woodfield Committee concerning audited annual returns, a computerised register and sanctions for default in lodging were adopted.[71] The powers of the Commission to deal with abuses were substantially upgraded. The Commission was empowered to take preventative measures such as suspending and replacing trustees, appointing receivers and restrictions on who could act as a trustee. Increased powers to search and acquire documents and exchange information with the taxation authorities were also adopted.[72] The White Paper also confirmed a number of administrative changes that followed the Thatcher theme of small government. The transfer of charity land would no longer require the consent of the Charity Commission. The Office of the Official Custodian for Charities was to be abolished and the Commission was to recover costs by charging fees.[73] This became law through a series of amendments to the Charities Act 1960 in 1992.[74]

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[66] Woodfield, P., Binns, G., Hirst, R. and Neal, D., *Efficiency Scrutiny of the Supervision of Charities*, Report to the Home Secretary and the Economic Secretary to the Treasury, HMSO, London, 1987.

[67] *Ibid*., p. 10.

[68] *Charities: A Framework for the Future*, Cm 694, HMSO, London, 1989.

[69] Parliamentary Panel on Charity Law, *Charity Supervision in the 1990's: A Response to the White Paper*, HMSO, London, May 1990.

[70] *Charities: A Framework for the Future*, *op. cit*., pp. 33–37.

[71] *Ibid*., p. 24.

[72] *Ibid*., pp. 26–30.

[73] *Ibid*., pp. 42–49.

[74] *The Charities Act Amendment Act* 1992.

The Commissioners and Their Role Under Contemporary Legislation

The Charity Commission is a non-ministerial government department as it is neither part of the Cabinet Office nor subject to the direction or control of Ministers. However Cabinet Office ministers have some functions in relation to the Charity Commission, including: appointing the Charity Commission Board Members, after a fair and open competition; replying to questions in Parliament about the Commission; and making orders to give effect to changes in charities' constitutions which are regulated by Acts of Parliament and have been agreed by the Commission. The role of the Commissioners in relation to the Inland Revenue (Her Majesty's Revenue and Customs (HMRC)), as governed by the charity legislation of 1992, 1993 and 2006 now determines the contemporary interpretation of charitable purposes.[75]

The Charities Acts of 1992 and 1993[76]

These statutes in effect transferred to the Commissioners much of the authority previously vested in the office of Attorney General.

Following the concern generated by the National Audit Office review of the Charity Commission, and also Sir Philip Woodfield's 1987 review of the wider issues of efficiency and scrutiny of charities, both of which highlighted charity accountability through annual reports and submission of accounts as a key weakness, the government introduced a revised statute. The Charities Act 1993, which modernised and strengthened the Commissioners powers, while retaining the traditional emphasis on "investigating and checking abuses",[77] considerably reinforced charity regulation in England & Wales. This body, for most purposes, has a jurisdiction and exercises powers concurrent with those of the High Court[78] and Commissioners are vested with the same powers as the Attorney General (see, further, Chap. 3) as regards taking proceedings in relation to charities.[79] The legal power of Commissioners to amend the

[75] The Charity Commission liaises with the Inland Revenue at the pre-registration stage in difficult cases and, since the latter must accept the Commission's registration as conclusive of charitable status for tax purposes, if it disagrees with the decision to register it has to challenge that decision at this stage.

[76] The Charity Commissioners constitution, as set out in the First Schedule to the Charities Act 1993, provides for the appointment of a Chief Charity Commissioner and two other Commissioners. The Home Secretary, with Treasury approval, has a discretionary power to appoint a further two Commissioners.

[77] Section 1(3) of the Charities Act 1993.

[78] The Charities Act 1993, s 16.

[79] *Ibid*., s 32.

purposes and constitutions of charities through 'schemes' (see, further, Chap. 6) also facilitate a policing function in relation to charitable purposes, for example in respect of rifle clubs which are no longer considered to promote the efficiency of the armed forces. Decisions of Commissioners are subject to review by the courts but are binding, in particular on the Inland Revenue.

The Charities Act 2006

This statute, passed by Parliament in November 2006, came into force partially on 7 November 2007 but mostly took effect in early 2008. It has introduced changes that will strengthen the Commission's capacity to give effect to the policing function.

- *Charitable purposes*

By extending the list of charitable purposes, the range of organizations now coming within the scrutiny of the Commission has been considerably broadened.

- *Exempt charities*

Some public bodies previously exempted from registration (e.g. further education corporations, foundation and voluntary aided schools, most universities and some museums) will now be required to register if they have no 'principal regulator' and have an annual income in excess of £100,000.

- *Excepted charities*

In future organizations, such as the Boy Scouts and Girl Guides and various religious charities, which have previously been excused registration, will be obliged to register and submit to Commission requirements if they have an annual income in excess of £100,000.

- *Intervention powers*

The powers of the Commission have also been significantly strengthened to allow it to direct trustees and employees to take specific actions, suspend or remove such persons and direct how charity property is to be used.

Commissioners' Registration Role

A registration system is a necessary prerequisite for an efficient policing function; the Central Register of Charities sets the parameters for the exercise of the Charity Commissioners regulatory powers. The new Charity Database and integrated monitoring system improved the Commissioners regulatory capacity, as did the coming into effect in 1998 of the reporting requirements in the Charities Acts 1992 and 1993.

The Charities Act 1993, in keeping with established precedents,[80] requires a charity to be set up under the jurisdiction of the law of England & Wales if it is to be eligible for registration. The Charities Act 2006 extends compulsory registration to all charities with an annual income in excess of £5,000, and to all Charitable Incorporated Organisations. This will bring a further 13,000 charities, including those previously exempted or excepted, within the Commission's supervisory remit. If an organisation operates wholly or partially within the jurisdiction, but is incorporated and registered elsewhere, it will not qualify as a charity for the purposes of the 1993 Act.[81] Charitable purposes may, however, extend beyond the jurisdiction of the courts of England & Wales as, for example, is the case with Oxfam and many other such humanitarian relief agencies. The policing function is apparent in the use of Commissioner's powers to register in accordance with a contemporary interpretation of the public benefit test: registering faith healing organisations[82]; refusing to register the Church of Scientology; and deregistering gun clubs.[83]

Exempt and Excepted Charities

The category of excepted charities largely consists of the large number of those with such a modest income that their registration would impose a disproportionately onerous burden on the Charity Commissioners as regulating authority and would be unlikely to prove cost effective. However, the longstanding exemption of certain types of charities from the necessity to register and be regulated is clearly a political matter reflecting entrenched social policy imperatives. Exempted charities are not just excused but prohibited from registering and are wholly outside any exercise by the Commissioners of their statutory authority.

Commissioners' Regulatory Role

All registered charities are required to draw up and submit to the Charity Commission an annual report of activities undertaken in pursuit of their objects, together with annual financial accounts, the complexity of which is determined by the size of the charity (measured in terms of income). Under the terms of the 2006 Act, examination or audit requirements are likewise set according to income thresholds. The reporting requirements for charities are set out in the Statement of Recommended Accounting Practice (SORP).

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[80] See for example, *Re Hummeltenberg* [1923] 1 Ch 237.

[81] See for example, *Gaudiya Mission v. Brahmachary* [1997] 4 ALL ER 957.

[82] See *Re Le Cren Clarke* [1996] 1 All ER 715.

[83] See (1993) 1 Ch. Com. Dec., paras 4 *et. seq*.

The Commission has extensive statutory powers to institute inquiries and appoint receivers, to investigate suspected misconduct, mismanagement and to protect a charity. It may appoint a receiver and manager to act in the place of trustees. Its remedial powers include replacing trustees and requiring restitution of charity money improperly used. It does not, however, have powers to prosecute abuse (a referral to the police is made if a criminal activity is suspected) or to impose punitive sanctions.

Commissioners' and Fundraising

The Part II provisions of the Charities Act 1992, as given effect by the Charitable Institutions (Fund-Raising) Regulations 1994, introduced a new regulatory regime which removed the traditional distinction between types of fundraising (house to house, street collections etc.) and substituted an approach requiring all forms of public charitable collections to be authorised by permits issued by local authorities or Charity Commissioners.[84] The latter have a purely advisory role in relation to fundraising[85] although they do have jurisdiction over funds collected in the name of charity, whether or not collected by a charitable body, and can act to protect funds so raised (e.g. by freezing bank accounts) and are empowered to make orders, subject to such conditions as they deem appropriate, authorising nation-wide public charitable collections. This new consolidated regime for policing fundraising is underpinned by criminal law sanctions.

The law as stated in the Charities Act 1993 was amended by the 2006 Act to give the Commission a new role in checking whether organizations are fit and proper to conduct charitable collections. A licencing scheme, drawn up by the Office of the Third Sector (see, further, Chap. 7) and the Commission and introduced possibly in 2009, will govern all public charitable collections whether by professional fundraisers, commercial participators or representatives of charities.

Judicial Development of the Policing Function

Development of the policing function, as with most other matters relating to charity within the common law tradition, has usually been judicially led. While agencies, notably the Revenue agency, are naturally associated with imposing restrictive constraints, it is the courts which set the precedents that thereafter significantly change the interpretation of the law in relation to charity and remain binding upon all other players. It has been assumed by some that, in contrast to the largely regula-

[84] The Charities Act 1992, s 72.

[85] See Charity Commissioners, CC20, *Charities and Fund-Raising*, London, 2002.

tory effect of legislation, the effect of the judiciary on the evolution of charity law has been in the main facilitative.[86] This interpretation runs the risk of devaluing the importance of judicial decisions that foreclosed possible avenues for further liberalisation of the law. Within the constraints they imposed and in the absence of any equivalent legislative initiative, much judicial decision-making has indeed served to broaden the interpretation of charitable purposes but we should not overlook the negative effect of judicial ruling on matters such as political activity, the causes of poverty, peace and reconciliation, the public benefit test in relation to public schools, religious organisations etc. It is now impossible to say how differently the law might have evolved if judicial precedent had not shut down potentially fruitful avenues for developing a more creative philanthropy.

Over the centuries certain principles have guided the judicial deployment of the policing function as it has been variously used to restrict or liberate the application of the law to charity. Firstly, the rights of donors and of next-of-kin must be protected. Secondly, a charity must have purposes which fit under one of the four *Pemsel* heads or come within the spirit and intendment of the Preamble to the founding legislation. Thirdly, it must be provided for the benefit of the public. Finally, unless exempted by statute, it must be exclusively charitable.

The capacity of the courts to develop and apply the policing function has naturally been dependant upon a continuous flow of litigation. For so long as the courts were regularly accessed to resolve issues affecting charities and their purposes they were in a position to shape developments. This has not been the case for some decades in England & Wales nor in most other common law jurisdictions, with perhaps the exception of the US (see, further, Chap. 9). Nonetheless, the judiciary have played a significant leadership role and although the opportunities to do so are diminishing, they will undoubtedly continue to put in place precedents to form key milestones in the future development of charity law. Moreover, judicial precedents as articulated by the European Court of Human Rights and by national courts as they apply the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (see, below and further at Chap. 3) are gradually acquiring a more prominent salience and will make their own contribution to the future bearing of the policing function upon charities and their activities.

Restrictive Approach to Charitable Bequests

Judicial concern to prevent abuse in the gifting of property for charitable purposes has been evident from the earliest cases.

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[86] See Keeton and Sheridan, *The Modern Law of Charities* (4th ed.), Barry Rose, Chichester, 1992: "The framework of facilitation comes mainly from judicial precedent. The machinery of supervision and control is mostly statutory", p. 1.

Protecting the Inheritance Rights of Next-of-Kin

From the time of the mortmain legislation in the 12th century, the judiciary in England & Wales have been assertive in their defence of the inheritance rights of next-of-kin. Judicial antipathy towards donors who resorted to charity at the expense of depriving their dependants was summed up in the comment made by Northington LJ in *Att. Gen. v. Tyndall*:[87]

> It is indifferent to the donors in what species of charity they give their money: not service to the poor but vanity is their motive.

The protection of the inheritance rights of next-of-kin from the whims of donors who foolishly bequeathed their family property to the Church had been a primary legislative intent from the statutes of Henry III in 1217 until at least the Mortmain and Charitable Uses Act 1736[88] when, as has been explained: "… the raison d'etre of the Act of 1736 was the protection of heirs from death-bed dispositions in favour of charity".[89]

Judicial vigilance in defence of the rights of next-of-kin has also been evident in respect of matters such as the testamentary capacity or motives of a donor when making a gift to charity. An intention to confer an essentially private benefit[90] or one that is contrary to public policy[91] will warrant a judicial denial of charitable status.

Protecting the Donor's Gift

Equally, the protection of gifts properly donated for charitable purposes from abuse or neglect by trustees or others has also been a matter of continuous judicial concern. To cope with problems resulting from a poorly expressed gift where there was a clear charitable intention, the courts developed a 'benignant construction' approach to make good the charitable gift (see, further, Chap. 4). This concern to protect a donor's gift was also evident in judicial employment of the principle of 'apportionment' to divide a gift between charitable and other purposes and by the use of schemes and the *cy-près* doctrine to rescue and redirect resources to fulfill, as closely as possible, that initial charitable intention.

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[87] (1764) Amb. 614, p. 616.

[88] 9 Geo. II, c. 36.

[89] See Brady, J., 'The Law of Charity and Judicial Responsiveness to Changing Need', *Northern Ireland Legal Quarterly*, 27: 3, 1976, p. 202.

[90] *Oppenheim v. Tobacco Securities Trust Co. Ltd*. [1951] AC 297.

[91] *Thrupp v. Collett (No. 1)* (1858) 26 Beav. 125 where a bequest to procure the discharge of imprisoned poachers was denied charitable status.

Restrictive Application of the Public Benefit Test

As public benefit compliance is the distinguishing hallmark of charitable status, conferring a stamp of virtue and carrying with it a passport to generous tax exemptions, the courts have naturally been particularly fastidious in policing the application of this test.

'Public'

The requirement that it be for the benefit of the 'public' prevents a charitable trust, unlike other forms of trust, from being made in favour of named or specific beneficiaries or those linked by a nexus of relationship (e.g. employees of a particular company).[92] Where a class is defined so that its membership is fixed then it is necessarily private; a 'closed' class cannot be a public one. The courts have policed these boundaries with some vigilance: a class of specified individuals can never be construed as a public class;[93] nor can a class which derives from a personal relationship with specified individuals;[94] similarly so for a sub-section of the public or 'a class within a class'; and a section of the public as defined by means other than locality, is also outside the definition of 'public'.[95] If the class is defined by membership of a particular profession then it is likely to be considered too closed[96] though common nationality may be sufficient to meet the 'public' requirement.[97]

While the 'poor relations' cases constitute a notable exception to this rule (see, also, Chap. 1), since extended to 'poor employees',[98] the judiciary have limited further exemptions. In *Re Compton*,[99] for example, the court declined to hold charitable an educational trust for the benefit of the descendants of three named persons. Lord Greene MR then explained "that on principle a gift under which the beneficiaries are defined by reference to a purely personal relationship to a named propositus cannot … be a valid charitable gift." Moreover, the courts have also required irrefutable evidence of poverty. So, for example, in *Re Drummond*[100] a trust to provide for the holiday expenses of employees in a department of a particular store was found not to be charitable. Again, in *Re Cullimore's Trusts,*[101] a trust for the benefit

[92] *Oppenheim v. Tobacco Securities Trust Co Ltd* [1951] AC 297.

[93] See for example, *Re Tree*, *op. cit*.

[94] See *Re Compton* [1945] Ch. 123, p. 131.

[95] See the 'narrow' and the 'wide' rule in *IRC v. Baddeley* [1955] AC 572.

[96] *Trustees of the Londonderry Presbyterian Church House v. IRC* [1946] NI 178, p. 183.

[97] *AG v. Stewart* (1872) LR 14 Eq 17.

[98] *Re Gosling* (1900) 48 WR 300.

[99] [1945] Ch. 123.

[100] [1914] 2 Ch 90.

[101] (1891) 27 LR Ir 18.

and maintenance of the families of employees of a firm was found not to be charitable. In the words of Porter MR:

> Mere kindness, generosity, or benevolence on the testator's part is not enough to constitute a charitable purpose; there must also be an element of poverty or need on the part of the object, or else the gift must be dedicated to some purpose, such as education, religion or the like which the law regards as charitable. There is nothing here to show that the persons whom the testator meant to benefit were to be poor persons.

In *Gibson v. South American Stores (Gath & Chaves) Ltd*.[102] the issue concerned a trust established for the benefit of necessitous employees and their dependants and the ruling of Harman J, resting on a requirement for an element of 'public' benefit, was upheld by the Court of Appeal.

'Benefit'

In applying the public benefit test the courts in England & Wales have, since the vivisection cases, demonstrated considerable rigour in requiring evidence that the 'benefit' component of the test is satisfied. In *Re Fouveaux*[103] Chitty J had held that the abolition of vivisection was a charitable purpose because the testator's intention was to benefit the community; he ruled that it was not for the court to consider whether the community would in fact benefit. However, the House of Lords in *National Anti-Vivisection Society v. IRC*[104] expressly over-ruled the approach taken by Chitty J. The House declared that it was wrong to treat the intention of the testator as decisive; the public benefit test was to be applied by the court.[105]

Applying the Test

The application of the public benefit test has traditionally varied across the four *Pemsel* heads: trusts falling within the first three of *Pemsel's* categories were 'assumed to be for the benefit of the community and therefore charitable, unless the contrary is shown'.[106] In fact, although this held good for the first and third categories, trusts for the advancement of education quite often failed to qualify as charitable trusts because of an inability to satisfy the public benefit requirement. No

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[102] [1950] Ch. 177.

[103] [1895] 2 Ch 501.

[104] *Op. cit*.

[105] In contrast to the subjective approach of the courts in Ireland: see *In re Cranston, Webb v. Oldfield* [1898] 1 IR 431 and *In re Worth Library* [1994] 1 ILRM 161.

[106] See *National Anti-Vivisection Society v. IRC* [1948] AC 31, *per* Lord Simonds, p. 65.

such presumption applied in respect of gifts within the fourth category which attracted the most stringent application of the public benefit test.[107]

The exemption of trusts for the relief of poverty was confirmed by the ruling of the House of Lords in *Dingle v. Turner*.[108] After considering the case law, they came to the conclusion that there was an exception to the usual public benefit requirements in 'poor relations' and 'poor employees' cases. More recently this approach was reaffirmed in *Re Segelman*[109] where the gift was to 'poor and needy relations'. Then the question for the court was whether it was a gift for the relief of poverty amongst a particular class, or a gift to particular poor people. Because of the fact that the class could grow as new relations were born, the court held it a valid charitable gift, even though it would only benefit a restricted class.

In the context of education, the application of this test has generated some controversy. In particular, the contention that elite schools which restrict access to those with the means to pay the considerable admission fee for pupils should not be eligible for charitable status continues to cause debate. The courts, however, have consistently held to the view that 'public schools' in England & Wales are charitable. In *Abbey Malvern Wells Ltd. v. Ministry of Local Government and Planning*,[110] for example, the argument that a school which charged full fees could not be a charity was met with the judicial response that this was "a rather startling proposition" which was "several centuries out of date". The same approach can be seen in relation to private hospitals.[111]

The Charities Act 2006 introduced a requirement that the public benefit test be uniformly applied in respect of all charitable purposes. It remains to be seen how this will affect the charitable status of 'public schools', private hospitals and other such facilities.

Restrictive Application of the Spirit and Intendment Rule

In the years following the Statute of Charitable Uses 1601, the judiciary repeatedly reaffirmed that only charitable purposes corresponding to those listed in the statute would be recognised in law. For four centuries it remained the case that for a purpose to be charitable it had to correspond to one mentioned in the Preamble or broadly come within its 'spirit and intendment'. Accordingly, the judiciary ensured that the development of charitable purposes was by a process of precedent and analogy rather than by the application of logic or principle with the result that the body of charity law grew in volume at the expense of coherence. The House of Lords

[107] *Ibid*.

[108] (1972) AC 601.

[109] (1995) 3 All ER 676.

[110] [1951] Ch. 728.

[111] *Re Resch's Will Trusts* [1969] AC 514.

eventually confirmed the appropriateness of this approach in *Williams' Trustees v. IRC*[112] when it was indicated that, as regards the legal limits of charity, it should be borne in mind that a trust would not be charitable unless it came within the spirit and intendment of the Statute of Elizabeth I (see, further, Chap. 4).

Restrictive Application of the Exclusively Charitable Rule

The judiciary have assiduously held to the view that for a trust to be charitable its purposes must be confined exclusively to charitable purposes. Where a donor provided for both charitable and non-charitable purposes, or allowed for the possibility of trustees using at their discretion some or all of a gift for non-charitable purposes, then the courts would refuse to recognise it as charitable (see, further, Chap. 1).

Restrictive Interpretation of Political Activity

In England & Wales, as in other common law jurisdictions, it is certain that an organisation may not acquire charitable status and highly probable that it will be unable to retain it if one of its primary purposes is to campaign for changes in the law or government policy. Since *Re Scowcroft*,[113] this constraint on charitable activity has been judicially reaffirmed in a number of leading cases.[114] Its origins lie in the legal nature of charities as 'trusts' enforceable by the courts which have traditionally regarded any changes to the law or to government policy as the responsibility of parliament, not the courts. This embargo has grown in scope to encompass gifts for the pursuit of justice, for improving international or multiracial relations and for promoting peace and reconciliation. Although the Charity Commissioners have issued guidance emphasising that charities have a wide discretion to campaign and otherwise undertake political activities in pursuance of their charitable purposes[115] the restriction is nonetheless very evident. It has clearly stated that "an organisation set up for a purpose (or which includes a purpose) of advocating or opposing changes in the law or public policy (in this country or abroad) or supporting a political party cannot be a charity".[116] Thus, while charities like Oxfam,

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[112] [1947] AC 447.

[113] [1898] 2 Ch. 638.

[114] See for example, *National Anti-Vivisection Society v. IRC* [1948] AC 31 and *McGovern v. A-G* [1982] Ch 321, *per* Slade J, pp. 336–337.

[115] See Charity Commissioners, CC9, *Political Activities and Campaigning by Charities*, London, 1997. Also, see comments by the Commission released in 2004 during the Charities Bill discussions (on website).

[116] *Ibid*., para 13.

RSPCA and Shelter are able to engage in political campaigning on third world, animal and homelessness issues quite vigorously, organisations such as Amnesty and Greenpeace are denied charitable status in this jurisdiction.

Restrictive Approach to Aid, Trade and Profit Distribution

The courts have maintained a vigilant watch on charities that engage in any form of commerce. This wariness springs from a perceived need to safeguard private enterprise from unfair competition by tax subsidised charities seeking to exploit their standing as registered public benefit organisations to gain a marketing advantage.

International Aid

In England & Wales, as elsewhere, charities have tended to respond to need as and where they see fit usually with basic food delivery and community development programmes. There is, however, some uncertainty as to whether in some circumstances this must be accompanied by evidence of that contribution also generating benefit within the jurisdiction. The uncertainty springs from a restrictive judicial approach, as articulated by Lord Evershed MR in *Camille & Henry Dreyfus Foundation Inc. v. Inland Revenue Commissioners*[117] and subsequently reinforced by the Charity Commissioners.[118] It would seem to rest on the issue of whether schemes of general public utility (e.g. roads, bridges, and other developmental projects) contribute directly to the relief of poverty in a specific locality or are of a more open-ended nature intended to generally improve the social infrastructure. The latter activity would appear not to warrant charitable status.

Trading

In the common law jurisdictions trading is not itself a charitable purpose.[119] When a charity undertakes commercial or enterprise activities the key issue is whether it is doing so as either primary purpose trading or as trading for fundraising purposes.

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[117] [1954] Ch. 672.

[118] See Charity Commissioners, Report para 72, 1963.

[119] See Charity Commissioners, CC35, *Charities and Trading*, London, 2001. Also, see Charity Commissioners *War on Want Inquiry* (1991) which found that the trading arm of this organisation was not entitled to receive an interest free loan from the parent charity as this constituted an application by the latter of charitable funds for non-charitable purposes.

Many charities can and do undertake trading activity in furtherance of their primary purposes, most often by setting up a subsidiary company to undertake trading on its behalf and to which any after tax profits will be returned for expenditure on its charitable purposes. The relevant regulatory provisions focus on ensuring that trading is not compromising an organisation's charitable status, determining eligibility for tax exemption on trading profits and on the post-tax use of those profits. The courts, as Picarda has noted, have carefully scrutinised the activities that come within the legal definition of 'trade'[120] and have been keen to ensure that "when a trade is carried on by a charity, tax is chargeable on the profits of the trade notwithstanding that the profits are, and can only be, applied to the purposes of the charity".[121]

Profit Distribution

A charity does not compromise its standing by making a profit "so long, at any rate, as all the profits (must, *sic*) be retained for its purposes and none can enure to the benefit of its individual members".[122] Entering fully into the commercial marketplace by engaging in trading, competitive practices, mergers and management takeovers etc., has become a modern necessity for many charities. Where such activities constitute a commercial undertaking with private benefit, as in *Inland Revenue Commissioners* v. *Oldham Training and Enterprise Council*,[123] they will be denied charitable exemption from rates. In this jurisdiction the restrictions on profit distribution have inhibited the development of entrepreneurial philanthropy.

The Judiciary and the European Convention

The policing function as applied by the judiciary when interpreting the principles of the European Convention for the Protection of Human Rights and Fundamental

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[120] Picarda, H., *The Law and Practice Relating to Charities* (3rd ed.), Butterworths, London, 1999, p. 741. Citing: *Coman v. Rotunda Hospital Dublin (Governors)* [1921] 1 AC 1 (letting out rooms for entertainment); *Grove v. Young Men's Christian Association* (1903) 88 LT 696 (running a restaurant open to outsiders); *Religious Tract and Book Society of Scotland v. Forbes* (1896) 3 TC 415 (bookselling); *Brighton College v. Marriott* [1926] AC 192 (carrying on a public school); *IRC v. Glasgow Musical Festival Association* (1926) 11 TC 154 (promoting a music festival to which the public were on payment admitted); ICTA 1988, s 510 – *Royal Agricultural Society of England v. Wilson* (1924) 9 TC 62 (running an agricultural show); and *British Legion Peterhead Branch, Remembrance and Welcome Home Fund v. IRC* (1953) 35 TC 509 (arranging regular public dances).

[121] *Ibid*., p. 741, citing: *St. Andrew's Hospital, Northampton v. Shearsmith* (1887) 19 QBD 624; *Psalms and Hymns Trustees v. Whitwell* (1890) 3 TC7; *Davis v. Superioress Mater Misericordiae Hospital Dublin* [1933] IR 480.

[122] *Incorporated Council of Law Reporting for England and Wales v. Attorney-General* [1972] Ch 73 (CA) 90, *per* Sachs LJ.

[123] *Inland Revenue Commissioners* v. *Oldham Training and Enterprise Council* (1996) STC 1218.

Freedoms 1950 seldom has a direct and specific relevance for charities but it does establish or underpin benchmarks that have consequences for these as for other areas of human activity. Among the basic civil rights accorded recognition and protection in the European Convention, as policed by the European Court of Human Rights, the following seem most relevant in this context: freedom of expression; freedom of association and assembly; freedom of religion; and the right to life (see, further, Chap. 3).

The Outcome of the Charity Law Reform Process and Implications for the Future of the Policing Function and Social Policy

In England & Wales, the lengthy charity law reform process concluded with the introduction of the Charities Act 2006. Although this legislation will be memorable mainly because of its approach to matters of definition and the resulting consequences for the mediation/adjustment function (see, further, Chap. 4) in fact it is also very much concerned with tightening the policing function.

Increasing the Powers and Range of the Policing Function

The institutional separation of the revenue driven functions from those of determining and developing charitable purposes (see, further, Chap. 4), represented by the Inland Revenue and the Charity Commissioners respectively, will remain as the key distinguishing hallmark of the regulatory framework in this jurisdiction. The capacity to supervise charities and their activities, as exercised firstly by the Charity Commissioners then by the courts has, however, been greatly strengthened.

Applying the Public Benefit Test

The common law presumption that the first three *Pemsel* heads of charity are public benefit compliant has now been replaced with a statutory requirement that the test must always be satisfied.[124] Charitable status in all cases will in future, therefore, be dependent upon the ability of an entity to establish firstly, that its purpose and activities fit under one of the 13 now statutorily defined heads (see, further, Chap. 4) and secondly, that it can satisfy the public benefit test. The meaning of public benefit as developed by the courts remains unchanged but all charities now have to pass that test.[125]

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[124] See s 3(1) of the Charities Act 2006.

[125] See Charity Commissioners, RR8, *The Public Character of Charity*, London, 2001 as revised in *Public Benefit – The Legal Principles*, 2005.

This single legislative change may carry profound implications for the future of the policing function. For example, in future bodies such as public schools, independent hospitals, religious organisations and those established under the rules relating to 'poor relatives' and 'poor employees' will be required to demonstrate that their services are compliant with this test if they are to acquire or retain charitable status.

Role of the Primary Regulatory Body

The Charity Commissioners dual role as regulator and facilitator of charities is to continue although its legal status will change. In future it will be a statutory corporation with the following new objectives:

- Increasing public confidence
- Increasing compliance with legal obligations
- Encouraging the "social and economic impact" of charities
- Enhancing accountability

In furtherance of these objectives the Commissioners have been vested with the following general functions:

- Determining charitable status
- Facilitating better charity administration
- Identifying, investigating and remedying abuse
- Obtaining, evaluating and disseminating information
- Giving information, advice and proposals to ministers

Registration

The registration requirement is now extended to include some larger charities previously exempt or excepted. As a starting point, all charities with an annual income of more than £5,000 are required to register as are all Charitable Incorporated Organisations. Where a charity has an annual gross income of less than £5,000 it may be allowed to register on a voluntary basis. This has greatly increased the number and range of charities that are now subject to the Charity Commissioners regulatory powers.

Charity Appeals Tribunal

This new body will hear appeals against decisions of the Charity Commission, including decisions on charitable status. The tribunal will consider the decision afresh and can admit new evidence.[126] This promises to be an important

development as critics of the present system have often made the point that a specialist court could do much to improve the development of the common law and would be in a position to ensure greater consistency in charity law judgments. Appeals can be made to the High Court against the tribunal's decision on a point of law.

Fundraising

Regulating fundraising, and thereby increasing public confidence in the sector, is a clear legislative objective and provisions in the 2006 Act are intended to implement the Home Office's proposals to introduce a unified system to regulate public charitable collections throughout England and Wales.[127] A public charitable collection is now defined as a collection of money or other property which takes place in any public place or by means of visits to houses or business premises. The definition is intended to be wide enough to cover all appeals for "good causes", whether or not charitable, and applies to collections by or on behalf of campaigning organisations. The promoters of a public charitable collection are obliged to apply for a Certificate of Fitness which will be issued by the local authority. Local authorities have limited powers to refuse or withdraw a certificate in appropriate circumstances, and the exercise of such powers is subject to a right of appeal. A new reserve power is provided for the Secretary of State to issue regulations to impose good practice requirements on those persons responsible for a charity's fundraising activities. The present policy of the government is to await and review the outcome of the charity sector's efforts to develop an effective policy of self-regulation of fundraising practices before deciding whether to make use of this power.[128]

Other Fiscal Matters

Apart from the considerable attention given to regulating fundraising, the new legislation does not otherwise seek to apply the policing function to fiscal matters. The above mentioned issues relating to donation incentive schemes, international trade

[126] According to the Regulatory Impact Assessment published at the same time as the draft Bill, charities will not have to pay to use the tribunal although they will have to pay any legal fees unless awarded costs in the absence of the suitor's fund proposed to but rejected by the government.

[127] See *Public Collections for Charitable, Philanthropic and Benevolent Purposes*, Home Office, London, 2003.

[128] The sector, led by the Institute of Fundraising, established the Buse Commission in 2003, under the chairmanship of Rodney Buse, to review the scope for the charity sector to establish a self-regulatory framework for charity fundraising. It released its initial report in January 2004

and profit distribution etc. have not attracted new legislative provisions, although the making of *cy-près* schemes will now be a simpler and more flexible process.

Giving Effect to Social Policy Through the Policing Function

The extension from 4 to 13 heads of charity essentially demonstrates the primary legislative intent to facilitate a broader legal interpretation of 'charity' that can more appropriately address contemporary manifestations of social need (see, further, Chap. 4). This formal categorisation of charitable purposes, like its *Pemsel* precursor which it preserves and continues, similarly serves to confer recognition and a sense of order on a range of activities now deemed to be charitable. The corollary, a corresponding increase in the number and range of organisations that will in future be subject to the policing function, is to be managed largely through the above adjustments to the mechanics of the law. The outcome of the charity law review process, however, would seem to carry few direct implications for the future application of this function to social policy themes.

Advocacy/Political Activity

It is noticeable that the government did not take this opportunity to introduce provisions that would clearly empower charities to have as a primary purpose the discretion to lobby for change in law and policy. The longstanding constraints on the freedom of charities to challenge government have been deliberately left in place.

Conclusion

In England & Wales the primary emphasis in the law relating to charity, applied mainly legislatively but also judicially, has traditionally been placed on the policing function. One of the outcomes of the charity law review process has once again been to strengthen this function through such measures as increasing the powers available to the Charity Commissioners and by greatly extending the number and range of charities required to submit to their supervision. Given that the process occurred in a political climate overshadowed by anti-terrorism concerns, generating a considerable body of legislation aimed at tightening surveillance of non-government organisations and increasing the information available on their activities, the renewed emphasis on control is unsurprising.

Chapter 6
Legal Functions: Mediation and Adjustment

Introduction

Calibrating the law to fit current social circumstances is, in a common law context, generally more a matter for judicial than legislative initiative and is thus highly dependant upon a continuous flow of litigation. Even then the capacity of the judiciary to shape the application of the law is hedged around with many constraints including the realities of an essentially adjudicative process, wariness of straying into social policy (judicially considered to be the responsibility of government), and the dictates of precedent. In many common law jurisdictions, however, for some decades the possibility of any such judicial action has been foreclosed by the absence of the necessary case flow.

In England & Wales the judicial role has to some extent been displaced by the responsibilities of the Charity Commissioners. As more powers are statutorily devolved to this body so the decision-making process has become less adjudicative, less confined by precedent and more inquisitorial in nature. This has allowed the legal function of mediation/adjustment to grow in significance relative to other functions. The development of charity law, led by the Charity Commission as it uses this function to explore the boundaries of charitable purposes and the potential for government/charity partnership, is now a distinctive characteristic.

This chapter deals with the common law capacity to re-interpret principles and precedents in the light of changing social circumstances. It considers the origins of the mediation/adjustment function, how charity law can be adjusted to address changes in the pattern of contemporary need (e.g. broadening the definition of 'poverty') and how charities can be facilitated to become active mediators in the change process (e.g. assisting the unemployed into employment). It notes the provision of alternative legal forms (unincorporated associations, trusts, companies) and the spread of forums for mediation and arbitration (High Court; Charity Commission; Inland Revenue; Companies Registry Office; and Rates office etc.). It focuses on the Charity Commissioners' development and deployment of the mediation/adjustment function. It explains the role of *cy-près* when objects cannot be satisfied and gifts must be saved. The chapter concludes by assessing the outcome of the charity law reform process in England & Wales and the implications arising for the future of the mediation/adjustment function and related social policy issues.

K. O'Halloran et al., *Charity Law & Social Policy*,

Origins of the Mediation and Adjustment Function

Charity law derived from the law of trusts and owes much to the creative use of judicial powers by the Court of Chancery as it developed the principles and legal forms governing the transfer of rights in property. Of central importance to the development of charity law by Chancery is the fact that this was a jurisdiction based upon guiding principles which permitted a degree of discretion that was anathema to the common law and its doctrine of precedent.

Chancery and the Common Law Courts

The approach adopted by the Court of Chancery was very different from that of the common law courts. It had an inquisitorial approach to issues and its hearings (which could be interminable and the value of the estate at issue could be wholly consumed in legal costs) tended to conclude in balanced judgments whereby the benefit of contested property was apportioned according to the merits of the case. A petitioner's plea was settled on the basis of principle and good conscience. A defendant could be summoned to appear by the issue of a *sub poena*. If successful, the plea could be enforced by utilising the prerogative powers, such as the power of injunction or of specific performance, which characterised the traditional authority of the Crown. Moreover, having assumed from the ecclesiastical courts the responsibility for making *cy-près* schemes, the Court of Chancery for the two centuries until 1860 had the power to make adjustments to the objects and redirect the use of resources in respect of defunct charities (see, further, below). A paternalistic use of judicial discretion coupled with access to prerogative powers gave this court considerable flexibility and real authority.

The common law court, on the other hand, exercised the sovereign authority of the Crown. It had a strongly adjudicative approach to issues and its adversarial proceedings concluded with absolute and prescriptive decision-making. The court of King's Bench, or Queen's Bench was the more important and powerful of the common law courts. It dealt with criminal and civil matters and supervised the lower courts. In common law no writ meant no action. A petitioner could only succeed in lodging a plea in court if he could fit his complaint within the narrowly defined terms of a particular writ; the range of standard form writs available was limited. On conclusion of the hearing, the range of judicial disposal options was again tightly constrained. Should the plea succeed and the court find in favour of the plaintiff, it quite often lacked the authority necessary to ensure that his rights were enforced.

Chancery, therefore, came to offer an alternative route to justice for petitioners whose cause did not find a remedy in the common law courts. This equitable approach was manifested most clearly in Chancery's treatment of the trust and led to the development of the modern law of charitable trusts (see, also, Chap. 3).

The current meaning of 'charity' throughout the common law world is derived from the approach developed by Chancery towards charitable trusts.

Chancery and the 1601 Act[1]

The judiciary never fully shared the concern of the Crown that the law should be used solely to prevent abuse. Instead of viewing their role as constrained by the 1601 Act, limited in effect to implementing its provisions, the Court of Chancery took the approach that the authority of the court in respect of charities was inherent, was of a protective nature and preceded the Statute of Charitable Uses. For example, in *AG v. Tancred*[2] Lord Northington acknowledged that even before the 1601 Act the Court of Chancery would have given aid to a defective conveyance in favour of a charity. In *Attorney General v. Skinners Company*[3] the court then formed the view that its jurisdiction over charities was inherent, and that the said statute was only declaratory of the existing law. As was subsequently explained in *Moggridge v. Thackwell*[4] "where money is given to charity generally and indefinitely, without trustees or objects selected, the King as *parens patriae* is the constitutional trustee".[5] Finally, in *Williams' Trustees v. IRC*,[6] the House of Lords indicated that as regards the legal limits of charity, it should be borne in mind that a trust would not be charitable unless it came within the spirit and intendment (rather than the prescriptive provisions) of the Statute of Elizabeth I.

The use of judicial discretion, a hallmark of this jurisdiction, allowed the judiciary to formulate a body of principles to guide its determination of matters affecting trusts and charitable trusts. This was quietly developed and consolidated during and following the protracted struggle between Church and State.

The Approach Developed in Chancery

Chancery exercised an equitable jurisdiction which supplemented the gaps left by an arid common law system based upon a classification of writs and the rigidity of precedent. Equity was introduced to mitigate the rigour of the law. This approach had long been applied in the administration of trust law and came to be

[1] Statute of Charitable Uses 1601 (43 Eliz. 1, c.4).

[2] (1757) Amb 351.

[3] (1826) 2 Russ 407.

[4] (1803) 7 Ves. 36.

[5] *Ibid*., p. 83

[6] [1947] AC 447.

further developed in relation to enforcing the fiduciary obligations of guardians in respect of children where the responsibilities were essentially based upon trust principles.[7]

A petitioner's plea was settled on the basis of principle and good conscience.[8] The following maxims of equity stand as powerful reminders of the principled basis on which Chancery resolved disputes; they continue to inspire lawyers and influence contemporary judicial decision-making:[9]

> Equity follows the law.
> Equity will not suffer a wrong to be without a remedy.
> Equity acts *in personam*.
> He who seeks equity must do equity.
> He who comes into equity must come with clean hands.
> Delay defeats equity.
> Equality is equity.
> Equity looks to the intent rather than the form.
> Equity looks on that as done which ought to have been done.
> Equity imputes an intention to fulfil an obligation.
> Where the equities are equal, the first in time prevails.
> Where the equities are equal, the law prevails.

Chancery came to offer an alternative route to justice for petitioners whose cause did not find a remedy in the common law courts. The application of this equitable approach to charities in England & Wales resulted in the development of the law of charitable trusts and its attendant body of principles which infuse contemporary charity law throughout the common law world.

Discretion

Equitable remedies are discretionary. This distinctive characteristic of the Court of Chancery was in marked contrast to the common law adherence to the doctrine of precedence. As MacDermott LJ once explained:[10]

> The Court of Chancery exercised a wider and more benevolent discretion [than the common law courts], but in this equity usually followed the law to the extent of accepting that the discretion to interfere was limited to certain types of cases.

Lord Hardwicke, as Lord Chancellor from 1737–1756, is credited with establishing this hallmark characteristic.

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[7] See Spence, *The Equitable Jurisdiction of the Court of Chancery*, Vol. 1, 1946, p. 605.

[8] See for example, Wylie, J.C.W., *A Casebook on Equity & Trusts in Ireland* (2nd ed.), Dublin, 1998, Chap. 1 'Fundamental Principles'.

[9] See further, Mr. Justice Ronan Keane, 'The Maxims of Equity' *Equity and the Law of Trusts in Ireland*, *op. cit*., p. 27.

[10] See *Re Townsend Street Belfast Presbyterian Endowment Trusts* [1954] NI 53.

Fraud

Interestingly, it was in the context of fraud cases that the judiciary became accustomed to practicing discretion. As has been pointed out:[11]

> In fraud cases, for example, the emphasis was placed on providing relief in a diverse range of circumstances; the aim was to prevent the taking of 'undue advantage'.[12] The breadth and flexibility of a jurisdiction animated by such a principle are obvious, as is the similarity between the approach adopted in fraud matters and that employed when infants were involved. In both areas, the Court felt free to exercise a benevolent discretion in a wide variety of situations.

In Equity there was a judicial capacity to set aside contracts procured through fraud and flexibility was exercised in respect of time stipulations. As Lord Redesdale put it: "Courts of Equity … dispense with that which would make compliance with what the law requires oppressive: and in various cases of such contracts, they are in the constant habit of relieving the man who has acted fairly, though negligently".[13]

Fusion of Equity and Common Law

Legislative intervention eventually ended the continuation of two parallel judicial systems. In England and Wales, the Supreme Court of Judicature Act 1873 unified the court systems of equity and the common law: all Divisions of the High Court were empowered to exercise the jurisdiction of Chancery; all were required to apply Chancery principles. This statutory fusion of equitable and common law principles included a directive that, in the event of a conflict between them, the principles of equity should prevail. For charity law, this meant that thereafter the principles of equity were available to induce flexibility into what would otherwise have been a rigid common law system wholly governed by precedent.

Developing Appropriate Legal Structures for Charities

Being dedicated exclusively for the public benefit, charities were from the outset readily distinguishable by their purposes from mutual benefit enterprises, co-operatives and private trusts etc. It was always more difficult, however, to differentiate between

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[11] Seymour, J., '*Parens Patriae* and Wardship Powers: Their Nature and Origins', *Oxford Journal of Legal Studies*, Vol. 14, 1994, p. 173.

[12] *Barnardiston v. Lingwood* (1740) 2 Atk 133, p. 135; 26 ER 484, p. 485.

[13] *Lennon v. Napper* (1802) 2 Sch & Lef 682, p. 684.

charities on the basis of legal structure. There has never been one mandatory legal structure for charities. As has been pointed out:[14]

> A charity may be constituted as a trust, a club, a limited company, a chartered corporation or a statutory body. Every charitable organisation is subject to the general law governing its particular type of structure but, however constituted, it also benefits or is constricted by rules peculiar to charities.

Charities often switch between legal structures in accordance with their changing organisational needs. In England & Wales, the preferred structure has traditionally been the association (the simplest, with incorporation to give legal personality possible under the Charities Act), trust or charitable company limited by guarantee while some have been established by royal charter or act of parliament.

The Charitable Trust

A charitable trust must fit within one of the four *Pemsel*[15] headings: relief of poverty; advancement of education; advancement of religion; or for charitable purposes other than those three. In addition, it must also be for the public benefit. The latter requirement prevents a charitable trust, unlike other forms, from being made in favour of named or specific beneficiaries.

Strengths of the Trust

A charitable trust has a number of advantages over other types of trust. It is not subject to the usual requirements relating to certainty of objects and it may exist in perpetuity. It is entitled to significant tax exemptions. It may be enforced in ways not available in relation to other trusts: the Attorney-General, as protector of the public interest, may commence enforcement proceedings; the charitable organisation involved may do so; and the Charity Commissioners have certain statutory powers available to permit direct intervention. It is given effect through the powers and duties of trustees who are bound to act selflessly in pursuit of the trust's objects (see, further, Chap. 3). Finally, in circumstances where other trusts would fail, a charitable trust may be saved through application of the *cy-près* doctrine.

Trust as Preferred Legal Form for a Charity

In England, the restrictions resolutely imposed upon owners of property to prevent their constraining the right of future owners to deal freely with that property are

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[14] Keeton and Sheridan, *The Modern Law of Charities* (4th ed. by Sheridan, L.A.), Chichester, Barry Rose, 1992, p. 1

[15] See *Commissioners of Income Tax v. Pemsel* [1891] AC 531.

directly attributable to the history of mortmain and the associated struggle between Church and State that led to the Reformation. A corporation, whether religious or lay, had unrestricted power under the common law to acquire and hold land indefinitely.[16] The fact that the Church, as perpetual religious corporation, was able to acquire and retain in perpetuity huge estates that were thereafter exempt from making any tax contribution to the revenue base of the State remained, for the latter, a forceful argument against facilitating the possible development of corporate structures for charity. Indeed the prohibition on this practice in the Magna Carta was extended in 1391 to lay corporations including guilds and other civil corporations that were beginning to emerge.[17]

Such restrictions are now abolished in England,[18] were never applied in most colonies[19] but still linger on in some states of America.[20] The consequences, however, can be seen in the fact that only in recent years have legal forms other than the trust become accepted as viable options for housing charities. Arguably, in England & Wales, the continued reliance upon trusts and a reluctance to experiment with corporate forms, constrained the development of the charitable sector for almost a millennium.

Other Legal Structures for Charities

Charitable activity in England & Wales can be housed in a range of different structures but is still largely oriented around its initial form – the trust. Government controlled bodies, religious organisations and foundations as well as the more traditional trusts, unincorporated associations and incorporated charities are now all likely to be claiming tax exemption on the grounds of their charitable activities. Industrial and Provident Societies, Friendly Societies and corporations (whether established by Royal Charter, statute or by Church measure) may also, provide structures for charitable activity. These alternative structures are important: many local voluntary organisations use the IPS model especially in fields like community transport; the Scout and Guide movement is established by Royal Charter and in

[16] See for example, Stebbings, C., 'The Commercial Application of the Law of Mortmain', *The Journal of Legal History*, 10, 1989, pp. 37–44, p. 37; Sir Edward Coke, Co. Litt. 2a; and Frowicke, J. and Tremaine, J. in 1497, Y.B. 12 Hen. VII Tf. 27, 28 pl 7.

[17] 15 Ric. II, c.5.

[18] Charities Act 1960, s 38.

[19] See *Cheah Neo and Others v. Ong Cheng Neo* (1875) LR 6 PC 381 and *Mayor, Alderman and Citizens of Canterbury v. Wyburn and the Melbourne Hospital* (1895) AC 89.

[20] See Joslin, G.S., 'Mortmain in Canada and the United States: A Comparative Study', *The Canadian Bar Review*, 29, 1951, pp. 621–630; Radford, M.F., 'The Case Against the Georgia Mortmain Statute', 8, 1992, pp. 313–361; Bomes, S.D., 'The Dead Hand; The Last Grasp', *University of Florida Law Review*, 28, 1976, pp. 351–364; and Cunningham, J.R., 'Mortmain Statutes: The Dead Hand Still Survives', *Idaho Law Review*, 27, pp. 49–80.

turn creates thousands of separate Royal Charter charities for every local group or pack. In the Church of England, every local PCC (approx. 25,000) is incorporated by Act of Parliament and by the powers of the Church Commissioners.[21]

Charities are thus subject to different governance arrangements and their trustees subject to a different set of standards depending on the legal structure involved (see, further, below).

Modern Types of Structure

In England & Wales there is still no prescribed form for a charity though the Charities Act 1960 introduced common investment schemes and the Charities Act 2006 makes provision for the introduction of Charitable Incorporated Organisations (see, further, below). The American community foundation successfully transferred to this jurisdiction in the late 1980s and has since prospered. Recently the government has been experimenting with social enterprises. This is a business with primarily social objectives whose surpluses are principally reinvested for that purpose in the business or in the community, rather than being driven by the need to maximise profit for shareholders and owners. Some social enterprises are registered charities. The government is proposing to introduce the Community Interest Company which will provide an alternative to charitable status.

In this jurisdiction the structures for charity, like the law itself, continues to strongly favour trusts.

Forums and Their Capacity for Developing Charitable Purposes

To be effective, law must relate to its immediate social context and charity law is clearly no exception. The fact that the definitional heart of this area of the common law has been legislatively ignored and left to judicial development is sometimes extolled as a virtue responsible for allowing a flexible judicial response to changing circumstances. In fact the courts have not always proved capable of making the necessary timely adjustments. The capacity to shape the law to meet emerging need has been inhibited not only by ease of access to an appropriate forum but also by reliance upon the ‘spirit and intendment’ rule, which has always set the common law parameters for developing charitable purposes, and other constraints.

[21] The authors are grateful to Gareth Morgan for the information illustrating the wide use of alternative legal structures.

Forums for Mediation and Adjustment

In England & Wales a number of decision-making forums have had a long association with charity matters. However, whereas in the legal system both the offices of Probate and the Attorney General have an undoubted relevance for charity, it is the precedents set by the High Court that have been of critical importance. Similarly, although the range of administrative forums with a brief for charity includes the Companies Registry Office, the Lands Registry, the Rates Office, Customs and Excise, the Registry of Friendly Societies and the Registry for Industrial and Provident Societies, in practice it is the decisions of the Inland Revenue and the Charity Commissioners that directly influence the development of charitable purposes.

The High Court

Until relatively recently, the history of charity law has been one shaped almost exclusively by judicial precedents but that in turn has been a product of the pattern of litigation. The random nature of issues coupled with factors of expense, time and unwelcome publicity have tended to mean that proceedings are usually either instigated by the Charity Commissioners or result from appeals taken by the Inland Revenue. Charities and donors do not generally initiate litigation and this is reflected in the nature of the resulting precedents.

- *The High Court and the mediation/adjustment function*

The High Court has always regarded its adjudicative powers as constrained by the straightjacket of the Preamble, the 'spirit and intendment' rule, *Pemsel*[22] and its own established precedents and has steadfastly declined to stray into the policy making arena, explaining that it was for Parliament and not the courts to change the nature of charitable purposes. As Sir John Romilly MR observed "instances of charities of the most useless description have come before the Court, but which it has considered itself bound to carry into effect."[23] The expense and unwelcome publicity associated with proceedings have deterred charities from bringing practice related issues to court. With its scope to exercise discretionary powers thus severely restricted, the High Court has been unable to develop any significant mediation/adjustment function (see, also, Chap. 2).

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

[23] *Philpott v. St George's Hospital* (1859) 27 Beav 107, p. 111.

The Charity Commissioners

Because of their concurrent High Court jurisdiction coupled with intensive ongoing engagement with matters of principle and practice the Commissioners have become the only body in a position to exercise the mediation/adjustment function in respect of charities and their activities.

- *The Charity Commissioners and the mediation/adjustment function*

Commissioners, however, are far from having a free rein to change charitable purposes as the Charity Commission is essentially a government body and the discretion of Commissioners remains confined by established precedent: new charitable purposes must still be analogous to those already recognised by the law (see, further, below).

The Inland Revenue

In England & Wales as in all common law jurisdictions the tax collecting agency has had a significant role to play in terms of policing the boundaries of eligibility for tax exemption.

- *The Inland Revenue and the mediation/adjustment function*

This has necessarily involved ruling on definitional aspects of charitable purposes but policing rather than adjustment/mediation remains the governing function (see, further, Chap. 5).

Constraints on Effecting Change

In the four centuries that have elapsed since the first legislative formulation of matters constituting charitable purposes the social context has changed greatly. Some purposes initially legislatively recognised as charitable (e.g. 'mariages of poore maides') have lost that status while others (e.g. sport and recreation) have acquired it. That a charitable purpose does not always retain its currency is a fact readily acknowledged by the judiciary:[24]

> A purpose regarded in one age as charitable may in another be regarded differently … A charity once established does not die, though its nature may be changed. But it is wholly consistent with this that in a later age the court should decline to regard as charitable a purpose, to which in an earlier age that quality would have been ascribed, with the result that (unless a general charitable intention could be found) a gift for that purpose would fail.

[24] *National Anti-Vivisection Society v. I.R.C.* [1948] AC 31, 74, *per* Lord Simonds.

The difficulty for the judiciary, however, has been in effecting the necessary change on the rare occasions when the opportunity presented itself in terms of proceedings that raised the issues permitting a ruling which could establish a fresh precedent. A hearing of propitious proceedings would not necessarily conclude in any such precedent: certain well established legal obstacles needed to be overcome; any one or combination of which could circumvent a new precedent.

The Doctrine of Precedent

The progress of charity law, as with other aspects of the common law, has been by means of judicial precedent. The great advantage of this doctrine, its ability to provide for greater certainty and consistency in the application of the law whether in a judicial or administrative forum, has also operated as a serious constriction. Each precedent has trapped the law into reflecting the then prevailing social circumstances. Moreover, each precedent was necessarily founded on a narrow set of facts and subsequent references to it had to be similarly confined to much the same facts. A precedent did not permit a broad interpretation or general application of principle. Attempting to escape the binding constraints of precedent by distinguishing the facts of a present case from those that had given rise to a governing precedent became an art form assiduously cultivated by lawyers. However, as the flow of cases into court dried up, so too did the opportunities for establishing precedents. Generations could pass until such time, if ever, that an opportunity is provided for a fresh precedent to mitigate the rigidity imposed upon the interpretation of a charitable purpose by the last one.

The Rule Against Perpetuities

This rule provides that if a gift is contingent upon a certain event, and that event may or may not occur for a considerable period of time, the law will declare that contingency void. At common law the perpetuity period is 'lives in being' plus 21 years, a period since modified by statute. Therefore, as has been said "no interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest".[25]

While it has always been true to say that "no gift for charitable purposes is void merely because it renders property inalienable in perpetuity",[26] it has equally been true that if such a gift was conditional upon a contingency that may only be satisfied, if at all, outside the perpetuity period then the rule had the effect of rendering that gift

[25] Gray, *The Rule Against Perpetuities* (4th ed.), S. 201.

[26] Megarry and Wade, *Law of Real Property* (5th ed.), p. 300. See *Chamberlayne* v. *Brockett* (1872) 8 Ch. App. 206.

void *ab initio*. Until the Perpetuities and Accumulations Act 1964 the rule imposed a serious constraint upon the scope of judicial discretion to save a gift for charity. That statute introduced the 'wait and see' principle which brought greater certainty as it allowed for the possibility of gifts vesting within the perpetuity period.

The 'Spirit and Intendment' Rule

Like the doctrine of precedent, the 'spirit and intendment' rule (see, also, Chap. 2) has both assisted and constricted the development of charitable purposes. The fact that even if a purpose could not be defined as coming under one of the established heads of charity, it would nonetheless be construed as charitable if by analogy it fell within the 'spirit or intendment' of the Preamble to the 1601 Act, did provide a window of opportunity to extend the interpretation of activities capable of acquiring charitable status. However, the rule permitted only marginal deviations from established precedent: there was never any presumption that a purpose which benefited the public but was not within the *Pemsel* classification should be entitled to charitable status under the rule.[27] It was also absolute: a purpose not already recognised as charitable and which could not be fitted by analogy within the 'spirit or intendment' rule was debarred from charitable status.

The Cy-près Doctrine

Limitations on the application of *cy-près* (see, further, below) have traditionally operated to severely restrict its usefulness. Originating in the ecclesiastical courts, the doctrine was for centuries applied by the Court of Chancery. In 1860 the power to apply *cy-près* schemes passed to the Charity Commissioners but the scope of their powers remained as exercised by the judiciary: the capacity to modify objects or redirect a charity's resources was restricted to circumstances where the purpose of that charity had become impossible or highly impractical to fulfill. As the Court of Appeal reminded the Commissioners:[28]

> The first duty of the court is to construe the will, and to give effect to the charitable directions of the founder, assuming them not to be open to objection on the ground of public policy. The Court does not consider whether those directions are wise or whether a more generally beneficial application of the testator's property might not be found. There are many charitable purposes which, according to modern views, are productive of more harm than good … but … the Court must give effect to a testator's direction …

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[27] However, in *Incorporated Council for Law Reporting for England and Wales v. Attorney General* [1971] 3 All ER 1029 it was stated that "if a purpose is shown to be beneficial or of such utility it is *prima facie* charitable in law" *per* Russell, L.J., p. 1036.

[28] *Re Weir Hospital* [1910] 2 Ch. 124, *per* Cozens-Hardy, M.R., pp. 131–132 as cited in Keeton and Sheridan, *op. cit*., pp. 216–217.

Not until the Charities Act 1960[29] released *cy-près* from the straightjacket of 'impossibility' by introducing the alternative of 'unsuitability' did such schemes become more generally used (see, also, Chap. 6).

Charity Commissioners' Development of the Mediation/Adjustment Function

The role played by the Charity Commissioners in England & Wales has uniquely facilitated the development of charitable purposes in this jurisdiction. Although other forums exist, with varying levels of developmental capacity, such change as has occurred in recent years has been largely due to this agency. Those common law jurisdictions left to rely on the traditional role of the courts or on the discretion of the Revenue have been unable to make similar progress but have benefited in varying degrees from the work of Commissioners in testing the boundaries of charity law and from an ability to follow the new common law precedents they have established.

The Statutory Duties of the Charity Commissioners

The Charities Act 1993, consolidating the reforms of the 1992 Act with the provisions of both the 1960 Act and the Charitable Trustees Incorporation Act 1872, essentially improved the registration and regulatory processes by vesting new powers in the Charity Commissioners. As a result, for most purposes the jurisdiction of Charity Commissioners and the powers they exercise are now concurrent with those of the High Court[30] and they are vested with the same powers as the Attorney General (see, further, Chap. 3) as regards taking proceedings in relation to charities.[31] The Charities Act 2006 has introduced an enlarged role for the Commissioners (see, further, below).

Registration

While the Charity Commissioners have important statutory duties to regulate and support charities (see, Chaps. 5, 7) it is their responsibilities in relation to registering and maintaining a public register of charities that empower them to broaden the

[29] The Charities Act 1960, s 13; further relaxed by the introduction of the 'unsuitability' criterion in s 16(1) of the Charities Act 1993.

[30] The Charities Act 1993, s 16.

[31] *Ibid*., s 32.

interpretation of charitable purposes.[32] By registering (e.g. faith healing)[33] or deregistering (e.g. gun clubs)[34] in accordance with a contemporary interpretation of the public benefit test the Commissioners are able to respond flexibly and reasonably promptly to changing definitions of social need.

Developing Charitable Purposes

The powers and responsibilities of the Charity Commissioners, as strengthened by the 1993 Act, have considerably reinforced their ability to develop a strategic approach and exercise effective leadership in adjusting charitable purposes to meet contemporary social need. In particular, the Commissioners review of organisations listed on the Register[35] which began in 1997, together with their issue of advisory leaflets, has broadened the range of activities now entitled to charitable status.[36] Their capacity to do so has been assisted by an approach which seeks to identify the intrinsic public benefit component of an activity and use it as justification for conferring charitable status rather than continuing the traditional reliance upon the 'spirit and intendment' rule (an approach endorsed in the Charities Act 2006). This has resulted, for example, in the extension of charitable status to organisations established to provide relief for the unemployed, to develop community capacity building, to promote urban and rural regeneration, to facilitate partnership arrangements with government bodies and to clarify the extent to which organisations can engage in political activity without endangering that status.

Relief of Unemployment[37]

Commerce has often proved fatal for charitable status and this component in schemes designed to retrain the unemployed and provide job placement opportunities etc. almost always had that result for the organisations involved. The public benefit test may be then breached both because the beneficiaries tend to be closely defined in terms of number, circumstances and/or a specified locality and because of the probable involvement of an investment scheme. However, following the ruling

[32] The Central Register of Charities was established under the provisions of the Charities Act 1960 and continued under the Charities Act 1993, and the Charities Act 2006.

[33] See *Re Le Cren Clarke* [1996] 1 All ER 715.

[34] See (1993) 1 Ch. Com. Dec., paras 4 *et. seq*.

[35] See Charity Commissioners, RR8, *The Public Character of Charity*, London, 2001, p. 2.

[36] Charity Commissioners, RR1a, *Recognising New Charitable Purposes*, London, 2001.

[37] Charity Commissioners, RR3, *Charities for the Relief of Unemployment*, London, 1999.

in *Inland Revenue Commissioners v. Oldham Training and Enterprise Council*,[38] which found that as "a matter of general public utility the unemployed should be found gainful activity and the state should be relieved of the burden of providing them with unemployment and social security benefits and this object is within the spirit if not the words of the Statute of Elizabeth",[39] the Charity Commissioners developed a new approach to schemes for the relief of the unemployed. In 1999 they advised that henceforth, subject to the public benefit test, the following activities would be deemed to be charitable:

- The provision of advice and training to unemployed individuals, concerning employment, self-employment and the establishment of co-operative enterprises and the provision of CV writing, job search and job club facilities for them.
- The provision of practical support to unemployed people by way of accommodation, child care facilities or assistance with travel.
- The provision by charities of land and buildings at below market price or at subsidised rents to businesses starting up.
- The provision of capital grants or equipment to new businesses.
- The payment by a grant-making charity to an existing commercial business to take on additional staff from among unemployed people.

Urban and Rural Regeneration[40]

Again, because the intended beneficiaries are most often closely defined in terms of number, circumstances and/or a specified locality with the probable involvement of investment funds, schemes to relieve deprivation were most usually denied charitable status. In 1999, however, the Charity Commissioners developed a new approach and advised that charitable status would be extended to the following types of schemes:

- The provision of housing for those who are in conditions of need and the improvement of housing in the public sector or in charitable ownership provided that such power shall not extent to relieving a government body of its statutory duty to provide or improve housing.
- The maintenance, improvement or provision of public amenities.
- The preservation of buildings or sites of historic or architectural importance.
- The protection or conservation of the environment.
- The provision of public health facilities and childcare.
- The promotion of safety and the prevention of crime.

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[38] [1996] STC 1218.

[39] *Ibid., per* Lightman, J., p. 1234.

[40] Charity Commissioners, RR2, *Promotion of Urban and Rural Regeneration*, London, 1999.

Community Development[41]

In 2000, in a further extension of the above approach designed to address the same components of commerce and specificity traditionally fatal to charitable status, the Charity Commissioners determined that measures designed to promote capacity building in deprived communities would in future be charitable. As expressed in Tudor:[42]

> Community capacity building here means developing the capacity and skills of members of a community in such a way that they are better able to identify and help meet their needs and to participate more in society. The relevant community may be geographical or may be a community of interest, for example, membership of a particular ethnic group. As with the promotion of urban and rural regeneration, care is needed to ensure that any private benefit remains incidental.

Partnership with Government[43]

As the line dividing public benefit service provision of government bodies from that of charities becomes more uncertain the Charity Commissioners have offered the advice that:[44]

> … it is not a bar to charitable status that a new body has been created with a view to discharging a function of central or local government, provided that the new body was established for exclusively charitable purposes (which may coincide with a governmental authority's function) and not for furthering the non charitable purposes of securing and implementing the policies of any governmental authority.

Also that:[45]

> … trustees cannot normally use a charity's funds to pay for services that a governmental authority is legally required to provide at the public expense. However, trustees might use a charity's resources to supplement what a governmental authority provides.

As government policy in this jurisdiction continues to promote the partnership ethos there is good reason to believe that this distinction will become increasingly blurred. Complicity between government and charities in addressing social need is an attractive and often effective proposition for both parties but if the latter allows itself to become merely the agent of the former then it may forfeit its right to charitable status.

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[41] Charity Commissioners, RR5, *The Promotion of Community Capacity Building*, London, 2000.

[42] See Tudor, *Charities* (9th ed.), Sweet & Maxwell, London, 2003, p. 103.

[43] Charity Commission, *Policy Statement on Charities and Public Service Delivery*, June 2005, p. 2. Also, see Charity Commission RR7, *The Independence of Charities from the State*, London, 2001 and Charities and Contracts (CC37).

[44] Charity Commission RR7, *The Independence of Charities from the State*, London, 2001.

[45] See Charity Commission CC37, *Charities and Contracts*, London, 2003.

The Charity Commissioners have emphasised that the governance of the charity must as the matter of practice be independent from governmental authority. It advises that any charity planning to deliver public services must continue to comply with the following key legal principles:[46]

- Charities must only undertake activities that are within their objects and powers. This is essential. Charities must not stray from their objects in pursuit of funding.
- Charities must be independent of government and other funders. An organisation must be a separate and independent legal entity to be eligible for charitable status.
- Trustees must act only in the interests of the charity and its beneficiaries.
- Trustees must make decisions in line with their duty of care and duty to act prudently.

In a recent and landmark decision[47] the Commissioners would seem to have reviewed and adjusted their position somewhat on the above guidance. Having come to the view that charities can deliver public services which public authorities have a statutory duty to provide but have chosen to 'hive off' to voluntary associations, it then permitted the Trafford Community Leisure Trust and the Wigan Leisure and Culture Trust to be registered as charities. This decision was based on evidence that in both cases the charities were sufficiently independent from the respective local authorities and that the trustees retained their discretion to use charitable funds to provide/subsidise a government service if they judged this to be in the best interests of the charity and complied with its objects. It is a decision which may prove critical in tipping the balance in arrangements made between government and charity from a supposed partnership of equals towards colonisation of the latter by the former.

Political Activity[48]

Recognising the issue that while charities cannot be established for political purposes nor have political objects[49] they must be free to continue their traditional role

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[46] See Charity Commission, *Policy Statement on Charities and Public Service Delivery*, June 2005, p. 2. Also, see Charity Commission RR7, *ibid*., in which, however, there is a notable lack of cited case law. The case of *Construction Industry Training Board v. A-G* [1973] Ch 173 suggests that Ministerial control is not incompatible with charity status (the authors are grateful to Paul Bater for drawing this to their attention).

[47] See Charity Commission and Applications for Registration of (i) Trafford Community Leisure Trust and (ii) Wigan Leisure and Culture Trust (21 April 2004).

[48] See Charity Commission, CC9, *Political Activities and Campaigning by Charities*, London, 1997. Also, see comments by the Commissioners released in 2004 during the Charities Bill discussions (on website).

[49] *Re Bushnell* [1975] 1 WLR 1596, where the dominant or essential objects (the teaching of 'socialised medicine') were found to be political and therefore fund held not charitable.

of contributing to social reform, the Charity Commissioners have issued guidance emphasising that charities have a wide discretion to campaign and otherwise undertake political activities in pursuance of their charitable purposes. Their advice is that a charity may engage in political activity if:[50]

- There is a reasonable expectation that the activity concerned will further the stated purpose of the charity, and so benefit its beneficiaries, to an extent justified by the resources devoted to the activity;
- The activity is within the powers which the trustees have to achieve those purposes;
- The activity is consistent with these guidelines; and
- The views expressed are based on a well-founded and reasoned case and are expressed in a responsible way.

The work of the Charity Commissioners in introducing some change to the constraints on political activity by charities has been acknowledged in Tudor:[51]

> Since 1983, the Commissioners have accepted as charitable trusts for the promotion of good race relations, for endeavouring to eliminate discrimination on the grounds of race and for encouraging equality between persons of different racial groups.

Changing Charitable Objects

The singular legal privilege of charity, that it may exist in perpetuity, can present legal obstacles for charity law when it comes to giving effect to its primary obligation of honouring a donor's charitable intention. As time passes it may become increasingly difficult to execute a valid charitable gift in the terms as expressed by the donor.[52] As a charity cannot die but the purposes for which it was established may become impossible or impractical to fulfil, the law has had to find a means to deal appropriately with its assets. In such circumstances the remedy of *cy-près* has been introduced to protect the assets and allow them to be used for charitable purposes similar to those indicated by the donor. This legal device has proven to be a most important tool for adjusting the use of charities and their resources but its deployment has been customarily subject to tight constraints. Until 1960, as noted in Tudor:[53]

> … the narrow definitions of 'impossibility' and 'impracticability' adopted by the courts severely restricted the application of the *cy-près*; inexpediency or uneconomic circumstances were not sufficient.

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[50] *Ibid*., at Section 3.

[51] *Op. cit*., p. 61.

[52] *Philpott v. St George's Hospital* (1859) 27 Beav 107.

[53] *Op. cit*., p. 435.

The Doctrine of Cy-près

A standard feature of charity law as experienced by common law nations has been the role played by the *cy-près* doctrine. Again, this power originated essentially in the legislative intent to restrict the common law abuse of charities and the misuse of their assets and it devolved eventually from the courts of equity to the High Court (see, also, Chap. 4). Access to this procedure, however, can be problematic. In some jurisdictions it falls exclusively to the High Court where the entailed delay and expense can make it impractical.

The Cy-près Rule

As expressed in Tudor:[54]

> It is a fundamental principle of the law of charities that whenever a clear intention to devote property to a charity is shown, and that intention is not confined to a particular form of charity which is initially impracticable, or a purpose which is illegal, effect must be given to it. The law distinguishes between the charitable intention and the mode of executing it and makes provision for the charitable intention to be carried into effect *cy-près*, that is to say, by substituting for the mode indicated by the donor another mode as similar as possible to the mode indicated.

For the rule to apply a clear charitable intention must be evident, the objects of the gift must be exclusively charitable, the subject must be certain and a '*cy-près* occasion' must have arisen.

Applying the Cy-près Rule

This equitable presumption,[55] that the charitable intentions of a donor should not be allowed to fail because of an inconsequential difficulty, provides a good illustration of the role played by the adjustment function in charity law. Inevitably, the charitable intentions of a donor sometimes fail, either at the outset or much later, perhaps after centuries of successful existence as a charitable entity. This may be due to a mere technical legality, an area of uncertainty, or perhaps a fundamental failure to construct a trust, or for one of many other reasons which the donor may not have foreseen.[56] The legal significance of *cy-près* is that it provides a court with the

[54] *Op. cit*., p. 435.

[55] See dicta of Lord Hanworth MR in *Re Watt* [1932] 2 Ch 243, p. 246.

[56] See for example, *Attorney-General v. Price* (1907) 24 TLR 763.

means to overcome such legal technicalities and give effect to a donor's general or paramount charitable intent. As Meredith J pointed out:[57]

> Donors cannot be expected to provide expressly for more than the world and the times with which they are familiar. Accordingly, the perpetuity for which charities may endure throws upon the court the burden of providing for that which the donor did not foresee, in accordance with what it finds to be the underlying intention of the charity foundation.

Most commonly, a donor's charitable intentions were undermined by circumstances which made it either impossible or impracticable to give effect to them as directed, typically: where there were insufficient funds; where there was no available or suitable site; where the gift was illegal or against public policy; where there was an impracticable condition; and where a charity was deprived of objects. These circumstances were all required to meet a strict definition of impossibility or impracticability. So, for example, in *Edinburgh Corporation v. Cranston's Trustees*[58] a gift to 12 poor persons meeting certain requirements, where only 2 could be found, was held not to satisfy the definition of impossibility. Nor would the definition of impracticability be met where it was evident that while the gift was not immediately practicable it would in due course become so.[59] The traditional rigorous application of the impossibility and impracticability rule to restrict the availability of *cy-près* has been significantly relaxed by modern legislation.

- *Insufficient funds*

A common cause of difficulty arises where the donor's gift is insufficient to give effect to his charitable intentions. Where the donor has identified a number of objects, but has provided insufficient funds to distribute among them, the court may order a *cy-près* scheme to benefit the primary object. Gifts of money intended to benefit curates,[60] or a cottage hospital,[61] or a home for aged seamen,[62] or a public hall[63] have all been applied *cy-près* due to insufficient funds.

- *No available or suitable site*

Certain charities need premises and these need to be sited in particular areas; homes for the elderly, soup kitchens, churches etc. are usually intended to be established in and for the benefit of specified communities. It has often been the case that the charitable intention of a donor that funds left for the purpose of building a community facility in a particular location has been thwarted by the eventual lack of an available or suitable site or a site at a reasonable cost. Where the court can detect a

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[57] See *Governors of Erasmus Smith Schools v. Attorney General and Others* (1932) 66 ILTR 57, p. 61.

[58] 1960 SC 244; 8(I) Digest (Reissue) 334.

[59] See for example, *Re Tacon* [1958] Ch 447, *per* Lord Evershed, M.R., pp. 453–454.

[60] See *Re Burton's Charity* [1938] 3 All ER 90.

[61] See *Re Whittaker* [1951] 2 TLR 955.

[62] See *Hay v. Murdoch* [1952] WN 145.

[63] See *Parker v. Moseley* [1965] VR 580.

primary objective it may then order a *cy-près* scheme to re-direct a gift which has become impossible or impracticable as a site for the purposes designated by the donor, to be used instead for the benefit of that primary objective.[64]

- *Gift illegal or contrary to public policy*

Where the charitable intention is genuine but the prescribed mode of giving effect to it is illegal or against public policy then a *cy-près* scheme can be prepared to substitute a different means for complying with the donor's intentions. For example, in *AG v. Vint*,[65] the donor directed that all inmates of a workhouse aged 60 or over should be supplied with porter. The court found that the charitable intention was genuine but the means of giving effect to it was illegal as alcohol in such premises was prohibited. Accordingly, it was held that the donor's charitable intention would be appropriately satisfied by supplying the inmates with other consumables.

- *Impracticable conditions*

Where an attached condition affects only a subsidiary aspect of the gift then a *cy-près* scheme will be appropriate to modify the gift by removing the condition. In *Re Lysaght*,[66] for example, the testatrix had bequeathed a sum of money to the Royal College of Surgeons for the purpose of funding medical scholarships for students. However she attached a condition, stipulating that students would not be eligible if they were of the Jewish or Roman Catholic religion. The College could not accept the gift subject to the condition but would otherwise do so. The court found that the donor's primary purpose had been to confer a charitable benefit upon the College which the College was prepared to accept. The attached condition was held to be subsidiary to the main objective and a *cy-près* scheme could be prepared to remove it.

- *Charity deprived of objects*

There is a considerable body of case law recording the efforts of donors to confer a benefit for a good cause but one which had in fact become redundant.[67] So, charitable intentions to benefit such socially progressive causes as the abolition of slavery, the treatment of leprosy and the ending of imprisonment for debtors were all defeated by the fact that the cause had already been eradicated by the time the gift was to take effect. Where the donor has tied a gift specifically and exclusively to a charity which is or has become devoid of any objects then the gift must fail. Where the objects exist at the time when the gift takes effect but subsequently cease then

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[64] See for example, *A-G for New South Wales v. Perpetual Trustees Co. Ltd*. (1940), 63 CLR.

[65] (1850) 3 De G & Sm 704.

[66] [1966] Ch 191. Followed by Carswell J in *Re Currie* [1985] NI 299. Also, see *Re Stewart's Will Trusts* [1983] NI 289; *Re Prescott* [1990] 2 IR 342. *Cf Re Dunwoodie* [1977] NI 141.

[67] *Attorney-General v. Ironmongers' Company* (1840) 2 Beav. 313 (1844) 10 CI. & Fin. 908 (fund for the redemption of Barbary slaves where none could be found).

a *cy-près* scheme may well be appropriate to re-direct the gift. The judiciary have on occasion intervened to halt activities previously judged to be charitable.[68]

In Ireland, the leading case of *Re Royal Kilmainham Hospital*[69] provides an interesting illustration of the *cy-près* rule being applied in such circumstances. This case concerned a hospital which had been established under a charter granted by Charles II in 1684 for the support and maintenance of old soldiers of 'our army in Ireland' and funds, lodged in court prior to the ending of British rule, which had been intended to compensate the hospital administration for the compulsory acquisition of some of its lands in the 19th century. After ownership of the hospital together with that of other crown property became vested in the Irish state, the question ultimately arose as to how the funds should be applied. The issues, therefore, concerned the donor's initial charitable intention, residual funds and the problem of giving effect to the donor's intention in the light of a supervening failure. The Royal Hospital Kilmainham Act 1961 was passed to deal with the matter. This it did by providing that certain payments be made to the Royal Hospital Chelsea (where the functions and some occupants of the Kilmainham Hospital now reposed), the balance to be applied for specified charitable purposes for the benefit of the Defence Forces. The case came before Budd J in the High Court on the issue of the charitable status or otherwise of the funds.

In the course of preliminary proceedings, it was submitted on behalf of the AG that the original gift was not charitable. One line of argument pursued on his behalf was that as the initial object of the trust establishing the hospital had been to benefit 'our army in Ireland' then either this object was still viable and now capable of being fulfilled by the Irish defence forces or the latter should be made the proper object by the application of a *cy-près* scheme. Budd J rejected this line of argument. He held that the original gift was charitable, that the present national defence forces did not fall within the intended meaning of the object 'our army in Ireland' (the fact that the army in question was now that of a sovereign Irish nation was unlikely to have been contemplated by the English monarch), but that there was evidence of a general charitable intention and that this had been to make an 'out and out' gift. However, he concluded that as it was no longer possible to give effect to the donor's original intentions, the funds should be administered by way of a *cy-près* scheme for the benefit of both the Royal Hospital Chelsea and the defence forces.

The Modern Application of the Cy-près Rule

The legal functions of *cy-près* are now the subject of legislative provisions but although *cy-près* 'occasions' have since been extended by statute, the rule continues to have a restricted application.

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[68] As in the anti-vivisection cases.

[69] [1966] IR 451.

In addition to giving authoritative advice on legal matters and drawing on its experience of governance, administrative and financial issues, the Charity Commissioners have legal powers to amend the purposes and constitutions of charities through 'schemes' without the charity having to apply to the courts. Under s 16(1) of the 1993 Act, Commissioners can now create a *cy-près* scheme enabling the funds of a charity that it has deregistered (because it is no longer active or has ceased to be charitable) to be consolidated with those of other similar defunct charities, and be directed towards a new set of similar but viable set of objects. In an important extension of Commissioners powers this legislation now allows amendment or transfer, not only when the original use is rendered impossible or impracticable, but also when it is no longer effective.[70]

The Cy-près Rule and the Charities Act 2006

New measures introduced by the 2006 Act will provide a more flexible and informal means, as an alternative to the *cy-près* process, for charities to change their purposes and transfer assets. In future, smaller unincorporated charities, with a gross annual income of £10,000 or less, will be able to update their charitable purposes by a simple two-thirds majority resolution of its trustees and notification to the Commission. The Act also allows the Commission and the courts to take into account current social and economic circumstances when making *cy-près* schemes to assist charities dispose of 'failed' funds or to update their charitable purposes. The Commission will have additional powers to conduct investigations including a new power to enter premises and seize documents.

The Outcome of the Charity Law Reform Process and Implications for the Future of the Mediation/Adjustment Function and Related Social Policy

The charity law reform process in England & Wales has concluded with legislative provisions that will undoubtedly serve to strengthen the legal function of mediation/adjustment in charity law. The long-term effects on the capacity of the Charity Commissioners to develop the law will be considerably greater than on their increased statutory ability to regulate it.

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[70] *Varsani v. Jesani* [1999] Ch 219.

Increasing the Powers and Range of the Mediation/Adjustment Function

As stated in the Charities Act 2006,[71] the Commissioners powers are now reinforced by statutory changes to the definition of charitable purposes and to the application of the public benefit test both of which will impact upon their scope for deploying the mediation/adjustment function.

Uniform Application of the Public Benefit Test

Under the 2006 Act, the mandatory application of the public benefit test as determinant of charitable status now enables, indeed requires, the Charity Commissioners to seek demonstrable evidence that both arms of this test can be satisfied in respect of every organisation wishing to acquire charitable status or, when applied in conjunction with its rolling review of the register, wishing to retain it. It licences intervention and empowers Commissioners to negotiate with organisations to ensure that such adjustments are undertaken as may be necessary to bring purposes and activities into synch in furtherance of declared charitable objects. Given the new legislative requirements regarding mandatory registration, many more organisations than formerly will now need to justify their charitable status or be prepared to accede to Commissioners advice in respect of the adjustments necessary to become charity compliant.

Impact Measures

When mediating with charities or with organisations intent on becoming such, Commissioners will in future have their negotiating position strengthened by the new statutory duty to encourage the "social and economic impact" of charities. This legislative introduction of impact measures, to an area where virtue and the gift of resources for public benefit has traditionally been sufficient, will enable Commissioners to seek evidence of effectiveness and to suggest strategic alliances both within the charitable sector and between charities and bodies in the commercial and government sectors where this would be conducive to maximising impact.

The Extended Range of Charitable Purposes

Under s 2 of the Charities Act 2006, the 4 common law heads of charitable purposes will increase to 13 statutory heads. In future a 'charitable purpose' will be one that is for either:

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[71] See sections 6 and 7 and Schedules 1 and 2 of the Charities Act 2006.

(a) the prevention or relief of poverty;
(b) the advancement of education;
(c) the advancement of religion;
(d) the advancement of health or the saving of lives;
(e) the advancement of citizenship or community development;
(f) the advancement of the arts, culture, heritage or science;
(g) the advancement of amateur sport;
(h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
(i) the advancement of environmental protection or improvement;
(j) the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;
(k) the advancement of animal welfare;
(l) the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services; and
(m) other purposes that are currently recognized as charitable or are in the spirit of any purposes currently recognized as charitable.

The additions are, in the main, a restatement of the purposes that in recent decades have come to be recognised as charitable. This list represents a significant increase, both in number and range, of areas in which charitable activities may now be further developed.

Giving Effect to Social Policy Through the Mediation/Adjustment Function

The above statutory additions to the *Pemsel* classification of charitable purposes clearly flag up the government's agenda with regard to charity and social policy. Charitable resources are earmarked for specified areas of social policy (e.g. "prevention of poverty") and the Charity Commissioners are to be equipped with specified objectives (e.g. encouraging the "social and economic impact" of charities) and with specified functions (e.g. "determining charitable status") to facilitate the contribution charities are intended to make towards addressing those themes. It is this extended and explicit definition of 'charitable purposes', coupled with impact measures and a mandatory application of the public benefit test, together with the considerable discretionary capacity latent in the default clause 'in the spirit of any purposes currently recognized as charitable' which now vests the Charity Commissioners with the leverage necessary to creatively develop an interpretation of 'charity' appropriate to meet contemporary social need. Indeed, employing such creative capacity has to an extent become a duty with the requirement in the 2006 Act that "in performing its functions the Commission must, in appropriate cases, have regard to the desirability of facilitating innovation by or on behalf of charities".[72] This new statutory approach will strengthen the legal function of mediation/adjustment in charity law.

[72] 1D(2) of the Charities Act 2006.

The Prevention of Poverty

This theme, as old as social policy itself, includes preventing those who are poor from becoming poorer and preventing persons who are not poor from becoming poor. However, although reinforcing and broadening the *Pemsel* head, it remains to be seen how or to what extent this new formulation will facilitate organisations dedicated to eradicating the causes of poverty. Nonetheless, this provision must increase the numbers benefiting from charities dealing strategically with embedded poverty within the jurisdiction and in developing countries.

The Advancement of Health or the Saving of Lives

The specific recognition now given to this charitable purpose again indicates the return of government policy to tackling basic aspects of social provision with an emphasis on preventative measures. It also must give a particular boost to those organisations involved in mass child inoculation programmes and in combating AIDS and other diseases in developing countries.

The Advancement of Citizenship or Community Development; and the Advancement of Amateur Sport

These two heads of charity represent a firm government acknowledgement that charities have a capacity to contribute towards building social capital and promoting or sustaining the growth of civil society. Government policy of encouraging the social engagement of citizens will be enhanced by both sets of charitable purposes. The first is intended to facilitate the development of healthy self-sustaining communities. Encompassing as it does activities that promote urban and rural regeneration, community capacity building, civic responsibility and good citizenship it should serve to encourage those organisations working with ethnic minorities and other deprived communities in this jurisdiction. The second, the promotion of amateur sport as a charitable purpose in its own right rather than as a means of advancing other existing charitable purposes,[73] will again foster the growth of local clubs and generate greater social interaction at community level.

[73] The provision of recreational facilities in the interests of social welfare will continue to be recognised as charitable under the Recreational Charities Act 1958.

The Advancement of Human Rights, Conflict Resolution or Reconciliation or the Promotion of Religious or Racial Harmony or Equality and Diversity

On the face of it this new charitable purpose marks a most important development in charity law as it relates to contemporary social policy. The recognition given to the role that could be played by mediatory organisations – locally, regionally, nationally and internationally – in negotiating with those who perceive themselves to be alienated, to find a positive way forward and thereby forestall a drift towards conflict, lies at the heart of the challenge to make philanthropy relevant to social inclusion in the 21st century. It would appear to represent an acknowledgement that this is a role for charities rather than government: that the former, being free from other policy constraints and without constituencies to placate, can go where the latter cannot; that the former rather than the latter are best placed to win the acceptance, trust and cooperation of the socially marginalised; and that charities have the resources, skills and motivation to engage in such tasks.

The reference to promoting 'religious or racial harmony or equality and diversity' has a particular resonance in the present global context of a growing estrangement between Islam, or some of its followers, and the western democracies. It is a reference that also encourages mediatory activity on behalf of those who in a more domestic context feel discriminated against for reasons of race, disability, age, sexual orientation etc. In addition, it would seem to accommodate activities intended to identify and address causes as well as effects of alienation or mutual estrangement. It has a strong preventative dimension.

However, clearly this new charitable purpose sits uneasily alongside the common law constraints on political activity by charities and until we see how the tension between the two is resolved it is difficult to gauge the potential contribution of charities under this head towards addressing the government's social policy agenda.

The Relief of Those in Need, by Reason of Youth, Age, Ill-Health, Disability, Financial Hardship or Other Disadvantage

Again, this charitable purpose is one which maintains the very traditional focus of charity on those in need for reasons that have attracted compassion, protection and resources throughout the duration and extent of the common law. It provides for relief in the form of specialist advice, equipment, care or accommodation and specialist housing, care centres, drop-in centres, etc. It clearly prepares the ground for the further sharing or devolving of responsibility for public service provision between government and charity and is intended to set out and firmly cement the basis of their future partnership relationship.

The Advancement of the Arts, Culture, Heritage or Science; and the Advancement of Environmental Protection or Improvement

These two new heads of charity would appear to denote government encouragement for further charitable involvement in the area of public utility: in developing and maintaining social infrastructure.

The Advancement of Animal Welfare

Undoubtedly the statutory designation of this as a charitable purpose merely signifies government acknowledgement that such charities, which consistently attract a great deal of donor wealth and social approval, should be assigned their own specific charitable head.

The Promotion of the Efficiency of the Armed Forces of the Crown, or of the Efficiency of the Police, Fire and Rescue Services or Ambulance Services

This late addition to the list carries into the next millennium a strong resonance with the Preamble reference to the "paymente of fifteenes, setting out of souldiers" etc. accompanied by the social policy presumption that defence of the nation and protection of its citizens are concerns as appropriate for charity as they are for government.

Other Purposes Currently Recognised as Charitable or Are in the Spirit of Any Purposes Currently Recognized as Charitable

Finally, this default provision continues the traditional role of the fourth *Pemsel* head, although in future any extension will be statutorily tied to the rule that a new purpose must be analogous to one already existing and therefore, by implication, the 'spirit and intendment' rule is discontinued. This purpose also carries over into the new legislative era the established capacity for partnership between government and charity by allowing for the continuation of charitable status in respect of those organisations that make a public service type contribution. So, the provision of public works and services and the provision of public amenities (such as the repair of bridges, ports, havens, causeways and highways, the provision of water and

lighting, a cemetery or crematorium, as well as the provision of public facilities such as libraries, reading rooms and public conveniences) are all thereby endorsed as charitable. Organisations and gifts for the relief of unemployment, for the social relief, resettlement and rehabilitation of persons under a disability or deprivation (including disaster funds) and for the benefit of a particular locality (such as trusts for the general benefit of the inhabitants of a particular place) will similarly continue to be entitled to charitable status.[74] The basis for consolidating and extending its partnership with charity emerges as a government policy priority in this and in many of its other new heads of charity.

Conclusion

The mediation and adjustment function is crucially important to the modern development of charitable purposes in a common law context. In England & Wales it has increasingly fallen to the Charity Commission, rather than to the judiciary or occasionally the Revenue as in other jurisdictions, to utilise this function, which it is statutorily empowered to do in a proactive fashion. All other legal functions have become relatively less significant.

A key component in this function is the public benefit principle. The *parens patria* legacy is now evident in the responsibilities of the Charity Commission as it deploys this principle to push back the *Pemsel* boundaries of charity. Its assertion of the public benefit principle in relation to charity is beginning to approximate the role judicially and, more recently, legislatively assigned to the welfare principle in relation to the upbringing of children. The overriding legal imperative to safeguard the welfare of a child in the context of all decision-making affecting his or her interests, is equally derived from the *parens patria* obligations of the Crown. Both principles were developed by the High Court judiciary, employing the discretionary equitable powers of the inherent jurisdiction as devolved from the Court of Chancery, and are now most usually applied in practice by administrative agencies.

The introduction of new charity legislation will bring with it statutorily defined charitable purposes and a mandatory role for the public benefit principle which is to be uniformly applied as the ultimate test of charitable status. The new primacy accorded this principle will equip the Charity Commission to use the mediation and adjustment function to greater effect in the future. As it does so, the development of charity law in this jurisdiction is likely to move ahead quite rapidly and the pace and nature of change may well set it on a divergent path from that followed by other common law countries. Unless similar key legislative changes are introduced in those countries it is unlikely that they will be as free to adopt in the future, as they have in the past, the case law precedents established in England & Wales. For the first time the development of charity law in England & Wales will be out of step with those nations with which for centuries it has shared its common law history.

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[74] See also, Charity Commissioners, RR1a, *Recognising New Charitable Purposes*, London, 2001.

Chapter 7
Legal Functions: Support

Introduction

This chapter begins by briefly tracing the history of the legal function of support as it relates to charity before identifying and assessing the use of statutory authority to reinforce that function in a contemporary context.

Most obviously support is evident in the preferential tax concessions long provided by revenue authorities across the common law world but it is also apparent in the fiscal support available from other government bodies, such as those responsible for rates and customs and excise, from quasi-government bodies such as the National Lottery and from the government itself in terms of direct grant aid. In England & Wales, the role and statutory responsibilities of the Charity Commission make a distinctive contribution to the creation of an enabling environment for charities and the support role of this agency is examined in some detail. The chapter considers the rationale for government support: the benefits to government resulting from activities that spread the responsibility for public benefit provision, generate the involvement of volunteers, promote active and responsible citizenship etc.; and the need to encourage greater efficiency, facilitate proper governance and provide appropriate legal structures for charities.

The support provided by non-government organisations, particularly those such as the NCVO[1] and CAF[2] that have developed a co-ordination or umbrella role, has proved to be of crucial importance. Indeed it's impractical to consider the support function as it relates to charity in isolation from the broader influences that are shaping the sector in general.

This chapter also examines the fiscal environment for public support of charitable activities: the law relating to fundraising and lotteries; the use of donor incentives, gift aid etc.; and the involvement of private finance and commerce. It concludes with an assessment of relevant aspects of the recent charity law reform process in England & Wales and of the implications arising for the future of the support function and related social policy matters.

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[1] The National Council of Voluntary Organisations.

[2] The Charities Aid Foundation.

K. O'Halloran et al., *Charity Law & Social Policy*,

Origins of the Support Function

Within the common law tradition, support has not just been recognised as an important function of the law as it relates to charities but in some jurisdictions successive governments have assured the public that they regard it as the primary function.

Emergence of Government Support for Charities

Government support has been evident since at least the introduction of the Statute of Charitable Uses 1601,[3] the original legislative acknowledgement of its vested interest in charity. The most basic elements of that support have always been: encouragement to donors, through trust and other laws which afford protection for their gifts; encouragement to charities, through tax exemption and other privileges; and encouragement to the general public through laws governing fundraising, volunteering registration etc. The rationale for government support, its interest in ensuring that charity prospers, has similarly remained essentially the same since the 1601 Act: to further develop a public benefit partnership. However imperfect the transference of modern social constructs, 'government' then as now can be seen declaring that in return for conferred tax exemptions[4] and other privileges it will share with the 'charitable sector' responsibility for public benefit 'service provision' (see, also, Chap. 2).

The Preamble and the Partnership Agenda

The Preamble clearly identified those aspects of public benefit provision the 'government' was prepared to recognise as charitable. In terms of engagement that were to endure, substantially unaltered, for four centuries across the common law world the government laid down an agenda for its future partnership with charities.

The support then extended to charities, in the form of legal status and exemption from taxes, was confined to certain quite specific purposes and grouped into two broad categories: for the relief of the poor and for public works. Because the purposes were treated from the outset as being illustrative rather than definitive, although judicial uncertainty initially prevailed as to whether they could be construed disjunctively or conjunctively,[5] the list has been amenable to diversification and now accommodates a wide range of analogous entities. Nonetheless, it is plainly evident that the

[3] 43 Eliz. 1 c. 4.

[4] Although a national tax system was not legislatively introduced in England & Wales until 1799, taxes had long been levied at shire level for maintenance of local poorhouses, roads and defence forces etc.

[5] See for example, *Re Ward* [1941] Ch 308, *per* Mackimmon LJ, p. 310.

government emphasis initially placed in the Preamble upon the contribution of charitable purposes to the following matters of public benefit has since been sustained:

- Health and social care provision
- Training for employment
- Public utility provision
- The physical maintenance of social infrastructure
- The protection of citizens

In addition to several of the 'service' type public utilities then found to be deserving of charitable status, there were also some of a 'social control' nature. The maintenance of houses of correction, assisting poor maids into marriage and the rehabilitation of prisoners are purposes indicating a legislative intent to promote a congruity between the agendas of charities and government on the assumption that both share a common interest in activities which conform with and tend to preserve the values of contemporary society. This in time evolved to become crystallised in the concepts of 'social capital' and 'civil society' which now form an important strand in the government's partnership agenda (see, further, below and Chap. 2).

Conversely, this approach may also explain the absence of any reference to religion or to religious organisations in the Preamble. Although recognition is given to the repair of churches as a charitable purpose, this occurs in the context of a list of public utilities and may simply be an acknowledgement that remedying the wear and tear suffered by all such social infrastructure facilities was equally deserving of charitable status. The absence of an explicit reference to religion serves as a reminder that the Statute of Charitable Uses 1601 did not set out to encode a definitive list of charitable purposes. It also reflects the political wariness of legislators who were mindful of the turbulent relationship between religion and royalty; property donated to religious purposes during the reign of one monarch could be confiscated during the next if the change in reign coincided with a change in the religious affiliation of the monarch. It was perhaps prudent to avoid a policy commitment to matters that could be socially divisive. Again, however, the role of religion evolved to underpin that strand of the government's agenda which now seeks to promote the involvement of faith-based organisations in educational and other forms of public service provision.

The Income Tax Act 1799

As Picarda notes "the Income Tax Act 1799 exempted from tax the income of any 'corporation, fraternity or society established for charitable purposes' ".[6] Since that legislation, reinforced by the decision a century later in *Pemsel*,[7] the Inland

[6] See Picarda, H., *The Law and Practice Relating to Charities* (3rd ed), Butterworths, London, 1999, p. 733.

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

Revenue has exempted charities from liability for national income tax. This privilege or right, extended to include exemption from rates, is available to all charities whatever their purpose simply on proof of charitable status and constitutes the single most important form of support provided by government.

The Charitable Trusts Act 1853

The lengthy, painstaking work of the Brougham Inquiry[8] from 1819–1837 during which assets retrieved far outstripped costs, convinced the government that relying on a Commission rather than solely upon the judiciary would provide a more efficient approach to failing charities (see, also, Chap. 5). As a direct consequence of the Inquiry, the Charitable Trusts Act 1853 (amended in 1855 and 1860) established a permanent Commission to supervise charitable activity. The supervisory/inspectoral role of the Commission included from the outset a support function as preventative measures quickly proved more cost effective than having to salvage and redistribute the assets of defunct charities. The priority given to the support function by the Charity Commission today germinated long ago in the work of the Brougham Inquiry.

The Police, Factories, etc. (Miscellaneous Provisions) Act 1916

This statute, which dealt with street collections, together with the House-to-House Collections Act 1939 constituted the first attempt by government to regulate fundraising for charitable purposes. The legislative intent then (as now in the 1993 Act) was to give the general public confidence that funds could be safely donated to charity by prohibiting opportunities for their abuse or improper use.

Emergence of Judicial Support for Charities

The services initially provided by the Court of Chancery to charities, which subsequently transferred to the High Court and then devolved to the Charity Commission, were intended, then as now, to promote greater efficiency in management and administration, to safeguard assets, assist the achievement of charitable purposes and to strengthen sustainability. Through the exercise of its inherent jurisdiction, the court has traditionally been able to provide a flexible response to remedy the faults and defaults of trustees. However, over time as the judicial process became longer, more expensive and exposing for the charities involved, while the litigation

[8] See further, Owen, *English Philanthropy 1660–1960*, 1965, pp. 183–197.

necessarily presented issues at random, so the Charity Commission proved to be a more efficient means of effecting change in the practice of charities.

Support for Donors

Judicial support for those who choose to donate private wealth for the public benefit has a long history as the courts considered they were bound to give effect to a valid charitable gift in the terms as expressed by the donor. Sir John Romilly MR summarised the judicial approach in *Philpott v. St George's Hospital*:[9]

> If the testator has, by his will, pointed out clearly what he intends to be done, and his directions are not contrary to the law, this Court is bound to carry that intention into effect, and has no right, and is not at liberty to speculate upon whether it would have been more expedient or beneficial for the community that a different mode of application of the funds in charity should have occurred to the mind of the testator, or that he should have directed some different scheme for carrying his charitable intentions into effect. Accordingly instances of charities of the most useless description have come before the Court, but which it has considered itself bound to carry into effect.

This sense of obligation, to honour the charitable intentions of a donor, is evident in the case law of England & Wales which contains many examples of judicial efforts, sometimes capricious, to challenge government intentions to prevent or control the misuse of charity. For example, the government policy to prevent deathbed dispositions in favour of charity that disinherited the next-of-kin by using the provisions of the Mortmain and Charitable Uses Act 1736 was undermined by "a number of cases adopting a generous interpretation of what amounted to a charitable purpose".[10] Again, the judiciary have on occasion adopted a lenient approach towards applicants who were clearly intent upon using charity primarily as a means of tax avoidance (e.g. under the Variation of Trusts Act 1958).[11]

In striving to give effect to donor intentions, the judiciary cultivated certain rules that clearly illustrate where their sympathies lay.

- *The rule of benignant construction*

The tendency to lean in favour of a donor intent on selflessly furthering the public benefit has long been illustrated by the 'benignant construction' approach exercised

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[9] (1859) 27 Beav 107, p. 111, as cited in Picarda, H., *The Law and Practice Relating to Charities* (3rd ed.), Butterworths, London, 1999, p. 302.

[10] See Tudor, *Charities* (9th ed.), Sweet & Maxwell, London, 2003, p. 3; citing *Thornton v. Howe* (1862) 31 Beav. 14, *Trustees of the British Museum v. White* (1826) 2 Sim & St. 594, *Tatham v. Drumond* (1864) 4 De G.F. & Sim 484 and also Jones, G.H., *History of the Law of Charity 1530–1827*, Chap. 9.

[11] *Re Weston's Settlement* [1969] 1 Ch. 223, p. 245. See further, Hackney, J., 'The Politics of the Chancery', *Current Legal Problems*, 1981.

by the courts to give effect to a poorly constructed but patently charitable bequest.[12] In circumstances where other trusts would fail, the courts will be guided by the principle expressed by Lord Loreburn[13] that "there is no better rule than that a benignant construction will be placed upon charitable trusts." Where, for example, there is ambiguity, technical fault or an absence of documentation the courts will endeavour to make good the deficiency and save an otherwise void charitable gift. This rule has enabled the court to admit extrinsic evidence in order to explicate the construction of a charitable gift[14] and to remedy a defective execution of a power of appointment by making good a technical fault[15] (see, further, Chap. 1).

- *The effectuation of charitable intention rule*

As expressed in Tudor:[16]

> Just as the court takes a benignant approach to the construction of charitable gifts, so the courts seek to save gifts where there is a charitable intention, although there are no clearly defined objects.

Where the donor has clear demonstrated a charitable intent but has failed to indicate how this is to be given effect then the court will provide the necessary machinery.[17] Similarly, where the donor declares a charitable intention but fails to specify a recipient[18] (see, also, Chap. 1).

- *The 'poor relations' rule*

Creative judicial interpretation of public benefit in the context of 'poor relations' trusts, where the donor or testator intends to make a gift for the benefit of poor relatives, has been responsible for extending charitable status to a class of beneficiaries who clearly do not satisfy the 'public' requirement. Such trusts have long been recognised as forming an anomalous exception to the general rule that gifts where the beneficiaries are identified by a purely personal relationship to the would-be donor cannot be charitable gifts. Judicial exemption of the so-called 'poor relations' or 'poor employees' trusts from the demands of the public benefit test have been recognised in a line of decisions that stretch back to the 18th century[19] (see, also, Chap. 1).

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[12] See for example, *Att-Gen v. Clarke* (1762) Amb. 422 and *Bruce v. Presbytery of Deer* (1867) L.R. 1 H.L. (Sc.) 96.

[13] *Weir v. Crum-Brown* [1908] AC 162, p. 167.

[14] *Drummond v. Att-Gen* (1850) 2 H.L.C. 837.

[15] *Sayer v. Sayer* (1848) 7 Ha. 337; *Innes v. Sayer* (1851) 3 Mac. & G. 606.

[16] Warburton, J., *Tudor on Charities* (9th ed.), London, Sweet & Maxwell, 2003, p. 17.

[17] See for example: *Moggridge v. Thackwell* (1802) 7 Ves. 360; *Mills v. Farmer* (1815) 1 Mer. 55

[18] *Re White* [1893] 2 Ch. 41.

[19] See for example: *A-G v. Bucknall* (1741) 2 Atk 328; 26 ER 600; *Issac v. Defriez* (1754) Amb 595; and *Brunsden v. Woolredge* (1765) Amb 507, 27 ER 327 (Sewell, M.R.).

Support for Charities

The long tradition of judicial support for charities originates in the approach taken by the Court of Chancery. It can be seen in the developmental history of trusts and in the archives of case law dealing with the responsibilities of trustees (see, further, Chap. 3). Judicial concern to protect charitable status, by introducing and defending the perpetuity rule,[20] breathing new life into it by analogy[21] and by use of the spirit and intendment rule[22] or by employing the *cy-près* doctrine,[23] is also evident in the case law.

- *The 'spirit and intendment' rule*

This rule provided the judiciary with a means whereby, to some extent, they could safeguard the relevance of 'charity' by broadening its legal interpretation to meet new manifestations of social need. In the centuries following the introduction of the 1601 statute, judicial discretion has often been creatively employed to develop charitable status by interpreting gifts as coming within the 'spirit and intendment' of the Preamble. This has served to extend the range of charitable purposes in an empirical rather than logical fashion; by a process of precedent and analogy the Preamble list is now considerably enlarged (see, also, Chap. 2).

- *The doctrine of cy-près*

To cope with the fact that particular purposes or charitable organisations may cease to be valid or viable, the principle of *cy-près* has traditionally allowed the objects to be varied and the resources of a defunct charity or purpose to be transferred to a comparable charity or purpose; to achieve a result as close as possible to the donor's original intention. For the rule to apply a clear charitable intention must be evident, the objects of the gift must be exclusively charitable, the subject must be certain and a '*cy-près* occasion' must have arisen. The traditional constraint, requiring proof of 'impossibility' or 'impracticability' in giving effect to the original charitable intention, has been significantly relaxed by modern legislation. A charitable trust will not be allowed to fail for uncertainty of object if there is firm evidence of a general charitable intent.

Until 1860 the power to apply *cy-près* schemes was exercised by the judiciary in circumstances where the purpose of a charity had become impossible or highly impractical to fulfill. This default mechanism, allowing the terms of a charitable trust to be varied and the assets of a failed charity or charitable gift to be applied

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[20] See Morris and Leach, *The Rule Against Perpetuities* (2nd ed.).

[21] *Scottish Burial Reform and Cremation Society v. Glasgow Corporation* [1968] AC 138; extension of charitable status to crematorium.

[22] *Re Vancouver Regional Free Net Association and Minister of National Revenue* (1996) 137 DLR (4th) 206 Federal Court of Appeal; recognition of internet access as a charitable purpose.

[23] *Att-Gen v. City of London* (1790) 3 Bro.C.C. 171; gift to convert infidels in America, but a finding of no infidels, with the result that the gift was saved to charity for a purpose in keeping with the general charitable intention of the donor.

for purposes commensurate with the initial charitable intention, has been in use since at least the 17th century and continues to be of considerable importance (see, further, Chap. 4).

The Modern Legislative Development of the Support Function

Government can counterbalance its traditional tax orientation with support functions to achieve desired political outcomes by various means including interposing an agency to determine charitable purposes and status, quite separate and independent of the tax and judicial systems, and by manipulating tax concessions and donation incentives. It can also do so by direct statutory intervention. For example, in many common law nations the government has accorded charitable status to sport, play and recreation activities by introducing legislation to that effect. Again, it may choose to ease the statutory restraints on fundraising or introduce new sources of public funding for charities. In the latter respect, the introduction of the National Lottery in England & Wales has had a considerable positive impact on the resources of designated charities. The rationale for providing such support and the methods used to achieve it, disclose the type of benefit intended for both government and charity.

Rationale for Government Support

There are clear benefits for government resulting from activities that spread the cost and responsibility for public benefit provision, generate the involvement of volunteers, promote active and responsible citizenship etc. When the activities are those of organisations, some extremely wealthy and knowledgeable, perhaps in existence for many generations, with considerable authority and resources in their respective areas, then they and government must reach some form of mutual accommodation.

Defraying Government Expenditure

In England & Wales, in common with many other developed western nations, the inexorable logic of current demographic trends together with the collapse of domestic manufacturing as production is outsourced to Asia have ensured that tax revenues are no longer sufficient to permit the continued pursuit of the cradle-to-grave Welfare State ideal. In conjunction with the steady growth of an inverse correlation between workers and dependants, such societies are witnessing the erosion of their traditional tax base. The cost of public service provision must now and increasingly in the future, be met from resources other than tax revenue. There is a

particular onus on charities, exempted from tax liability on the grounds of their commitment to public benefit, to shoulder a share of these costs and governments across the common law world have entered into negotiations with the non-profit sector, including charities, for that purpose.

Complementing Government Provision

In keeping with the terms of engagement first articulated in the Preamble, government bodies continue to look to charities to assist in the provision and delivery of public services. The withdrawal of government from health and social service provision is now being matched by a similar retreat from its traditional responsibilities in respect of public utilities such as water supply, electricity, transport etc. Wherever possible, government is implementing a policy of engaging with private companies and non-profit organisations, including charities, to arrange for the transfer of such service provision. This transfer does not entail a complete abrogation of government responsibility as core service elements are retained (e.g. in the rail and health services) while outsourced provision is subject to tight government control, regulatory standards and benchmarks.

In addition, charities continue in their traditional role of augmenting the work of government through pioneering new models for service delivery.

Building Social Capital

Government has a vested interest in facilitating the growth of charities. It can only gain from supporting a sector that: generates a vibrant and diverse participative form of democracy; attracts the involvement of volunteers; bolsters a sense of social obligation and civic responsibility; thereby fostering the growth of social capital and consolidating civil society. Altruistic activity, a sufficient 'good' in itself, also acts as a model for others and can galvanize local communities into more responsible citizenship through bonding activities that accrue to the common good.

The introduction in England & Wales of the Recreational Charities Act 1958, followed by similar legislation in many common law nations, was intended to extend that capacity by ensuring that organisations developing social capital in local communities through sport, play and recreation activities were awarded charitable status.

Maintaining Social Cohesion

The larger charities, because of their institutional nature, pastoral concerns and longevity, are well positioned to reinforce and continue established social norms: some, such as religious or faith based organisations, are often accused of having a conservative if

not reactionary influence and can have a strong investment in maintaining the status quo. Their longevity, coupled with financial and information resources, together with expertise and credibility established over generations of close engagement with vulnerable communities, place charities in a singularly strong position to provide the necessary continuity of concerned involvement to those communities with potential to threaten government stability. By absorbing the needs of minority groups, assuaging the dissatisfaction of the alienated, mediating on behalf of the socially excluded and involving armies of volunteers in community care activities, charities can make a unique contribution to maintaining social cohesion.

Recent Legislative History

The tradition of leaving charity law developments to the customary common law processes has for centuries been maintained in England & Wales as in almost all other jurisdictions.[24] However, while legislators deliberately avoided dealing with charitable purposes and definitional matters,[25] attention was given to processes, the distribution of responsibilities between court and other agencies and to issues of legal structures, good governance etc., some which have had a bearing on the support function. This approach changed with the introduction of the Charities Act 2006.

The Charities Act 1960

This statute charged the Charity Commissioners with responsibility for "promoting the effective use of charitable resources by encouraging the development of better methods of administration, by giving charity trustees information or advice on any matter affecting the charity"[26] in addition to its customary investigatory duties.

The Income and Corporation Taxes Act 1988

Under this legislation, charities were enabled to qualify for exemption from income tax and corporation tax (Schedules A, C, D and F) while under the Taxation of

[24] With the exception of Barbados which introduced legislative changes to matters of definition in 1989.

[25] Although, in the UK, s 506 of the Income and Corporation Taxes Act 1988 included a definition of charity this relied upon a form of words similar to those used by the House of Lords in *Pemsel*.

[26] s 1(3) of the 1993 Act.

Chargeable Gains Act 1992 they could be exempted from capital gains tax and also from inheritance tax and stamp duty.[27] The 1988 Act, as amended by the Finance Act 2000, introduced donation incentives and thereby further bolstered the fund-raising capacity of the charitable sector. Thereafter, a company or an individual was able to claim tax relief on donations made by way of a gift aid scheme to charities. Gift aid by individuals grew in importance both in scale and practical impact because the charity was entitled to reclaim the tax paid by the donor; payroll giving also became significant.[28]

The Charities Acts of 1992 and 1993[29]

The overall statutory duty of the Commissioners, as restated in the 1993 Act, is that of "promoting the effective use of charitable resources by encouraging the development of better methods of administration, by giving charity trustees information or advice on any matter affecting the charity and by investigating and checking abuses".[30] Further, the Commissioners are required to promote and make effective the work of any charity by assisting it to meet the needs designed by its trusts.[31] Significantly, these provisions vest Commissioners with the responsibility and power to act independently when giving effect to such aspects of its developmental role without the necessity of seeking prior government authorisation in respect of policy matters.

The National Lottery Act 1993

This statute, as amended in 1998 (and replaced by new legislation in 2006), governs the raising and distribution of national lottery funds for charities and other good causes within six categories: the arts, sport, the national heritage and charitable expenditure, millennium projects and health education together with the environment.

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[27] The Value Added Tax Act 1994 governs charitable exemption from VAT (a European Union tax imposed by the EC Sixth VAT directive which the UK is obliged to implement). The Local Government Finance Act 1992 provides charities with limited exemption from rates liability.

[28] In the UK, total tax relief to charities on donations has been estimated at £1 billion for 2004/05: see *A Generous Society*, the Home Office, 2005.

[29] The Charity Commissioners constitution, as set out in the First Schedule to the Charities Act 1993, provides for the appointment of a Chief Charity Commissioner and two other Commissioners. The Home Secretary, with Treasury approval, has a discretionary power to appoint a further two Commissioners.

[30] Section 1(3) of the Charities Act 1993.

[31] Section 1(4) of the Charities Act 1993.

Disbursement of lottery funds, administered by a distributing body established for each category, is subject to directions issued by the Secretary of State. In theory distribution is also subject to the 'additionality principle', intended to govern disbursement of funds by ensuring that projects funded would be supplementary to government services, but in practice this is bypassed with a significant proportion of lottery funds being diverted to ease the pressure on child care, health care and other public service provision. While undoubtedly the effect of the National Lottery has been to increase the resources broadly available for charitable purposes, this has arguably favoured designated charities at the expense of all other charities and is increasingly being channeled towards subsidizing the running costs of mainstream government services. The creation of the New Opportunities Fund as a separate and more directly controlled body than the Community Fund, working to government priorities, is seen by some as further evidence of takeover by stealth.[32]

The role now played by National Lottery funding in charity law and practice within the UK clearly illustrates the difficulty in drawing a line between the responsibilities of government and charity and highlights the extent to which the support provided is conditional upon the latter complying with government's agenda.

The Trustee Act 2000

This includes provision for the possible introduction of measures permitting charitable trustees to be remunerated; thereby signaling the end of the centuries old rule that a trustee must act gratuitously (see, further, Chap. 3). The new charity legislation has firmed up on this development and now allows charities to pay their trustees for professional/specialist services.[33]

The Charities Act 2006

The Modern Partnership Agenda

The contemporary political significance of charity lies partially in its capacity to assist government as the latter transfers its traditional public service responsibilities as outlined above. In order to facilitate this, in many common law nations (e.g. the UK, Ireland, New Zealand and Canada) the government has been negotiating with

[32] See Anheier, H. and Leat, D., *From Charity to Creativity: Philanthropic Foundations in the 21st Century*, Comedia, Stroud, 2002.

[33] See also, Charity Commission CC 11 *Payment of Charity Trustees* and *Smallpiece v. Attorney-General* [1990] Ch Com Rep 36–7 where the test for payment was held to be one of necessity.

the voluntary or not-for-profit sector (of which charities form the cutting edge) to form a partnership tasked with addressing a public service agenda. In addition to the matters listed above, that agenda now typically focuses on certain other issues.

Channeling Charitable Resources

Increasingly charity is being led towards investing its resources in government targeted areas of public benefit provision. The government lead is apparent in its pattern of funding for charities, whether through preferentially awarded direct grant aid or service delivery contracts. In England & Wales this is evident, for example, in the newly created trust hospitals and education foundations (e.g. the City Academies are charities established to take over the management of failing schools, usually in deprived inner city areas). Much of the recent growth in schools, day care facilities for children and nursing home provision in this jurisdiction has been taken up by the charitable sector.

This is a difficult dynamic for charities as they may unwittingly thereby assume the role of government agent. In that event, having sacrificed its independence and in all probability compromised its objects, any such organisation risks being denied charitable status.

Encouraging Efficiency and Effectiveness

Government support for charities is also rooted in a concern to improve their efficiency and effectiveness. Media exposure of corporate corruption and mismanagement in the business world has alerted government to the potential for similar scandals in the charitable sector and stimulated awareness of the need to facilitate transparency, greater accountability, proper models of governance and the provision of appropriate legal structures for charities. Encouragement is increasingly being given to formulating and applying impact measures to estimate cost effectiveness and comparative value within the sector.

Co-ordinating International Aid, Trade and Charity

Charities are now coming under considerable government pressure to align their overseas work more closely with political objectives. This is due in large part to World Bank insistence that assistance to failed states is accompanied by conditions requiring recipients not only to deny terrorists a safe haven but also to adopt free-market socio-economic standards. So, for example, grant aid to Ghana and other African countries has been coupled with a requirement that their governments privatize the supply of running water and electricity. As this disproportionately affects the poorer section of the population, worsening the plight of those already impoverished and bringing many more below the poverty line, it is often opposed by international

charities such as Oxfam. Government logistical support and protection may not be made available to those charities that act in defiance of World Bank policy.

Again, many developed nations operate a protectionist policy that disadvantages producers in the underdeveloped world. Most obviously the Common Agricultural Policy, protecting the farmers of the 27 member states in the European Union from open market competition, prevents or seriously restricts the import of agricultural produce from underdeveloped nations.

Facilitating Anti-terrorism Surveillance

Finally, in the post-9/11 world, governments have come to view non-government organisations including charities as a potential area of weakness in the fight against terrorism. In order to monitor information flow and thereby detect terrorist associated transfers of funds etc., the governments of all developed nations have introduced legislative measures and new regulatory procedures requiring a higher degree of transparency and accountability as regards the assets of non-government organisations.

A Framework for Partnership

The ability of charities in England & Wales to engage with local communities and reach areas of social need that cannot be accessed by government bodies was recently acknowledged by the Minister responsible for charities:[34]

> Charities are a major force for good in society. They can reach out to some of our most marginalised and deprived communities and provide a strong voice for those who need it… The Government is committed to a diverse, expanding and vibrant voluntary sector. We are achieving this by helping charities to realise their full potential to change lives and help transform communities.

In furtherance of this policy to support and promote the work of charities the government in this jurisdiction has negotiated a formal partnership arrangement with the sector.[35]

The Compacts

In the UK, the Deakin report recommended that the partnership approach be formalised by a concordat between central government and the voluntary sector[36] and in May 1997 four separate compacts (for England, Scotland, Wales, and Northern

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[34] See Ms Fiona Mactaggart on introducing the Charities Bill in May 2005.

[35] Not dissimilar arrangements have subsequently been negotiated in other common law nations e.g. Canada.

[36] See the Commission on the Future of the Voluntary Sector in England, *Meeting the Challenge of Change: Voluntary Action into the 21st Century*, NCVO, London, 1996, p. 50, para 2.2.21.

Ireland) were duly developed.[37] The compact is a framework document and a process negotiated initially between central government and a cross section of representatives of the voluntary and community sector (i.e. national and local charities and non charitable and community bodies) which sets out the principles under which partnerships between public authorities and voluntary and community bodies should be developed. In particular it seeks to entrench the independence of voluntary bodies and ensure that the relationship is genuinely one of partnership.

The Charity Law Reviews

In many common law jurisdictions there have recently been government declarations of intent to further develop partnership arrangements with the voluntary and community sector (or nonprofit, or third sector) as a means of consolidating civil society. A revised charity law framework is seen as a means of specifying the terms of reference for any future such government/charity partnership and the process of charity law review has provided an expedient forum for negotiating partnership objectives.

Giving Effect to the Support Function: Bodies, Powers and Application

The network of agencies that provide support to charities has for many generations remained much the same across the common law jurisdictions. In England & Wales the relevant government bodies are, as they have been for centuries, the Inland Revenue, the High Court, Attorney-General and the Charity Commission, with the recent addition of the Office of the Third Sector, while the equivalent non-government agencies are now the NCVO and the Charities Aid Foundation. Elsewhere, while there is no equivalent to the Charity Commission, in each jurisdiction the agency network and its support capacity are not dissimilar.

The Inland Revenue

For this agency the support function has naturally been a low priority. Its overriding concern is to police the grounds for entitlement to tax exemption, donor incentives, rates exemption, trading privileges etc. as these apply in individual cases. However, it does provide support in cases where organisations wish to become charities or where it can assist charities to be more efficient.

[37] Subsequently local compacts have been agreed and a new Compact Plus introduced (2005). See further www.compact.org.uk.

The High Court and Attorney-General

In England & Wales the supportive common law powers of the High Court and the Attorney General – to protect and where necessary to amend charitable trusts – have now been largely statutorily transferred to or assumed by the Charity Commission since the Charities Act 1993. While the High Court shares a dual jurisdiction for most purposes with the Commission, it still retains its powers of adjudication and thus a capacity to offer support in relation to certain matters and it will hear cases on appeal from the Commission.

Across the common law nations, the expense, the length of proceedings and the risk of attracting unwelcome publicity have combined to outweigh the attraction of seeking the remedial powers of the judiciary and have greatly reduced recourse to the High Court. Similarly, the ancient *parens patriae* jurisdiction (see, further, Chap. 4) vested in the Attorney-General as protector of charities should provide a significant source of support for charities but instead this office has become of marginal significance for charities throughout the common law world.

The Charity Commissioners

The support of charities is now claimed to be the main function of the Charity Commission in England & Wales. As the Chief Charity Commissioner said in evidence to the Public Accounts committee:[38]

> Our fundamental role as set out in the Charities Acts certainly from 1960 has been to enable charities to operate, to use their resources more effectively. In that sense, it is a promotional and support role first and foremost.

The Commission gives effect to this role largely through the exercise of administrative powers, particularly by maintaining a national register of charities and by monitoring, supervising and assisting those registered. Its new Charity Database and integrated monitoring system have improved the quantity and quality of the information available to the Commission. In the main, Commissioners use their support powers to provide guidance on operational matters, to make schemes for administration, to vest or transfer property, to make decisions on the many issues affecting the running of charities and by carrying out a review of those that are registered. In so doing the Commission aims to improve public confidence in the integrity, efficiency and effectiveness of charities. Until the introduction of the 1993

[38] Committee of Public Accounts, *Charity Commission: Regulation and Support of Charities*, 28th Report, HC Session 1997–1998, London: The Stationery Office, 1998, p. 10. A position that has at times left it open to the challenge that it does not give sufficient attention to its statutory regulatory duties: see for example, Wilkinson, H.W., 'The Charity Commission: Regulation and Support of Charities', 148 NLJ 752, 1998.

Act the Commission provided its support free of cost but that legislation empowered it to levy charges which it now does in respect of certain services.

Advice and Guidance

The Commission promotes effective performance by providing advice and guidance[39] to some 24,000 charities annually and it publishes regulatory reports explaining matters of law, highlighting good practice and helping charities improve their own performances and learn lessons from others. It also responds to the approximately 250,000 enquiries made to its Contact Centre and makes available all publications, other useful guidance and operational advice on its website. The 1993 Act entitles any trustee to apply in writing to the Commission for advice on a matter affecting their responsibilities with regard to the affairs of a charity[40] and such a trustee is indemnified from the consequences of any decisions taken when acting on advice given by the Commission.[41] However, as pointed out by the Prime Minister's Strategy Group, "the blurring of boundaries between the Commission's advisory and regulatory roles continues to cause confusion among charities and other key stakeholders".[42]

Assistance with SORP and Risk Management

In the interests of increasing efficiency, the Commission requires charities to use the Statement of Recommended Accounting Practice (SORP) when completing annual reports and making returns to the Inland Revenue. Since 2000 it has required trustees of charities when submitting their Annual Reports to include a statement confirming that:[43]

> ..the major risks to which the charity is exposed, as identified by the trustees, have been reviewed and systems have been established to mitigate those risks.

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[39] See for example: CC3, *Responsibilities of Charity Trustees*; CC8, *Internal Financial Controls for Charities*; CC9, *Political Activities and Campaigning by Charities*; CC12, *Managing Financial Difficulties and Insolvency in Charities*; CC14, *Investment of Charitable Funds: Basic Principles*; CC19, *Charities' Reserves*; CC20, *Charities and Fund-raising*; CC22, *Choosing and Preparing a Governing Document*; CC24, *Users on Board: Beneficiaries who become trustees*; CC29, *Charities and Local Authorities*; CC35, *Charities and Trading*; CC37, *Charities and Contracts*; CC38, *Expenditure and Replacement of Permanent Endowment*; CC48, *Charities and Meetings*; CC49, *Charities and Insurance*; CC60, *The Hallmarks of a Well-Run Charity*.

[40] Section 29(1) of the Charities Act 1993.

[41] Section 29(2) of the Charities Act 1993.

[42] *Public Action*, *Private Benefit*, 2002, p. 80

[43] Charity Commission, *Accounting and Reporting by Charities - Statement of Recommended Practice (SORP 2000)*, issued October 2000.

It does, however, also provide a valued source of support, particularly to smaller charities, by making available specialist expertise on the complexities of risk management in the context of SORP.[44]

Schemes for the Administration of a Charity

The Commission is empowered by virtue of its concurrent jurisdiction with the High Court to modernise charities by making schemes, including *cy-près* schemes, for their administration in response to a request to do so from the court or the charity concerned.[45]

Review of Registered Charities

The Commission visits several hundred larger charities every year, as part of its ongoing review of those listed on its register (see, further, below). In the course of so doing it offers advice and guidance and where appropriate takes decisions to improve matters of governance, administration, effectiveness and to facilitate a closer correlation between activities and charitable purpose. Government concern to support small charities, by not imposing a burden of administrative costs disproportionate to their size, is evident in the exclusion of such charities from the statutory requirements to register with the Commission[46] and to submit full audited annual accounts.[47]

Office of the Third Sector[48]

This body, located in the Cabinet Office, was created in May 2006 when the Active Communities Directorate in the Home Office, and the Social Enterprise Unit, in the Department for Trade and Industry amalgamated. Established to work in partnership with the sector, it has the following stated aims:

- Enable campaigning and empowerment, particularly for those at risk of social exclusion

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[44] The Charities (Accounts and Reports) Regulations 2000 (SI No.2868).

[45] Section 33(2) of the Charities Act 1993.

[46] Section 3(5)(c) of the Charities Act 1993.

[47] Section 48(4) of the Charities Act 1993. Some 33% of registered charities are thereby excused from compliance with full accounting requirements.

[48] See further at http://www.cabinetoffice.gov.uk/third_sector/about_us.

- Strengthen communities, drawing together people from different sections of society
- Transform public services, through delivery, design, innovation and campaigning
- Enable social enterprise growth and development, combining business and social goals

The Non-government Organisations

Umbrella bodies, representing the diverse interests of the voluntary sector (including those of charities), have for some decades played an important role in negotiating with government on matters of policy and strategy affecting the sector. The Charity Commission has leant its support to such bodies by advising that an umbrella body established for the purpose of campaigning on behalf of its member organisations is entitled to charitable status.[49] In England & Wales the primary such body has been the NCVO[50] whose recommendations for charity law reform[51] did much to prompt government to initiate that process and which also publishes advice for charities.[52] In addition, the resources and overview of organisations such as CAF[53] have done much to enhance capacity across the sector. In the present political context, with a Labour government completing a third successive term in office, the leverage available to such organisations is considerable.

Charity Commission's Exercise of the Support Function to Develop Charitable Purposes: Establishing Precedents

In the course of its review of registered charities, the role of the Charity Commission has to some extent evolved to become a forum for developing a contemporary interpretation of 'charitable purpose'. Its success in introducing policy changes has enabled practice to accommodate activities such as training for employment, urban/rural regeneration and

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[49] See Charity Commissioners, CC9, *Political Activities and Campaigning by Charities*, London, 1997, para 42.

[50] Equivalent organisations elsewhere in the UK would be the Wales Council for Voluntary Action, the Northern Ireland Council for Voluntary Action (NICVA) and in Scotland the Scotland Council for Voluntary Organisations (SCVO).

[51] See the Commission on the Future of the Voluntary Sector in England, *Meeting the Challenge of Change: Voluntary Action into the 21st Century*, NCVO, London, 1996 and NCVO, *For the public benefit? A consultation document on charity law reform*, Charity Law Reform Advisory Group, London, January 2001.

[52] See for example, *Managing Risk – Guidelines for medium-sized voluntary organisations*.

[53] The Charities Aid Foundation.

community development and thereby strengthened the relevance of charities to current patterns of social need (see, further, Chap. 4). In addition, the Commission has also been able to provide significant support through strategic decision-making which has had the effect of setting legal precedents (see, Chap. 4) to broaden future practice.

Commission Capacity to Set Precedents

The ability of the Commission to intervene in matters of current practice and take decisions intended to effect change not just for the charity concerned but for all future charities in similar circumstances, is due both to its initiation of a systematic review of registered charities and to the extent of the powers now statutorily vested in it. The 2006 Act has introduced further flexibility by permitting smaller charities the freedom to alter their purposes.

Review of Registered Charities

Following the legislative extension of their powers, permitting closer monitoring and control of charities, the Charity Commissioners initiated a review of the Register of Charities in 1997. Instead of being dependant, as previously, solely upon a process which presented issues entirely at random for opportunities to arise to broaden the interpretation of 'charity', the review then allowed the Commission to systematically filter registered charities, abstract data, formulate policy and issue guidance accordingly. Moreover, it has been a process that has seen the Commission gradually move away from the constraints of the 'spirit and intendment' rule.

Using a checklist of identified principles for screening charitable purposes and activity,[54] the review proved to be a fruitful mechanism for clarifying the public benefit test[55] and developing the scope of charitable status in relation to matters such as unemployment,[56] rural and urban regeneration,[57] training[58] and co-operation between charities and business (see, further, Chap. 4). It led to the issue of considerable guidance notes from the Commission which, as noted in Tudor:[59]

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[54] See RR1, *The Review of the Register of Charities*, 2001, pt 2.

[55] See RR8, *The Public Character of Charities*, 2001.

[56] See RR3, *Charities for the Relief of Unemployment*, 1999. Following *IRC v. Oldham Training and Enterprise Council* [1996] STC 1218 the relief of unemployment became charitable under the fourth *Pemsel* head whereas previously it was confined to the first which required the unemployed to also be poor.

[57] See RR1, *The Promotion of Urban and Rural Regeneration*, 1999.

[58] *Ibid*.

[59] *Op. cit*., pp. 102–103.

> … sets out possible activities for charitable regeneration organisations including the provision of housing for those in need, assistance and training to the unemployed, assistance to businesses and the provision of roads and public amenities … Linked with urban and rural regeneration is the decision of the Charity Commissioners that the promotion of community capacity building in relation to communities which are socially and economically (or in some cases simply socially) disadvantaged is charitable.[60]

Extent of Powers

The capacity of the Commission to exercise a developmental role was considerably increased by provisions in the Charities Act 1993 which granted it enlarged powers to act for the protection of charities and a jurisdiction concurrent with that of the High Court for certain purposes.[61] While prohibited from initiating any use of this jurisdiction – being restricted to referrals from either a charity, a majority of its trustees, the court or Attorney General – Commissioners use their powers not just to adjudicate on disputes but to arbitrate and mediate on matters with policy implications and formulate a fresh sense of direction for charitable purposes where the circumstances permit. This capacity to use decision-making powers to offer strategic leadership has become the most significant aspect of the support function of the law relating to charity, transcending the essentially randomly utilised adjudicative role of the judiciary. The enlargement of charitable purposes to 13 heads under the 2006 Act has further extended the Commission's reach.

Commission Decision-Making

In the main, the Commission exercises its decision-making powers in response to administrative issues that affect only the charity concerned. However, when it chooses to act strategically and take decisions in relation to issues with wider policy implications it has then been able to establish case law precedents which strengthen and support the future practice of many charities. The following are some examples of instances where Commission decisions have had such an effect; instances which have since found government endorsement in the provisions of the 2006 Act.

Poverty

The Commission has been able to endorse as charitable novel methods of tackling poverty such as the positive discrimination approach adopted by the Fairtrade

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[60] See RR5, *The Promotion of Community Capacity Building*, 2000.

[61] Sections 16, 24 and 25 of the Charities Act 1993.

Foundation to identify products provided in a manner that benefits those involved in the production process[62] and by the Garfield Poverty Trust which provided loans to enable the less well off to acquire mortgages for accommodation.[63] Again, the Commission has broadened the approach to poverty relief by advising that instead of once-off grants it may in some circumstances prove more effective to arrange a programme of staged investments.[64]

Public Service Provision

The Commission Reports reveal a number of cases where gifts for the purpose of providing rehabilitation were found to be charitable, including for the benefit of those suffering from a disability,[65] from abuse or deprivation[66] and where child welfare was at risk.[67] Gifts and organizations dedicated to public recreation prompted a Commission review of the law which resulted in a broadening of the grounds for charitable status.[68]

Partnership with Government

The Commission has declared that purposes intended to promote the voluntary sector as a whole[69] are to be accorded charitable status as is the promotion of greater effectiveness in the use of resources by bodies within it.[70] It has also formed and developed the view that organisations dedicated to promoting good citizenship, perhaps by crime prevention, are worthy of charitable status.[71] In a recent decision with significant implications for future partnership arrangements between government and charity, the Commission has conceded that in some circumstances the functions of the former may be delegated to and performed by the latter (see, further, Chap. 4).[72]

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[62] See 4 Charity Commission, Dec. 1995, pp. 1–7.

[63] See 3 Charity Commission, Dec. 1995, pp. 7–10

[64] See Charity Commission Guidance, *Charities and Social Investment*, 2002.

[65] See [1989] Charity Commission Report para 31.

[66] See [1989] Charity Commission Report para 32.

[67] See [2002] Ch. Com. Dec. September 12 (The Internet Content Rating Association).

[68] See Charity Commission Discussion Paper, Charitable Status and Sport, 2002.

[69] See Charity Commission Discussion Paper, *The Promotion of the Voluntary Sector for the Benefit of the Public*, 2001.

[70] See Charity Commission Discussion Paper, *Promoting the Efficiency and Effectiveness of Charities and the Effective Use of Charitable Resources*, 2001.

[71] (1995) 4 Ch. Com. Dec., pp. 8–12 (Community Security Trust).

[72] See Charity Commission and Applications for Registration of (i) Trafford Community Leisure Trust and (ii) Wigan Leisure and Culture Trust (21 April 2004).

Human Rights

Following the introduction of the Human Rights Act 1998, the Commission has recognised the promotion of human rights as charitable[73] and has taken into account ECHR principles when, for example, determining the charitable status of organisations dedicated to the advancement of religion where 'religion' is broadly defined as it was in the Church of Scientology case.[74]

International and Race Relations

The Commission has been able to significantly relax the established judicial view that trusts for promoting better relations between nations and races are not charitable.[75] As noted in Tudor:[76]

> Since 1983, the Commissioners have accepted as charitable trusts for the promotion of good relations, for endeavouring to eliminate discrimination on the grounds of race and for encouraging equality between persons of different racial groups.

For example the Commission registered the Community Security Trust which had, as one of its purposes, the promotion of good relations between the Jewish community and others by seeking the elimination of anti-Semitism, this being a form of racism.[77] Trusts to support equal rights for women and for the gay community have similarly been held to be charitable.

Moreover, the Commission has significantly modified the rule in *Camille and Henry Dreyfus v. I.R.C.*[78] that charitable status in relation to an organisation's overseas activities is determined by the public benefit test as applied in that organisation's country of origin. Instead the Commission formed the view that the test should be:[79]

> ... whether they would be regarded as charities if their activities were confined to the United Kingdom and then deny charitable status only if there were good public policy reasons to do so, including whether or not the activities are legal in the country concerned.

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[73] See Charity Commission, *The Promotion of Human Rights*, 2002.

[74] [1999] Ch. Com. Dec. Nov 17.

[75] *Anglo-Swedish Society v. IRC* (1931) 16 TC 34, *Re Strakosch* [1949] Ch. 529 and *Buxton v. Public Trustee* (1962) 41 TC 235.

[76] See Warburton, J., *Tudor on Charities* (9th ed.), Sweet & Maxwell, London, 2003, p. 61, citing [1983] Charity Commission Report para 15 *et seq*.

[77] (1995) 4 Ch. Com. Dec., pp. 8–12.

[78] (1954) Ch. 672.

[79] RR1, *The Review of the Register of Charities*, 1999, p. 13.

Use of Cy-près

The rolling review programme has also provided many opportunities for creative *cy-près* schemes to transfer assets from dormant or redundant charities to those capable of applying the resources to alleviate contemporary instances of social need. As with the Commission's approach in the above matters, the government has now endorsed this initiative by providing formal recognition for it within the 2006 Act. This statute introduces new and simpler ways for charities to change their objects and purposes and transfer their assets.

Research

The Commission has been able to move beyond some of the restrictions previously associated with pure research (e.g. the requirements regarding dissemination and a pupil/teacher relationship).[80] Consequently, research itself has now become charitable without the necessity of it having to form part of a recognised educational activity.

Political Activity

Following the decision in *Att-Gen v. Ross*,[81] which recognised the purpose of encouraging political awareness as charitable, the Commission has developed a slightly less restrictive interpretation of 'political activities'. It now advises that charities can, to some degree, engage in political activity and exercise influence on government policy without endangering their status.[82]

The Outcome of the Charity Law Reform Process and Implications for the Future of the Support Function and Social Policy

The legal function of support relates most basically to charity by increasing its capacity to achieve charitable purposes. This, in the main, occurs in the context of related institutional infrastructure and involves adjusting and increasing the

[80] See for example, [1988] Ch. Com. Rep. para 24.

[81] [1986] 1 WLR 252.

[82] See CC9a, *Political Activities and Campaigning by Local Community Charities*, 1997 and CC9, *Political Activities and Campaigning by Charities*, 1999.

efficiency of existing organisational and administrative arrangements. The support function must also lend itself to facilitating the particular role played by charity within a contemporary social policy context. However, although the outcome of the charity law review process in England & Wales, as represented by the provisions of the Charities Act 2006, does have implications for the future of the support function in both contexts, these are probably of less significance than for any of the other legal functions.

Institutional Change and the Support Function

The 2006 Act has a bearing on the support function both by virtue of the adjustments it makes to the institutional environment of charities and the consequences of changes to the regulatory framework for public confidence. As funding is the lifeblood of charities any new legislative measures that tend to increase its credibility and trustworthiness in the perception of the general public will bring a financial dividend and bolster the resources of the sector.

The Inland Revenue and the Charity Commission

The clear institutional separation of the revenue driven functions from those of determining and developing charitable purposes, represented by the Inland Revenue (now Her Majesty's Revenue and Customs) and the Charity Commission respectively, will remain as the key distinguishing hallmark of the regulatory framework in this jurisdiction. The future legal status of the Commission as a statutory corporation, the additional powers to be vested in it, together with the increased numbers of charities subject to those powers, will make the Commission a powerful legal entity and more firmly embed this institutional distinction. The tiered approach to accountability means that most charities with an annual income of less than £500,000 will no longer need to submit professionally audited accounts which in turn will free up the Commission to concentrate its scrutiny on the fiscal probity of the larger charities.

Strengthening the Support Capacity of the Charity Commission

The Charities Act 2006 requires the Commission to undertake certain responsibilities that directly reinforce its capacity to give effect to the support function. Specifically the Commission is now statutorily required to facilitate better charity administration, obtain, evaluate and disseminate information and give information, advice and proposals to ministers. The generalised wording of these provisions would seem to give the Commission considerable room for discretion in the exercise

of its new responsibilities and may provide it with opportunities to develop a more assertive leadership role in relation to furthering the interests of the sector.

New Legal Structures for Charities

As has often been pointed out, the types of legal structures available in this jurisdiction are not ideally suited to give effect to charitable purposes.[83] The Charities Act 2006 has introduced a new structure – the Charitable Incorporated Organisation – which can be established with limited or unlimited liability but only for charitable purposes. The Charity Commission is solely responsible for the incorporation and registration of the CIO and for assisting existing charitable companies limited by guarantee or industrial and provident societies to convert to a CIO. In addition, the government is proposing to introduce the Community Interest Company which will provide an alternative to charitable status.

These developments provide tailor-made vehicles to differentiate between organisations pursuing charitable or other purposes and should in particular facilitate and support charities.

Increasing Public Confidence in Charities

Improving the regulation of fundraising, and thereby increasing public confidence in the sector, is clearly among the legislative priorities and provisions in the 2006 Act concerned with fundraising are intended to implement the Home Office's proposals to introduce a unified system to regulate public charitable collections throughout England and Wales[84] (see, further, Chap. 5). Also, broadening the registration base will enable and require a commensurate broadening of the Commission's support services; many more charities, both larger and smaller than those currently registered, will in future be brought within the scope of Commission scrutiny and services (see, further, Chap. 5). The proposed changes to registration and fundraising should do much to strengthen public confidence.

Giving Effect to Social Policy Through the Support Function

Government is again seeking to enlist the support of charity to accomplish its contemporary social policy objectives, as it did in 1601, by legislatively specifying as

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[83] See Warburton, J., et al., *Tudor on Charities*, *op. cit*., p. 173.

[84] See *Public Collections for Charitable*, *Philanthropic and Benevolent Purposes*, Home Office, London, 2003.

charitable purposes those activities that augment its agenda. In future a 'charity' will be an organisation with exclusively charitable purposes, for the public benefit, which fall within the list of 13 descriptions of such purposes contained in the 2006 Act, some overtly converging with aspects of government policy. The success of this modern attempt to proscriptively channel charity will, however, ultimately depend upon the rigour of its enforcement by judiciary and Charity Commission through their discretionary use of other legal functions.

The New Charitable Purposes

The emphasis in the Charities Act 2006 on broadening the legal definition of 'charitable purposes', together with impact measures and a mandatory application of the public benefit test, will vest the Charity Commissioners with the leverage necessary to creatively develop an interpretation of 'charity' appropriate to meet contemporary social need. By specifying particular activities to be construed as new charitable purposes, government has ensured that this leverage will be exercised to further the coupling of charity to its social policy agenda.

The 'advancement of health or the saving of lives'[85] and the 'relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage',[86] for example, are new charitable purposes that give specific recognition to the government's interest in making more room for the involvement of the charitable sector in NHS provision. In the former case, by statutorily defining this as a charitable purpose in its own right, government is giving a particular boost to those organisations involved in mass child inoculation programmes and in combating AIDS and other diseases in Third World countries which would seem to complement existing government policy.

Again, the 'the promotion of civic responsibility, volunteering, the voluntary sector'[87] is a new charitable purpose. This, together with the 'the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity'[88] and the 'advancement of amateur sport',[89] signals government acknowledgement that charity has the capacity to contribute towards building social capital and promoting or sustaining the growth of civil society.

Conferring charitable status on activities that promote urban and rural regeneration, community capacity building, civic responsibility, good citizenship, and mediatory activity on behalf of those experiencing discrimination for reasons of

[85] Charities Act 2006, s 2(2)(d).

[86] Charities Act 2006, s 2 (2)(j).

[87] Charities Act 2006, s 2 (3)(c)(ii).

[88] Charities Act 2006, s 2 (2)(h).

[89] Charities Act 2006, s 2 (2)(g).

race, disability, age, sexual orientation etc. should serve to encourage those organisations working with ethnic minorities and other deprived communities in this jurisdiction. These charitable purposes lend themselves to reinforcing the government's current social inclusion policy. Indeed, a legislative intention to provide for a continuation and strengthening of the partnership between government and charity would seem to be explicit in some of the new charitable purposes and implicit in others.

Conclusion

Support is an essential aspect of charity. Just as those in need depend upon the support given by charity so it depends upon that provided by government, non-government organisations, by public donations and by a facilitative legal framework. In England & Wales, as in all common law jurisdictions, the preferential tax concessions provided by revenue authorities have constituted the main form of support to charity. The extension of such support to the additional charitable purposes now listed in the Charities Act 2006 represents a significant broadening of government support to charity in this jurisdiction as does the level of grant aid, gift aid and other donor incentive schemes, the use of National Lottery funds, overhaul of fundraising regulations, creation of new legal structures for charity etc.

However, in England & Wales it is the role and statutory responsibilities of the Charity Commission that make a distinctive additional contribution to the creation of an enabling environment for charities. While government can employ the support function to permit a flow of resources towards new and traditional charitable purposes, it requires in particular the mediation and adjustment function as applied by the Charity Commission to effectively translate legislative permission into charitable practice. The policing function, as traditionally applied by the tax collection agency which for centuries has borne the brunt of this responsibility throughout the common law world, has not proven conducive to creating such an environment. Furthering the legislative intent to facilitate the building of an ever closer partnership arrangement between government and charity, plainly evident in the Charities Act 2006 in this jurisdiction, will require the leadership and mediation skills of the Charity Commission.

Part III
International Perspectives

Chapter 8
Australia

Introduction

In 1788 the British Crown claimed the sovereignty and ownership of this continent on the basis of *terra nullius* – that Australia was an empty land belonging to no one – despite the presence of some 350,000 Indigenous People[1] who had occupied it as hunter-gatherers for at least 40,000 years. The European settlement, which began with a British penal colony in New South Wales, was followed by five more colonies during the first half of the 19th century. These colonies eventually became states, each with their own constitutional establishment Acts, parliaments, administration and a considerable degree of sovereignty. In 1901 the six colonies federated to form the Commonwealth of Australia. The Constitution formally divided powers between the two levels of government. The constitutional powers given to the federal government were mainly concerned with external or national affairs such as defense, immigration, currency and marriage laws. For most purposes, the Australia Act 1986 ended the traditional constitutional ties between Australia and the United Kingdom although each state and the Commonwealth still retain the Queen as titular 'head of state' and accept her right to appoint the Governor General and state governors.

A Socio-economic Profile

In 1901 the colonies federated to form the Commonwealth of Australia which now consists of six states (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia), two major mainland territories (the Northern Territory and the Australian Capital Territory), and other minor territories. Each state and territory has its own legislature. In most respects, the territories function similarly to the states, but the Commonwealth Parliament can override any legislation

[1] See Smith, L., *The Aboriginal Population of Australia*, Australian National University Press, Canberra, 1980.

K. O'Halloran et al., *Charity Law & Social Policy*,

of their parliaments. Federal legislation, however, overrides state legislation only with respect to certain areas as set out in Section 51 of the Constitution; all residual legislative powers are retained by the state parliaments, including powers over hospitals, education, police, the judiciary, roads, public transport and local government.

The heads of the governments in each state and territory are called premiers and chief ministers, respectively. In each state the Queen is represented by a governor, in the Northern Territory by an administrator and in the ACT by the Governor-General; they have analogous roles.

Population and Composition

Australia's estimated resident population at December 2006 was just over 20.7 million, an increase of approximately 12.5% over the past decade. The Indigenous People comprise more than 300,000, representing about 1.7% of the total population. Since the 1970s, the population has been supplemented by the arrival of many thousands of immigrants not just from the UK and New Zealand but also from Asian countries.

An increasing variety of ethnic groups are now represented in Australia. White Caucasians, constituting 92% of the population in 2005, decreased to 91% in early 2006 and are expected to decline further to 89% in 2050. These are predominantly of English, Scottish, Irish and Welsh decent, but there have been large waves of Dutch, Balkan Slavic, Eastern European, Italian, and Portuguese migration from 1940 to 1970. Asian Australians are the second largest group, and also the fastest growing. Asians constituted 8% of the population in April 2006 and are mainly Chinese, Vietnamese, Lebanese or Indian, but others are Afghani, Japanese, Korean, Filipino and Laotian.

The National Economy

Following the financial downturn of the late 1980s and early 1990s, Australia experienced more than a decade of sturdy 4% economic growth in a low inflation environment producing a growth in GDP from $180 billion in 1992 to $830 billion in 2000 with the result that it now has a per capita GDP slightly higher than the UK, Germany and France in terms of purchasing power parity. The country was ranked third in the United Nations' 2006 Human Development Index and sixth in The Economist worldwide quality-of-life index 2005. In recent years, the Australian economy has been resilient in the face of global economic downturn and is now in its 17th consecutive year of steady growth. Rising output in the domestic economy has offset the global slump. The unemployment rate has fallen steadily: 8.1% in November 1995; 8.3% in June 1997; 6.0% in September 2000; then, following a

rise to 7.0% in October 2001 it fell to 4.8% in July 2006; to stand at 4.3% in June 2007, its lowest point in 30 years. Home ownership has risen. In 2000–2001 there were approximately 18.9 million people living in private dwellings in Australia, an increase of 7% since 1994–1995.[2]

Shrinking of the State Sector

Since 1996 the government has continued to press forward with its programme of economic reform. This has included a partial deregulation of the labour market and the privatisation of state-owned business most notably in the telecommunications industry.[3] Other state-owned businesses fully or partly privatised include ports, airlines, ships, banks and power generation. In 1999 the federal government established the Reference Group on Welfare Reform (RGWR) to develop a new welfare reform blueprint to address welfare dependency.[4] The RGWR approach was that "the nation's social support system must be judged by its capacity to help people participate economically and socially, as well as by the adequacy of its income support arrangements".[5] Following submission of the RGWR report, the government stated its welfare reform objectives as:[6]

> People who depend for long periods on income support rather than paid work face increased risk of financial hardship and social exclusion. The longer they spend out of work the harder it is to get another job and the more likely they are to lose confidence. This can have negative effects on their personal relationships and lead to a sense of detachment from society … The Government believes that Australia is best served by a safety net that encourages participation, through a renewed emphasis on expecting Australians to use all their existing capacities.

The reforms which followed the RGWR report tightened the mutual obligation requirements on those receiving unemployment benefit while the 2005 budget announced further reforms to pensions for sole mothers and those with a disability. The key feature of the latter was a reduction in the 'capacity to work' requirement making many recipients no longer eligible, forcing them instead onto the lower

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[2] In 'real' terms (i.e. after adjustment for changes in prices), equivalised disposable household income for all people, on average, increased by 12% between 1994–1995 and 2000–2001 while the real mean income of low income people increased by 8% the increase spread reasonably evenly over the period. The real mean income of middle income and high income people increased by 12% and 14% respectively.

[3] Parham, D., *Microeconomic Reforms and the Revival in Australia's Growth in Productivity and Living Standards*, Conference of Economists, Adelaide, 1 October 2002.

[4] Reference Group on *Welfare Reform, Participation Support for a More Equitable Society*. Full Report, Department of Family and Community Services, Canberra, 2000.

[5] *Ibid*., p. 3.

[6] Commonwealth of Australia, *Building a Simpler System to Help Jobless Families and Individuals*, Canberra, 2002, pp. 5 and 7.

benefits. During the same period, individual states have been controlled by labor governments which, while not embracing the mutual obligation rhetoric, have been forced to rationalise their health and welfare services through the imposition of conditional federal funding and a requirement to adopt new public management processes.

The Charitable Sector

It is estimated that there are approximately 700,000 nonprofit organisations in Australia.[7] Of these, some 48,000 are charitable institutions or funds.[8] An unknown, but probably fairly small number are in the legal form of a charitable trust with the vast bulk being corporations with charitable objects. The nonprofit sector employs 6.8% of Australians in employment (similar to US, but larger than UK) and contributed 3.3% to GDP. Its sources of income are about 58% from sale of goods and services, 30% from government contracts and fees and 9% from household transfers.[9] Compared to the US and UK, the Australian sector is more reliant on fees and charges, is less dependant upon government funding and has less philanthropic income.[10]

Philanthropy has significantly increased in Australia over the past decade rising to 0.68% of Australian GDP; in the USA, during the same period, it constituted 1.6% of GDP.[11] In 2004 giving by Australians amounted to approximately $A11b (excluding the Asian tsunami) with $A7.7b from individuals and $A3.38b from business.

The Giving Australia (2005) report,[12] which focused on giving by individuals and businesses to non-profit organizations, estimated that the giving of money, goods and services totalled approximately A$11 billion per year: A$7.7 billion given by individuals (including A$2 billion through 'charity gambling'); and A$3.3 billion by businesses. Of this A$3.3 billion business giving, A$2.2 billion was

[7] Lyons, M., *Third Sector: The Contribution of Nonprofit and Cooperative Enterprises in Australia*, Allen & Unwin, Crows Nest, 2001.

[8] CPNS, Current Issues Information Sheet 2005/2, *ATO Data: Deductible Gift Recipients*, available at http://www.bus.qut.edu.au/research/cpns/howwecanhelp/documents/DGR11-QCFPhilProj.pdf

[9] Australian Bureau of Statistics, *Non-Profit Institutions Satellite Account*, Cat No. 526.0, Canberra, 2002.

[10] Salamon, L.M., Sokolowski, S.W., and List, R., *Global Civil Society: An Overview*, The Johns Hopkins Comparative Nonprofit Sector Research Project, Baltimore, MD, 2003.

[11] Australian Government, *Giving Australia: Research of Philanthropy in Australia, Summary of Findings*, Canberra, October 2005.

[12] ACOSS *Summary of Findings*. Giving Australia: Research on Philanthropy in Australia, Canberra, Department of Family and Community Services, 2005. http://www.partnerships.gov.au/philanthropy/philanthropy_research.shtml#FinalReports

money, rather than goods or services. Giving through trusts and foundations is largely unreported but thought to be small in comparison but growing with the introduction of Prescribed Private Funds.

As for business giving, the Giving Australia report estimated that 58% was given as donations, 25% as sponsorship, and 17% as community business projects. The study put Australia's giving rate as a percentage of GDP at 0.68%. The report also noted that Canadian donations were equivalent to 0.46%, but the Australian and Canadian rates were well below the USA rate, at 1.6%.

Nonprofit organisations play a vital role in Australian society. They provide education for over 30% of school children, over half the private hospital beds, the majority of arts and cultural institutions and community services such as housing, aged care, counseling and emergency aid as well as facilitating sport, leisure and religious interests. Traditional sector areas such as health, aged care and childcare are coming under increasing competition from the for profit sector which is largely facilitated by government procurement policies and lack of access to capital by nonprofit organisations. Currently, charities and other nonprofit organisations, particularly those delivering health, education and community services, are struggling to adapt and respond to the challenges not only in order to achieve their mission but in many cases simply to survive and be relevant to the new environment.

Volunteering

In 2004, 41% of Australians volunteered a total of 836 million hours of labour for nonprofit organisations of all sizes. This voluntary contribution, equivalent to an additional $A8.9 billion worth of income to the nonprofit sector, including volunteer labour, boosted the sector's contribution to GDP to 4.9%.[13] In 2006, 5.2 million people, or 34% of the Australian population aged 18 years and over, participated in voluntary work. They contributed 713 million hours to the community. Between 2000 and 2006, increases in volunteer rates occurred for both sexes and most age groups.[14]

Charity and Social Policy: A History

Australia, not unlike other common law nations, was stamped at its colonial birth with the imprimatur of English laws and institutional infrastructure. As the latter transported its armed forces, criminals, missionaries and others it also transplanted

[13] Australian Bureau of Statistics, *Non-Profit Institutions Satellite Account*, Cat No. 526.0, Canberra, 2002.

[14] Australian Bureau of Statistics, *Non-Profit Institutions Satellite Account*, Cat No. 4441.0, Canberra, 2007.

its laws, informed by its own social policy concerns, to provide the foundations for constructing a society in its own image in the antipodes. Over the following centuries, as Australia assimilated immigrants from other nations, responded to local and regional pressures, reached an accommodation to some extent with the culture of its Indigenous people and acquired increasing autonomy from the UK, this legacy was gradually customised to fit the very different circumstances of an emerging nation. This process that was adjusted considerably to allow for a marked increase in the social, cultural and legal influence of the US in the years following World War II (e.g. the Associations Incorporation Acts of South Australia and Western Australia appear to virtually replicate New York statutes of the 1800s). As is evident, however, from the following brief history, the basic social policy themes have remained in place and continue to exercise considerable influence on the modern development of charity law in this jurisdiction.

Relevant Social Policy Milestones

Since federation in 1901 the main strands of social policy in Australia have been not untypical of those pursued in other liberal democratic 'western' societies – except that it has had to address two particularly fraught sources of tension within and without this largely White Caucasian society in the antipodes. Firstly, Australia's colonial legacy in the form of its disadvantaged Indigenous people has presented a fundamental and long-term challenge to its capacity to build a liberal democratic society. Secondly, managing the growth of a relatively small White Caucasian society, with a European orientation, within a surrounding mixed Asian cultural context would also test its political principles. In other respects, the domestic social policy concerns of Australia in the 20th century have perhaps most closely resembled those of Canada while it has otherwise shared with other developed nations the same geopolitics of war, trade, immigration and the vagaries of economic cycles.

The Indigenous People

The indigenous Australian population, estimated at about 350,000 at the time of European settlement then comprised many distinct communities from quite diverse cultural groups sharing some 200 to 300 languages. Now only about 500 of these communities and 70 languages survive. The decline in population continued for 150 years following settlement, mainly because of infectious disease combined with forced re-settlement, inadequate health and social care provision and cultural disruption. The government refusal to recognize their traditional rights in relation to land, a consequence of the *terra nullius* doctrine, was crucial to the decline of

the hunter gatherer communities and accelerated the cultural disintegration of the Indigenous people.[15]

The marginalization of indigenous Australians is graphically illustrated by the fact that prior to 1967 they were identified in the census solely in order to exclude them from official population figures, as required by the Constitution. Up until that time disenfranchisement was a constitutional requirement; not until a national referendum in the 1960s did they achieve citizen status. Discrimination against Indigenous people was an institutionalized aspect of Australian society. The practice in the 1880s of enforced removal of Indigenous people from traditional homelands and their resettlement in townships or compounds disrupted cultural roots, mixed together incompatible tribes/clans and traumatized several generations. Once Indigenous people were re-located, systematized discrimination ensured that they were excluded from the residential areas, schools and public facilities used by the non-Indigenous.

In particular, in the early years of the 20th century, an invidious government policy of compulsorily removing aboriginal children and placing them for adoption with White Caucasian families was pursued under the Aboriginals Ordinance 1918 (NT) and continued for some decades officially ending, at least in New South Wales, in 1967. The severance of a generation of children from their community and cultural roots, coupled with their indoctrination into non-Aboriginal cultural norms, caused serious dislocation to the continuance of traditional Aboriginal values and community cohesion. An objective account of this policy and its long-term effects in terms of the incidence of suicide, mental illness and family breakdown etc., are documented in the *Bringing Them Home* report by the Human Rights and Equal Opportunity Commission.[16] The government's response to the report was dismissive: refuting the claim that an entire generation was affected; and consigning the entire matter to history with the assertion that the policy had to be judged in accordance with the value context that prevailed at that time.[17] In keeping with that approach, it has most recently declined to sign the UN Declaration on Rights of Indigenous Peoples.[18]

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[15] Native title to land was not recognised until the High Court case *Mabo v. Queensland (No 2)* overturned the doctrine of *terra nullius*.

[16] 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 (http://www.austlii.edu.au/au/special/rsjlibrary/hreoc/stolen/). The factual basis of this report was memorably illustrated in the film *Rabbit Proof Fence*.

[17] See the Federal Government submission to the Senate Legal and Constitutional References Committee on the *Inquiry into the Stolen Generation*, 1997.

[18] On 13 September 2007, the General Assembly adopted a landmark declaration outlining the rights of the world's estimated 370 million indigenous people and outlawing discrimination against them: 143 Member States voted in favour; 11 abstained and 4 – Australia, Canada, New Zealand and the United States – voted against the text.

The White Australia Policy

This policy, which emerged in the early 1800s and lasted for approximately 150 years, marks a period of government resistance to non-European immigration and official resolve to build and protect an homogenous 'White Caucasian' society in Australia.[19] It was the most comprehensive policy of its type in the world and reached its apotheosis in 1901 with the Commonwealth's Immigration Restriction Bill and the Pacific Islanders Labourers Act. The race riots involving the Chinese on the goldfields at Buckland River in Victoria, at Lambing Flat in New South Wales, and at Gympie in Queensland, served to strengthen this policy. It only petered out, officially, when immigration restrictions were gradually liberalised by the Menzies government in the mid-1950s and lifted completely by the Whitlam government in 1975. Although, the policy was officially excised from the Labour party's programme in 1965, arguably the underlying bias towards favouring European immigration can be seen in the continuation for a further decade or so of assisted passage schemes to facilitate emigration from the UK to Australia.[20] The legacy of this long established tradition of opposition to non-European immigration may continue to influence some attitudes towards multi-culturalism in Australia (see, further, below).

An Evolving Pacific Rim Orientation

The weakening of its constitutional links with the UK stimulated Australia to embark on a process of building trade and commercial links with its Asian neighbours, cultivating an independent relationship with the US (evidenced in part by the contingents of Australian troops now serving alongside those from the US in both Iraq and Afghanistan) and with the latter's encouragement, it has in recent years developed a strategic role at the centre of a loose alliance of Pacific rim countries.

The abolition of the 'White Australia' policy[21] was followed by official encouragement of immigration from Asia and the deliberate promotion of a multi-cultural society; though, arguably, the policy of multiculturalism has declined since the demise of the Keating labour government. In recent decades, the arrival of many thousands of immigrants from countries such as Vietnam, Thailand, Malaysia and

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[19] See, further, Gwenda Tavan, G., *The Long, Slow Death of White Australia* and Windschuttle, K., *The White Australia Policy*, Macleay Press, NSW, 2004.

[20] The Immigration Department reported 44,521 persons of non-European and mixed descent arriving in Australia between January 1, 1966 and December 31, 1971: 9,410 in 1969, 9,055 in 1970 and 9,666 in 1971.

[21] As explained in Wikipedia, the White Australia policy is the prevailing term used to describe a collection of racist Australian policies which restricted non-white immigration and promoted white, European immigration from 1830 to 1973 with related policies enduring as late as 1982.

Hong Kong together with terrorist attacks on its citizens in Bali has strengthened Australia's Pacific Rim orientation.

Current Social Policy Themes and Charity

As always, the pattern of social policy themes currently forcing the pace and direction of change in the charity law of this jurisdiction is a product of pressures both typical of modern developed nations and those arising from its own particular domestic circumstances.

Poverty

Despite a recent period of sustained economic growth, there is considerable evidence that poverty is a serious problem in Australia. Professor Peter Saunders, a leading social policy researcher, has estimated that in 1998–1999 the national poverty rate (in income terms) was around 23% and if poverty is estimated using expenditure, then 20%.[22] In 2004 a United Nations Human Development Report found Australia to have the fourth highest level of poverty in the developed world and the second highest percentage of people living below half the average income.[23] A Senate Standing Committee Inquiry into Poverty in March 2004 found high rates of poverty among the following groups: Indigenous Australians, unemployed people, single parent families, people on low incomes, people with disabilities (20% of the population has a disability), homeless people, migrants and refugees. The Salvation Army estimates that 2.5 million Australians, approximately 12% of the population, are living in poverty: an increase of 400,000 people in the last three years; or an additional 0.5% since 2002.[24]

The cause of poverty, like its prevalence, is well established. Castles has memorably identified a 'wage earners welfare state' as the culprit: meaning that the government approach of allowing low minimum wage levels, thereby increasing the numbers in work and assisting commerce, while offsetting the disadvantage to low

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[22] Saunders, P., *The Meaning and Measurement of Poverty: Towards an Agenda for Action*, Submission to the Senate Community Affairs References Committee Inquiry into Poverty and Financial Hardship, Social Policy Research Centre, University of New South Wales, 2003.

[23] See Jacobi, N., 'Poverty in Australia', *Journalism*, University of the Sunshine Coast, Australia. Also, see ABS Catalogue No., 4430.0 2003 *Survey of Disability, Ageing and Carers*, September 2004.

[24] See the Salvation Army submission to the Senate's Inquiry into Poverty and Financial Hardship, *op. cit*. In 2004, 1.5 million Australians sought help from The Salvation Army, an increase of 11% from the previous year.

wage earners by topping up with meagre welfare benefits, was essentially to blame[25]; this can give poverty an embedded intergenerational dimension. In Australia, as in Canada, this approach results in a large sector of the population, in which Indigenous people and new immigrants are over represented, being caught in a poverty trap where very many families remain at subsistence level as the wage earner cannot afford to earn more as this would disentitle their dependants to a range of contingent health, social care and other welfare benefits. It continues to be the case that the primary causes of poverty, as identified in the Poverty Commission's 1975 report *Poverty in Australia*, are too few job opportunities and inadequate levels of income support.

Welfare Reform

The pace of social change and its effects on public spending has impacted upon Australia in much the same way as it has on countries such as the UK, Canada, Ireland and New Zealand. In common with such countries, Australia is experiencing a demographic shift towards an older population, with more retirees and fewer people of working age resulting in a weaker tax base and less revenue for funding public services. Particularly since the 1990s the consequences have been evident in the dismantling of much of the welfare state, the move to new public management styles and in a much greater reliance on 'open market' mechanisms. Mission Australia has recently argued that "the for-profit, not-for-profit and public sectors are now becoming more closely merged through outsourcing of public activity, and it is difficult to distinguish between the sectors on the basis of activities".[26]

Successive governments have moved in recent decades from a position of struggling to maintain a role as central provider of health and social care services to one of openly embracing the opportunity to share such responsibility with the nonprofit or charitable sector. In Australia as in the above mentioned common law nations, this approach has resulted in the formulation of a policy of partnership between government and the sector as the basis for bridging the shortfall in welfare provision and planning the delivery of future public benefit services. Inexorably, this then led into a process of charity law reform[27] as government and sector negotiated

[25] See Saunders, P., *Defining Poverty and Identifying the Poor: Reflections on the Australian Experience*, Social Policy Research Centre Discussion Paper no. 84, June 1998. Also see poverty reports by Brotherhood of St Laurence, August 2007.

[26] See Castles, F.G., *The Wage Earners' Welfare State Revisited*, Australian National University, Graduate Program in Public Policy, 1994.

[27] The Industry Commission report on *Charitable Organisations in Australia* 1995 was part of such a process. However, the present Liberal federal government is unlikely to further this in their term – the charity definitions inquiry having been forced on it by a minor party in order to get the GST through the Upper House and in the absence of any government concessions made or planned with the sector – the government would seem to have ignored the process, apart from trying to close down any 'voice' the sector may have on policy by defunding peak organizations etc.

the terms of reference for a new legal framework that would outline the nature and extent of the sector's future contribution to public benefit provision (see, further, below).

Multi-culturalism

A sustained policy of actively promoting immigration, accelerated by the introduction of the post-1975 non-European immigration programme, has seen the population of Australia quadruple since the end of World War I. In 2001, 23.1% of Australians were born overseas having arrived mainly from the United Kingdom, New Zealand, Italy, Vietnam and China. The assimilation of large numbers of new citizens from many different cultural backgrounds has been facilitated by the introduction of state and federal laws to combat racism and inequality[28] and by government endorsement of international conventions.[29]

The relatively recent policy of positively encouraging the building of a multicultural and multiracial society in Australia looks certain to survive recent setbacks. The first of these came with the rise of the anti-immigration One Nation Party formed by Pauline Hanson in the late 1990s. The incidence of abuse and even physical violence against Asians increased sharply during the short period of her party's ascendancy and against the background of media coverage given to other parties opposing multiculturalism such as Australia First and the Australian Worker's Party. Then, following the terrorist attacks of 9/11, a degree of racial harassment focused on immigrants from Islamic and Middle Eastern countries, culminating in the riots between Lebanese and Australian youth on the Cronulla beaches of Sydney in December 2005.

In Australia as in Canada, the rate of progress in embracing the challenge of cultural diversity has been hampered by social tensions associated with a high level of immigration, the multiple problems of chronically socially disadvantaged indigenous people, a low minimum wage and public service retrenchment. However, there can be no denying the fact of multicultural and multiracial character of cities such as Melbourne which, for example, is reputed to have the largest concentration of Greeks outside Athens.

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[28] For example, the Commonwealth Racial Discrimination Act 1975 (Cth) and the Western Australian Equal Opportunity Act 1984 (WA).

[29] Australia is a signatory to: the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief; the International Convention on the Elimination of All Forms of Discrimination Against Women; and the International Convention on the Rights of the Child.

'Asylum Seekers'

Australia has a proud tradition of welcoming refugees: over half a million refugees have resettled there in the past 50 years; including 4,000 ethnic Albanians from Kosovo in 1999; followed by 1,800 people evacuated from East Timor; professionals from around the country were then mobilised to provide relevant health care.[30] However, with its recent approach to asylum seekers, the federal government has broken from this tradition. Australia now has some of the toughest policies in the world on asylum seekers, despite the fact that far fewer people attempt to claim asylum there than in Europe and North America.[31] Sweden, for example, receives similar numbers of asylum seekers as Australia, despite having less than half the population. Detention is only used to establish a person's identity and to conduct criminal screening. Most detainees are released within a very short time, particularly if they have relatives or friends living in Sweden. Of the 17,000 asylum seekers currently in Sweden 10,000 reside outside the detention centres. Children are only detained for the minimum possible time (a maximum of six days).[32]

In sharp contrast to the Swedish approach, asylum seekers arriving in Australia without authority have since October 1999 been processed under the Migration Act 1958 (Cth), which provides for the administrative detention of unlawful non-citizens, and have only been able to receive a temporary protection visa. Since September 2001, holders of such visas, who had previously been able to apply for a permanent protection visa after 30 months, have been restricted to recurring temporary visas. While applications are being processed the applicants are routinely held in one of the six facilities in Australia used for immigration detention purposes.[33] On being refused entry to Australia, intercepted asylum seekers are often sent to the Pacific states of Nauru and Papua New Guinea, where they are arbitrarily detained without access to legal assistance. Other asylum seekers have been warehoused in camps in a newly built facility on Christmas Island. This so-called 'Pacific Solution' has been criticized for exposing refugees and asylum seekers to the known serious failings in human rights protection available in those countries.[34]

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[30] Carrello, C., Carr, P.H., Coleman, J.A., et al. 'Operation Safe Haven: The Leeuwin Experience', *The Medical Journal of Australia*, 172, 2000, pp. 502–505.

[31] For example, in 1999–2000 Australia received about 12,700 applications, while in 1999 Germany received 95,000 and the United Kingdom 71,000.

[32] See the Edmund Rice Centre for Justice & Community Education and the School of Education of the Australian Catholic University (http://www.erc.org.au/issues/text/se01.htm).

[33] During 2000/2001, 8,401 people were held in immigration detention facilities in Australia, the largest number (1288) in Woomera, a remote region of South Australia.

[34] See Human Rights Watch, *By Invitation Only: Australian Asylum Policy*, *op. cit*. Also, see the report by the UN Human Rights Commission, 2002.

If asylum seekers are released on 'bridging visas' into the community, they are often denied the ability to earn an income and ordinary health services and social welfare payments. Many are entirely supported by charity for up to five years while their status is being determined. As of October 2001, of just under 3,000 people in detention, 80% were either in the process of applying for asylum, or had done so and had had their applications rejected. Ultimately, 84% of all asylum seekers are found to be legitimate refugees and are permitted to stay in Australia.

In 2006 the Australian Government proposed changes to its refugee policy to require all asylum seekers arriving by boat to be removed to offshore detention centres for 'processing'.[35] The resulting Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 was reluctantly withdrawn from the Senate by Prime Minister Howard, in the face of united opposition, in August 2006. However, the development of such a harsh policy in respect of a relatively small problem, and one almost always resolved in favour of those detained, has tarnished Australia's reputation for welcoming immigrants[36] even if this policy has been judicially endorsed.[37]

The Indigenous People

The most enduring and seemingly intractable domestic social policy issue facing Australia in the 21st century rests on unresolved issues relating to its chronically disadvantaged Indigenous population. The population of mainland Aborigines and Torres Strait Islanders was 410,003 (2.2% of the total population) in 2001, a significant increase from the 1976 census, which showed an Indigenous population of 115,953. However, Indigenous Australians remain gravely disadvantaged according to a range of socioeconomic indicators, including education, employment, income and housing, and are therefore at greater risk of ill health.[38] They have

[35] In breach of Australia's obligations under the Convention Relating to the Status of Refugees 1951 and the Protocol to that Convention 1967, both of which it ratified.

[36] See for example, Human Rights Watch, *By Invitation Only: Australian Asylum Policy*, 2002, which found that many asylum seekers from Afghanistan, Iraq and Iran were at risk in the countries through which they passed – such as Jordan or Indonesia – then had their human rights violated by the Australian Defence Forces before being sent to detention camps.

[37] See *Al-Kateb v. Godwin* [2004] HCA 37 (6 August 2004) where the court ruled that unsuccessful asylum seekers, who could not be removed to another country despite their wish to leave Australia, could be held in immigration detention indefinitely.

[38] 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. Also, see Australian Bureau of Statistics, *Measures of Australia's Social Progress, Multiple Disadvantage*, 21 April 2004, updated 18 March 2005, available at http://www.abs.gov.au. Most recently, see Vinson, T., *Dropping off the Edge: the distribution of disadvantage in Australia*, Jesuit Social Services, Catholic Social Services, 2007.

higher rates of imprisonment and suicide, lower levels of education, while the life expectancy for males and females is 17 years lower than that of other Australians. Their plight has been emphasised by researchers[39] "Indigenous Australians remain the most disadvantaged section of the Australian population" and is not helped by the common law restrictions on extending charitable status to beneficiaries united through a relationship nexus such as a blood-link which would breach the public benefit test. This can have serious consequences for those who are part of the same tribal grouping. Most recently, an Oxfam Australia-commissioned assessment on the proposed amendments to the Aboriginal Land Rights (Northern Territory) Act 1976, published in August 2007, provides compelling evidence that the proposed changes have no connection with the incidence of child sexual abuse, are likely to jeopardize the effectiveness of the Government's emergency response in the Northern Territory and are detrimental to the development of Aboriginal communities.[40]

The judiciary have also recognized the special position of Indigenous people. In *The Mum Shirl* case[41] Gyles J expressed the view that:

> 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 ruling endorsed existing judicial notice of the fact that Indigenous people *per se* are within the definition of 'necessitous circumstances' and it construed activity, intended to benefit those in need by providing more strategic leverage, as being worthy of charitable status. The Australian Taxation Office (ATO) subsequently chose not to appeal against this ruling commenting only that it will "seek the earliest available opportunity to test these issues before the court".[42] Other seminal judgments have extended charitable status to the provision of assistance to Indigenous people,[43] to their housing[44] and to a trust to change the law with respect

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[39] 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. The Centre is a multi-disciplinary Social Sciences Research Centre at the ANU that focuses on Indigenous Australian economic policy and economic development issues, including social justice and the socio-economic status of indigenous Australians. Also, see Hunter, B., 'Indigenous self-employment: miracle cure or risky business?', *CAEPR Discussion Paper 176*, 1999, CAEPR, ANU, Canberra.

[40] For the full report, see – http://www.oxfam.org.au/campaigns/indigenous/docs/land-rights-Altman.

[41] See *Trustees of the Indigenous Barrister's Trust: The Mum Shirl Fund v. FC of T* (2002) ATC 5055.

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

[43] *Aboriginal Hostels Ltd v. Darwin City Council* (1985) 75 FLR 197; *Flynn and others* v. *Mamarika and others* (1996) 130 FLR 218.

[44] *Toomelah Co-operative Limited v. Moree Plains Shire Council* [1996], unreported Land and Environment Court of New South Wales, Stein, J.

to Indigenous land rights.[45] The High Court, in its decision in *Mabo* and subsequently, has been instrumental in forcing states and commonwealth government to adopt more progressive policies towards the circumstances of the Indigenous people. However, while the courts have done much to recognise and restore the legal rights of Indigenous people to the ownership of the land they traditionally lived on, nonetheless, the evidence of social disadvantage is extensive, irrefutable and most starkly evident in the fatalistic ennui afflicting many Aboriginal communities in the Northern Territories.

Human Rights, Anti-terrorism and Social Justice

In Australia, as elsewhere in the more developed common law nations, a primary social policy concern has been to legislatively embed measures for the recognition of rights to equality, social justice and the protection of citizens.

- *Human rights*

Although Australia does not have a formal Bill of Rights nor as extensive human rights based legislation as operates in the European context, it does have a Human Rights and Equal Opportunity Commission (HREOC) established under the Human Rights and Equal Opportunity Commission Act 1986 (Cth) and each state has some sort of human rights commission.

- *Anti-terrorism*

Australia, along with many other countries, has recently introduced new laws to implement anti-terrorism measures, including the Australian Anti-Terrorism Act 2005 (Revised) (Cth) which is intended to hamper the activities of any potential terrorists in Australia. These necessarily have an impact on general civil liberties as in particular they seek to control suspect nonprofit organisations. Provisions include preventative detention for up to 14 days, new sedition laws, increased stop, question and search powers, interception of electronic communications, anti money laundering and financing provisions, banning of organisations and criminalisation of membership of certain associations.[46] The potential to abuse freedom of association and expression, which is the foundation of nonprofit organisations, is available to governments and administrations with fewer safeguards and checks than ever before in Australia's history.

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[45] See for example: *Mabo and Others v. Queensland (No. 2)* (1992) 175 CLR 1 F.C. 92/014; *The Wik Peoples v. The State of Queensland & Ors; The Thayorre People v. The State of Queensland & Ors*, Matters No B8 and B9 of 1996; and *Public Trustee* v. *Attorney-General of New South Wales* (1997) 42 NSWLR 600.

[46] For a summary of the provisions refer to Australian Parliamentary Library, *Terrorism law Brief* at http://www.aph.gov.au/library/intguide/LAW/TerrorismLaws.htm.

- *Social justice*

Australia has pursued the same policies and put in place much the same set of laws addressing much the same domestic social justice concerns (equity, equality and non-discriminatory practices etc.), with some exceptions (e.g. adoption by gay couples) as other modern nations. They are mainly enacted at federal level[47] but some states and territories[48] have an established reputation for initiating independent legislation. A considerable body of case law testifies to the vigour with which social justice issues are pursued, mainly by the Human Rights and Equal Opportunity Commission.

Charity and the Law

The legal fiction of *terra nullius* permitted the wholesale transfer of English law to Australia without the necessity for any concession to Indigenous law, custom or practice. Charity and the associated law – as legislatively derived from the 1601 Act, developed by judicial precedent and applied through the established legal functions (see, further, Part I) – formed part of that transfer. Four hundred years later the decisions of the higher courts in England still carry at least persuasive influence. Charity law, its legal functions and accompanying social policy concerns have thus remained an integral part of Australia's colonial legacy.

The Relationship Between Law and Charity: An Overview

Australia received English common law at the time of colonisation; both the common law of charitable trusts as well as the Statute of Charitable Uses of 1601 (Statute of Elizabeth).[49] Over the following centuries the activities, organisations and legal framework of charity were to some extent adapted to meet the evolving needs of its particular social context. In particular, and unlike England & Wales, Australia moved away from dependency on trusts as the designated legal structure instead cultivated the corporate model as the preferred vehicle for charitable activity. It did, however, emulate later UK statutory initiatives such as the charitable provisions of trust statutes, the extension for recreational charities and the company limited by guarantee.[50]

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[47] For example: the Age Discrimination Act 2004 (Cth), Racial Hatred Act 1995 (Cth), Disability Discrimination Act 1992 (Cth), and the Sex Discrimination Act 1984 (Cth).

[48] For example, the Anti-Discrimination Act 1977 (NSW).

[49] 43 Eliz. I, c.4.; this act is a modification of a prior Statute of Uses in 1597, 39 Eliz. I, c.6. The Statute of Charitable Uses 1601 has been repealed with reservations that it will not affect the general law of charity in the Australian Capital Territory: Imperial Acts Application Act 1986 (ACT) s 4(5), New South Wales: Imperial Acts Application Act 1969 (NSW) s 8, and Queensland: Trusts Act 1973s 103(1). It is not in force in Victoria, but remains in force in the other jurisdictions.

[50] Adopted in Queensland, South Australia, Tasmania and Western Australia.

The Common Law: Definitional Matters

In this jurisdiction, charity law has faithfully adhered to common law principles (see, further, Chap. 1) with judicial interpretation of definitional matters closely following the guidance established by English precedents. Exceptions to this rule have been the distinction made between institutions and funds and the introduction by the federal government in the 1930s of the concept of a Public Benevolent Institution (PBI), subsequently judicially explicated in *The Perpetual Trustee Co. Ltd.v. Federal Commissioner of Taxation*,[51] as a subset of charity (see, further, below).

The general absence of legislative initiative has meant that the 'spirit and intendment' rule, as applied by judiciary and the ATO, has remained a crucial determinant in the development of the public benefit test for charitable activity. Those organisations that have purposes which do not fit within the *Pemsel* classification or are not analogous to those listed there must show that they can instead be construed as coming broadly within the legislative intent of the Preamble to the 1601 Act. Four hundred years later it can require some ingenuity and willingness to interpret the public benefit of a modern activity (such as internet access) to correspond with a preamble activity (such as repair of highways) and so qualify for charitable status.[52] This is much less likely to happen in Australia where the responsibility for making such interpretations largely falls to the ATO which adopts a conservative approach to novel purposes with potential to further erode the tax base.

The Common Law: Institutional Infrastructure

Australia never adopted the English regulatory model, centred on the specialist role of a Charity Commission, but instead this rests by default with the central regulatory authority the ATO, thereby ensuring that the ethos of charity law in this jurisdiction would be driven essentially by revenue garnering concerns. In other respects, the institutional infrastructure is much as it is in England & Wales. The courts and the Attorney General, the government agencies with responsibilities for determining eligibility for rate relief, exemption from customs duties and for supervising fundraising activities are all vested with broadly similar powers and duties as in other common law countries.

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[51] [1931] 45 CLR 224 *per* Starke, J., p. 232.

[52] See *Re Vancouver Regional FreeNet Association v. Minister of National Revenue* (1996) 137 DLR (4th) 206.

Developmental Milestones in Australian Charity Law

Charity law in Australia has remained rooted in the common law and its development has been largely shaped by judicial precedents on definitional matters as established in the courts of England & Wales.

Case Law Milestones

As stated, the Australian courts, at both state and federal level, have adopted and closely follow the English definition of charity based on the Elizabethan 1601 Preamble. As the Australian Tax Office (ATO) has explained:[53]

> 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 common law as judicially applied provides the basis of the definition of charity in Australia, at all levels of jurisdiction, and has allowed its courts to find purposes such as the preservation of native fauna and flora,[54] the elimination of war,[55] the Church of Scientology,[56] adopting electronic commerce,[57] and promotion of a culture of innovation and entrepreneurship[58] to be charitable. This reliance on the common law as elucidated chiefly by the English judiciary, was demonstrated in a recent definitive taxation ruling on the meaning of "charity" for the purposes of the Income Tax Assessment Act 1997 which, in the course of a 70 page judgment, cites 145 English cases and only 113 Australian with 28 decisions from other jurisdictions.[59]

In practice, however, it is the ATO that presents the most accessible forum for raising issues and the taxation rulings it regularly publishes offer the best opportunity for interpreting and challenging contemporary interpretations of activities constituting charitable purposes. Although infrequent, the decisions of Australian courts, supplemented by rulings of the judiciary in the UK and occasionally elsewhere in the common law world, have continued to shape a modern role for charity law in this jurisdiction.

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

[54] *Attorney General (NSW) v. Satwell* [1978] 2 NSWLR 200.

[55] *Southwood v. AG* [1998] 40 LS Gaz R 37

[56] *The Church of the New Faith v. The Commissioner of Pay-roll Tax* (Victoria) (1983) 154 CLR 120

[57] *Tasmanian Electronic Commerce Centre Pty Ltd v. FC of T* (2005) 142 FCR 371; 2005 ATC 4219; (2005) 59 ATR 10.

[58] *FC of T v. The Triton Foundation* 2005 ATC 4891; (2005) 60 ATR 451.

[59] Australian Taxation Office, *Income tax and fringe benefits tax: charities*, TR 2005/21 &22, dated 21 December 2005.

- *Chesterman v. Federal Commissioner of Taxation*[60]

In this case the Australian High Court decided that the meaning of 'charity' in a federal taxing statute was the popular narrow meaning of the word, rather than the wider legal meaning. The decision was overturned on appeal to the Privy Council which relied on *Pemsel*. The federal government at the time responded with the new legislative concept of 'Public Benevolent Institution' (PBI), a subset of charity, which still constitutes the only major departure from common law definitions as interpreted through the courts of England & Wales.

- *The Perpetual Trustee Co. Ltd. v. Federal Commissioner of Taxation*[61]

In this case the High Court defined the term 'public benefit institution' as an "institution organised for the relief of poverty, sickness, destitution or helplessness". The component of 'helplessness' has since attracted a good deal of judicial attention, most usually affirmative in nature. From that time Australia has had a double-pronged approach to tax liability: a charity is eligible for tax exemption; while a Public Benefit Institution (PBI) is eligible for donation deduction. Some state jurisdictions have also adopted the public benevolent institution definition for the purpose of their payroll and land tax statutes. The PBI category has become a distinguishing feature of Australian nonprofit law in that charities generally do not qualify for tax donation deductible status. Gift deductibility is reserved for a restricted subset of nonprofit organisations and only about one third of charities are PBIs.

- *Congregational Union of New South Wales v. Thistlethwayte*[62]

Australian common law holds to the general principle that a trust expressed for both charitable and non-charitable purposes is invalid, but a charitable institution can have non-charitable purposes that are merely incidental or ancillary to its charitable purposes. In this case, a religious association had objects which when examined independently were both charitable and non-charitable. The non-charitable objects were maintaining philanthropic agencies, and preserving civil and religious liberty. However, when viewed in the context of the constitution as a whole, the court found that the offending objects were ancillary to the appellant's main object to advance religion.

- *Mines Rescue Board of New South Wales v. Commissioner of Taxation*[63]

The decision in this case embedded 'helplessness' as a core component in the Australian judicial definition of PBI, and with it the traditional dynamic of benefactor and supplicant. This derives from Hely J's explanation of 'benevolence':

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[60] [1925] 37 CLR 317.

[61] [1931] 45 CLR 224 *per* Starke, J., p. 232.

[62] (1952) 87 CLR 375.

[63] (Cth) (2000) 44 ATR 107, p. 30. Also, see *Perpetual Trustee Co Ltd v. FC of T*[32] *per* Evatt J who described the recipients of charity as:
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.

> … the 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.

While all PBIs are necessarily charities, within that category they constitute a discrete subset. This provides a means of narrowing the otherwise wider net of the charity definition to 'hands on' poverty symptom relief thereby confining tax deductions to a smaller set of organisations that are directly focussed on the shared state agenda in relation to poverty, rather than promoting "choirs, advocacy or advancing religion etc." Principles expounded by the judiciary in this and other PBI cases, such as the *Perpetual Trustee Co. Ltd. v. Federal Commissioner of Taxation*, do not, therefore, necessarily have equal application to charity cases as a whole.

- *Trustees of the Indigenous Barrister's Trust: The Mum Shirl Fund v. FC of T*[64]

This ruling marks an important milestone in the development of the way in which the law relates to Indigenous people and therefore also in the relationship between law and social policy in this jurisdiction. It endorsed existing judicial notice of the fact that they are *per se* within the definition of 'necessitous circumstances' and construed activity, intended to benefit those in need by providing more strategic leverage, as being worthy of charitable status. The case builds on the obiter statements of Santow J in *Public Trustee v. Attorney General of New South Wales*[65] where a trust, which had as one of its objects the removal of racial discrimination, could be charitable. The context was that some states in Australia had not legislated to remove racial discrimination. A distinction was drawn between trusts that were 'contrary to the established policy of the law' and trusts whose object is to "introduce new law consistent with the way the law is tending". To 'refine and improve legislation' may also be acceptable in some situations.[66]

- *Central Bayside Division of General Practice Ltd v. Commissioner of State Revenue*[67]

An independent association of general medical practitioners, almost wholly funded by a federal government department, found at first instance not to be charitable, was finally confirmed to be so (see, further, below).

- *Commissioner of Taxation v. Word Investments Limited*[68]

Word Investments Ltd was established by a group of business people to provide funds to a charitable religious organisation. The ATO challenged the charitable status of the

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[64] (2002) ATC 5055.

[65] (1997) 42 NSWLR 600.

[66] Santow, G.F.K. 'Charity in Its Political Voice – A Tinkling Cymbal or a Sounding Brass?', *Bar Law Review*, 18, 1999, pp. 225–253.

[67] [2005] VSCA 168/

[68] [2007] FCAFC 171.

entity because it raised its funds through various activities such as investing money borrowed at non-commercial rates from supporters, offering financial planning for a fee, and a funeral business. The court noted that with the decline of the welfare state, charitable organisations are expected to do more with the same resources and reliance on donations in many cases will be insufficient. They further noted that many charitable organisations have established business ventures to generate the income necessary to support their activities. While there may be a vast difference between selling lamingtons at a church fete and selling funeral services, where the object of raising the funds is the same, the court could see no reason to draw a legal distinction between the two. This placed the court at odds with the interpretation for the ATO which would claim that such a large unrelated income would preclude a determination that the purpose of the organisation was charitable.[69]

Legislative Milestones

Australia, being a federation of territories and states, does not have a unified and uniformly applicable legislative capacity: each state and territory is reasonably free to legislate for itself; except that some Commonwealth legislation is applicable across all state jurisdictions. Consequently, there are now over 15 federal statutes and 163 State and Territory Acts which use the term 'charity'. Most adopt the common law definition, but there is some statutory modification. Each state and territory has a trust statute which provides minor modifications to the law of equity such as dealing with mixed purpose gifts, *cy-près* applications and some states extend the common law definition to include facilities for recreation or in the interests of social welfare.[70] Each state and territory (except the Northern Territory) also has legislation regulating public fundraising with provisions that differ considerably.[71]

Again, in many states, but not at federal level, there is legislation which mirrors the UK Recreational Charities Act 1958 and extends charitable status to the provision of recreational facilities.[72] More recently, the development of charities legislation has been closely modelled on the English Charities Act 1960.[73]

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[69] The case is subject to appeal to the High Court of Australia at the time of writing.

[70] Queensland, South Australia, Tasmania and Western Australia follow the pattern of the Recreational Charities Act 1958 (UK).

[71] Fundraising Appeals Act 1998 (Vic); Charitable Fundraising Act 1991 (NSW); Collections Act for Charitable Purposes Act 1939 (SA); Collections for Charities Act 2001 (Tas); Collections Act 1966 (Qld); Charitable Collections Act 1940 (WA); Collections Act 1959 (ACT).

[72] Section 103 of the Trusts Act 1973 (Qld); section 69C of the Trustee Act 1936 (SA); s 5 of the Charitable Trusts Act 1962 (WA) and s 4 of the Variation of Trusts Act 1994 (Tas).

[73] See for example, the Trusts Act 1973 (Qld.), the Charities Act 1978 (Vic.) and the Charitable Trusts Act 1962 (WA).

- *The Income Tax Assessment Act 1927 (Cth)*

The concept of 'charitable purposes' was central to the law governing gift deductions until the introduction of the Income tax Assessment Act 1927 (Cth). This legislation divorced 'charity' from gift deductibility and introduced the term 'benevolent institution'.

- *The Income Tax Assessment Act 1936 (Cth)*

The federal government, in s 23 of this Act, introduced the right to claim for charitable exemption from income tax liability. It followed the lead set by Tasmania's Real and Personal Estate Duty Act 1880 and the Taxation Act 1884 in South Australia.

- *The Associations Incorporation Act 1991*

This legislation introduced provisions and principles specifically for regulating not-for-profit incorporated entities. Each Australian state and territory has enacted a statute allowing the creation of incorporated associations.[74] Two states have a long history of incorporated associations dating from the 1880s, apparently derived from New York precedents. Reform and introduction of such statutes during the 1980s was a response to the legal uncertainty and liability of the unincorporated association structure. The limited liability and perceived simplicity compared to other alternatives has made this structure the most popular nonprofit structure in Australia.

- *The Income Tax Assessment Act 1997*

This statute uses the common law definition of charity as the federal basis for the exemption regime of certain nonprofit organisations from income tax. It established the following distinction between 'institutions' and 'funds'[75] as a key characteristic of Australian tax law as it relates to charities:

> An institution is an establishment, organization or association, instituted for the promotion of some object, especially one of public or general utility. It connotes a body called into existence to translate a defined purpose into a living and active principle. 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.

Division 50 of the 1997 Act lists the classes of organizations and specifically named organizations, including charities that qualify for income tax exemption; Division 30 lists those, including public benefit organizations, that may be the recipients of tax deductible gifts.

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[74] Associations Incorporation Act 1984 (NSW); Associations Incorporation Act 1981 (Vic); Associations Incorporation Act 1981 (Qld); Associations Incorporation Act 1985 (SA); Associations Incorporation Act 1987 (WA); Associations Incorporation Act 1964 (Tas); Associations Incorporation Act 1991 (ACT); Associations Act 2003 (NT).

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

- *The New Tax System 1999*

This legislation introduced a broad based value added tax on consumption in Australia at the rate of 10% known as the Goods and Services tax (GST). The result was to bring nonprofit organisations more closely into the tax regulatory system with most entities requiring a unique identifier in the form of an Australian Business Number (ABN) and registration with the ATO. There were also some provisions that permitted charitable institutions, funds and Deductible Gift Recipients to engage in GST-free transactions.

- *The Corporations Act 2001*

This legislation provides a federal jurisdiction for the registration and regulation of companies limited by guarantee. Previously, corporate law regulation, including companies limited by guarantee had been a state responsibility and after over 20 years of negotiation the state handed over their constitutional powers to enable a federal corporate law regime.

- *The Extension of Charitable Purpose Act 2004*

This legislation, provides that 'the provision of child care services on a non-profit basis' is a charitable purpose. Child care services include those of day care, long day care (full-time and part-time), casual care, before and after school hours care, vacation care, occasional care, and similar sorts of care. These services are not limited to pre-school-aged children. The categorisation of services as child care under government programs would commonly be a strong indicator that they qualify as child care services for the purposes of this Act. The provision of child care services includes matters that are merely incidental or ancillary to those services. Under s 5, provision is made for self-help groups to acquire charitable status provided that they are 'open and non-discriminatory'.

All federal statutes (not just taxing acts) are now modified by this legislation which extends the common law definition of charity to include certain child care and self-help groups, and closed or contemplative religious orders.

Charity Law Reform

To pass the 1999 transaction tax (GST) through the upper house of the Australian Parliament the government promised to hold an inquiry into the definition of charity used to exempt or preference certain nonprofit organizations in respect of the transaction tax. The prospect of charity law reform[76] was introduced by the Prime

[76] Note the earlier charity law reform process, resulting in the 428 page Australian Industry Commission Report *Charitable Organisations in Australia*, 1995, has since been ignored.

Minister with an acknowledgment that the government shares responsibility for community care with the charitable sector:[77]

> Charitable, religious and community service not-for-profit organisations play a vital role in our community and are pivotal members of the social coalition. The Government has recognised their importance in a range of policy areas, including the business and community partnership, illicit drugs policy, welfare reform and the Job Network.

It was in that policy context that the *Inquiry into the Definition of Charities and Related Organisations* was launched in September 2000. The submission of the report in 2001[78] led to protracted wrangling which finally culminated in an announcement by the Federal Treasurer on 11 May 2004 that:[79]

> … [t]he common law meaning of a charity will continue to apply, but the definition will be extended to include certain child care and self-help groups, and closed or contemplative religious orders. The Government has decided not to proceed with the draft Charities Bill.

The collapse of the charity review process was a serious setback for the prospects of updating the law so as to better address contemporary social policy issues in Australia. The Extension of Charitable Purposes Act 2004 (Cth) which enlarged the charity law definition to include child care, self-help groups and closed religious orders was not just a minimalist, conservative exercise in political face saving but more importantly it missed the main issues on the social policy agenda. The circumstances of the Indigenous people, the plight of 'asylum seekers' and the multi-cultural or racist tensions are currently among Australia's most pressing social problems and the outcome of this review process did nothing to facilitate much needed ameliorative philanthropic intervention. It was also an outcome that threatens to damage government attempts to cultivate an authentic and durable working partnership with the sector.[80]

Applying the Legal Functions of Charity Law

In the absence of reform, the current legal functions of charity law remain much as before. The opportunity to change, adjust or extend their range has been missed. They continue to be given effect in the same manner, by the same agencies, guided

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[77] See The Hon John Howard MP, Prime Minister, 18 September 2000, *Inquiry into Charitable and Related Organisations*, Press Release.

[78] Sheppard, I., Fitzgerald, R., and Gonski, D., *Inquiry into the Definition of Charities and Related Organisations*, 2001.

[79] Costello, P., 'Final Response to the Charities Definition Inquiry', Press Release, No. 31, 11 May 2004.

[80] Although there is an alternative view that any such talk by government of 'partnership' is mere rhetoric and in reality it is content to just impose change on the sector through funding agreements and control of relevant purse strings.

by the same principles as they have been for some generations. Additionally, there is growing evidence pointing to a new, tougher government approach to charities and to the sector generally: a move away from a partnership discourse and towards imposed control through funding streams; a muting of dissent; and an unwillingness to engage with special interest groups.[81] This has led some academics to express the view that "advocacy organisations, such as peak bodies, are systematically being excluded from policy making and defunded because of their advocacy work".[82]

Protection

This, the legal function most usually associated with charity (see, further, Chap. 4), has faded in significance in Australia and shows every sign of weakening further as the pressure increases for charities to share more responsibility for the public service provision traditionally borne by government. It is given effect, if in a conservative and defensive fashion, by the customary agencies. In comparison with England & Wales, however, the effectiveness of this legal function is constrained in Australia by the fact that corporate structures have long been preferred to trusts as appropriate legal vehicles for charitable activity. When Australia broadened its common law inheritance, allowing diversification into corporate legal structures rather than a continuing adherence to the trust model as in England & Wales, it paid the price of a proportionate reduction in the extent to which the traditional powers of the *parens patriae* jurisdiction and the duties (fiduciary and other) of trustees were thereafter available for the protection of charities.

The Courts and Attorney General

The courts have progressively less opportunity to exercise any legal function, including affording protection, in respect of charities as litigation dries up due to

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[81] See for example, Melville, R., 'The State and Community Sector Peak Bodies: Theoretical and Policy Challenges', *Third Sector Review*, 1991a, 3, pp. 41–65; Melville, R., 'Australian Peak Bodies and the Market Policy Culture', *Social Policy for the 21st Century: Justice and Responsibility*, 1991b, Proceedings of the National Social Policy Conference, Sydney, 21–23 July 1999, Vol. 1. (eds: Shaver, S. & Saunders, P.), Social Policy Research Centre, Reports and Proceedings No. 141, December, 1999; Melville, R., 'Nonprofit Umbrella Organisations in a Contracting Regime: A Comparative Review of Australian, British and North American Literature and Experience', *International Journal of Not for Profit Law*, 1999c, 1, p. 4, http://icnl.org/journal.vol1iss4/melville.html; Melville, R., 'Voice and the Role of Community Sector Peak Bodies', *Third Sector Review*, special issue, 2001, 7(2), pp. 89–110. Also, see Dalton, B. and Lyons, M., 'Advocacy Organisations in Australian Politics: Governance and Democratic Effects', *Third Sector Review*, 11: 2, 2006.

[82] Melville, R. and Perkins, R. 'Changing Roles of Community Sector Peak Bodies in a Neo-Liberal Policy Environment in Australia', NCOSS Conference Paper, University of Wollongong. NSW 12 March 2003.

the entailed costs, time constraints and adverse publicity. The Attorney General in each state and territory exercises the traditional *parens patriae* role in relation to charitable trusts but there is little evidence of any substantial control or scrutiny being applied to charities. Reported cases involving the AG show, almost without exception, that the proceedings were instigated privately. Inquiries in Victoria,[83] for example, noted very few actions brought by the AG against charities. This is partly due to a lack of interest in respect of charitable matters but also to the fact that the bulk of charitable activity is undertaken through corporate entities and therefore falls outside the *parens patriae* jurisdiction.

The Australian Taxation Office

The ATO has not adopted the same protective role as the Charity Commission in respect of charities and their activities, nor has it demonstrated any inclination to develop a leadership role in terms of protecting the integrity of charitable status. It has, for example, adopted a generally facilitative approach in relation to issues of such status being undermined by the merging of charitable activity with the public service responsibilities of government bodies.

Policing

In Australia, the traditional concern of the State to maximise return of tax revenues prevails and policing remains the primary function of the law as it relates to charities (see, further, Chap. 5). The regulatory framework for charities is very largely oriented around scrutinising the grounds for tax exemption. This is evident in the efforts made to police the grounds and the process for conferring charitable status and to a lesser extent in the supervision and inspection of charities, and of organizations purporting to be charities, to prevent abuse. It is also apparent in the concern of charity law with fundraising, rates, trading and more recently with the contract culture.

The effectiveness of this function is impeded by the fact that there is no one government body with a particular responsibility for administering the law as it relates specifically to charities nor are there any legal provisions imposing either registration or regulatory requirements upon charities *per se*: they are not required, as charities, to register the facts of their existence, location, assets, governance arrangements or dissolution with any public body. This situation is not helped by legal provisions that fail to harmonise the requirements for charities variously structured as

[83] See Victorian Legal and Constitutional Committee, 'A Report to Parliament on the Law Relating to Charitable Trusts', Victorian Government Printer, Melbourne, 1965, p. 77.

companies or trusts. In addition, each state and territory has it own laws with respect to incorporation of associations and exemption from state taxes such as stamp, land and payroll taxes. Little effort has been made to rationalise and co-ordinate the different rules that apply across trusts and incorporated charities nor across Australia at federal and other levels.

This problem is particularly apparent in relation to the law governing fundraising and, as Professor Dal Pont noted, the "lack of uniformity, coupled with the antiquity of the legislation in some jurisdictions, has prompted calls for widespread and wholesale reform of fundraising laws."[84] The Industry Commission in 1995 made similar comments.[85] National charities must register in each state and comply with differing requirements which add to their compliance burden with little gain in accountability or protection of the public from fraudulent behaviour.

The lack of a central public registry of charities and other nonprofit organisations and the absence of any requirement for the filing of financial reports to any central register, impose serious constraints on the capacity to efficiently exercise the policing function in this jurisdiction.

The Courts and Attorney General

In this as in many other common law jurisdictions the judiciary no longer play their traditional lead role in exercising the policing function. Few cases have been pursued to the superior courts over recent years. The recent *Central Bayside* case,[86] however, does demonstrate that when definitional matters are brought before the court (in this case, the issue was whether the petitioner's organisation came within the definition of 'charitable institution') the judiciary are still capable of implementing the policing function by rulings that determine whether or not a category of activity can be interpreted as charitable. Before that ruling, the previous last major charity law case in the ultimate court of appeal (High Court of Australia) occurred 30 years ago.[87] In respect of corporations with charitable objects, the Australian courts have held that directors have fiduciary-like duties to the objects which are not unalike those of the traditional duties of trustees in respect of charitable trusts.

The role of the Attorney General is devoid of any regulatory functions so, for example, that office maintains neither a register nor an auditing program in respect

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[84] Dal Pont, G., *Charity Law in Australia and New Zealand*, Oxford University Press, Melbourne, 2000, p. 388.

[85] Industry Commission, *Charitable Organisations in Australia*, Report No 45, AGPS, Canberra, 1995, pp. 221–230.

[86] *Central Bayside Division of General Practice Ltd v. Commissioner of State Revenue* [2005] VSCA 168/.

[87] *Bathurst City Council v. PWC Properties* (1998) 195 CLR 566 concerned a church carpark and the previous case was *Commissioner of Land Tax (NSW) v. Joyce* (1974) 132 CLR 22.

of charities operating within the jurisdiction. Moreover, the fact of incorporation will itself remove a charity from the remit of the Attorney General.

The Australian Taxation Office

As in other common law nations, such as Canada, the primary regulatory authority in Australia is by default at federal level in the government revenue agency (ATO) which applies the provisions of the Income Tax Assessment Act 1997 (Cth) in conjunction with the Extension of Charitable Purposes Act 2004 (Cth) to regulate the fiscal environment including charities. As the tax collection agency has exclusive responsibility for determining charitable status this positions it firmly in the role of gatekeeper for any contingent award of tax exemption. It follows established English precedents on definitional matters, deploys a conservative and defensive interpretation of *Pemsel* and the 'spirit and intendment' rule, and gives priority to its tax collection duties to prevent any further dilution of the nation's tax base. Its exercise of the policing function is compromised by the lack of a central register together with mandatory and uniform financial reporting requirements that would enable the ATO to maintain an informed overview of the sector. While the introduction of a GST introduced a register of organisation's names with a unique identifier (ABN), the register does not have any other return or financial information and policing is left to specific audit activity by the ATO.

In broad terms, the ATO has played a limited regulatory role in relation to the taxation affairs of nonprofit organisations including charities; indeed it only has records relating to approximately 80,000 of the estimated 700,000 Australian not-for-profit organisations.[88] It has not been as active or dynamic in developing an inspection and supervisory role as the taxing authority in either the USA or Canada.

- *Charitable status*

The ATO has not only issued extensive rulings on its interpretation of what is charitable but also numerous other linked terms such as Public Benevolent Institution,[89]

[88] See Lyons, M. (2001) *Third Sector: The Contribution of Nonprofit and Cooperative Enterprises in Australia*, Allen & Unwin, Crows Nest.

[89] See *Trustees of the Indigenous Barristers' Trust v. Commissioner of Taxation* (2002) 127 FCR 63, where Gyles, J. explained:

> … 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.

See also: *Perpetual Trustee Co Ltd v. Federal Commissioner of Taxation* (1931) 45 CLR 224, where Starke, J. expressed the view that PBI means "an institution organized for the relief of poverty, sickness, destitution or helplessness", p. 232; *Australian Council of Social Service Incorporated v. Commissioner of Payroll Tax* (NSW) (1985) 16 ATR 394, *per* Street, C.J., p. 395; and *SIM Australia (As Trustee for SIMAID Trust) v. FC of T*, 2007 ATC 2243.

public fund and Deductible Gift Recipient with few laypersons understanding the difference and grasping the resulting significance for tax exemption privileges. As a consequence the range of quasi government 'public service' bodies that inhabit a no man's land between government and other sectors is growing at an increasing rate. Several cases have come before the Australian courts in relation to bodies such as ambulance, fire brigade and mine rescue authorities involving the definition of Public Benevolent Institution.[90] The quest for such status is often driven by the fiscal advantages attached to such classifications and the federal authorities often perceive this as state governments trying to avoid federal taxes.

- *Charitable purpose and community development*

In Australian charity law, gifts 'for the benefit of the community' have long been recognized as a general heading for other charitable purposes not fitting under the usual *Pemsel* heads.[91] As the ATO has explained:[92]

> 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.

It has employed this approach to restrict entitlement to charitable tax exemption. Most obviously it has been applied to the detriment of Indigenous community development projects.[93] Self help groups have similarly failed to qualify for charitable status, even where some external access is allowed, because the ATO has found that the necessary 'public' element has not been met, the activity or facility is construed as being essentially for member benefit[94] or as being too vague or imprecise.[95]

- *Cultural affirmation*

Where a group belonging to a minority culture constitutes an organisation to preserve and promote its cultural heritage the ATO is likely to regard such activities as essentially social and therefore of insufficient 'benefit' to the community.[96] So, for

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[90] *Metropolitan Fire Brigade Board v. The Commissioner of Taxation* (1990) 27 FCR 279; *Mines Rescue Board (NSW) v. The Commissioner of Taxation* (2000) 101 FCR 91; *Ambulance Service of New South Wales v. Deputy The Commissioner of Taxation* (2003) 130 FCR 477.

[91] 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.

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

[93] 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.

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

[95] 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.

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

example, a community centre 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 it addressed were mainly social in nature.[97] Such initiatives may also fall foul of the ATO rule that purposes must not be vague or ambiguous.

- *Businesses*

Disadvantaged communities usually place a priority on projects that may serve to 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 for the purpose of training the unemployed in skills appropriate to the needs of local industries. However, the ATO is likely to regard the involvement of private funds and/or the basis for distributing any profits as fatal to any claim for charitable status by the organisation concerned.

- *Transparency and accountability*

The absence of a central register, which does more than merely record an entity's existence and name, with related mandatory registration requirements has meant that there is no onus on Australian charities to regularly make a full and publicly accessible disclosure as to their finances and activities. Similarly the lack of such information greatly weakens the role of the ATO, compared with that of the Charity Commission in England & Wales, in relation to supervising and inspecting the charitable sector. The lack of a central regulatory body with the capacity to collate all relevant financial data in ways that promote accountability and transparency is increasingly seen as a significant deficiency.[98]

- *Advocacy*

The conservative regulatory role of the ATO is becoming steadily more evident in its approach towards organizations with an advocacy role. This has been demonstrated most recently in its decision to revoke the 12 year old charitable status of AidWatch, an organization which it conceded had wholly charitable objectives except for three deemed political: urging the Government to put pressure on the Burmese regime; delivering an ironic 60th anniversary birthday cake to the World Bank; and raising concerns about developmental impacts of the US-Australia Free Trade Agreement. This decision has attracted considerable critical comment from many quarters. As the Chair of the National Roundtable of Non Profit Organisations stated:[99]

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

[98] Industry Commission, *Charitable Organisations in Australia*, Report No 45, AGPS, Canberra, 1995, p. 210; Sheppard, I., Fitzgerald, R., and Gonski, D., *Inquiry into the Definition of Charities and Related Organisations*, 2001.

[99] See 'AidWatch appeals charity status decision', Wednesday, 30 May 2007.

> If we're to have a robust, transparent and effective democracy, we need organisations like AidWatch doing the homework to say well is this necessarily what we should be doing with public policy on aid etc.

The Offices of Fair Trading

These agencies maintain an overview of general consumer issues and industry licensing. Each state and territory (except the Northern Territory) has legislation, regulating the conduct of fundraising activities, the provisions of which are administered by the local Office of Fair Trading.[100] There is quite a variation in the proactive administrative regulation in such departments though they usually respond to complaints from the public. During the 1980s, all states and territories either reformed or introduced a simple form of incorporation designed specifically for small community associations and sporting bodies known as an 'incorporated association'.[101] These are administered through the states and territories. There are now over 138,000 incorporated associations, some with charitable purposes,[102] regulated by the state and territory Offices of Fair Trading.

The Australian Securities and Investment Commission (ASIC)

In Australia many charities choose to assume the legal form of a company limited by guarantee. There are approximately 11,000 such companies and these are almost identical to their UK counterparts.

When incorporated, and in common with all other companies, these entities are required to register with ASIC. This body administers the provisions of the Corporations Act 2001 (Cth) as it applies to all companies including incorporated charities but it has no specific brief in relation to charities as such. Australian incorporated bodies that claim to be charitable tend to have loosely drafted constitutions in relation to their objects, often mixed in with powers. This is probably due to their not being vetted at incorporation by a regulatory body such as a Charity Commission or taxing authority. Unlike the UK, there are no provisions of corporate law which link the charitable objects of a corporate body to supervision by a charity regulator or to charity law. This matter has been indirectly addressed in the Australian courts through

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[100] Fundraising Appeals Act 1998 (Vic); Charitable Fundraising Act 1991 (NSW); Collections Act for Charitable Purposes Act 1939 (SA); Collections for Charities Act 2001 (Tas); Collections Act 1966 (Qld); Charitable Collections Act 1940 (WA); Collections Act 1959 (ACT).

[101] Associations Incorporation Act 1984 (NSW); Associations Incorporation Act 1981 (Vic); Associations Incorporation Act 1981 (Qld); Associations Incorporation Act 1985 (SA); Associations Incorporation Act 1987 (WA); Associations Incorporation Act 1964 (Tas); Associations Incorporation Act 1991 (ACT); Associations Act 2003 (NT).

[102] Refer correspondence with Fair Trading Offices at http://www.bus.qut.edu.au/research/cpns/whatweresearch/usefullinks.jsp#stats

the issue of whether a gift to a charitable corporation is a gift in trust or a gift to the corporation generally for its objects. Although the decisions espouse differing judicial views, it appears that a disposition to a "charitable" corporation will presumptively take effect as a trust for the purposes of the corporation rather than a gift to the corporation.[103] There are no provisions in corporate law statutes regulating corporate forms such as the company limited by guarantee to prevent the changing of charitable objects to non-charitable objects, altering a non-distribution constraint clause or making new arrangements for the distribution of surplus assets on dissolution.

Mediation and Adjustment

The common law has traditionally been wholly dependent upon a continuous case flow through the courts to permit a review of principles and the consequent establishing of judicial precedents to adjust the law to meet the pressures from contemporary practice (see, further, Chap. 6). In England & Wales this flow has been very largely redirected to the Charity Commission which, being vested with the powers of the High Court, is equipped to mediate and make the appropriate adjustments. In Australia, the traditional approach persists but as only a trickle of cases now reach the courts they seldom have the opportunity to give effect to their common law role, while the ATO does not have a brief to be proactive in giving recognition to those charities which engage in new forms of public benefit activity. In fact and ironically, both agencies further the mediation/adjustment function mostly through their role as proxy enforcers of initiatives taken by the Charity Commission and the courts in England & Wales: using the common law to import decisions to broaden the interpretation of charitable purposes (e.g. relief of the unemployed, promotion of community development, facilitating partnership with government bodies etc.) probably achieves more to develop charitable purposes in Australia than does reliance on decisions taken by the courts and the ATO in response to domestic issues.

That in this jurisdiction no mechanism exists to permit ongoing review and adjustment of the law, to ensure an appropriate fit with new or embedded forms of social disadvantage, amounts to a structural flaw in the charity law framework.

The Courts and the Attorney General

In the absence of an equivalent to the English Charity Commission, the task of fitting the law to contemporary social need falls exclusively to the courts. However, as the volume of litigation has been drying up so too has the judicial capacity to

[103] *Re Inman* [1965] V.R. 258; *Sir Moses Montefiore Jewish Home v. Howell and Co*, (No.7) Pty Ltd [1984] 2 N.S.W.L.R. 406 and Victoria, 'Report on Charitable Trusts', Chief Justice's Law Reform Committee, Melbourne, 1965, p. 26; Ford, H.A.J., 'Dispositions for Purposes', *Essays in Equity*, Finn, P. (ed.), Law Book Company Limited, Sydney, 1985, p. 168.

exercise any consistent influence on the evolution of charity law. This issue was addressed in recommendations made by the Charity Definition Inquiry[104] of 2001 to codify a definition of charity in contemporary terms and for the establishment of an independent administrative body.

When the opportunity arises the judiciary can make important rulings with potential to reset the application of the law. This was demonstrated by the finding made by Gyles J, in *Trustees of the Indigenous Barristers Trust:*[105]

> 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".

- *Developing charitable purposes*

Although this jurisdiction lacks any forum equivalent to the Charity Commission for developing charitable purposes to meet contemporary forms of social need, the courts have availed of the rare and random opportunities to do so. The recent *Central Bayside* case,[106] for example, concerned a company limited by guarantee, established to deliver a government healthcare scheme within a small geographic area in accordance with a national plan. Its members were general medical practitioners in the Central Bayside area of Melbourne and the directors were appointed by the members but its funding was almost entirely provided by government. The court at first instance upheld the ruling of the revenue authority that Central Bayside was not a 'charitable body' because: its main purpose was to protect and advance the interests of its members; and it was merely a governmental conduit executing government policy. On appeal this decision was overturned when all five judges of the High Court, in three separate judgments giving varying reasons, concluded that Central Bayside was a 'charitable body'. The ruling determined that just because a charity has the same goals as government, does not mean without more, that it is not independent of government. This is a significant decision that broadens the interpretation of 'charitable purpose' and will permit future closer partnership arrangements between government bodies and charities; perhaps to the detriment of the latter's independence.

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[104] Report of the *Inquiry into the Definition of Charities and Related Organisations*, Canberra, 2001.

[105] 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, p. 232; *Re Bryning* [1976] VR 100, pp. 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, pp. 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.

[106] *Central Bayside Division of General Practice Ltd v. Commissioner of State Revenue* [2005] VSCA 168.

- *Cy-près*

The mechanism of *cy-près* provides an important means whereby the State may unlock a trust's perpetual existence and its unalterable objectives, adjust its charitable purposes and redeploy its resources. This aspect of the mediation and adjustment function, usually exercised by the judiciary (but also by the Charity Commission in England & Wales), falls to be supervised by the relevant Attorney General in Australia.[107] Australian courts have inherent powers to deal with subsequent frustrations but have no power to vary a charitable purpose that is defined and legally capable of being executed. The court cannot vary the donor's original charitable purposes to what it considers to be more beneficial to the public, or even what the court may surmise that the founder would have contemplated if they could have foreseen the changes in circumstances.[108] It may, however, order a *cy-près* scheme to re-direct a gift which has become impossible or impracticable to be used instead for the benefit of the donor's primary objective.[109]

In New South Wales, the courts are given widened powers to devise *cy-prés* schemes where the original purposes have "ceased to provide a suitable and effective method of using the trust property, having regard to the spirit of the trust."[110] Queensland, South Australia, Tasmania and Victoria follow New South Wales with slight variations in the statutory wording.[111]

In Australia the Attorneys General rarely initiate *cy-prés* actions. On the rare occasions when this occurs the results do not arouse a great deal of faith in the efficient redeployment of dormant charitable funds.[112] For example, a recent case involved an endowment fund of $64,000 for charitable purposes. Between 1937 and 1950, no meetings of trustees were held and the judge noted:[113]

> Thereafter at various times the incumbent Lord Mayor of Brisbane, officers of the Justice Department, and the present applicant raised questions as to the future management of the trust, the desirability of passing legislation with respect to it, and otherwise debated among themselves the future management of the trust. However, nothing concrete has ever been done.

- *Legal structures*

Flexibility, in the range of legal vehicles available to give effect to an organisation's charitable purpose, is an important element in adjusting the fit between charity and type of social need. In addition to the more traditional trusts, unincorporated associations and

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[107] For example the Charitable Funds Act 1990 (Qld.) section 6.

[108] *Attorney General* v. *Sherborne Grammar School* (1854) 18 Beav 256.

[109] See for example, *A-G for New South Wales v. Perpetual Trustees Co. Ltd*. (1940), 63 CLR.

[110] Charitable Trusts Act 1993 (NSW) s 9(1).

[111] Trusts Act 1973 (Qld) s 105; Trustee Act 1936 (SA) s 69B(1); Variation of Trusts Act 1994 (Tas) s 5(3); Charities Act 1978 (Vic) s (2)(1).

[112] In other recent cases similar tardiness is apparent, *Re Anzac Cottages Trust* [2000] QSC 175; In *Roman Catholic Trusts Corp. for Diocese of Melbourne* v. *Att. Gen*. (Vic) [2000] VSC 360.

[113] Williams, J., *Re Application by Perpetual Trustees Queensland Ltd*, No. 4239 of 1999, para 15.

incorporated charities, this jurisdiction has developed a considerable reliance upon corporate charitable structures. The courts have facilitated this development. There is however a growing call by those who are keen social entrepreneurs for the introduction of new legal structures such as the UK CICs to provide legal structures to facilitate social enterprise. Most of the concern is around access to favourable tax classifications and access to investor capital.

The Australian Tax Office

The ATO is a relatively free-standing government agency with no particular brief for charities and no incentive to develop a proactive role mediating with organisations engaged in new or embedded forms of social need with a view to adjusting the law accordingly. The Inland Revenue, its UK counterpart, is statutorily obliged to take direction from the Charity Commission on matters of interpreting charitable purpose and determining charitable status. The ATO, in the absence both of an agency with equivalent powers and an explicit High Court judgment directing a different interpretation of the law, continues its conservative defence of established grounds for charitable tax exemption. For example, although judicial notice has been taken, in the above *Indigenous Barrister's* case and others, of the fact that Indigenous people are *per se* socially disadvantaged, this has not influenced the approach adopted by the ATO.

The ATO has been a cautious regulator in comparison to the Charity Commission, it has considered itself bound by established precedents and has not attempted to push the boundaries past the case law. An example of this is nonprofit child care. While nonprofit child care is recognised in other jurisdictions there was not a significant case on point that could be used by the ATO as a basis of accepting the purpose as charitable and legislation was then required to effect the necessary adjustment; a deficit ultimately addressed in one of the few legislative reforms introduced by the Extension of Charitable Purposes Act 2004 (Cth).

The cautious approach of this agency to opportunities for broadening its interpretation of activities constituting contemporary charitable purposes is apparent from certain crucial rulings on definitional matters.

- *Charitable purpose*

The ATO has proven to be rather reticent in its attempts to define 'charitable'.[114] In fact it took seven years to settle the ruling on the definition of charity. The first draft ruling used the phrase that "an institution is accepted as charitable if its dominant purpose is charitable", and that "any non-charitable purposes of the institution must be no more than incidental or ancillary to this dominant purpose".[115] The second

[114] In fairness, it has to be pointed out that latterly its reticence resulted from an agreement to avoid finalising any such ruling until the charity definition inquiry had been concluded and the resulting legislation introduced while also giving the sector plenty of time to be consulted about its views.

[115] ATO, Income tax and fringe benefits tax: charities, TR 1999/D21.

draft ruling omitted the reference to "dominant" purpose and used the phrase "wholly, solely and exclusively" charitable.[116] The final ruling settled on "its sole purpose must be charitable", but "in carrying out its charitable purpose it can have purposes which are incidental or ancillary to the charitable purpose."[117]

Unlike the Charity Commission, the ATO has neither the remit nor the resources to undertake a strategic programme for the development of charitable purposes to ensure their closer alignment with contemporary patterns of social need. Where the Charity Commission employs the creative opportunities offered by the concepts of 'spirit and intendment' and 'public benefit' to guide its application of the mediation/adjustment function and broaden the legal interpretation of charitable activity, the ATO is much more likely to invert the use of the same concepts and use them when applying the policing function to limit any such interpretation.

- *'Helplessness'*

For an organisation to qualify for PBI status[118] the ATO requires evidence that its charitable purposes include a commitment to relieve 'helplessness'. This elevation of 'helplessness' to its current role as an essential component for PBI status endorses a very traditional and conservative supplicant/benefactor dynamic as an appropriate interpretation of contemporary philanthropy, but it is anathema to minority groups (see, further, Chap. 1). By focusing on direct alms to the poor it would seem to foreclose any possibility of a more functional and strategic approach intended to tackle structural and embedded causes of social deprivation. Although confined to that small subset of charities that can be defined as PBIs, the recognition of 'helplessness' as a formal legal component has become a distinguishing characteristic of charity law in Australia.

Support

In this jurisdiction, as in all others in the common law world, the main form of support to charity comes primarily in the form of preferential tax concessions (including gift aid and other donor incentive schemes) supplemented by government grant aid, the modernizing of fundraising regulations to facilitate new methods and the creation of customized legal structures for charity etc. The extension of such support to the additional charitable purposes, as proposed in the Charities Bill, would have represented a significant broadening of government support for charity. This is now overshadowed by the withdrawal of the Bill which represents a serious

[116] ATO, Income tax and fringe benefits tax: charities, TR 2003/5.

[117] ATO, Income tax and fringe benefits tax: charities, TR 2005/21.

[118] See *The Perpetual Trustee Co. Ltd. v. Federal Commissioner of Taxation* [1931] 45 CLR 224 *per* Starke J at 232 where the High Court first defined the term 'public benefit institution' as an "institution organised for the relief of poverty, sickness, destitution or helplessness".

failure in the government commitment to charities and the non-profit sector as a whole. Currently, support for charity comes mainly from manipulation of the tax code and from the sector itself. The traditional institutions of the regulatory framework have little influence.

Government

Although grants by government bodies are of less significance to charities in this jurisdiction than, for example in the UK, direct intervention by government has been important. Thus, by replicating the English Recreational Charities Act 1958, the government extended tax exemption to a wide range of 'civil society' type organizations and thereby provided an important source of financial support to many local communities. By similarly replicating provisions in the English Charities Act 1960, it was able to require the ATO to support charities. So, also, by introducing the concept of Public Benefit Institution, and by manipulating tax concessions and donation incentives (see, further, below), the government has extended real support to charities. However, the corollary is that by not introducing legislation to modernise and co-ordinate fundraising activities the government has failed to directly intervene with measures that could instill in the general public a greater confidence in charities which would in turn translate into a greater level of financial support.

The Courts and the Attorney General

There is little evidence that the courts in this jurisdiction are in a position to apply the support function for the benefit of charities by creative judgments drawn from domestic issues, as opposed to acting as a conduit for transferring supportive precedents established in the courts of England & Wales. Even the important case of *Re Resch*,[119] which originated in New South Wales and established that a hospital could charge fees for its services without compromising its charitable status, was in fact decided by the Privy Council in London. Similarly, the support function traditionally borne by the Attorney General has waned considerably, partially due to the fact that incorporated charities are construed as falling outside the remit of that office.[120]

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[119] [1969] 1 AC 514 (PC).

[120] *Re Inman* [1965] V.R. 258; *Sir Moses Montefiore Jewish Home* v. *Howell and Co, (No.7) Pty Ltd* [1984] 2 N.S.W.L.R. 406 and Victoria, 'Report on Charitable Trusts', Chief Justice's Law Reform Committee, Melbourne, 1965, p. 26; Ford, H.A.J., 'Dispositions for Purposes', *Essays in Equity*, Finn, P. (ed.), Law Book Company Limited, Sydney, 1985, p. 168.

The ATO

The ATO has produced a range of educational materials and rulings on charity definitional matters[121] although it has been fairly conservative compared to the Charity Commission in its policy statements on contested boundaries such as human rights, political advocacy and the boundaries with government.

- *Donation incentives*

In this jurisdiction, income tax is levied at the federal level and there are provisions for taxpayers to claim a deduction for certain gifts made to specified types of non-profit organisations (Deductible Gift Recipients). Generally the deductible amount is uncapped, apart from the restriction that the deduction can only be set off against assessable income, so it cannot create a tax loss. Provisions have been recently introduced for taxpayers to average their gift deduction over five years.[122]

The federal government has since 1999 initiated a series of gift deduction reforms. These reforms widen the range of acceptable forms of gifts to property other than cash which is valued by the ATO at over $5,000, conservation covenants, streamlined administrative procedures for payroll giving and the allowance of US styled private foundations. These new foundations known as Prescribed Private Funds allow families and private individuals to establish charitable trusts which they effectively control, but are also allowed a taxation deduction (in sharp contrast to the IRS approach in the US). Previously a gift deduction was only permitted when the trusts had a publicly controlled board and actually received donations from the general public.

Supplying a service does not fall within any of the gift types. There is no deduction for a gift of a service, as no money or property is transferred to the Deductible Gift Recipient. For example, volunteers' expenses in carrying out voluntary work are not considered tax-deductible.[123]

Testamentary gifts are not deductible, except in respect of cultural bequests. A deduction can be claimed for a quid pro quo transaction in respect of a political and certain minor benefits such as fundraising dinners.

Non-government Agencies

The non-profit sector in Australia has a number of umbrella or apex organizations that do much by way of training and advice to increase effectiveness and raise

[121] Refer to their website for publications such as *CharityPack* and other fact sheets http://www.ato.gov.au and comprehensive taxation rulings on the matters such as TR2005/21 and 22.

[122] Howard, J., 'Community-Business Partnership Develops New Initiatives to Promote Philanthropy', Press Release 30 March 2001, available at http://www.pm.gov.au.

[123] S43 85ATC 343 and Commissioner of Taxation, *Taxation Determination* 93/185.

standards of practice. Some of these are nation-wide charities which have developed a role representing the interests of charities to government as well as promoting proper models of governance and appropriate legal structures for charities while encouraging their use of modern methods of management and administration. Their importance as entities for representing and advocating on behalf of their members was acknowledged in both the 1995 Industry Commission Inquiry into the role of charitable organizations and the Charities Definition Inquiry 2001.

Such organizations are currently operating in an official context that is quite adverse to advocacy and policy development by the sector, as illustrated by the AidWatch case.

Charity Law and Social Policy: The Fit with Contemporary Circumstances

In Australia, the law currently regulating charities and their activities remains essentially as derived from its original common law definitional foundation, subsequently established judicial precedents and the English Act of 1960. Following the recent collapse of the government's extensive law reform process, charity law continues to largely reflect the social policy agenda that originally informed its sources.

The Legal Functions

Charity law in Australia is essentially revenue driven, if by default rather than design. This would inevitably be the consequence of a political decision to leave the ATO as the agency with sole responsibility for determining charitable status and with lead responsibility for applying the legal functions of policing, mediation/adjustment and support. It's a consequence made more emphatic by the fact that the majority of charities in this jurisdiction are incorporated and therefore fall outside the protective function as traditionally applied by the Attorney General. The restricted opportunities for applying the mediation/adjustment function, due to dwindling role of the judiciary and the absence of any equivalent to the Charity Commission, have served to maintain the functional imbalance.

Differential in Functional Weighting

The primacy given to the policing function in Australia forecloses the potential of all other functions. However, its effectiveness has been diluted to some extent by the accompanying lack of efficient methods for giving effect to policing – such as

mandatory requirements following registration to provide a full annual statement of accounts, permit inspection and submit to an activities test etc. It is also more sharply defined and contained by the introduction of a restrictive class of PBI which imposes a cap on tax expenditure; whereas in other jurisdictions the broad class of charity is the gateway to all tax exemptions, this is not the case in Australia (nor in Singapore).[124] The ATO, in comparison with the Charity Commission and the IRS, has been conservative in its stated views on the interpretation of 'benevolence' in the definition of PBI as well as regards the interpretation of 'public benefit' and 'spirit and intendment' in the definition of charity. With neither the resources nor the powers to do much else, the ATO is left with the role of controlling as best it can the tax revenue base and the entitlements to charitable exemption that erode that base. The net effect of this primacy can be seen in a pervading defensive ethos for the practice of philanthropy in this jurisdiction that instills caution in charities and discourages new initiatives.

Perhaps the most important consequence of the overriding importance placed on policing is the complete subordination of the mediation/adjustment and protection functions. The absence of any forum with the capacity and incentive to develop charitable purposes to meet newly emerging and embedded forms of social disadvantage is directly attributable to the relative importance placed on policing. Equally, there has been a progressive diminution in the protection initially extended to charities. As the judiciary and Attorney General withdraw, the duties of trustees become less relevant and uncertainty increases as to the principles governing trusts and incorporated entities and those that distinguish between a charity, PBI and DGR, so the shrinking of the protective function has left the integrity and independence of charities exposed to undermining by private trusts and partnership with government initiatives.

The Functional Imbalance in Charity Law

The Australian government had forced upon it a review of the boundaries of charity as part of a political deal with a minor party to ensure timely passage of its new consumption tax. The report, which finally appeared several years later, provided some promising avenues to reform Australian law and regulation but was never implemented. The draft legislation produced by the government was rejected as it significantly departed from the inquiry report and imposed some potentially adverse restraints on the charitable sector in relation to advocacy, taxation of unrelated business income and other politically motivated regulatory control seemingly targeted at critical green and welfare lobby groups. It also proposed a definitional code which would have swept away the common law base and the ability of the courts to reinterpret the definition of charity.

[124] This, of course, introduces the added complexity of two definitional systems – charity and then PBI (see, further, Chap. 13)

Unlike other countries, the conservative government has chosen to muzzle outspoken elements of the sector rather than enlist the support of charity to accomplish its contemporary social policy objectives, as had occurred in England in 1601, by legislatively specifying as charitable purposes those activities that would augment its social policy agenda. The collapse of that initiative leaves the government with the same agenda as outlined above but without the intended additional charitable purposes and other comprehensive provisions required to redress the existing functional imbalance in charity law and facilitate a better fit between law and social need. In the absence of a further government initiative, there are no factors in the current regulatory environment capable of offsetting the primacy of the policing function as given effect by the ATO and therefore little possibility of achieving the functional adjustment necessary to address more effectively the contemporary social policy agenda. This should not obscure the fact that the net outcome suits those in the federal conservative government who are happy to leave 'traditional PBIs' to deliver assistance to the 'deserving poor' without any power of advocacy as to the causes of poverty etc.

The Resulting Social Policy Deficit

There is a logical and most often a fully intended correlation between the primacy of a legal function and the type of social need addressed by the law comprising that function. In Australia, the philanthropic outcomes for society have been a natural consequence of the primacy given to the policing function in charity law. The withdrawal of the draft Charities Bill in May 2004 means that, at least for the immediate future, there will be little change in those outcomes.

Arguably, the enduring primacy of the policing function in this jurisdiction has served to keep relatively intact its common law social policy legacy, as first articulated in the 1601 Act, at the expense of accommodating more recent manifestations of social need and the associated developments in knowledge and methodology. Four centuries later, this inheritance is still very evident in the operating environment for charity. It can be seen in the continuing strong similarity with the previous nature and ordering of social policy priorities, the supplementary role for charity in assisting government on the latter's terms and in the related institutional infrastructure. The range of organizations delivering charity and the methods they employ are also little changed with religious bodies and agencies allied to government to the fore and relying in varying degrees on the traditional supplicant/benefactor model. In particular, the charity law framework with its established restrictions on accommodating groups and communities bound by a 'blood-link' within the confines of the public benefit test, will continue its failure to adequately address the needs of the Indigenous people.[125] The outcomes

[125] See Martin, F., 'Entities that Manage and Maintain Native Title: Can they be Exempt from Tax as Charitable Trusts?' Paper presented at the Australasian Tax Teachers Conference, Brisbane, 22–24 January 2007.

are also much the same: charity in Australia currently produces essentially the same palliative outcomes as it has done over the centuries.

The social policy deficit, resulting from the enduring primacy of the policing function and compounded by the withdrawal of the draft Charities Bill, can be detected in various ways. The list of seven charitable purposes to be introduced in the proposed Bill provides a good starting point for identifying and estimating the projected shortfall: the advancement of – health, education, social or community welfare (including care of young people), religion, culture, the natural environment and any other purpose that is beneficial to the community. This would have been accompanied by a new statutory definition of 'public benefit' and the introduction of a new administrative agency with a role and responsibilities comparable to those of the English Charity Commission and the capacity to similarly broaden the interpretation of matters constituting a 'charitable purpose' by applying and developing the mediation/adjustment function. It is possible that such a new regulatory regime could have led to the closer alignment between charity law and the contemporary social policy agenda that now exists in England & Wales.

Matters excluded as charitable purposes in the draft Charities Bill also indicate the nature of a future social policy shortfall. In particular the Bill may have disqualified any organization advocating a political party or cause or attempting to change the law or government policy from acquiring charitable status. Such provisions would have strengthened the required convergence between government and charity on matters constituting an agreed social policy agenda, reinforced the muting of dissent from the sector and may well have further threatened the independence and integrity of charities.

The consequences for social policy of leaving definitional matters and the regulatory framework untouched, with the ATO positioned (albeit reluctantly) as gatekeeper to charitable status and lead regulator, continuing to deploy the policing function as its primary mode of engagement with charities, are also not difficult to predict. This deficit will be apparent in the continuing inability of charities to deal with such issues as the causes as well as the effects of poverty, the entrenched multiple deprivation suffered by Indigenous People, the inequitable treatment of 'asylum seekers', the assimilation of those from different non-European ethnic and cultural origins and the development of equitable partnership arrangements between government and charity for public service provision. It will also be evident in the continuance of existing constraints on effective charitable contribution to addressing issues on this agenda due to inappropriate legal structures and methods, lack of consistency between the principles governing trusts and companies etc.

Conclusion

Australia provides a contrast to other jurisdictions with its lack of both significant charity law case development and legislative reform, accompanied by minimal effective regulation through the relevant institutional framework. The corporate form overshadows that of the charitable trust for the bulk of organisations with little practical acknowledgement of the sanctity of charitable purpose. It is a regime with no

appointed central regulator, no requirement for publicly available annual financial statements, but surprisingly few public scandals. In fact, volunteering and philanthropy have been growing apace within a relatively strong economic context over the last decade. Governments have embraced new public management and outsourcing to the charitable sector without any coordinated capacity building, dedicated regulatory agency or meaningful accord with the sector. There is a discernible growth in the consistent use of government power to stifle articulation of policy concerns from the sector and this trend would seem to be influencing the approach of the ATO to charitable status. If anything, and again in contrast with other jurisdictions, the charity law reform process has served to widen the gap between government and sector, increase government readiness to impose controls and stifle the 'voice of the sector' and weaken the base for participative democracy.

These trends are occurring against a social policy background in which the well-established difficulties relating to increased levels of poverty, the marginalization of Indigenous people and tensions between ethnic minorities are competing with more recent problems relating to 'asylum seekers' and the threat of terrorism for government attention. The government's response[126] would seem to be focused more on further retractions to public service and welfare benefit provision while tightening surveillance of the sector and increasing anti-terrorism legislation. In the midst of this, at a time when the contribution of philanthropy and nonprofits to easing social stress is clearly necessary, the government has allowed the charity law reform process to collapse.

The question now arises – Is this a jurisdiction ripe for a string of public scandals caused by a lack of appropriate regulation and capacity building investment for accountability that will erode trust in charities and other such organisations or is it ready to place its confidence in a light touch regulatory regime that other jurisdictions should contemplate?

[126] In November 2007 the national elections brought an end to 11 years of conservative rule and ushered in a new era of Labour government. The indications, from this new government's policy document *An Australian Social Inclusion Agenda* (2007), are that a new period of rapprochement with the sector may now commence. As then stated "rebuilding trust and reciprocity will form the foundation of a new relationship between a Federal Government and the community sector" (p. 11).

Chapter 9
The United States

Introduction

The United States of America (the United States or the U.S.), as the name implies, is a country made up of the various states of the Union.[1] It was originally established as a result of the coming together of a set of 13 disparate colonies of the British Empire and has been defined throughout its history by reliance upon self-governing, not-for-profit institutions. Of all the former British colonies it has the greatest reputation for its citizens being philanthropic in nature and forming associations for religious purposes and to provide essential public goods such as education and health. In terms of the government/charity relationship and resultant social policy, it also provides a stark comparison to the other common law countries considered in this book.

This chapter begins with a brief history of the country, its primary socio-economic indicators, a history of the charitable sector and its current characteristics. It then considers the background to the present relationship between charity and social policy, followed by an outline of the history of the relationship between charity and the law as developed primarily through its case law and legislative milestones. The common law foundations of the charity law framework are examined.

The template of legal functions (see, further, Chap. 3) is then applied to identify and assess the distinctive features of charity law as it has evolved and currently operates in this jurisdiction. The chapter concludes by examining the primary social policy issues and the shortfall, in terms of those issues that are not addressed by contemporary charity law.

[1] The name 'America' seems to have first appeared on a map of what is clearly South America made in 1507 by an "obscure German cartographer" names Martin Waldseemüller. He was apparently misled by the wholly fictitious claims of Amerigo Vespuci that he had discovered such a land (rather than Christopher Columbus, who actually did – in 1492, at least seven years before Vespucci reached the "New World.").

K. O'Halloran et al., *Charity Law & Social Policy*,

Brief History

From the earliest days of the colonies, when the European inhabitants were poor and needed to be remarkably self-reliant in order simply to survive, to the modern era, in which there is more interaction and relatedness between the State and the charitable part of the not-for-profit sector than ever before, the legal and social conditions under which charities have been established have varied considerably according to the times.

Aboriginal Peoples and European Settlements

What is now the territory of the mainland United States (including Alaska) was originally inhabited by Aboriginal peoples,[2] many of whom lived in the northwest and the southwest, gradually migrating to the east, where they first encountered the Europeans who created the 13 colonies that broke away from the British Empire.[3] Unlike in Canada, the Aboriginal peoples tend to be known as Native Americans, and their population groupings as nations or tribes. The first settlements by Europeans[4] occurred in the southern part of what is now the United States (French[5] and Spanish),[6] in the southwest (Spanish),[7] in the east (Dutch[8] and English),[9] and in the northeast to the Great Lakes region (principally French).[10]

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[2] The Hawai'ian people and other Pacific Islanders are also Aboriginals, and their settlement of the Hawai'ian (and other) Islands that became the 50th State of the United States in 1959 probably predates the settlement of the North American continent.

[3] Estimates of the number of Native Americans living in what is now the United States at the onset of European colonization range from 2 to 18 million, with most historians tending toward the lower figure.

[4] Earlier explorations by the Norse did not result in lasting settlements. While Norse sagas suggest that Viking sailors explored the Atlantic coast of North America down as far as the Bahamas, such claims remain unproven.

[5] Louisiana, was purchased from France by the United States when Thomas Jefferson was President, in 1803.

[6] France had established a colony in what became Florida after its first Quebec colony collapsed in the 1540s. Spain destroyed this colony and established the first permanent European settlement in what would become the United States at St. Augustine in 1565.

[7] Spain conquered Mexico in 1522, and from there sent colonizers and priests northward.

[8] Nieuw Amsterdam until 1644, later New York, after being conquered by the British.

[9] The 13 colonies that later became the United States of America.

[10] The French settlements in the Great Lakes region show their influence in the names of certain cities of today, such as Detroit.

The first successful English settlement occurred at Jamestown in 1607,[11] and with it North America entered a new era. The early 1600s saw the beginning of a great tide of emigration from Europe to North America. The interest in religion, which many of them shared, had a deep and important impact on their notions of charity. This is more evident when one considers the different faith traditions in the various colonies (Catholic, Protestant (Puritan, Huguenot, and Dutch Reformed), Anglican, and Quaker) that influenced the beliefs about the role of charity in everyday life.

It is certain, however, that their idea of charity did not extend to much care for the indigenous populations, who were regarded as "savages" and whose communal land it was permissible to take and fence in, leading to numerous clashes between the colonizers and the Aboriginal peoples. In addition, it is certain that European disease had a devastating effect on the indigenous population, practically from the time of initial contact.

Beginnings of Slavery

The first black Africans were brought to Virginia in 1619, just 12 years after the founding of Jamestown. By the 1660s, as the demand for plantation labor in the Southern colonies grew, the institution of slavery began to harden around them, and Africans were brought to America in shackles for a lifetime of involuntary servitude.

Development of Cultural and Educational Institutions

The development in the colonies of both private and public educational and cultural institutions is a significant factor underlying the growth of the sector in the United States. For example, Harvard College was founded by private subscription in 1636 in Cambridge, Massachusetts. Near the end of the century, the College of William and Mary was established in Virginia, and a few years later, the Collegiate School of Connecticut, later to become Yale University, was chartered. Both of these were also private institutions. Benjamin Franklin's endeavors also led to the founding of

[11] A second colony, established in Massachusetts in 1620 under the Mayflower (named after the ship on which they traveled) Compact had a much more successful relationship (at least for a time) with the Native populations. The leader of the colony, John Winthrop, was a strict Puritan, and his sermon (delivered on board the ship bearing him and his fellow Puritans to Massachusetts) called 'A Model of Christian Charity'. See Hammack, D.C. (ed.), *Making the Nonprofit Sector in the United States*, Bloomington, IN, 1998, p. 19.

a public academy that later developed into the University of Pennsylvania. He was a prime mover in the establishment of a subscription library, which he called "the mother of all North American subscription libraries."[12]

Even more noteworthy was the growth of a school system maintained by governmental authority. The Puritan emphasis on reading directly from the Scriptures underscored the importance of literacy. In 1647 the Massachusetts Bay Colony enacted the "ye olde deluder Satan" Act, requiring every town having more than 50 families to establish a secular[13] grammar school (a Latin school to prepare students for college). Shortly thereafter, all the other New England colonies, except for Rhode Island, followed its example.

Self-governance, Confederation and Revolution

In part to provide for the defense measures against Native tribes that England was neglecting, the Massachusetts Bay, Plymouth, Connecticut, and New Haven colonies formed the New England Confederation in 1643. It was the European colonists' first attempt at regional unity, and it came over an issue that had far-reaching consequences – taxes.

The colonists were also influenced by other developments in England, including the Glorious Revolution, whose principal theorist, John Locke, in his *Second Treatise on Government* (1690),[14] set forth a theory of government based not on divine right but on contract. It contended that the people, endowed with natural rights of life, liberty, and property, had the right to rebel when governments violated their rights. Recurring clashes between royal governors and colonial assemblies made the colonists aware of the differences between their interests and those of England, and it became extremely clear in the course of the French and Indian War[15] that those interests diverged sharply.

On May 10, 1775, Congress voted to go to war. The Declaration of Independence, adopted July 4, 1776, not only announced the birth of a new nation, but also set forth a philosophy of human freedom that would become a dynamic force throughout the entire world. The Declaration drew upon French and English Enlightenment political philosophy, but one influence in particular stands out: John Locke's *Second Treatise on Civil Government*.

The events leading up to and during the Revolution had a tremendous impact on all American history thereafter.

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[12] Benjamin Franklin, 'Autobiography,' Hammack, D.C., *op. cit*., p. 70.

[13] This represented a movement away from clergy control of education.

[14] John Locke, *Second Treatise on Civil Government*, available at http://www.constitution.org/jl/2ndtreat.htm.

[15] French and Indian War 1754–1763. This is the North American version of the Seven Years' War in Europe.

Growth Through Settlement and Land Purchases in 18th and 19th Centuries

After the formation of the United States the country lived in relative peace[16] and concentrated on expansion. The Northwest Territory Act 1787 had been passed by the Second Continental Congress, and other states in the area gradually joined the Union. The Louisiana Purchase (from France) in 1803 added vastly more land, and gradually many more states. The United States annexed Texas from Mexico in 1845 and went to war (until 1848) to secure this territory. California also became part of the United States as a result of the Mexican-American War.

Growth of Slavery and the Civil War

As late as 1808, when the international slave trade was abolished, there were many Southerners who thought that slavery would soon end. The expectation proved false, for during the next generation, the South became solidly united behind the institution of slavery as new economic factors made slavery far more profitable than it had been before 1790. Chief among these was the rise of a great cotton-growing industry in the South, stimulated by the introduction of new types of cotton and by Eli Whitney's invention in 1793 of the cotton gin, which separated the seeds from cotton. At the same time, the Industrial Revolution, which made textile manufacturing a large-scale operation, vastly increased the demand for raw cotton.

Soon the rich Northern Sates, with their demands for abolition of slavery for the entire nation and poorer Southern states with concerns about tariffs, were at loggerheads with each other. The Civil War (1861–1864) was the result. Although the Civil War (1861–1864) was a disaster for many people, one positive consequence was the freeing of the slaves with the Emancipation Proclamation issued in January 1863. Subsequently, the 13th, 14th and 15th Amendments to the Constitution (granting full citizenship rights to Negroes (as they were known then) were passed, but nonetheless racial discrimination has had a lasting effect well into the 21st century.

The Industrial Revolution, Growth and Change

Between two great wars – the Civil War and the First World War – the United States came of age. In a period of less than 50 years it was transformed from a rural republic to an urban nation. With this economic growth and affluence came corresponding problems which led to the growth of charities and associations for the betterment of working

[16] The British attempted to re-establish dominance over their former colony in the War of 1812, but were defeated by the U.S. troops.

and living conditions. In addition the great wealth of the owners of steels mills, shipyards, and railroads led eventually to the establishment of the first large philanthropic foundations, such as the Rockefeller Foundation and the Carnegie Corporation.

World War I and the Great Depression

The United States emerged from the war with a sense of becoming a player on the international stage and with a strong commitment to the League of Nations and the use of world power for peace.

The period after the war was also one of economic growth (the 'Roaring Twenties'), at least until 1929, when in October the booming stock market crashed, wiping out many investments. Over the next three years, an initial American recession became part of a worldwide depression. By November 1932, approximately one of every five American workers was unemployed.

The New Deal and World War II

In 1933 the new president, Franklin D. Roosevelt, brought an air of confidence and optimism that quickly rallied the people to the banner of his program, known as the New Deal which represented the culmination of a long-range trend toward abandonment of laissez-faire capitalism that had begun in the late 19th century. The New Deal meant the development of publicly funded programs to assist those who were out of work, the elderly (Social Security was inaugurated at this time), and to find ways to obtain federal funds to make sure that the country would not suffer as badly as it had in the past.[17]

Prior to its entry into World War II on the side of the allies, the United States was profoundly isolationist but it dominated global affairs in the years immediately afterwards; this was the 'American Century'. For 20 years most Americans remained sure of this confident approach. They accepted the need for a strong stance against the Soviet Union in the Cold War that unfolded after 1945 and through the Korean War. They endorsed the growth of government authority and accepted the outlines of the rudimentary 'welfare state' first formulated during the New Deal. They enjoyed a postwar prosperity that created new levels of affluence. But gradually some began to question dominant assumptions. In the 1950s, African Americans launched a crusade, joined later by other minority groups and women, for a larger share of the American dream. In the 1960s, politically active students protested the nation's role abroad, particularly in the corrosive war in Vietnam.

Of these social movements, it is the Civil Rights Movement that was most significant, because it was necessary for the radical change needed to give African-Americans true racial equality. With the landmark Supreme Court decision in *Brown v. Board of Education*[18] the Court signaled its intention, later codified in numerous

[17] Wage withholding was one of Roosevelt's reforms.

[18] *Brown v. Board of Education*, 347 U.S. 483 (1954).

pieces of legislation, that integration in public facilities was going to be necessary for the development of a modern nation. This case has an important impact on charity law, as will be seen in the discussion of various issues found below.

The 21st Century, Terrorism and Human Rights

Everything in the United States and the American people's assumptions about themselves and their country changed irrevocably on September 11, 2001, when the country suffered the most devastating foreign attack ever against its mainland. It was in this setting that the administration obtained passage of the USA Patriot Act on October 26, 2001. Designed to fight domestic terrorism, the new law considerably broadened the search, seizure, and detention powers of the federal government and in November 2002 the Department of Homeland Security was authorized.

There is very little question that human rights have been eroded both in the United States and abroad as a direct result of the terrorist attacks, but the extent of the erosion of rights is difficult to assess at this writing with almost daily disclosures of new developments. When all is said and done, scholarship, such as the 2007 book *The Terror Presidency*, by Jack Goldsmith of the Harvard Law School, will assist in the weighing and sifting of the facts.

A Political and Socio-economic Profile

Alexis de Tocqueville, whose *Democracy in America*, first published in 1835, remains one of the most trenchant and insightful analyses of American social and political practices, had much to say about American associational life. Tocqueville was far too shrewd an observer to be uncritical about the United States, but his verdict about the civic virtues of a society whose citizens were forever forming associations for a wide variety of purposes was fundamentally positive.[19]

Political Overview

The United States is a federal jurisdiction of 50 states and the District of Columbia, each of which has a governor (as chief executive) and a bicameral legislature. The U.S. Constitution of 1789 (as amended), provides for a presidential system of government with a bicameral legislature (the United States Congress). The Federal government, via the Congress, has the power to "lay and collect" taxes as well as a power over interstate commerce.[20] All bills for raising revenue are to originate in the House, under Article 1, section 7.

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[19] Alexis de Toqueville, *Democracy in America* (1835).

[20] See U.S. Const. Art. 1, Section 8, Powers of Congress.

The Tenth Amendment to the Constitution (ratified in 1791) provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The allocation of powers between the federal and state governments thus leaves the taxing power over charities and other NPOs in the hands of the federal government (which is not to say that states do not themselves have taxing power as well), while the state governments retain the common law powers over such organizations. This is true whether a charitable organization is set up as a charitable trust or a not-for-profit corporation – the federal government simply has no powers with regard to such matters.

Population and Composition

The United States is a largely urbanized country with a population of around 300 million people.[21] Population growth is being fueled by net inward migration, even though the general population is aging. Most of the inward migration comes from Latin America and Asia.

As of 2005, about 45% of the children under five were Latino/Hispanic. In 2006, the nation's minority population reached 100.7 million; a year before, the minority population totaled 98.3 million. In 35 of the country's 50 largest cities, non-Hispanic whites are or soon will be in the minority.[22] According to the CIA, the break-down of the current U.S. population is as follows: white 81.7%, black 12.9%, Asian 4.2%, Amerindian and Alaska native 1%, native Hawaiian and other Pacific islander 0.2% (2003 est.).[23]

The National Economy

The economy of the United States had the world's second largest gross domestic (GDP), $13.06 trillion, in 2006,[24] $0.02 trillion behind the European Union.[25] It is a mixed economy with a reasonably high GDP growth rate, a low unemployment rate, and high levels of research and development investment.[26] Economic concerns

[21] CIA estimate July 2007. See CIA *Factbook*, available at https://www.cia.gov/library/publications/ the-world-factbook/print/us.html.

[22] All statistics from Census Bureau website, available at http://www.census.gov/population/pop-profile/dynamic/PopDistribution.pdf. Put another way, Hispanics will constitute 24% of the nation's total population by 2050.

[23] See CIA *Factbook*, available at https://www.cia.gov/library/publications/the-world-factbook/print/us.html.

[24] *Ibid*.

[25] *Ibid*.

[26] See U.S. Labor Department, Bureau of Labor Statistics, available at http://www.bls.gov/eag/eag.us.htm.

include the growing national debt, external debt, entitlement liabilities (enhanced by the size of the post-war "baby boom" generation), consumer debt, a low savings rate, and a large current account deficit.

Low-skill employment is declining in the U.S. economy, and that has had an impact on both the manufacturing sector and the rural economy. It is also important to note that in the goods economy there have been steady gains in the U.S. from information technology (IT) growth, which has enhanced the ability to manufacture at an increased production rate, while diminishing jobs. IT added $2 trillion to the U.S. economy in the past decade, according to a report released in March 2007 by the Information Technology & Innovation Foundation.[27]

Social Policy Issues Raised by the State of the National Economy

Despite the overall wealth of the U.S. economy, the wealth gap in the United States is now greater than it has been at any time since 1929. In 2005, 21.2% of national income accrued to just 1% of earners.[28] The massive income disparities between the unemployed or underemployed segments of the United States population are even more staggering. In 2005, the most recent year of reporting, the Gini coefficient as reported by the U.S. Census Bureau[29] was 0.469, the highest ever.

On the other hand, the Census Bureau reported the following in 2007 (for the year 2006):

> Real median household income in the United States climbed between 2005 and 2006, reaching $48,200.…This is the second consecutive year that income has risen.
>
> Meanwhile, the nation's official poverty rate declined for the first time this decade, from 12.6% in 2005 to 12.3% in 2006. There were 36.5 million people in poverty in 2006, not statistically different from 2005. The number of people without health insurance coverage rose from 44.8 million (15.3%) in 2005 to 47 million (15.8%) in 2006.
>
> At the same time, however, median earnings for men and women continued to fall, an indication that household income rose as a result of more people working longer hours.[30]

Despite the upward trend in median household income, significant issues relevant to the wealth gap include: an increasing number of people lacking health insurance[31];

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[27] See Atkinson, R.D. and McKay, A.S., 'Digital Prosperity: Understanding the Economic Benefits of the Information Technology Revolution', available at http://www.itif.org/index.php?id=34.

[28] See Reich, R.B., *Supercapitalism*, 2007, p. 108.

[29] United States Census Bureau, website available at http://www.census.gov/hhes/www/income/income.html.

[30] These findings are contained in the Census Bureau's *Income, Poverty,* and Health Insurance Coverage in the United States: 2006 report [PDF]. The data were compiled from information collected in the 2007 *Current Population Survey* (CPS) 'Annual Social and Economic Supplement' (ASEC).

[31] Lack of health insurance is, of course, one of the singular problems for the poor in the United States, who lack an effective public safety net when they are ill or seriously injured.

poverty among immigrant and illegal immigrant populations[32]; rural poverty[33]; urban poverty, accompanied by a growing sense that there is a black underclass in the United States[34]; elder poverty[35]; child poverty, including the increasing numbers of children lacking health insurance[36]; and poverty among Native Americans.[37]

The Role of the State Sector in Addressing Various Social Policy Issues

The United States is emphatically not a 'Welfare State'. In fact the welfare systems and health care systems in the country are principally based on employment. For example, the federal government's 'Earned Income Tax Credit' (EITC), as its name implies, is only relevant to the working poor.[38] This tax credit scheme has been called "vital" for the working poor in rural areas by a think tank in New Hampshire.[39]

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[32] According to a report published by the Center for Immigration Studies in November 2007, "The poverty rate for immigrants and their U.S.-born children (under 18) is 17%, nearly 50% higher than the rate for natives and their children." See Camarota, S.A., 'Immigrants in the United States, 2007 A Profile of America's Foreign Born Population', available at http://www.cis.org/articles/2007/back1007.html. The statistics are based on Census Bureau data gathered in March 2007.

[33] Rural areas continued to fare poorly compared with cities and suburbs. While the poverty rate declined 2.7% in metro areas last year, it increased 6.2% elsewhere. See Census Bureau, *op. cit*., note 27.

[34] A study released in November 2007 indicates that African Americans see a widening gulf between the values of middle class and poor blacks, and nearly four-in-ten say that because of the diversity within their community, blacks can no longer be thought of as a single race. See Pew Research Center, 'Blacks See Growing Values Gap Between Poor and Middle Class' (November 2007), available at http://pewsocialtrends.org/assets/pdf/Race.pdf. Bearing this out, the Census Bureau's 2006 statistics indicate that while all racial and ethnic groups gained in median household income, the increase among blacks was minimal. See Census Bureau, *op. cit*., note 27.

[35] The Census Bureau's study indicates that elder poverty was also reduced between 2005 and 2006. According to the statistics, only 9.4% of seniors were in poverty in 2006, the lowest rate ever recorded, surpassing the 9.7% pre-recession rate in 1999. See Census Bureau, *op. cit*., note 27.

[36] According to the Census Bureau's special survey on health insurance, "The percentage and the number of children under 18 years old without health insurance increased to 11.7% and 8.7 million in 2006 (from 10.9% and 8.0 million, respectively, in 2005). … With an uninsured rate in 2006 at 19.3%, children in poverty were more likely to be uninsured than all children." See Health Insurance Coverage Highlights 2006, available at http://www.census.gov/hhes/www/hlthins/hlthin06/hlth06asc.html.

[37] According to the Census Bureau, about one in every five Pacific Islanders and one in every four Indians and Alaska Natives lived below the poverty level in 2006, compared with about one of every ten non-Hispanic Whites. These statistics are for 2004. See Census Bureau, American Community Survey Reports, issued May 2007, available at http://www.census.gov/prod/2007pubs/acs-07.pdf.

[38] The EITC is a refundable tax credit that reduces or eliminates the taxes that low-income married or single working people pay (such as payroll taxes); it also frequently operates as a wage subsidy for low-income workers.

[39] See O'Hare, W. and Kneebone, E., 'EITC is Vital for Working-Poor Families in Rural America', published by the Carsey Institute in Fall 2007, and available at http://www.carseyinstitute.unh.edu/documents/FS_EITC_07.pdf.

It is also important to note that the federal welfare reforms discussed below abolished the national program of Aid to Families with Dependent Children (AFDC) and the JOBS Act, for the non-working poor, and left it to states to structure their own programs. In the State of Maryland, for example, the Family Investment Program (FIP) explains that it "provides for the Department of Social Services to provide cash assistance, work experience, and other services to low-income families with children that qualify for welfare benefits."[40] The abolition of AFDC – a welfare program that was not related to seeking work – was based on views that seeking work should be a criterion for receiving aid. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWROA)[41] (also known as the Welfare Reform Act) initiated the Temporary Assistance to Needy Families (TANF) program.[42] TANF recipients must work or look for work.[43] Since the Act, large numbers of the poor have left or been terminated from the program, with most states' caseloads dropping by 50% over the first few years.[44]

A noteworthy problem of PRWORA is that it provides less training and education than the earlier JOBS program (under AFDC), which means that the "last hired, first fired" recipients have been returning to welfare and the caseloads have been increasing in recent years.

It is difficult to assess whether the "reforms" actually achieved the intended result – more mothers of young children back in the workforce. One scholar, writing in 2002, suggests that post-PRWORA rules compare favorably with their pre-PRWORA equivalents, and particularly positive outcomes can be observed when financial incentives to work are combined with rules requiring strong work efforts. These positive findings are tempered in part by the growing economy of the late 1990s.[45]

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[40] The website of the Family Investment program is available at http://www.peoples-law.org/income/gov-ben/family_investment_program.htm.

[41] Public Law 104–193 (August 1996), available at http://wdr.doleta.gov/readroom/legislation/pdf/104–193.pdf.

[42] The reauthorization of PRWORA in the Deficit Reduction Act of 2005 (S. 1932, available at http://thomas.loc.gov/cgi-bin/query/D?c109:5:./temp/~c109VpIYta::) maintains the original law's requirement that 50 percent of states' welfare caseloads fulfill statutory work requirements. To fulfill work requirements, TANF recipients must be participating for 20 hours per week (or 30 hours in cases where the youngest child is six years old or older) in one or more of the 12 work activities named in the statute.

[43] The federal government also makes food aid available to the neediest in the form of food stamps or supplies to local food banks. See USDA's Food Stamp Program, which is explained at http://www.fns.usda.gov/fsp/.

[44] See Moffitt, R.A., 'The Effect of Pre-PRWORA Waivers on AFDC Case-loads and Female Earnings, Income, and Labor Force Behavior', a report prepared for the Joint Center for Poverty Research at Northwestern University, available at http://ideas.repec.org/p/wop/jopovw/89.html.

[45] See Blank, R., 'Evaluating Welfare Reform in the United States', *Journal of Economic Literature*, 40, 2002, pp. 1105–1166. See also, Schoeni, R.F. and Blank, R., 'What Has Welfare Reform Accomplished? Impacts on Welfare Participation, Employment, Income, Poverty, and Family Structure', available from the Rand Corporation at http://www.rand.org/labor/DRU/DRU2268.pdf, suggesting in 2000 that the reforms had been largely effective.

Health-related welfare programs are available for the poor (Medicaid), the elderly (Medicare) and children (SCHIP). Medicare is a federally funded system[46] of health and hospital insurance for U.S. citizens age 65 or older, for younger people receiving Social Security benefits, and for persons needing dialysis or kidney transplants for the treatment of end-stage renal disease. Medicaid is a medical assistance program jointly financed by state and federal governments for low income individuals. It is a major social welfare program and is administered by the Centers for Medicare and Medicaid Services.[47] The State Children's Health Insurance Program (SCHIP) is jointly financed by the federal and state governments and is administered by the states. Within broad federal guidelines, each state determines the design of its program, eligibility groups, benefit packages, payment levels for coverage, and administrative and operating procedures. The Centers for Medicare and Medicaid also administers this program,[48] which is designed to provide health care benefits to uninsured children who cannot qualify for Medicaid but who are otherwise "low income." Despite the success of SCHIP in removing more than four million children from the ranks of the uninsured, it is possible that federal SCHIP funding that states receive will not be able to keep pace with the rising cost of health care or population growth.[49]

Finally, the United States government has a retirement program called Social Security, which is administered by the Social Security Administration (SSA). Adopted at the time of Franklin Roosevelt's presidency (in 1935),[50] the program is funded by contributions from the current workforce to support old age, survivors, and disability insurance. It is currently troubled by a lack of resources.

The Not-for-Profit or Nonprofit Sector (NPO Sector) – Its Current Role in U.S. Society

The NPO sector in the United States is large. The National Center for Charitable Statistics (NCCS) estimates that there were a total of 1.478 million NPOs in the U.S., in 2006, which represents a percentage increase of 36.2% over 1996. According to research published in 2007 by the Johns Hopkins Center for Civil Society Studies:

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[46] Medicare was enacted in 1965 as one of President Lyndon B. Johnson's 'Great Society' programs. The current version of Medicare can be found at 42 U.S.C. §1395 *et seq*. In 1977 management was transferred to the Health Care Financing Administration (HCFA, since renamed the Centers for Medicare and Medicade Services (*http://www.cms.hhs.gov/*).

[47] http://www.cms.hhs.gov/

[48] For more information on SCHIP, see http://www.cms.hhs.gov/NationalSCHIPPolicy/

[49] See Broaddus, M. and Park, E., 'Freezing SCHIP Funding In Coming Years Would Reverse Recent Gains in Children's Health Coverage', Center on Budget and Policy Priorities, February 2007, available at http://www.cbpp.org/6-5-06health.htm.

[50] The original act covered unemployment insurance as well.

> The nonprofit institutions sector that comes into focus in the NPI[51] satellite accounts is a significant economic force. Including the value added by volunteers, these institutions account for an average of 5 percent of Gross Domestic Product in the eight countries for which satellite account data are available. This varies from a high of 7.3 percent in Canada to a low of 1.3 percent in the Czech Republic. The United States is at 7.2 percent.[52]

The NPO sector in the U.S. works in all fields of endeavor that are related to the charitable purposes recognized in charity law. For example, the NCCS takes note of the following statistics in its 2006 report:

> Currently, 850,455 public charities and 104,276 private foundations are registered with the IRS. In addition, 463,714 other types of nonprofit organizations, such as chambers of commerce, fraternal organizations and civic leagues, are registered with the IRS.[53]
>
> In 2004, nonprofits—including public charities, private foundations, and all other—accounted for 8.3 percent of the wages and salaries paid in the United States.[54]
>
> In addition to these organizations an estimated 377,640 congregations currently serve their communities in the United States.[55]

While the sector itself claims to be 'independent', a very large proportion of its funding comes from the federal or state governments.[56] Writing in 2002, Lester Salamon notes that between 1977 and 1997, government funding for the sector grew by 195%, "proportionally more than any other source."[57] In determining sources of funding, Salamon also says that the percentage of funding increased to all forms of organizations other than religious congregations to 37% in the same time period.[58] But this was, of course, before the Faith-based and Community Initiatives Office was announced by President George W. Bush in 2001.[59] NCCS's findings indicate that "[o]f the nearly $1.1 trillion in total revenues [for 2004], 23% came from contributions, gifts and grants and 71% came from program service revenues, which include government fees and contracts. The remaining 6% came from "other" sources including dues, rental income, special event income, and gains or losses from goods sold.[60]

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[51] "Nonprofit Institutions"

[52] See Salamon, L.M., Haddock, M.A., Wojciech Sokolowski, and Tice, H.S., *Measuring Civil Society and Volunteering: Initial Findings from Implementation of the UN Handbook on Nonprofit Institutions* Working Paper No. 23, Johns Hopkins Center for Civil Society Studies, Baltimore, MD, 2007.

[53] Citing as source: The Urban Institute, National Center for Charitable Statistics, Business Master File 01/06.

[54] Citing as source: The Urban Institute, National Center for Charitable Statistics, Nonprofit Almanac 2007 (Forthcoming, preliminary estimate based on data from the U.S. Bureau of Economic Analysis).

[55] Citing as source: American Church Lists 2006, http://list.infousa.com/acl.htm).

[56] See Salamon, L.M. (ed.), Chapter 1, 'The Resilient Sector', *The State of Nonprofit America*, Washington, DC, 2002, pp. 32–34.

[57] *Ibid*., p. 33.

[58] *Ibid*.

[59] See Executive Order 13199, January 2001. This seeks to provide more federal funding to faith-based organizations that provide traditional charitable services.

[60] The Urban Institute, National Center for Charitable Statistics, Core Files 2004.

The most striking change in the relationship between the State and the charity sector since the middle of the 20th century has been the increase in public funding available for the sector, in all sub-sectors, including health, social services, culture, and education. For example, Chapter IV of the Filer Commission report is entitled "The State as a Major 'Philanthropist.' "[61] In fact, the Commission pointed out that in some areas, the State is "*the* major philanthropist."[62] What that has meant for a sector that is traditionally private and nongovernmental has in some ways had a major impact on the shaping of the social policy agenda in the United States. As the Commission reports, in 1974, the support from government funds amounted to around $25 billion, as opposed to the support from private funds of around $23 billion.[63] The trend in these statistics is borne out in subsequent decades according to the figures and analysis of Lester Salamon[64] and NCCS, as indicated above. Notwithstanding the fact that the growth of mega-philanthropy in the early years of the 21st century will alter the balance somewhat,[65] there is no question that continuing State support of the sector has had a dramatic impact on choices of program and approaches to problems.

The role of charity law, in this context, concerns the way in which the law asserts the predominance of private oversight of the organizations themselves in order the ensure that they do not bend their principles to serve public masters. In addition, as the Filer Commission makes clear, it is important that private support for charities should continue to be made available through the charitable contribution deduction under §170 of the Internal Revenue Code.[66]

Giving and Volunteering

According to a recent study, while nearly six in ten U.S. households routinely contribute to charity, a fairly large proportion – almost a third – give in some years but

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[61] The Commission on Private Philanthropy and Public Needs, named after its Chair, John H. Filer. The Commission for two years, from 1973 to 1975, produced the most far-reaching and detailed report of American philanthropy ever undertaken, published under the title *Giving in America*, 1977.

[62] Filer Commission, *op. cit*., p. 89 (emphasis in original).

[63] *Ibid*.

[64] See Salamon, L., *op. cit*., pp. 25–29.

[65] See *Philanthropy News Digest* (PND), 'Mega-Philanthropy Hits New Highs in 2006', noting that the number of Americans who contributed at least $100 million to charity in 2006 increased to 21. See PND electronic edition, posted on February 20, 2007, available at http://foundationcenter.org/pnd/news/story.jhtml?id=170400025. PND also ran a Special Issue on 'A New Golden Age of Philanthropy?' on January 4, 2007, available at http://foundationcenter.org/pnd/specialissues/content.jhtml?id=165400065. Of course the list was headed by Warren Buffett, who contributed 84% of his $43 billion fortune to charity, with about $31 billion pledged to the Bill and Melinda Gates Foundation. See http://www.berkshirehathaway.com/donate/bmgfltr.pdf.

[66] See e.g., File Commision, *op. cit.*, Chapter VI, 'Broadening the Base of Philanthropy', pp. 123–157, which discusses several possible ways to increase private charitable giving in the United States.

not in others.[67] Conducted by the Center on Philanthropy Panel Study (COPPS) in conjunction with the University of Michigan Institute for Social Research's Panel Study of Income Dynamics, the biannual survey asked the same 8,000 families about their charitable giving in 2000, 2002, and 2004 and found that 68% of the households surveyed donated at least $25 to charity in 2004, the most recent year for which household giving data are available. The survey also found that 56% of households donated during each of the three years, 29% contributed in some but not all three years, and 15% did not contribute at all.

COPPS is believed to be the first survey to examine the proportion of Americans who switch between giving and not giving. "Nonprofits' ability to encourage donors to keep giving is vital to raising needed funds," said Eugene R. Tempel, executive director of the Center on Philanthropy at Indiana University. "Finding that a sizable portion of people who give in one year do not make any gifts at all the following year opens the door to greater understanding of the factors that influence people's giving and what causes those behaviors to change. The more we understand these factors, the more we can help donors, nonprofits, and policy makers understand philanthropy and their roles in shaping it."

According to the statistics of NCCS:

- Approximately 28.8% of Americans over the age of 16 volunteered through or for an organization in 2005. This proportion has remained relatively constant since 2003 after a slight increase from 27.4% to 28.8% in 2003.[68]
- Charitable contributions by individuals, foundations and corporations reached $248.52 billion in 2004, an increase of 2.3% from 2003 after adjusting for inflation.[69]
- Individuals gave $187.92 billion in 2004, an increase of 1.4% from 2003 after adjusting for inflation.[70]
- In 2004, religious organizations received the largest proportion of charitable contributions, with 35.5% of total estimated contributions going to these organizations.[71]
- Educational institutions received the second largest percentage of charitable contributions, with 13.6% of total estimated contributions going to these organizations.[72]

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[67] See the Center on Philanthropy at Indiana University http://philanthropy.iupui.edu/ <https://mail.cua.edu/exchweb/bin/redir.asp?URL=http://philanthropy.iupui.edu/> Further, at 'Majority of U.S. Households Give an Average of $2,045 to Charity, New Study Shows.' Center on Philanthropy at Indiana University, Press Release 12/04/07.

[68] Citing as source: *Current Population Survey*, September 2005 Supplement, found at http://www.bls.gov/news.release/volun.toc.htm

[69] Citing as source: *Giving USA 2005*.

[70] *Ibid*.

[71] *Ibid*.

[72] *Ibid*. Other research indicates that 63% of all gifts of $10 million or more go to mainly private educational institutions, while over 80% of college students attend public universities. See Tobin, G., Karp, A., and Weinberg, A., *American Mega-Giving: A Comparison to Global Disaster Relief*, available at http://www.jewishresearch.org/v2/reportsPhilanthropy/MegaGift.Report.Final.pdf.

- Contributions to human service organizations, which accounted for 7.7% of total estimated contributions, declined for a third year in a row, dropping by an inflation-adjusted 1.1% in 2004.[73]

Charity and Social Policy: An Overview

Role of the Aboriginal Peoples

Aboriginal peoples, including Native American and Alaskan Natives as well as Pacific Islanders have inhabited the area that is now United States for thousands of years and have their own diverse histories. The cosmology of some Aboriginal cultures contributed to the communal holding of land and hence to the responsibility of the community for all its members.[74] Some researchers suggest, for example, that the Northwest Coast potlatch indicates "that Native Americans were traditionally suspicious of accumulations of wealth and sought to disperse or destroy personal property upon the death of its owner or distribute it to those in need."[75]

It is only recently, when more attention has been given to Native American traditions, that the American culture has begun to absorb the true meaning of Native traditions of charity as a part of the culture of the United States.

European Influences

Although the European settlers came with their own notions of charity, one can easily see from the sermon by John Winthrop, who was a strict Puritan, called 'A Model of Christian Charity',[76] that his views and those of his compatriots did not extend charity to non-Christians, such as the Native American tribes they encountered when they arrived in what became the Massachusetts Bay Colony. Other faith traditions, such as the Quakers, were presumably more interested in having good relations with the Aboriginal peoples. The problems that arose in the settlement process, including disease and displacement, made it difficult to achieve an early American notion of charity unless the Native peoples converted to Christianity.[77]

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[73] *Ibid*.

[74] See Berry, M.L., 'Native-American Philanthropy: Expanding Social Participation and Self-determination', available at http://www.cof.org/files/Documents/Publications/Cultures_of_Caring/nativeamerican.pdf, 43 ff.

[75] See for example, Kidwell, C.S., 'Indian Giving', a paper delivered at the Researchers Roundtable Seminar of the Council on Foundations, 1989, available at http://www.cof.org/files/Documents/Publications/Cultures_of_Caring/bibnaam.pdf.

[76] See Hammack, D., *op. cit*., p. 19.

[77] The same can be said of the Catholics who settled New Mexico.

Louisiana, a former French colony, is the one U.S. jurisdiction that follows the civil law. Yet the civil law traditions of France with regard to charity have given way to the predominant English influenced 'charity law'.

The Revolution, the Constitution, and Their Impact on State and Federal Involvement with NPOs

The Tenth Amendment to the Constitution (ratified in 1791) provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This means that states are left to determine matters with regard to charities, and they set abut doing so immediately after independence.

One of the most interesting historical artifacts of the system of charity law in the United States is that the early history associated with declaring independence from Great Britain had a significant impact on the current almost exclusive use of the charitable corporation as the legal form for charitable entities in the United States. In some states[78] (which are described as a minority group by Carl Zollman, an early chronicler of the law of charity in the United States),[79] the repeal of English legislation at the time of the Revolution was thought to extend to the Statute of Charitable Uses or Statute of Elizabeth,[80] thereby rendering all charities established in the newly founded states null and void. This determination was made by the United States Supreme Court in the case *Philadelphia Baptist Ass'n v. Hart*.[81] Given that many state legislatures had already begun specially chartering both religious and secular charities, this development led to the clear preference in the minority states for the use of charitable corporations as opposed to charitable trusts.[82]

In the other group of states (the majority), Zollman suggested in 1924 that "the English charity rule is in force …though its legal foundation is not by any means the same in all or even in a majority of them."[83] In these states as well, the preference for charitable corporations (as opposed to charitable trusts) became evident early on.[84] Despite some fear that corporations might become too autonomous,[85]

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[78] As indicated previously, the Tenth Amendment to the Constitution allocates power over charities to the States.

[79] Zollman, C., *American Law of Charities* (Milwaukee, 1924) (hereinafter American Law of Charities). See also Miller, *Legal Foundations, op. cit*.

[80] Stat. 43 Elizabeth I, c. 4 (1601).

[81] 17 U.S. (4 Wheat.) 1 (1819).

[82] Zollman, *American Law of Charities*, *op. cit*., pp. 20–46.

[83] *Ibid*., p. 70.

[84] See Neem, J.N., 'Politics and Origins of the Nonprofit Corporation in Massachusetts and New Hampshire, 1780–1820', *Nonprofit and Voluntary Sector Quarterly*, 32: 3, 2003, pp. 344–365.

[85] Miller discusses at length the difference in attitude toward corporations in Pennsylvania, a "majority" state and Virginia, the leading "minority state. See Miller, *Legal Foundations*, *op. cit*., Chap. 5.

the acceptance of the corporate form was essential to allowing charitable corporations to be free from state control and hence gave recognition to the new principles of electoral democracy. The Supreme Court decision in *Dartmouth College v. Woodward*[86] makes this clear, relying as it does on the notion that the state must respect the personal and property rights set down in the college's charter. Although state legislatures had been incorporating charitable corporations for special purposes (including the charters granted to Harvard and Dartmouth Colleges by the legislatures of Massachusetts and New Hampshire respectively), the *Dartmouth College* case showed that despite the special charters, such institutions are private and not subject to the control of powerful elites.[87]

As time went on, various states developed general incorporation statutes for both business corporations and not-for-profit (or nonprofit) corporations. The principal difference is, of course, the non-distribution constraint, which has been called the "single most important legal feature" distinguishing the two.[88] Although some states do permit certificates of membership, which are sometimes called "stock," these do not entitle the holder to distributions of profits either currently or upon dissolution of the entity.[89]

The prevalence of the corporate form for charities in the United States has had little impact on social policy per se. It has, however, been relevant to the development of institutionalized philanthropy which is such a large part of today's charity culture in the United States. In fact, the model of the business corporation appealed to the founder of the Rockefeller Foundation, who established it in 1913, partly because it would exist in perpetuity as an entity[90] whose mission was to "promote

[86] *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

[87] The case involved a shift of political power in the state of New Hampshire and an attempt by the newly elected legislature to change the board of trustees of the college. It is nicely detailed in Professor Neem's article.

[88] See Irish, L.E., Kushen, R., and Simon, K.W., *Guidelines for Laws Affecting Civic Organizations* (2nd ed.), New York, 2004, p. 47.

[89] There have been attempts to develop consistent approaches to not-for-profit corporation laws in the 50 states and the District of Columbia, but they have made little progress in achieving their goals. This is particularly troublesome with regard to the rules that apply to corporate governance, which in many states are quite lax. See generally, Fremont-Smith, M., *Governing Nonprofit Organizations*, Cambridge, 2004. In response to the perceived need to reform governance of these institutions, the American Law Institute has begun a project to develop what it calls 'Principles of the Law of Nonprofit Organizations' (see infra).

[90] The term 'benevolent trusts' was coined by Rockefeller, J.D., in his *Random Reminiscences of Men and Events*, Doubleday, Page and Company, New York, 1909, pp. 186–188. He used it to indicate that combinations were occurring in philanthropy as in business. See also, Dobkin Hall, P., 'An Historical Overview of the Private Nonprofit Sector' *The Nonprofit Sector – A Research Handbook*, Powell, W.W. (ed.), New Haven, 1987, p. 12. See generally, Karl, B.D. and Katz, S.N. 'The American Private Philanthropic Foundation and the Public Sphere, 1890–1930', *Minerva* 19, 1981, pp. 236–270.

the well-being of mankind throughout the world."[91] Indeed it is unlikely that either the 'private'[92] U.S. foundations or the community foundations[93] that have become so prevalent in recent years as vehicles for "donor-advised funds"[94] would exist without the use of the corporate form.

Current Social Policy Themes and Charity Law

The pattern of social policy themes currently forcing the pace and direction of change in the charity law of the United States is a product of two competing sets of pressures. One set is that typical of modern developed nations, including their need to participate in foreign aid and assistance to poorer countries. The other set of pressures arises from the country's own particular domestic circumstances, as described above.

Poverty and Inequality

Both the states and the IRS view addressing poverty and inequality as one of the most important goals of charity law in the United States.[95] There is an inherent tendency for many Americans to think that private organizations and individuals

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[91] See Rockefeller Foundation website, available at http://www.rockfound.org/about_us/about_us.shtml. Interestingly the Rockefeller Foundation was incorporated by special charter from the New York legislature (see Freund, E., 'Legal Aspects of Philanthropy', *Intelligent Philanthropy*, Faris, Laune, and Todd (eds.), Chicago, IL, 1930, p. 160.

[92] This term was coined by the Tax Reform Act of 1969, which distinguished such entities from 'public charities'. A useful description of what they do and the current issues with regard to them can be found in Lenkowsky, L., 'Foundations and Corporate Philanthropy', Salamon, *op. cit*., pp. 355–386. Fremont-Smith, M. also discusses the developments leading up to the 1969 Tax Reform Act and the outcomes in terms of greater regulation of private foundations. See Fremont-Smith, M., *op. cit*., pp. 71–84.

[93] The Cleveland Foundation is the oldest of these foundations dedicated to supporting local communities. See Cleveland Foundation website, available at http://www.clevelandfoundation.org/page19868.cfm. Peter Dobkin Hall points out that local boards of trade and civic federations helped to support the development of such foundations, which he calls, "a rationalization and centralization of the charitable resources of communities" (see Dobkin Hall, P., *op. cit*., p. 13).

[94] A donor-advised fund (DAF) is "any separately identified fund or account owned and controlled by a sponsoring organization such as a community foundation or other public charity if the donor has or expects to have advisory privileges over distributions of amounts from the fund. DAFs have come under increasing scrutiny and were the subject of legislation under the Pension Protection Act 2006 (PPA), PL 109-280, August 2006, available at http://waysandmeans.house.gov/media/pdf/taxdocs/pensiontextpt1.pdf.

[95] See text below.

should be the ones – rather than the State – to deal with these issues. This general notion was perhaps best exemplified by President George H.W. Bush in his 1989 inaugural address, where he spoke of "a thousand points of light, of all the community organizations that are spread like stars throughout the Nation, doing good."[96] This attitude continues to be a leitmotif for the delivery of social services in the United States.[97]

Homelessness

As many as 3.5 million people experience homelessness in a given year (1% of the entire U.S. population or 10% of its poor), and about 842,000 people in any given week.[98]

Welfare Reform

The current situation with regard to welfare and back to work programs indicates that there is a shortfall in the safety net, which many NPOs and charities seek to meet. Working together with state welfare agencies, NPOs are often called upon to provide basic services to assist those who are unable to find jobs. What is known as 'Charitable Choice' originated with section 104 of PRWORA[99] in 1996. The purpose of s 104 is to allow states to contract with charitable, religious or private organizations, when they (the state) enter into purchase of service agreements or voucher arrangements with non-governmental organizations under Temporary Assistance for Needy Families (TANF). Charitable Choice also applies to Supplemental Security Income (SSI) and to the food stamp and Medicaid programs to the extent that the state uses contracts or vouchers with non-governmental providers.

Aboriginal Peoples

Although federal and state governments provide a significant amount of social services to Native Americans, many of the services are available principally through

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[96] George H.W. Bush, 41st President of the United States, 'Inaugural Address', January 20, 1989. It is, however, clear that many of these community organizations addressing social policy issues can do so only because they receive large grants or contracts with state (and federal) agencies, which are outsourcing work in the fields for which they are responsible.

[97] See Community Solutions Act 2001 (which never became law), H.R. 7 2001, available at http://www.publicpolicy.umd.edu/puaf650-Fullinwider/Charitable%20Choice2.htm.

[98] See 1996 *National Survey of Homeless Assistance Providers and Clients* (NSHAPC).

[99] Discussed above in text.

tribal governments and/or NPOs. For example, the United Indians of All Tribes Foundation provides services in critical areas, such as education and training, community development, healing and wellness, youth and family services.[100] They also focus on issues related to arts and culture, which are important if tribal identities are to survive. Such organizations may, for example, be financed by local community foundations, as is the case with the United Indians of All Tribes Foundation.

Other social service providers for Native Americans are financed by casinos owned by tribes or nations. The Choctaw Nation, for example, has several casinos that provide it with resources.[101] The Choctaw Nation also runs the Choctaw Nation Health Services Authority, which is described as "[t]he best rural health care system in America; providing services to the Choctaw Nation and Native American Tribes of Oklahoma."[102]

Violence Against Aboriginal Women

The National Organization of Women (NOW) issued a report in 2001, based on a Department of Justice report which found that:[103]

> Native American women experience the highest rate of violence of any group in the United States. A report released by the Department of Justice, American Indians and Crime, found that Native American women suffer violent crime at a rate three and a half times greater than the national average. National researchers estimate that this number is actually much higher than has been captured by statistics; according to the Department of Justice over 70% of sexual assaults are never reported.
>
> As women of color, Native Americans experience not only sexual violence, but also institutionalized racism. Alex Wilson, a researcher for the Native American group Indigenous Perspectives, found a high level of tension between law enforcement and Native American women, who report numerous encounters where the police treated the women as if they were not telling the truth.

The source of the widespread domestic violence against Native American women is unclear. Some point to alcoholism on reservations;[104] others, particularly in Hawai'i

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[100] See United Indians of All Tribes Foundation homepage, available at http://www.unitedindians.com/programs.html.

[101] These are described at http://www.choctawcasinos.com/.

[102] See http://www.choctawnationhealth.com/.

[103] See Bhungalia, L., 'Native American Women and Violence', available at http://www.now.org/nnt/spring-2001/nativeamerican.html.

[104] For example, Mark Anthony Rolo, an enrolled member of the Bad River Ojibwa and a former Washington correspondent for Indian Country Today, wrote in 1999, 'A Native teen's chance of dying from alcoholism is seventeen times higher than a teen from another race'. Rolo also notes that along with diabetes, obesity, mental illnesses, and suicide, alcoholism is one of the major causes of death for Native peoples today. See also, Falcon, J., 'Alcoholism, the Reservation, and the Government', August 15, 2005 American Chronicle, available at http://www.americanchronicle.com/articles/viewArticle.asp?articleID=1878.

to colonialism,[105] but, whatever the source, this is an issue in which charities have become involved as advocates and service providers (e.g., abused women shelters).

Illegal Immigration

According to the Center for Immigration Studies, since 2000, 10.3 million immigrants have arrived in the United States — the highest seven-year period of immigration in U.S. history. More than half of post-2000 arrivals (5.6 million) are estimated to be illegal aliens.[106] Because illegal immigration by Hispanics/Latinos is such a highly charged political issue, there is a need for charities to respond both in terms of pro-immigrant education and advocacy and in terms of relief[107] and service provision (language training, etc.)

Human Rights, Terrorism, and Social Justice

- *Human rights*

The United States Constitution as amended contains an important 'Bill of Rights' (the first ten amendments) as well as other provisions (such as the 13th Amendment abolishing slavery and the 19th Amendment granting women the right to vote). The United States has signed and ratified the International Covenant on Civil and Political Rights (albeit with significant "reservations, understandings and declarations"). It has not signed the Optional Protocol nor has it signed the American Convention of Human Rights.

Despite its unwillingness to subject itself or its officials to scrutiny under human rights instruments, the United States claims that it is a country that protects human rights and feels that it can criticize other countries for their human rights records on an annual basis.[108] Against this background it is difficult to square the position of the George W. Bush administration that it has the right to use extreme methods of interrogation of terrorists with any notion of what is actually a 'human' right, but the United States has always been full of contradictions.

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[105] This theory is disputed by a young scholar in a paper published on the web (see Kanuha, V.K., 'Colonialization and Violence Against Women'), available at http://www.apiahf.org/apidvinstitute/CriticalIssues/kanuha.htm.

[106] Center for Immigration Studies, *op. cit*.

[107] On December 4, 2007, Catholic Charities of Baltimore signed a formal Consortium Agreement with the leaders of St. Joseph Medical Center, Johns Hopkins Medicine, and St. Agnes HealthCare to develop a Health Services Center to focus on the needs of Hispanic and immigrant people who have no health care coverage. See *Catholic Charities News Release*, available at http://www.catholiccharities-md.org/news/HealthServicesInitiative.html.

[108] The U.S. Department of State issues annual 'Human Rights Country Reports', which are available at http://www.state.gov/g/drl/rls/hrrpt/.

- *Terrorism*

In response to the attacks of September 11, 2001, three different pieces of legislation/regulation of interest to charities were developed by government and Congress. These include:

- Executive Order 13224
- The USA Patriot Act
- The Treasury Department's Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities

The USA Patriot Act was reauthorized in 2005/2006.

All of these obviously have an impact on charities operating both in the United States and abroad – civil liability under the USA Patriot Act is a threat to charities and private organizations whose funds end up in the hands of terrorists. And failure to comply with the "voluntary" guidelines is also cause for concern and may well have a chilling effect on the way in which charities operate outside the United States.[109]

- *Social justice*

A lack of social justice in health can be seen as a risk factor for increased illness, disease (morbidity) and mortality. Creating a health care system that is congruent with the goals of social justice appears to have the potential to contribute to the wellbeing of all Americans. But such a system is clearly lacking in the United States.

Another important social justice issue in the United States has to do with race. Given the history of the United States, slavery, and the Civil War, it is clear that the issue of race would always be important in the development of social policy from the 1860s onward.

Foreign Aid

The U.S. system of direct foreign aid is also supplemented by an enormous amount of indirect foreign aid, where government agencies outsource operations to domestic charities, such as Freedom House, World Learning, etc. The Revenue Act of 1935 first restricted the deductibility of donations to such organizations by corporations and required that funds donated be used domestically.[110] This was extended to

[109] For an extensive analysis of these provisions up through the 2005 reauthorization of the USA Patriot Act, see Ramos, E. and Nichols III, C.E., 'Legal Dimensions of International Grantmaking: The USA Patriot Reauthorization Act, Treasury Guidelines, and Executive Order 13224: An Update on Implications for Grantmakers', available at http://www.cof.org/members/content.cfm?itemnumber=6420#4.

[110] See Revenue Act of 1935, Pub. Law 74-407, §102 (r), 49 Stat.1014 (1935).

individuals in 1938,[111] and it remains the policy with respect to direct donations to overseas charities to this day. On the other hand, individuals – but not corporations[112] – are entitled to deduct contributions to any charities set up in the United States but working to provide poverty relief and humanitarian assistance outside the United States. The Treasury Regulations so provide[113] and the 1980 Tax Court case *Bilingual Montessori School of Paris v. Commissioner*[114] upheld the principle. The IRS has ruled favorably with regard to both *religious and secular organizations that engage in poverty alleviation activities in foreign countries*. These include such giants as CARE USA, Catholic Relief Services, American Jewish World Service, Save the Children USA, and World Vision, along with smaller agencies.

In addition, domestic private foundations are permitted to make grants to charities outside the United States as long as they either exercise "expenditure responsibility" or making an equivalency determination (that the foreign organization is the equivalent of a domestic charity). Many large philanthropic organizations in the United States, such as the Bill and Melinda Gates Foundation, the Ford Foundation, and the Open Society Institute have significant foreign operations.

Charity and the Law

The IRS has made several courageous expansions of the concept of charity to meet social policy needs of the maturing American society, which will be discussed in the following substantive sections. Although some of these have represented compromises that not all segments of society have been comfortable with,[115] they nonetheless suggest that by using its power to issue published Revenue Rulings and otherwise, the IRS has expanded the scope of charity law in a fairly progressive manner.

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[111] See Revenue Act of 1938, Pub. Law 75-554, §23 (o), 52 Stat. 447 (1938).

[112] This restriction is strange given the significant role of corporations in relief activities generally (see Dobkin Hall, P., *op. cit*., pp. 13–18). See Chang, J., Goldberg, J., and Schrag, N., 'Cross-Border Charitable Giving', available at http://www.law.nyu.edu/ncpl/libframe.html. It remains present in Section 170 (c) (2). However, most corporations get around the rule by setting up corporate foundations (incorporated separately). See Rev. Rul. 69-80, 1969-1 C.B. 65.

[113] See Treas. Reg. §1.170A–8(a)(1). There is a conflict between the rules permitting a deduction to domestic relief organizations and those qualifying as 'friends of' organizations.

[114] 75 T.C. 480 (1980).

[115] There was, for example, a progressive backlash against the IRS's move to the 'community benefit' standard for hospitals in Rev. Rul. 69-545, 1969-2 Cum. Bull. 117. See *Eastern Kentucky Welfare Rights Organization v. Simon*, 306 F. 2d 1278 (DC Cir. 1974), discussed infra. (The case was never decided by the Supreme Court on the merits because the plaintiffs were held to lack standing to challenge the IRS's change in position.)

The Relationship Between Law and Charity: An Overview

One of the principal features of the current system of charity law in the United States is the predominance of the U.S. Treasury Department and the Internal Revenue Service in making decisions with regard to what is charitable.[116] Although state courts continue to play a role in this regard,[117] the Employee Plans and Exempt Organizations (EE/EO) Division of the IRS makes most of the decisions about what constitutes a charity.

The Common Law: Definitional Matters

As in other common law jurisdictions, it is the four 'heads' of charity set out by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax Act v. Pemsel*,[118] that generally govern the current definition in the United States, but in much looser form than in other jurisdictions. The IRS applies the Internal Revenue Code categories of organizations exempt from tax under Section 501 (c) (3),[119] whereas state courts tend to look at broader definitions of not-for-profit purposes for a State level determination of whether a corporation is an organization that deserves to be recognized as a charity or other beneficial non-business organization. State courts also must decide whether provisions of charitable trusts will be enforced.

The state laws permitting incorporation of not-for-profit organizations are basically of three types:

- The California model,[120] which is also the model used in the Revised Model Nonprofit Corporation Act (RMNCA)[121] (this permits an organization to choose to call itself a "public benefit" organization).

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[116] Both the Treasury Department and the IRS are involved with setting tax policy regarding charities. The Treasury issues regulations, which are more general, while the IRS issues Revenue Rulings, which are pubic documents describing how the IRS will treat various types of organizations or transactions. The Treasury Regulations under §501 (c) (3) of the Code have been said to virtually codify the Statute of Elizabeth categories of charity, as interpreted by Lord Macnaghten in *Pemsel*'s case. See Fishman, J.J. and Schwarz, S., *Nonprofit Organizations, Cases and Materials* (3rd ed.), New York, 2006, p. 358.

[117] State courts generally become involved in determining whether the organization qualifies for a state property tax exemption as a charitable organization, and they have tended to interpret charity broadly. See generally, 'Developments in the Law – Nonprofit Corporations', 105 *Harv. L. Rev*., 1578, 1634, 1992.

[118] [1891] A.C. 531 (H.L.).

[119] Section 501 (c) (3) lists the following charitable purposes: religious, charitable, scientific, testing for public safety, literary, educational, amateur sports (under certain circumstances), and the prevention of cruelty to children or animals. For more on the role of the IRS, see text below.

[120] See California Corporations Code, Title 1, Division 2, Nonprofit Corporation Law, §5111, available at http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=corp&codebody=&hits=20.

[121] American Bar Association, Revised Model Nonprofit Corporation Act, Art 2.02 (a) (2) (1987), available at http://www.muridae.com/nporegulation/documents/model_npo_corp_act.html. It should be noted that the ABA is considering revising the revised model once again.

- The New York model,[122] which requires certain types of organizations to obtain permission from various state agencies before the Secretary of State will incorporate them.
- The model used by the vast majority of states, in which there is a listing of many different types of not-for-profit activities, going beyond the bounds of what is "charitable" at common law.[123]

Despite the U.S. distinctiveness with regard to charity law, the *Pemsel*[124] quadripartite division is nonetheless useful, with some nuances that will be amplified in the following paragraphs.

Application of the Public Benefit Requirement

The idea that a charity must benefit the public or a substantial segment thereof was carried over from English law into American law, where it finds it first confirmation in *Jackson v. Phillips* in 1867. The Supreme Court of Massachusetts there made it clear that "a charity in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons…"[125] This requirement has been picked up by the IRS in various determinations.[126] The requirement can also be described as one involving the need for a "charitable class."[127] Proposed regulations under §501(c)(3) provide examples of the difference between serving a public as opposed to a private interest.[128]

Political Activities

In 1919 the Treasury issued a regulation holding that "associations formed to disseminate controversial or partisan propaganda are not educational within the meaning

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[122] See New York Not-for-Profit Corporation Law, available at http://public.leginfo.state.ny.us/menugetf.cgi?COMMONQUERY=LAWS.

[123] See e.g., Illinois General Not for Profit Corporation Act, §103.05, which lists 32 purposes, including some that are clearly not charitable in the common law sense (benevolent, for example). This law is available on the website of the Illinois General Assembly at http://www.ilga.gov/LEGISLATION/ILCS/ilcs2.asp?ChapterID=65.

[124] *Pemsel, op. cit*.

[125] *Jackson v. Phillips*, 14 Allen (Mass.) 539, 556 (1867).

[126] See Staff of the Joint Committee on Taxation, 'Historical Development and Present Law of the Federal Tax Exemption for Charitable and Other Tax-Exempt Organizations' (JCX-29-05), April 19, 2005.

[127] See Korman, R., 'Charitable Class and Need: Whom Should Charities Benefit?', available at http://www.law.nyu.edu/ncpl/library/publications/Korman2002.pdf.

[128] See Prop. Reg. §1.501(c)(3)–1(d)(1)(iii).

of the statute."[129] This was applied in a variety of cases, which the government did not always win. Nevertheless, its victory in *Slee v. Commissioner*,[130] signaled that its position was well-regarded by the courts. In an opinion by Judge Learned Hand, the Second Circuit Court of Appeals held that the American Birth Control League was not entitled to tax exemption as it was not operated exclusively for charitable purposes, because it disseminated "propaganda" to legislators and the public supporting the repeal of birth control laws. This position was further strengthened by the new version of the predecessor to §501 (c) (3) enacted in 1934, which prohibited more than insubstantial lobbying by charitable organizations and by the further introduction in 1954 of an absolute prohibition on "electioneering."[131] One of the persistent criticisms of charity law is the extent to which it restricts advocacy by charities. This traditional limitation on what charities can do in terms of advocacy is embodied in two parts of §501(c) (3) – the restriction on lobbying ("no substantial part" of the activities of an organization may constitute "carrying on propaganda, or otherwise attempting to influence legislation") and the absolute prohibition on engaging in election-related activities "on behalf of (or in opposition to) any candidate for public office." Although exempt charities may elect to use a quantitative test, set out in §§501 (h) and 4911, for the purpose of staying within the limits of permissible lobbying activities, applying the rules is extremely complicated and thus provides little comfort unless an organization is going to engage in a highly visible campaign.

Nevertheless there is a very interesting way in which tax exempt charities can avoid the restrictions, although they will not be entitled to finance their lobbying efforts with tax deductible contributions.[132] The question of whether the Code's denial of §501(c)(3) status to organizations that engage in substantial lobbying was presented to the Supreme Court in *Regan v. Taxation With Representation of Washington, Inc*.,[133] where the organization in question claimed that such a rule violated the First Amendment's free speech clause. Holding that Congress was well within proper bounds when it decided not to subsidize lobbying by tax exempt charities, the Court[134] nonetheless made clear that the case survived First Amendment scrutiny in part because of the alternative available. The IRS administers the Code so as to permit an exempt charity to establish a parallel or sister non-charity social welfare organization[135] to carry out its purposes while at the same time not being

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[129] See Treas. Reg. 45, art. 517 (1919 ed.)

[130] 42 F. 2d 184 (2d Cir. 1930).

[131] This is said to have been inserted, by the then Senator Lyndon Johnson, as the 1954 Code went to the Senate floor because of his personal pique with an exempt organization that had campaigned against him. See Hopkins, B.R., *The Law of Tax-Exempt Organizations* §21.1 (a) (8th ed.), 2003. The legislative history of the provision is entirely silent as to its intent. See 100 Cong Rec. 9604 (1954).

[132] The rule described in this section has an exact counterpart in Canada (see, further, Chap. 12).

[133] *Regan v. Taxation With Representation of Washington, Inc*., 461 U.S. 540, 103 S. Ct. 197 (1983). The organization will be referred to as TWR.

[134] The concurring opinion, by Blackmun, J., is much stronger on the point that the First Amendment requires the IRS to administer the Code provisions in this manner. *Ibid*.

[135] Exempt from tax under §501 (c)(4) but not a charitable organization for purposes of §170.

subject to the lobbying restrictions applicable to charities. Thus, TWR could set up a lobbying organization as long as it made sure that the tax deductible contributions to the charity did not subsidize the lobbying activities of that organization.[136]

The theory of the case was further extended in *Branch Ministries v. Rossoti*,[137] where the court discussed the fact that an intricate structure would also make it possible for the church in question not only to set up a lobbying arm but also to endorse or oppose candidates for public office by having the lobbying organization, exempt from tax under §501(c)(4), set up a political action committee. The latter is also en exempt organization under §522 of the Code, but neither it nor the lobbying arm or sister organization could receive contributions that are tax deductible under §170 of the Code. Although this elaborate set of structures undoubtedly creates more work for lawyers, it is also a successful response to limitations on lobbying and electioneering.[138]

The most recent foray of the IRS into the minefield of partisan political activities was Rev. Rul. 2007–44.[139] It sought to make distinctions between various factual situations, including voter education and get out the vote drives, individual activities of organization leaders, candidate appearances, etc.

Business Activities

In a 1924 case, *Trinidad v. Sagrada Orden*,[140] which the IRS lost, the Supreme Court interpreted the income tax exemption to apply to income earned on both investments and business activities of a religious order, stating quite clearly what came to be known as the destination of income test:[141]

> [Charitable] activities cannot be carried on without money; and it is common knowledge that they are largely carried on with income received from properties dedicated to their pursuit. This is particularly true of many charitable, scientific and educational corporations and is measurably true of some religious corporations. Making such properties productive to the end that the income may be thus used does not alter or enlarge the purposes for which the corporation is created and conducted.

From that time on, the tax laws permitted charities to engage in income-seeking activities for their support, and it was not until 1950, when Congress enacted the

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[136] *Taxation with Representation*, *op. cit*.

[137] *Branch Ministries*, 211 F. 3rd 137 (D.C. Cir. 2000).

[138] *Branch Ministries* is an interesting case – the church had taken out a full-page advertisement in several daily newspapers urging people to vote against the then Governor Clinton because his position on certain issues "violated Biblical precepts." Although the church lost its tax exempt status, the court seemed to delight in pointing out how it (and other similar organizations) could go about doing everything they wanted short of using tax deductible money to finance their lobbying and electioneering activities.

[139] Rev. Rul. 2007-44, 2007-25 I.R. B. 1421 (June 2007).

[140] *Trinidad v. Sagrada Orden de Predicadores*, 263 U.S. 578 (1924).

[141] *Ibid*.

unrelated business income tax (UBIT) now codified in §§511–514 of the Code, that this view of charity was limited.[142]

The Pemsel Heads

- *Relief of poverty*

From the earliest beginnings of the poor and undeveloped colonies, it was always recognized that relief of poverty was an important and necessary issue to be addressed by private voluntary associations.[143] The approach in the early years of the country has found much resonance in more recent times. So, for example, the Treasury Regulations since 1959 specifically refer to activities "to combat community deterioration and juvenile delinquency" as being charitable in nature.[144] In addition, the IRS has held that certain community development organizations that focus their work on preventing the causes of poverty instead of simply providing traditional charitable relief are charitable in nature. The types of organizations include the following:

- *Providing low-income housing* to the poor and underprivileged constitutes a charitable purpose.[145] In fact, a 1996 Revenue Procedure gives advice on how to qualify a "Low Income Housing Tax Credit Limited Partnership" between a business entity and the low income housing charity as a charity, thus permitting charities to engage in economic development with private entities as partners as long as there is little private benefit.[146]
- *Stimulating economic development* by making loans and purchasing equity interests in businesses unable to obtain funds from other sources in depressed inner city areas constitutes a charitable purpose.[147] Other activities that qualify for the charitable tax exemption include buying blighted land and converting it to an industrial park in order to induce businesses that would hire low skill workers and

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[142] As John Simon has pointed out, however, the tax on unrelated business income has nothing whatever to do with redefining what is charitable. It resulted from a lobby on the part of business concerns against unfair competition from the not-for-profit sector, and that continues to be the rationale behind it today. See Simon, J.G., 'Is There a Law of Charity?', NYU National Center for Philanthropy and the Law Conference Proceedings 2002, available at http://www.law.nyu.edu/ncpl/libframe.html.

[143] See Filer Commission, *op. cit.* p. 39, quoting Boorstin, D.J., *The Genius of American Politics*, Chicago, IL, 1953. The report also quotes a study prepared for the Filer Commission as follows: "The principle of voluntary association accorded so well with political and economic theories that as early as 1820 the larger cities had an embarrassment of benevolent organizations."

[144] Treas. Reg. §1.501 (c)(3)–1 (d)(2). See also Rev. Rul. 74-587, 1974-2 C.B. 162. and Rev. Rul. 70-585, cited infra note 42.

[145] See Rev. Rul. 67-138, 1967-1 C.B. 129; Rev. Rul. 70-585, 1970-2 C. B. 113; and Rev. Rul. 76-408, 1976-2 C.B. 145.

[146] See Rev. Proc. 96-32, 1996-1 C.B. 717, and advice available at http://www.irs.gov/pub/irs-tege/urbanmemo42406.pdf.

[147] See Rev. Rul. 74-587, 1974-2 C.B. 162.

provide job training.[148] However, as with the provision of low income housing community development organizations that qualify as charities, organizations will not qualify if the private benefits provided are too substantial.[149]

- *Making funds available to stimulate the development of affordable child care* constitutes a program-related investment that is charitable in nature for a private foundation.[150]

Although all these organizations focus their work on poverty relief in the United States, the IRS has granted similar privileges with respect to organizations engaged in poverty relief outside the United States (see, also, at 'Foreign Aid').

- *Advancement of education*

In the early days of the United States, most education, whether at the primary, secondary or tertiary level, was provided by private organizations. The founding in 1636 of Harvard College is indicative of the emphasis the colonists placed on the need to create good educational outlets and libraries.[151] Nonetheless, primary and secondary schools gradually became government-funded, beginning in the third decade of the 19th century.[152] State and local governments also began to provide for tertiary education, libraries, cultural institutions, etc. during the course of the latter half of the 19th and into the 20th centuries. The social policy implications of these developments are clear – the American public regards 'education' as an area in which both public and private not-for-profit provision are deemed desirable.[153]

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[148] See Rev. Rul. 76-419, 1976-2 C.B. 146.

[149] See e.g., Rev. Ruls. 77-111, 1977-1 C. B. 144 and 78-86, 1986-1 C.B. 151.

[150] See PLR 200043050 (July 25, 2000). See also §4944 (c) and Rev. Rul. 74-587, note 44, supra.

[151] Franklin founded the country's first subscription library in 1731. See Benjamin Franklin, 'Autobiography: Recollections of Institution–Building', describing the JUNTO, in Hammack D.C. *op. cit.* Other libraries were founded by private individuals, most notably by Andrew Carnegie, whose lasting contributions begun at the end of the 19th century can be seen all over the United States. See information available on the libraries, available at http://andrewcarnegie.tripod.com/ACgrants_19thcentury.htm.

[152] See Filer Commission, *op. cit*., p. 41. See also Stewart, Kane and Scruggs, *op. cit*., p. 110, citing the passage of the Morrill Acts in 1862 and 1890.

[153] On the other hand, there appears to be a broad recognition that such institutions should not benefit from property tax exemptions when municipal services would otherwise suffer as a result of a diminished property tax base. Harvard University and the Massachusetts Institute of Technology set a precedent in 1928 when they agreed to make in lieu of tax payments to Cambridge, Massachusetts for any property acquired after 1928 regardless of its use. By the 1960s, many colleges were making payments for fire fighting equipment, sewage treatment plants, city police for special events, street lighting and street improvements. See also, The Kentucky Association of Independent Colleges and Universities, 'Private Colleges, Public Benefit', a report detailing the types of benefits provided by private educational institutions to the general public, such as free access to libraries, museums, clinics, etc., available at http://aikcu.org/resources/Private%20Colleges,%20Public%20Benefits%20-%20AIKCU%2011-1-06.pdf. Thus, the situation in the United States has not been as fraught as that in the UK, where the recent debate about the public benefit standard's application to "public" schools continues to be quite heated.

The legal requirements of charity law as it applies to this head are found in the regulations under §501(c)(3), which define educational as (1) the instruction or training of individuals for the purpose of improving or developing their capabilities, or (2) the instruction of the public on subjects useful to individuals and beneficial to the community. The first class of organizations has been treated quite expansively by the government, which has granted tax exempt status to child care centers,[154] college bookstores,[155] and alumni associations.[156] The more controversial issues have arisen with respect to the second class of organizations, although some have seemed to be fairly easy for either the IRS or the courts to deal with, such as jazz festivals[157] and community arts organizations.[158]

Controversies have arisen with respect to organizations that teach the public about homosexuality or women's rights and that draw on the government's "full and fair exposition" test for determining whether an organization is educational and not involved in producing and disseminating propaganda.[159] In the case of *homosexuality*, the IRS ruled in 1978 that an organization would qualify as educational if it was formed to "foster an understanding and tolerance of homosexuals and their problems …[It] collects factual information relating to the role of homosexual men and women in society and disseminates this information to the public."[160]

On the issue of *women's rights*, however, the IRS suffered a defeat in the case of *Big Mama Rag, Inc. v. United States*,[161] which considered an organization that published a newspaper of the same name. The government denied exempt status in part because it held that the organization had violated the "full and fair exposition" test of the Treasury Regulations,[162] which an organization would need to meet (exposing both sides of an issue for public hearing) in order to be tax exempt. The lower court agreed, but the Court of Appeals reversed on constitutional grounds, holding that the test was void for vagueness in accordance with the First Amendment.

The government later denied tax exempt status to a *hate group*, which appealed to the D.C. Circuit after the Tax Court once again upheld the denial, though at this stage using a different test for what is educational to the one applicable to Big

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[154] See *San Francisco Infant School, Inc. v. Commissioner*, 69 T.C. 957 (1978). See also §501 (k).

[155] Rev. Rul. 69-538, 1969-2 C.B. 116.

[156] Rev. Rul. 60-143, 1960-1C.B. 192.

[157] Rev. Rul. 65-271, 1965-2 C.B. 161.

[158] See *Goldsboro Art League v. Commissioner*, 75 T.C. 337 (1980).

[159] This is similar to the test in Canada.

[160] See Rev. Rul. 78-305, 1978-2 C. B. 172. Compare, *State ex rel. Grant v. Brown*, 39 Ohio St. 2d 112, 313 N.E. 2d 847, 68 O.O. 2d 65 (Ohio 1974), in which the Supreme Court of Ohio upheld the decision of the Secretary of State to not incorporate an organization with similar objectives on the ground that it would violate public policy (even though homosexuality was no longer a crime in the state).

[161] See *Big Mama Rag, Inc. v. United States*, 631 F. 2d 1030 (DC Cir. 1980).

[162] See Treas. Reg. §1.501(c)(3)–1(d)(3).

Mama Rag.[163] Despite the *Big Mama Rag* precedent, the appeals court upheld the denial of tax exempt status to National Alliance, a neo-Nazi organization.[164]

- *Advancement of religion*

Many commentators on the not-for-profit sector in the United States have remarked that this is the most American of the categories of charity because unlike in many countries, which have established churches,[165] the First Amendment's Establishment Clause forbids government to be excessively involved with religion, in particular with religious congregations. Religious organizations today receive far and away the biggest segment of popular financial support provided to the sector,[166] with "the largest piece of America's charitable pie going to the sustenance of religious groups – for their facilities, their operating costs, and their clergy salaries".[167] While it cannot be doubted that the Establishment Clause would probably not be implicated if the State makes monies available to social service agencies or hospitals and schools connected with religious organizations, any attempt to provide money directly to religious congregations would be far more problematic. Nonetheless, the federal and state income tax exemptions and the deductibility of contributions to such congregations have never seriously been called into question since the Supreme Court decision in *Walz v. Tax Commission*[168] in 1970 when it declined to base the rationale for upholding the exemption on the "good works" of churches but rather looked to whether or not the exemption created excessive entanglement with religion.[169] This type of test seems well-designed to meet any objections at the federal level to either the tax exemption or the deductibility of contributions to such organizations.

The sort of balancing applied in *Walz* seems to be required by the Free Exercise Clause of the First Amendment, which protects individuals in their religious practices, but the two clauses do not create a bright line that can always be easily discerned. Recognizing this, the Treasury and the IRS have been very cautious in determining what sorts of activities are religious for purposes of the charitable exemption and the contribution deduction. The IRS has acknowledged that the

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[163] The IRS developed the "methodology test," which it then set out in more detail in Rev. Proc. 86-43, 1986-2 CB 729.

[164] See *National Alliance v. United States*, 710 F. 2d 868 (1983); see also, *The Nationalist Movement v. Commissioner*, 102 T.C. 558, aff'd *per curiam* 37 F 3d 216 (5th Cir. 1994), which upheld the constitutionality of the 'methodology test'.

[165] See *Everson v. Board of Education*, 330 U.S. 1 (1947), in which Justice Black describes the historical reasons behind the Establishment Clause, which are rooted in pre-colonial and colonial experience with religious discrimination and persecution. *Id*., pp. 8–14.

[166] Lester Salamon's statistics for 1977–1997 show that religious organizations' absolute percentage of the share of total revenue from philanthropy for various segments of the not-for-profit decreased from 86% to 84% during that time. On the other hand, the share of the revenue growth was 83% during the same period. Salamon, *op. cit*., p. 37.

[167] See Brown, M., *Giving USA 2005*, the Annual Report on Philanthropy for the Year 2004, cited by Reich, B., *op. cit*., p. 8.

[168] *Walz v. Tax Comm'n City of New York*, 397 U.S. 664 (1970).

[169] *Ibid*., pp. 675–676.

"statutory term 'religion' cannot be defined with precision" and that "serious Constitutional difficulties would be presented if this section were interpreted to exclude those beliefs that do not encompass a Supreme Being."[170]

Other doctrines have applied to preclude certain religious organizations from receiving tax exempt status.

- Carrying out too many political activities, as in *Christian Echoes National Ministry, Inc. v. United States*[171]
- Engaging in impermissible activities in support of or opposed to a candidate for public office, as in *Branch Ministries v. Rossotti*[172]
- Providing too many private benefits to the founders and other insiders, as in *Church of Scientology of California v. Commissioner*[173] and *Founding Church of Scientology v. United States*[174]

The IRS exercises extreme caution with regard to the definition of 'church',[175] as churches are entitled to even more generous benefits – particularly of a procedural nature – than other religious organizations. In the lead-up to the 2004 election some churches, both on the right and on the left, strayed closer to the line than usual, in general with regard to the war in Iraq. The IRS engaged in some highly dubious audits of some of the organizations, including All Saints Church of Pasadena, CA, the audit of which was eventually dropped.[176] This clearly calls into question restrictions on the ways in which churches – with strongly held beliefs about war and peace – can interact with their communities at election time.

- *Other purposes beneficial to the community*

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[170] Treas. Reg. 1.501 (c)(3)–1(d).

[171] *Christian Echoes Nat. Ministry, Inc. v. United States*, 470 F. 2d 849 (10th Cir. 1972).

[172] *Branch Ministries v. Rossotti*, *op. cit.*

[173] *Church of Scientology of California v. Commissioner*, 823 F. 2d 1310 (9th Cir. 1987).

[174] *Founding Church of Scientology v. United States*, 412 F. 2d 1197 (Ct. Cl. 1969). The IRS never contended that the Scientology Church and its various branches were not religious organizations, but it did attack aspects of the way in which the organizations connected to Scientology were operated. Curiously, the latest victory of the IRS in its efforts to treat Scientology as a bit different from other religions was made "obsolete" by the government's decision to not enforce the Supreme Court's decision in *Hernandez v. Commissioner*, 490, U.S. 680, 109 S. Ct. 2136 (1989). *Hernandez* held that members of Scientology were not permitted to deduct the fees they paid for 'auditing' and other services, but the IRS reversed this position, in all likelihood because of a threat from Scientology to tie it up in court litigating the differences between these payments and other arguable *quid pro quo* payments to mainstream religions.

[175] The 14-part test for determining whether or not an organization qualifies as a church can be found in 'Tax Guide for Churches and Religious Organizations', available at http://www.irs.gov/pub/irs-pdf/p1828.pdf.

[176] The All Saints website has a detailed discussion of the controversy. See http://www.allsaints-pas.org/site/PageServer?pagename=IRS_Exam_splash.

The United States, like other common law nations and in keeping with the Preamble, extended the fourth *Pemsel* class to organizations that "lessen the burdens of government".[177] The Regulations have therefore picked it up as matter of definition, and the government has relied on it in several areas that deserve special mention.

Health and the Community Benefit Standard

In its earliest foray into the issue of whether hospitals should be exempt from tax, Revenue Ruling 56–185, the IRS held that they had to provide a degree of charity care – in other words to render services to people regardless of ability to pay.[178] In 1969, however, the emphasis changed, when the IRS ruled that a hospital could, by meeting the community benefit standard (lessening the burdens of government), qualify for tax exempt status.

The IRS decision to abandon the requirement of care for the poor and indigent for tax exempt hospitals was challenged in *Eastern Kentucky Welfare Rights Org. v. Schultz*.[179] The District of Columbia Court of Appeals decision is worthy of note in that it suggests that the Service's change of heart was proper and that the community benefit standard was a good one in light of changed circumstances with regard to notions about what charity law should mean.

The development of the community benefit standard with regard to health care at the federal level then moved into the question of whether health maintenance organizations (HMOs) would qualify as tax exempt. The IRS began to test the issue in a series of cases that focus on private benefit versus public benefit. One of the problems HMOs face is that they tend to serve communities of members, all or almost all of whom pay membership fees. As a result, courts have agreed with the IRS that such organizations cannot meet the community benefit standard.[180]

Similar developments have been occurring at the state level, where various legislatures have passed laws requiring that health care organizations exempt from property taxes provide a minimum amount of community services[181]

Environmental Protection

These organizations can qualify for tax exemption as either charitable, educational, or scientific organizations. Although many organizations engaged in environmental protection activities are advocacy organizations, their counterparts or sister organizations

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[177] See Treas. Reg. §1.501(c)(3)–1 (d)(2)

[178] See Rev. Rul. 56-185, 1956-1 C. B. 202.

[179] See *Eastern Kentucky Welfare Rights Org. v. Schultz*, 370, F. Supp. 325, rev'd, 506 F. 2d 1278 (D.C. Cir. 1974), vacated on other grounds, 426 U.S. 26, 96 S. Ct. 1917 (1976).

[180] See e.g., *IHC Health Plans, Inc v. Commissioner*, 325 F. 3rd 1188 (10th Cir. 2003). But see *Sound Health Ass'n v. Commissioner*, 71 T.C. 158 (1978), in which the IRS eventually acquiesced (1981-1 C.B. 2). Sound Health provided emergency care and subsidized membership fees for individuals who could not afford to pay the normal rates.

[181] See, e.g., *Alvio Med.* Ctr. *V. Illinois* Dept. of *Revenue*, 299 III. App. 3d 647, 702 N.E. 2d 189 (1998), and generally, Schwinn, E., Hospitals Oppose Plan to Require Charity Care, *Chron. Philanthropy*, Feb. 9, 2006.

that do not engage in any lobbying activities, can be §501(c) (3) organizations.[182] Thus the IRS has ruled that the following organizations are tax exempt:

- An organization formed to preserve a lake as a public recreational facility and improve the condition of the water.[183]
- An organization formed for the purpose of purchasing and maintaining a sanctuary for wild birds.[184]
- An organization formed to acquire and preserve ecologically significant land.[185]

These rulings are consistent with the Restatement (Third) of Trusts,[186] which recognizes that efforts to preserve and protect the natural environment for the benefit of the public serve a charitable purpose.

Public Interest Law Firms

In a holding that is unique within the common law world, the IRS has upheld the validity of tax exempt status for what are known as "public interest" law firms. These are different from traditional legal aid organizations, which qualify for tax exemption because they provide free or low cost services to persons who need them.[187] Public interest law firms engage in "public interest litigation" in such areas as environmental protection, freedom of information, etc.

Eliminating Racial Discrimination

Issues related to racial discrimination include the question of whether attempting to eliminate prejudice and discrimination constitutes a charitable purpose. According to the regulations under §501 (c)(3), organizations that engage in such activities are indeed charitable, as are organizations that are organized and operated to "lessen neighborhood tensions, to defend human and civil rights secured by law; [and] to combat community deterioration and juvenile delinquency."[188]

Revenue Ruling 70-585 extends these ideas into the area of low-income housing primarily aimed at securing living quarters for people from black ghettoes.[189] In an

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[182] See the discussion of advocacy organizations below.

[183] See Rev. Rul. 70-186, 1970-1 C.B. 128.

[184] See Rev. Rul. 67-292, 1967-2 C.B. 184.

[185] See Rev. Rul. 76-204, 1976-1 C.B. 152.

[186] Section 375 Restatement (Third) Trusts.

[187] See e.g., Rev. Rul. 69-161, 1969-1 C.B. 149, amplified by Rev. Rul. 78-428, 1978-2 C.B. 177.

[188] See Treas. Reg. §1.501(c)(3)–1(d)(2). John Simon asserts that this definition did not result from "a process of Treasury rumination over the definition of charity but something much less academic." He goes on to suggest that this language came into the regulations as a result of lobbying by influential individuals involved in such activities. See John Simon, *op. cit*., p. 10.

[189] Rev. Rul. 70-585, 1970-2 C. B. 115, Situation 2.

earlier ruling, the IRS had also focused on housing in granting tax exempt status to an organization formed to promote racial integration in housing.[190] It remains important, however, that the poor be the focus of the activities of an organization

In addition to these issues, voter education was viewed as an important need to be addressed, especially in the South, where black voters had not had easy access to the polls even into the mid-20th century. As a result, the Voter Education Project was established within the Southern Regional Council.[191] It later applied for and was granted tax exempt status as a charity in a private ruling.[192]

In perhaps the most important case involving race, *Bob Jones University v. United States*,[193] the Supreme Court of the United States upheld the IRS policy that denies tax exempt status to racially discriminatory private schools. In so doing, it also established a "public policy" overlay on the definition of charitable in the United States. In what has been called "[u]ndoubtedly the most important development in the definition of charity" since the enactment of the Tax Reform Act of 1969[194] the IRS revoked the charitable status of two schools with racially discriminatory policies.

The Common Law – Institutional Infrastructure

The limited extent to which the charity sector in the United States is regulated by federal tax authorities is truly astonishing when one looks at other countries. As described in this chapter, that has by and large not been wholly negative in the context of substantive charity law. On the other hand, it is useful to examine the current institutional infrastructure, with powers held by both the IRS and the Treasury, on the one hand, and the state Attorneys General, on the other. As will be seen, exercise of the traditional *parens patriae* authority of the Attorney General in the United Kingdom to intervene in matters relevant to charities seems to have been lost entirely in some states in the United States.

The IRS

The principal responsibility of the Treasury and the IRS is to deal with charities in the context of the Internal Revenue Code, and this limits their capacity, for example, to provide guidance on governance, etc.

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[190] Rev. Rul. 68-655, 1968-2 C.B. 213.

[191] See King Encyclopedia, Voter Education Project, available at http://www.stanford.edu/group/King/about_king/encyclopedia/voter_education_project.htm.

[192] See John Simon, *op. cit*., p. 10.

[193] *Bob Jones University v. United States*, 461 U.S. 574, 103 S. Ct. 2017 (1983).

[194] See Fremont-Smith, M., *op. cit*., p. 101.

Courts and State Attorneys General

Marion Fremont-Smith points out in her 2004 book Governing *Nonprofit* Organizations:[195]

> In 2003 there were … only eleven states with registration and reporting statutes, although Attorneys General in several others were attempting to regulate fiduciary behavior and were actively regulating conversions [of nonprofits to for-profits). These eleven states included New York, California, Illinois, Michigan, and Ohio, which meant that the vast majority of charities nationwide were subject to a regulatory regime.

In addition to exercise of the general powers of oversight, oversight of fund raising activities improved in the 1980s "when representatives of the National Association of Attorneys General…and the National Association of State Charity Officials (NASCO)…began to coordinate their activities."[196]

On the other hand, there is still the possibility for forum-shopping because regulatory regimes differ so tremendously from state to state. One of the most frequent states for incorporation – Delaware – is notably lax with regard to fiduciary duties.

Self-Regulation

While the large national charitable sector representatives (Independent Sector and the Council on Foundations) each have developed codes of ethics, neither has disciplinary power under a code applicable to its members.[197] On the other hand, some state associations of NPOs do have a set of such guidelines (e.g. the Maryland Association of Nonprofit Organizations has developed 'Standards of Excellence').[198]

On a national level, Independent Sector convened the Panel on the Nonprofit Sector,[199] which published its 'Principles of Governance' in fall 2007.[200] This document

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[195] Fremont-Smith, M., *op. cit*., p. 55. See also, American Law Institute (ALI), *Principles of the Law of Nonprofit Organizations*, Part II. Charities, Chapter 3, 'Governance' (most of which was approved at the 2007 Annual Meeting), available at http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=89.

[196] *Ibid*.

[197] See Independent Sector, 'Statement of Values and Code of Ethics for Charitable and Philanthropic Organizations', available at http://www.independentsector.org/PDFs/code_ethics.pdf. See also, Council on Foundations, 'Proposed Governance Principles: Large Foundation Discussions', available at http://www.cof.org/Learn/content.cfm?ItemNumber=1227.

[198] Available on the Maryland Nonprofits website at http://www.marylandnonprofits.org/html/standards/04_02.asp.

[199] This was a major effort to assist in the development of new legislation for the sector. It was convened by IS at the request of the Senate Finance Committee and funded by major foundations. For more information on the Panel, see http://www.nonprofitpanel.org/about/Index.html.

[200] The 33 recommendations are available online at http://www.nonprofitpanel.org/, as is the 'Reference Edition', which includes legal background for each Principle, studies on self-regulation systems, and a glossary of terms.

has been criticized because it did not recommend a system (like that in Maryland) in which peer review plays the major role. Writing in the *Chronicle of Philanthropy* for November 1, 2007, Peter V. Berns asserts that "Real self-regulation means that charities must have access to a voluntary system in which their operations can be reviewed by independent, knowledgeable third parties."[201]

Developmental Milestones in American Charity Law

The development of charity law in the United States has been a constant process, beginning with the creation of state charters for not-for-profit corporations. This section looks at developments in the case law (both federal and state), the legislative landscape, and the regulations issued by the Treasury Department and the Revenue Rulings issued by the IRS.

Case Law Milestones

- *State cases*

Fiduciary duty cases. A recent state case of huge significance involved fiduciary duties of directors of not-for-profit corporations. In *Stern v. Lucy Webb Hayes National Training School for Deaconesses*[202] (known colloquially as the 'Sibley Hospital case'), the Federal[203] District Court for the District of Columbia discussed at some length what the proper standard should be. Deciding that the 'corporate' gross negligence standard was applicable to both the duty of care and the duty of loyalty, the court nonetheless made clear that its ruling should be taken with utmost seriousness by directors and officers of not-for-profit corporations. It is a widely cited case, whose reasoning has never been questioned, except by academics, some of whom insist that the trust standard of ordinary negligence should apply.

A second interesting fiduciary duty case involved the Bishop Estate, a Hawai'i charity established by the will of Princess Pauahi Bishop to fund the creation and maintenance of the King Kamehameha Schools for the education of Native Hawai'ians.[204] Although the case did not involve actual litigation, events that were

[201] See Berns, P.V., 'A Missed Opportunity to Ensure Real Charity Accountability', available at http://www.marylandnonprofits.org/documents/ChronicleArticle_001.pdf.

[202] 381 F. Supp. 1003 (U.S.D.C., District of Columbia, 1974).

[203] This is a state case in the sense that it involved the District of Columbia Corporations Code; the fact that jurisdiction lies in federal courts is irrelevant to this issue.

[204] Commonly cited as (in other words, Bishop Estate Case) this fiduciary scandal involved a $10 billion trust fund, trustees, state Supreme Court justices, former governor and leaders in the Hawaii State Legislature.

brought to light in the media (trustee over-compensation, conflicts of interest and the like) resulted in an investigation by the Attorney General and resulted in the trustees being removed and the governance of the estate/schools reorganized. The IRS had also begun an inquiry into whether the organization should lose its tax exempt status, but after significant changes were made, it entered into a closing agreement with the estate/schools allowing it to remain tax exempt.[205]

- *Federal cases*

Public policy requirement. The U.S. Supreme Court's decision in *Bob Jones University v. United States* established a requirement that all charities exempt from tax under §501 (c) (3) must not violate public policy.[206] This seminal decision relied on English charitable trust law in reaching its conclusion.

Political activities. The two most important cases in this area are *Regan v. Taxation with Representation of Washington* and *Branch Ministries v. Rosotti*,[207] both of which made it clear that restrictions on advocacy and other political activities would not violate the free speech clause of the First Amendment to the United States Constitution as long as an exempt charity could establish a related social welfare organization (exempt from tax under section 501(c)(4)) to carry out such activities.

Standing to challenge tax exempt status. In a case that could conceivably have some impact on social policy issues, the United States Court of Appeals for the Second Circuit held in *In re United States Conference*[208] that the plaintiffs lacked standing to challenge the tax exempt status of the Catholic Church in the United States. The issue raised was alleged partisan political activity by the Church, and the plaintiffs used several arguments to suggest why standing should be available, but to no avail. In recent years, with far greater emphasis being placed by the IRS on these issues,[209] it is doubtful that actual partisan political activity by a church would succeed. But with strong faith issues involved, this line is potentially very difficult to draw.

Legislative Milestones[210]

The legislative history of charity law in the U.S. records no attempt to statutorily define 'charity' and as the term "charitable" has been interpreted to incorporate the common-law definition it is generally assumed that this jurisdiction must, therefore,

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[205] The closing agreement is reproduced in full on the website of the estate/schools at http://www.ksbe.edu/newsroom/filings/toc.html. A full account of the case and its importance for governance of NPOs in the United States can be found in King, S.P. and Roth, R.W., *Broken Trust-Greed, Mismangement* and *Manipulation at America's Largest Charitable Trust,* 2006.

[206] See, further, discussion in text.

[207] See, further, discussion in text.

[208] *In re United States Catholic Conference,* 885 F. 2d 1020, cert denied 495 U.S. 918 (2d Cir. 1989).

[209] See, further, discussion in text.

[210] This outline of the general legislative framework is taken in part from O'Halloran, K., *Charity Law and Social Inclusion*, Routledge, London, 2007, pp. 320–323.

have been content to continue the common law interpretation. Moreover, as mentioned earlier, it must be remembered that all law comes under the umbrella of the Constitution, the Tenth Amendment to which provides that government powers with regard to charities are placed within the jurisdiction of the states.

- *Tenth Amendment to the U.S. Constitution*

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This allocates the power over charities to the state governments.

- *Revenue Act or Wilson-Gorman Tariff Act 1894*

This legislation was the first corporate income tax of the "modern era",[211] and it provided tax exemption for charitable, religious and educational associations and trusts. It was held unconstitutional the year after it was enacted.[212]

- *Sixteenth Amendment to the U.S. Constitution*

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." The addition of the amendment was necessary to ensure that income taxes could be constitutionally levied.

- *Revenue Act 1913*

This legislation replaced the 1894 Act, and it introduced the current concept of a federal income tax regime and regulatory framework for charities as administered by the Internal Revenue Service. The provision that is now section 501 (c)(3) has been amended only five times since 1913 and the pertinent amendments for the general definition of "charitable" were made in 1934 and 1954 – both of which codified aspects of the limitations on political activities that are now in the statute.

- *Revenue Act 1917*

This legislation introduced the first charitable contribution deduction, which had been rejected in 1913.

- *Internal Revenue Code 1939*

This is the first codification of the income tax, and it retained the tax exemption and charitable contribution deduction scheme of the earlier revenue acts.

- *Revenue Act 1950*

This legislation, added to the Internal Revenue Code provisions on 'unrelated business income', thus removing the 'destination of income' test under which charities could claim tax exemption on commercial activities that were unrelated to their charitable

[211] There were revenue acts including income taxes during the Civil War.

[212] *Pollock v. Farmers' Loan & Trust Co*, 157 U.S. 429, aff'd on rehearing 158 U.S. 601 (1895). This was a test case.

purpose if they could show that the profits generated went to further those purposes. Whether or not such activities were related to an organisation's purpose, the right to tax exemption would be lost if the commercial activity was disproportionate to charitable purpose activity.[213] The legislative intent was to prevent charities from using their privileged status to engage in unfair competition with commercial bodies.

- *Internal Revenue Code 1954*

This legislation saw the charitable tax exemption provisions brought together for the first time under section 501 of the Code (it renumbered provisions in the 1939 Code). The new section 170 also contained the charitable deduction rules for income taxes, with section 2522 providing for the gift tax deduction and 2055 for the estate tax deduction.

- *Model Nonprofit Corporation Act 1964*

This was a private attempt by the American Bar Association to introduce a model statute to govern nonprofits and versions of it are currently still in effect in Alabama, the District of Columbia, New Jersey, North Dakota, Texas, Virginia, and Wisconsin.

- *Tax Reform Act 1969*

This legislation introduced a variety of reforms for charities, but it particularly focused on providing for a regime distinguishing between public charities and private foundations. It provided for excise taxes on various aspects of the activities of private foundations, including an excise tax on the net investment income of such organizations. This tax was expected to fund the exempt organizations oversight function within the IRS but the monies collected have, to the disappointment of many, never been designated for that purpose.

- *Tax Reform Act 1986*

This legislation placed significant restrictions on non-cash gifts to charity and led to a drop in giving. The restrictions were partially repealed by Congress in 1990 and fully repealed in 1993.

- *Revised Model Nonprofit Corporation Act 1987*

This "model" legislation, based loosely on California law and introduced by the American Bar Association sets out basic parameters for the structure and composition of boards. It requires that "a director shall discharge his or her duties as a director, including his or her duties as a member of a committee (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the corporation." It has been adopted in whole or in modified form by 22 states[214] for regulation of tax-exempt entities, including charitable organisations.

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[213] See *Scripture Press Foundation v. US* 285 F.2d 800 (Ct. Cl. 1961), *American Ins. For Economic Research v. United States*, 302 F.2d. 934 (Ct. Cl. 1962), *Elisian Guild, Inc. v. United States*, 292 F. Supp. 219 (D. Mass. 1968), and *Living Faith, Inc. v. Comm'r*, 60 TCM 710 (1990).

[214] *Op. cit*., n. 1.

- *Taxpayer Bill of Rights (Part II) 1996*

This legislation introduced the "intermediate sanctions" regime for public charities. Under what is now §4958 of the Code, charities and their managers are subject to excise taxes in situations when they engage in "excess benefit transactions."

- *Welfare Reform Act 1996*

This legislation, known as the PWRORA, facilitated the rise of faith based organisations as providers of publicly funded services as the federal government reached out to organisations through the Charitable Choice clause in the 1996 Act, enabling them to assist in the welfare reform effort.

- *Uniform Supervision of Trustees for Charitable Purposes Act 1996*

This legislation requires all charitable trustees (and, although this is less clear, corporate directors) to register with the state Attorney General's office (so that it is at least aware of the charities under its jurisdiction). It also empowers the Attorney General to investigate potential wrongdoing, among other things by calling witnesses and demanding the production of relevant documents.

- *Sarbanes-Oxley Act 2002*

This Act imposes new obligations and penalties on corporate officers and directors of publicly traded companies and mandates increased disclosure by corporations to the Securities and Exchange Commission. For example, publicly traded companies must have an independent audit committee and CEOs must certify financial statements. Penalties for non-compliance include imprisonment and fines. Two specific provisions apply to all entities (including nonprofits): prohibitions on destruction of litigation-related documents and on retaliation against whistleblowers who identify specific types of financial wrongdoing. Although intended to address primarily the pervading corporate crisis resulting from scandals involving Enron, Arthur Andersen, and several other large corporations many thought that the federal corporate accountability provisions laws of the Sarbanes-Oxley Act would be extended to charities and other nonprofits (currently similar rules are only applicable in California).

- *The American Jobs Creation Act 2004*

This legislation limits the deductions taxpayers can claim for donations of motor vehicles to charitable organisations.

- *California Nonprofit Integrity Act 2004*

This legislation provides for new rules with regard to hiring of auditors and appointment of audit committees for large charities; rules affecting professional fund-raisers; and executive compensation contracts, which must be reviewed and approved by the board.

- *Uniform Prudent Investor Act (UPIA) 2005*

This regulates investment responsibilities of trustees of charitable trusts to conform to modern prudent investor theory and has been introduced in 44 states.

- *Pension Protection Act 2006*

This imposed new rules on Donor Advised Funds (DAFs) and their sponsors along with many other important reforms.

- *Uniform Prudent Management of Institutional Funds Act (UPMIFA) model legislation 2006*

This legislation was drawn up by the National Conference of Commissioners on Uniform State Laws to govern the management and expenditure of investment assets held by charitable organisations. It has been adopted in some form by most states and the District of Columbia but is generally not applicable to charitable trusts it was first proposed in 1972.

IRS and Treasury Milestones

This section highlights some other milestones that have a social policy impact.

- *Treasury regulations under §501 (c)(3)*

These regulations were issued in the years immediately following the enactment of the 1954 Code and they have, by and large stood the test of time.[215] The regulations have a very broad definition of charitable,[216] and the other terms defining charitable purposes are similarly broadly defined.

- *Partisan political activities – Rev. Rul. 2007–44*

The question of the way in which charities may or may not become involved in political activities, including partisan activities, is one with important social policy implications. During the 2004 political campaign, and before (the *Branch Ministries* case involved the 2000 campaign), there were multiple allegations of churches and other tax exempt charities being engaged in partisan activities. This caused the IRS not only to begin investigation of some of the allegations (three organizations lost their tax exempt status) but also to attempt to devise a strategy for dealing comprehensively with what charities are permitted to do. The IRS initiated the Political Activities Compliance Initiative (PACI), which sought to work with the sector to devise workable rules. The Ruling is the result of that process.

[215] The one instance in which a challenge to the regulations was sustained was the *Big Mama Rag* case.

[216] Treas. Reg. §1.501(c)(3)–1 (d)(2).

Charity Law Reform

- *Federal reforms*

Senate Finance Committee. In 2004, the Senate Finance Committee determined that it should be involved in reforms of the tax rules for the NPO sector. A document was prepared that listed several potential reforms, including a five year review of tax exempt status, reforms for DAFs, a revised reporting Form 990, etc.[217] The Committee later held hearings on the proposed reforms in June 2004[218] and April 2005.[219] The Chair of the Committee and the Ranking Member followed up with additional suggestions to the IRS.[220]

Because the focus of the Senate Committee was on issues related to accountability and transparency and ultimately governance, its proposals would elevate the federal government as a regulator of good governance. This would, of course, increase compliance costs for charities.

Panel on the Nonprofit Sector. An interesting development coming out of the June 2004 hearings was the request from the Committee to Independent Sector (IS) to convene what became known as the Panel on the Nonprofit Sector. The Senate Finance Committee requested that the Panel issue two reports during 2005: an interim report in March and a final report in June. The Panel also provided supplementary comments during the autumn of 2004.

Was the Panel effective? It depends who you ask. The Panel claims responsibility for some of the changes enacted in the Pension Protection Act of 2006 but it is clear that many of the issues were raised earlier by academic commentators and government officials.

House Ways and Means Committee hearings and JCT Staff report. Not to be outdone by their colleagues in the Senate, the House Committee on Ways and Means commissioned the staff of the Joint Committee on Taxation to issue a report in 2005 dealing with issues of reform for the tax legislation related to charities.[221] The Committee also held hearings,[222] the focus of which was far broader than the

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[217] The staff report is available at http://www.senate.gov/~finance/hearings/testimony/2004test/062204stfdis.pdf. The newly designed from 990, which is to be used for years begining in 2008, is available on the IRS website at http://ftp.irs.gov/charities/article/0,,id=176637,00.html.

[218] The written statements of those invited to testify are available at http://www.senate.gov/~finance/sitepages/hearing062204.htm.

[219] The written statements from these hearings are available at http://finance.senate.gov/sitepages/hearing030505.htm.

[220] One of the most significant issues was Form 990 reforms, which were eventually made in order to make the information easier to understand and hence IRS audits easier to conduct. See statement of Senators Baucus and Grassley at http://www.guidestar.org/DisplayArticle.do?articleId=1134.

[221] See Joint Committee on Taxation, 'Historical Development and Present Law of the Federal Tax Exemption for Charities and Other Tax-exempt Organizations' (JCX-29-05), April 29, 2005, available at www.house.gov/jct/x-29-05.pdf.

[222] The written statements are available at http://waysandmeans.house.gov/hearings.asp?formmode=detail&hearing=400%20.

issues raised in the Senate. A threshold question posed was the extent to which charities are in fact providing the public services that underlie their tax exempt status. This allowed them to think about issues such as whether the criteria for granting tax exempt status should be reconsidered.

Social Enterprise. On June 14, 2007, the Aspen Institute and the Fourth Sector Network, in partnership with the Calvert Social Investment Foundation and The Case Foundation, brought together 30 capital market innovators to discuss new developments in social capital markets. The Institute has also explored the question of whether there should be a new legal form in the U.S. for these 'Fourth Sector' ventures. According to Aspen, "the new generation of hybrid organizations is taking root in a fertile space between the corporate world, which is constrained by its duty to generate profits for shareholders, and the nonprofit world, which often lacks the market efficiencies of commercial enterprise."[223] Issues explored at the 2007 meeting and an earlier one held in 2006 include the issuance of hybrid securities that would provide limited rates of return and expanding the use of purpose related investments (PRIs) by private foundations. The suggested approaches could be accomplished under either federal tax law or state law.

American Law Institute (ALI). The extensive effort to reform state laws with regard to all NPOs that has been undertaken by the American Law Institute promises to address not only issues about charities and their governance, but also charitable gifts, membership organizations and supervision and enforcement (dealing principally with the *parens patriae* powers of the Attorney General to oversee charities).[224] As often with such extensive projects, it will take many years before it is completed and the highly bureaucratic process for the adoption of its recommendations means that compromises are inevitable. Nonetheless the 'Reporter' for the project is a well-known legal scholar, Evelyn Brody, and she will shepherd it along as well as anyone can. Proposals for law reform at the state level that are undertaken by the ALI have had good reception by legislatures, and this effort may thus produce some fruit in terms of better governance for charities as time goes on.

American Bar Association (ABA). Responsible for the Model Nonprofit Corporation Act and the Revised Model Nonprofit Corporation Act (RMNCA, 1987), the ABA is currently looking to a new revision that would make the 'model' more like the Model Business Corporation Act (MBCA).[225] The extent to which this approach will actually be adopted by the ABA remains to be seen, but the proposed MNCA 3d would have features move similar to the MBCA.[226]

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[223] See Billitteri, T.J., 'Mixing Mission and Business: Does Social Enterprise Need a New Legal Approach?' available at chttp://www.nonprofitresearch.org/usr_doc/New_Legal_Forms_Report_FINAL.pdf. These issues have also been explored by academic economists. See Young, D.R., 'Social Enterprise: Strategy for Nonprofit Mission and Sustainability', available at http://www.chass.ncsu.edu/nonprofit/engagement/young_keynote.pdf.

[224] This project of the ALI is described at http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=3.

[225] See http://www.abanet.org/dch/committee.cfm?com=CL580012.

[226] The text of the proposed MNCA 3d is available on the website of the Business Law Section of the ABA, at http://www.abanet.org/dch/committee.cfm?com=CL580000.

Applying the Legal Functions of Charity Law

The procedural aspects of how charity law is administered have suffered because of the bifurcation of power between state Attorneys General (and some Secretary of State offices) and the IRS. This could obviously be remedied if there were a federal level 'charities commission', with the power to interpret and apply the law in addition to exercising effective oversight over the sector. As it is, the mechanics of applying the functions of the law to charities conforms pretty much to the traditional revenue driven model with the IRS, as the lead regulatory body, making a determination as to whether an entity is or is not a charity (or 'public benefit organisation') in accordance with section 501 (c)(3)–1 (d)(2) of the Internal Revenue Code, and thereafter providing such scrutiny of its activities as it can.

Protection

In jurisdictions like the United States, the issue is always how the two levels of government (state Attorneys General and courts as well as federal tax regulators) interact with each other. In practice, there is little coordination nor is there much evidence of proactive effort at either level to ensure a continued application of the *parens patriae* responsibilities.

The Courts and State Attorneys General

While the courts have more frequent involvement in the affairs of charities in the U.S. than in other jurisdictions, as this is most usually at the behest of the IRS, it cannot be said that their involvement is particularly protective in nature. Again, while the *parens patriae* responsibilities have devolved to the office of Attorney General in the US, as in other common law countries, they are not pursued with any vigour or consistency by the state Attorneys General. Only a handful of states appear to take this responsibility seriously by any measure and the recent conversion of health institutions to for profit or hybrid management models involving the for profit interests bears witness to this situation.[227]

[227] See Lipman, H. 'Health-Conversion Funds Hold $16 Billion in Assets,' *Chronicle of Philanthropy*, May 4, 2000, p. 12. and Grantmakers in Health, *A Profile of New Health Foundations*, Washington, DC, 2003. Corbet, C., 'Stewardship of Public Assets Under Nonprofit Conversion Models: New York's Empire Blue Cross Blue Shield Case Study' Nonprofit Management & Leadership, 16: 2, 2005, p. 153.

It seems clear that the current formulation of the principal fiduciary duties[228] applicable to directors and officers of not-for-profit organizations and the way in which they are enforced at the state level is not designed to address the mission-focus perspective if the charity sees an opportunity for government funds as potentially meeting the need for additional resources to support current staff.[229] Could the duty of care be re-interpreted with a stronger focus on mission that would control this tendency and permit charities to remain as independent voices? The ALI's study of the 'Principles of the Law of Nonprofit Organizations', whose major focus to date has been the governance of charities has not raised this issue, looking at mission only in the context of addressing the needs of current beneficiaries as opposed to future ones and not considering effective mechanisms to ensure that boards carefully consider any change in mission or possible mission creep that would elevate the needs of staff over those of beneficiaries. While the duty of care has been touched upon in the draft IRS document 'Good Governance Practices for 501(c)(3) Organisations' it has not been treated as a crucial component to better practice.[230]

Recent discussions of how to improve the governance of not-for-profit organizations in the United States have occurred against a backdrop of scandals, particularly with respect to financial dealings in the sector,[231] as well as state level legislative action[232] or proposed legislative action.[233] None has addressed the question presented here.

The Treasury and the IRS

Protection has not been the principal function of the IRS to date, but the intermediate sanctions rules of §4958 of the Code (applicable to public charities) relevant to excess benefits and the private foundation excise taxes do permit some involvement in the protection of charities by the federal government. One thwarted and

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[228] The duty of care is focused almost entirely on the question of the decision-making processes used within charities, while the duty of loyalty looks more to the concept of fair dealing and lack of conflicts of interest. See Fremont-Smith, M., *op. cit*., pp. 201–226.

[229] See Bailey, C. and Martin, K., 'Getting to No', in the e-edition of *Strategy + Business*, available at http://www.strategy-business.com/li/leadingideas/li00002. This is not to suggest that there is not also the possibility of mission creep to follow the attention paid by private funders to specific issues, but it seems particularly prevalent with respect to government funding.

[230] See further, Silk, T., 'Good Governance Practices for 501(c)(3) Organisations: should the IRS get further involved?', *The Exempt Organisation Tax Review*, 57: 2, August 2007, pp. 183–190.

[231] The Senate Finance Committee has been involved in key investigations of large charities, such as the American Red Cross, the Nature Conservance, and the Smithsonian Institution.

[232] California Nonprofit Integrity Act, s.b. 1262 (2004), effective from January 1, 2005.

[233] New York State did not pass the proposed legislation.

misguided effort at protection by the IRS involved litigation to hold that an outside fund raiser for the United Cancer Council (UCC) was an "insider" to which the "no private inurement" rule of §501 (c)(3) should apply (and thus cause the organization to lose its tax exempt status).[234]

Policing

Policing charities and the charitable sector means ensuring that charity does not subvert the agenda of government, that it does not improperly invade the realm of the commercial sector or place its assets at risk by engaging in commercial ventures, that it contributes value for the benefit of the public that is at least equivalent to the tax revenues lost through the charitable tax exemption and the taxes lost on the tax credit for donations and that it does all this with proper regard to standards of transparency, accountability and good governance. In the United States, these functions are carried out by the state Attorneys General through court litigation and by the IRS through Revenue Rulings and court litigation.

The Courts and State Attorneys General

As mentioned earlier, judicial involvement in the affairs of charities occurs more frequently in the U.S. than in most other jurisdictions in part, perhaps, because it has a particularly litigious culture. This has enabled the courts on occasion to give direct and powerful weight to the policing function: for example, in the *Bob Jones* case which set clear parameters in respect of educational facilities and their discretion to set discriminatory entry criteria.

It is difficult to find recent state cases dealing with issues about policing the boundaries of the sector. Some cases from the 1970s, such as *People ex rel. Groman v. Sinai Temple*,[235] have dealt with the question of whether a not-for-profit organization was engaged in too much business activity. These issues may also arise in the context of a state property tax exemption, as they did in *State v. North Star Research and Development Institute*.[236] But with the adoption of the unrelated business income tax in 1950, there is not much attention paid by state regulators in this area. There is little evidence that state Attorneys General play any direct regulatory role.[237]

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[234] See *United Cancer Council, Inc. v. Commissioner*, 165 F. 3d 1173 (7th Cir. 1999).

[235] *People ex rel. Gorman v. Sinai Temple*, 20 Cal. App. 3d 614 (Cal. Ct. App.1971).

[236] *State v. North Star Research and Development Institute*, 294 Minn. 56, 200 N.W. 2d 410 (1972).

[237] See The National Association of Attorneys General, 'State Regulation of Charitable Trusts and Solicitations', Committee on the Office of Attorney General, Washington, DC, 1977. Also, see Fishman, J.J., 'The Development of Nonprofit Corporation Law and an Agenda for Reform', *Emory Law Journal*, 34, 1985, p. 699.

Treasury and the IRS

The IRS is the gatekeeper for obtaining tax exempt status as a charity – if an organization does not apply for and receive such status, it does not matter what it does – it is not a charity.[238] The gatekeeper role is a crucial aspect of the policing function and one which the IRS has demonstrated a capacity to exercise. For example, in the Scientology cases[239] the IRS determined that elements of mutual benefit and private profit the practices of that organization debarred it from charitable status.

As it is the only federal government body with responsibility for oversight of the nation's charitable sector, the IRS maintains the register of all tax-exempt or non-profit organizations and once charitable status is confirmed, details of the organization are entered in the registration system, providing the basis for such monitoring as may subsequently be undertaken by it. This system determines which public benefit organisations (the term usually used to describe 'charities' or 'charitable organisations') will receive the highest level of tax benefits (including tax-preferred donations).[240] In states that have adopted a version of the Revised Model Nonprofit Corporation Act 1987 an organisation either self-declares that it is a public benefit organisation or is deemed to be one under state law if it is an IRC section 501 (c)(3) entity – by obtaining status as a §501 (c)(3) organization the entity subjects itself to heightened scrutiny under state law as well. In addition, some states have enacted the Uniform Supervision of Trustees for Charitable Purposes Act 1996, which requires charitable trusts to register with the Attorney General's office. Of the approximately 1.5 million not-for-profit organizations in the United States in 2006, 850,455 public charities and 104,276 private foundations are registered as charities with the IRS. Once registered, all private foundations and many public charities[241] are required to file annual information returns[242] with the Internal Revenue Service that includes information about the organisation's finances and operations. Such information is supplied by completing Form 990 which is available to and can be demanded by a member of the public, is used by Guidestar[243] and is published on

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[238] "Churches" but not other religious organizations, do not have to apply for exempt status, but many of them do.

[239] See *Church of Scientology, of California v. Commissioner* and *Founding Church of Scientology v. United States, op cit*.

[240] *See* I.R.S., *Search for Charities, Online Version of Publication 78*, <http://www.irs.gov/charities/page/0,id=15053,00.html>.

It might be added that an organisation is perfectly free to set itself up as a charity and undertake charitable activities and need never be known to the IRS unless it also chooses to seek tax exempt status.

[241] Organisations, other than private foundations, with annual gross receipts of $25,000 or less, houses of worship and specific related institutions, specified governmental instrumentalities, and other organisations relieved of this requirement by authority of the IRS are excluded from this requirement.

[242] Form 990, 990-EZ, or 990-PF.

[243] An organization that deals with transparency and accountability for the sector. The website is available at http://www.guidestar.org/.

organizational web sites etc. This important mechanism for introducing transparency and accountability in respect of the affairs of charities gives media and watchdog bodies access to crucial financial and other data. The Generally Accepted Accounting Principles (GAAP) regime applied by the Financial Accounting Standards Board (FASB) sets out the relevant standards.

It does not appear that the IRS is denying applications or revoking exempt status for a significant number of organizations. A report published in 2002 by the General Accounting Office (GAO)[244] says that the number of applications denied by the IRS dropped from 73 in 1998 to 58 in 2001. The number of revocations of tax-exempt status has dropped too, from 24 in 1998 to 9 in 2001. These numbers indicate that the IRS is not capable of providing thorough examinations of charitable organizations. Thus, even if the IRS is the gatekeeper, it is not a very effective one.[245]

That said, the larger issues about charities and the work they perform that were addressed by the Ways and Means Committee continue to receive Congressional attention. It is highly likely that, in the future, charities will be subject to greater federal regulation in the interest of improving governance of the sector.

Mediation and Adjustment

The predominant use of the corporate form in the United States has meant that there has been a great deal of flexibility in terms of meeting social needs and those of the local community. Whether the same would have been true if the trust form had been predominant is not clear. The lack of any forum with responsibility for proactively developing charitable purposes to meet present and emerging forms of such need, however, disables the potential effectiveness of the mediation/adjustment function and constitutes a continuing weakness in the regulatory framework.

The Courts and State Attorneys General

In general, the doctrines of *cy-près* and deviation derived from trust law have been held to apply to charitable corporations, but less strictly. For example, in *Matter of Multiple Sclerosis Service Organization of New York, Inc.*,[246] the appeals court

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[244] GAO, 'Tax Exempt Organizations, Improvements Possible in Public, IRS, and State Oversight of Charities' (GAO-02-526), available at http://www.gao.gov/new.items/d02526.pdf.

[245] The GAO report also notes that states rely on information collected from the IRS for assessing how charities in their jurisdictions are behaving. Small wonder, then, that state regulators rely most frequently on media reports about problems, if data received from the IRS and the Form 990 are highly questionable and not very reliable.

[246] 68 N.Y. 2nd 32, 496 N.E. 2nd 861, 505 N.Y.S. 841 (N.Y.Ct. App. 1986).

remanded to the lower court to permit an assessment of whether the assets of a dissolving charitable corporation should be distributed to an organization that dealt with multiple sclerosis (MS) or to other organizations that provided similar services to ill persons, but not to those suffering from MS. More recently, in the much-discussed case of the Barnes Foundation in Philadelphia the court applied the *cy-près* doctrine to amend its charter and bylaws in a fashion that was inconsistent with the express wishes of its dead founder but consistent with keeping the notable art collection he had given the foundation intact and within a viable institution.[247]

As to racial discrimination, the use of *cy-près* powers by the courts has been quite important. For example, those advocating against slavery prior to the Civil War sought to establish charities that would educate the public about the evils of the institution. In 1867 the Supreme Court of Massachusetts decided a landmark charity case *Jackson v. Phillips*[248] and applied the *cy-près* doctrine to a trust that had been established "to create a public sentiment that will put an end to negro slavery in [the United States]."[249] After the passage of the 13th Amendment to the United States Constitution, which abolished slavery, the court held that the income of the charitable trust could be employed for the "use of necessitous persons of African descent in the city of Boston and its vicinity."[250]

More recently, *cy-près* has been used to eliminate racial restrictions in certain cases involving educational institutions, such as *Trustees of University of Delaware v. Gebelin*[251] and *Wooten v. Fiztgerald*.[252] The outcome in such cases is, however, dependent upon the testator having had a general charitable intent with respect to their gift. In cases where no such intent exists, such as *Evans v. Abney*,[253] the courts have held that *cy-près* does not apply. In *Evans v. Abney*, Senator Bacon had conveyed a trust of land in Macon, Georgia to the city for the creation of a park for the exclusive use of white people. Since the park's segregated character was an essential and inseparable part of the testator's plan, the court held that the trust must fail.[254]

It's interesting, perhaps, to note that in recent cases involving the conversion of health entities from a charitable to a for profit basis, the issue of disposal of assets was managed by a process that stands in sharp contrast to the traditional use of *cy-près*.

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[247] *In re Barnes Foundation*, No. 58,788, 2004 WL 2903655 (Pa.Com.Pl. Dec. 13, 2004) (Orphan's Court of Montgomery County, PA).

[248] 96 Mass. (14 Allen) 539 (1867).

[249] *Ibid*., p. 541.

[250] *Ibid*., p. 597.

[251] *Trustees of University of Del. v. Gebelin*, 420 A. 2d 1191 (Del. Ch. 1980) (racial restriction removed but not gender restriction).

[252] *Wooten v. Fitz-Gerald*, 440 S.W. 2d 719 (Tex. Civ. App. 1969). See generally, Luria, D., 'Prying Loose the Dead Hand of the Past: How Courts Apply the *Cy-près* to Race, Gender, and Religiously Restricted Trusts', 21 U.S. F. L. Rev. 41 (1986).

[253] *Evans v. Abney*, 224 Ga. 826, 165 S.E. 2d 160 (1968), aff'd 396 U.S. 435, 90 S. Ct. 628 (1970).

[254] *Ibid*.

In the Empire Blue Cross Blue Shield case, legislation was introduced to place the organisation's assets in two specially created funds: the Public Asset Fund (95%) and the Charitable Asset Fund (5%). The legislation prescribed the specific health care services to which the funds are to be put, a three-year period of expenditure and the model of governance.[255] Recourse to such a process in New York and other states where there have been hospital conversions, illustrates the willingness in this jurisdiction to experiment with new methods but it also raises questions as to the grounds on which government will in future intervene in such conversion cases.[256] This is done in lieu of employing the traditional *cy-près* approach whereby assets would be transferred to a similar charitable organization without any government interference.

Treasury and the IRS

The IRS has demonstrated a willingness to stretch the boundaries of accepted common law definitions and this approach has, perhaps, reduced some of the pressure that, in other jurisdictions, resulted in charity law reform.

So, for example, it has picked up on the importance of determining that racial restrictions will render a trust non-charitable, particularly in light of the *Bob Jones University* decision discussed above. For example, Private Letter Ruling 8910001[257] held that a privately administered trust will not be considered charitable if the beneficiaries are restricted to "worthy and deserving white persons." The IRS stated that in its view the decision in *Bob Jones* "was not limited to racial discrimination in education but encompassed the eradication of racial discrimination." It has permitted the development of public interest law firms that go further than the legal aid and advice bodies in other jurisdictions by engaging in litigation on matters judged to be in the 'public interest'. This is a powerful endorsement for the right of charities to challenge the status quo, of importance in any democratic society, but without any equivalent in the other jurisdictions studied. It has also set and developed the benchmark of 'community benefit' as a standard which gives some protection to local hospitals and other social utilities that might otherwise be in danger of offending the rule against mutual benefit. Again, in respect of the advancement of religion, the IRS took an early and clear view that charitable trusts could not be restricted to those that declared their belief in one 'Supreme Being'.

Unlike the approach adopted in other revenue driven regulatory frameworks for charity, the IRS has broadened its remit in respect of 'poverty' as a charitable purpose. Instead of confining itself to the usual interpretation of alleviating its effects,

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[255] See Fremont-Smith, M., *op. cit*.

[256] The use of conversion foundations, as they are called, has created a sizable literature. See for example, the resources available on the Foundation Center website at http://foundationcenter.org/getstarted/topical/healthco.html.

[257] PLR 8910001 (November 30, 1988). The ruling cites Rev. Rul. 67-325, 1967–2 C.B. 113, which held that a racially restrictive community center was not charitable.

the IRS has accepted that charitable status is compatible with activities that address the causes of poverty, even if this entails some degree of private profit. So, as mentioned above, community development organizations and child care projects that depended upon private investment and some private profit, have been endorsed as charitable.

Support

Financial support for the NPO/charity sector in the United States comes in many forms, not only from the enormous amount of State support discussed earlier. Both individual and corporate contributions as well as the immense amount of volunteer time have made the sector strong and viable. However, one might have expected the wealthiest nation on earth not to have a growing gap between the rich and the poor and to provide a safety net with less holes. Government funding and social policy could play a much greater part in alleviating these trends.

Treasury and the IRS

The tax expenditure (tax revenue forgone by U.S. government) for charitable deductions amounted to US$41.3 billion or 0.32% of GDP for the financial year 2006, making it the eighth largest category of tax expenditure.[258] In addition to the tax exemption given to charities under §501(c)(3), individual and corporate contributions are deductible for income tax purposes under §170 of the Internal Revenue Code. They are also deductible for the gift and estate taxes under §§2055 and 2522 respectively. The general individual income tax limits are 50% of adjusted gross income for individuals and 10% for corporations, although there are inevitable complications because of different limits for contributions to private foundations, of capital gain property etc.[259] There is 100% deductibility for the gift and estate taxes.

In comparison to other nations, tax concessions involving donations are skewed to advantage the wealthy unlike, for example, the Canadian tax credit system. The findings of the *Wealth with Responsibility Study 2000* found substantial participation in planned giving among respondents worth US$1 million or more, with 67% of respondents making contributions to trusts, gift funds, and foundations, averaging US$844,017 per household or 63% of total charitable contributions.[260] As net

[258] Hungerford, T., 'Tax Expenditures: *Trends and Critiques, Congressional Research Service'*, The Library of Congress, September 13, 2006, p. 4.

[259] See, §170.

[260] Havens, J. and Schervish. P., *Wealth with Responsibility Study*, Social Welfare Research Institute, Boston College, 2000, available at http://www.bc.edu/swri.

worth rises, so does the use of planned giving vehicles with one in four respondents having over US$5 million in net assets reporting establishment of a charitable trust.[261] A 2005 survey of U.S. households with income in excess of US$200,000 or assets in excess of US$1 million (3.1% of all U.S. households) revealed that 11.5% had established split interest trusts with 40% having made a charitable bequest and nearly 20% establishing a foundation.[262]

The tax provisions provide a great deal of indirect support to charities because they inevitably encourage gifts. This leads to the position where it can be said that the U.S. has "the world's most generous tax concessions"[263] for philanthropy and "no other nation grants subsidies at such a high level or across so many types of activities".[264] On the other hand, "U.S. giving is heavily interlaced with self-interest, either directly through tax benefits, benefits from the supported charity, or social status or indirectly through the achievement of social goals which one might desire, such as better child care, civil rights, better parks etc".[265]

Treasury and the IRS provide non–financial support to the sector through their various publications as well as advice and assistance in preparing applications for tax exempt status and filling out the Form 990. The Exempt Organisations Branch of the IRS works closely with organisations that seek and obtain tax-exempt status, providing services and advice and generally assisting them to better serve the public. They also issue regulations (which require public notice and comment procedures) and rulings (which do not), thus giving not only informal but also formal advice on a regular basis. For example, the issuance of *Rev. Rul. 2007–44*, as mentioned above, is the result of an IRS initiative to work with the sector; in this case to devise workable rules that would govern the involvement of charities in political activities. Litigation about aspects of tax-exempt status is more frequent in the U.S. then in other countries and the resulting judgments provide all nonprofit organisations with information about how courts view the IRS oversight of the public benefit sector.

Other Government Agencies

The non-financial support obtained from other government agencies is also important for the functioning of the sector. Every state Attorney General (or Secretary of

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[261] Spectrem Group, *Charitable Giving and The Ultra High Net Worth: Reaching the Wealthy Donor*, 2002, available at http://www.spectremgroup.com

[262] Bank of America, *Study of High Net-Worth Philanthropy*, initial report October 2006, available at http://newsroom.bankofamerica.com/index.php?s=press_kit&item=63

[263] See Clotfelter, C., 'Tax-Induced Distortions in the Voluntary Sector', *Case Western Law Review*, 39, 1988/1989, pp. 663–694.

[264] See Weisbrod, B., 'The Pitfalls of Profits', *Stanford Social Innovation Review*, Winter 2004.

[265] See Wright, W., 'Generosity vs. Altruism: Philanthropy and Charity in the United States and United Kingdom', *Voluntas*, 12: 4, December 2001, p. 411; citing Wolpert, J., 1993.

State, as states differ as to where organization papers are filed) has on its website the requisite forms to be filed to incorporate an NPO, and they frequently offer online guidance for the filing process. In addition, as mentioned previously, certain state charities bureaus have considerable guidance available on the web.

Non-government Agencies

Organizations representing large segments of the sector, such as Independent Sector and the Council on Foundations, provide many forms of support to their members (and even to non-members) through their websites, conferences and other programmes. There are also a myriad of non-membership independent organizations that provide general support – these include, for example, the Foundation Center, the National Center for Charitable Statistics (affiliated with the Urban Institute), the Aspen Institute's Nonprofit Sector Research Fund, etc. In addition, there are numerous academic programs affiliated with universities, which provide both research facilities and outreach to charities in the community and nation-wide. The sub-sectoral bodies representing, e.g., health providers, are also of assistance to their members.

Charity Law and Social Policy: The Fit with Contemporary Circumstances

In the absence of any completed federal charity law reform process, the institutional infrastructure and the common law basis of the regulatory legal framework for charities, remain much the same now as they have for generations. However, the courts continue to play a more prominent role in the U.S. than in the other jurisdictions studied,[266] while both the Treasury and IRS have made some courageous decisions that have had the effect of updating and introducing balance in the application of the law to contemporary issues. This federation is marked by greater thought and activity in the sector and in legal profession is attempting to devise model laws and codes for the sector which are offered to the states for adoption as agreed best practice, such as model trust and incorporated association models. Other federations considered in this book such as Australia and Canada have no or very pale imitations of such attempts to bring some considered laws to a federated chaos of conflicted and neglected provisions. As with other jurisdictions, there are obvious questions about the extent to which federal oversight of the sector would work in

[266] With respect to the review of a denial or removal of tax exempt status, this is facilitated by §7428, which permits charities to initiate a declaratory judgment action. This makes court supervision of IRS determinations relatively inexpensive and quick.

the U.S.,[267] but there can be no doubt that the time has come to begin rethinking the question of government oversight of charities in the United States.

The Legal Functions

The functions of the law in relation to charity, applied through the traditional institutional framework of courts, Attorneys General and IRS, are necessarily complicated by the federated constitutional context. In other respects, however, this traditional regulatory framework ensures that the legal functions are given effect in a conservative fashion, not very different from other revenue driven models, with policing as the priority.

Differential in Functional Weighting

Unquestionably, the regulatory framework for charities in the U.S. conforms to the traditional revenue driven model. While this places a priority on the policing function, as administered by the IRS, it would be a mistake to assume that this negates the importance of the other functions. The IRS does not discharge its functions with a heavy hand, partly because it lacks the staff to adequately supervise let alone exercise control over the affairs of charities.

The Functional Imbalance in Charity Law

The priority given to the policing function through the institutional framework is offset to a greater degree than the revenue driven models of other jurisdictions, by closer involvement of the courts and by a willingness on the part of the IRS to take a less prescriptive line than is taken in other jurisdictions in respect of matters such as lobbying by charities. However, the lack of a forum to counterbalance the tax driven priorities of the IRS has attracted comment from U.S. academics.[268] As in other common law jurisdictions, the issue as to whether a Charity Commission type body might lend more weight to the mediation/adjustment function has arisen in the U.S.

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[267] These are similar to federalism problems in Canada and Australia.

[268] See Simon, K. W. and Irish, L. E., *A Public Benefit Commission for the United States? A Discussion Document*, for the Senate Finance Committee, Roundtable Discussion, July 22, 2004. Needless to say, the Committee was underwhelmed by this proposal.

Since 1930, there have been proposals to establish such a commission. For example, Ernst Freund's 'Legal Aspects of Philanthropy' suggests as follows[269]:

> Effective protection [of trusts against trustees] might be possible through the creation of a body analogous to the English Charity Commissioners. Experience has shown how much superior administrative commissions are to the Attorney General in availability for the protection of interests that are not backed up by financial resources or inducements.

In 1985, the Filer Commission proposed "that a permanent national commission on the nonprofit sector be established by Congress"[270] claiming that a full-blown commission on the model of the English Charity Commission was not warranted in the United States.[271] But the report went on to describe benefits to be obtained from such a quasi-governmental commission as including being able to speak to the needs of the sector, exploring ways to strengthen philanthropy, and providing a public forum for discussion of issues about the sector.[272]

More recently public debate has centered on the question of whether there should be another government agency with power to oversee the sector. Both the President of the Council on Foundations, Steve Gunderson, and Mark Lloyd, Senior Fellow at the Center for American Progress, have suggested such a solution to the current hodge-podge of oversight bodies and regulatory agencies.[273] Gunderson, for example, favors the Department of Commerce having a division on the NPO sector, while the National Association of Nonprofit Associations proposed a Small Business Administration-type entity as early as 2004.[274]

The Resulting Social Policy Deficit

Paradoxically, although it is the world's richest country with ample evidence of a wealthy, generous and thriving philanthropy, there is also evidence that political failings in the U.S. have resulted in an agenda of serious social policy issues. The following are some of the more pressing matters which, although clearly the business of government rather than charity, result in social disadvantage that could be more effectively addressed by the latter if the fit between charity law and contemporary social need was improved.

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[269] Freund, E., *op. cit*.

[270] Filer Commission, *op. cit*., p. 191.

[271] *Ibid*., p. 190. See Freund, E., *op. cit.*, at 189

[272] *Ibid*., pp. 191–192.

[273] See Hemingway, M.Z., 'Nonprofit leaders propose a new agency', in FederalTimes.com, for November 24, 2006, available at http://federaltimes.com/index.php?S=2376194.

[274] *Ibid*.

Poverty

The official poverty rate[275] in the U.S. increased for four consecutive years, from a 26-year low of 11.3% in 2000 to 12.7% in 2004. This means that 37 million people were below the official poverty thresholds in 2004. In 2006, the poverty rate for minors in the United States was 21.9%, the highest child poverty rate in the developed world. With 12% of the population currently living below the poverty line, accompanied by falling family income in the lower income groups, there will be millions of socially disadvantaged families and communities requiring assistance from government and/or charity to keep them from destitution. As recorded above, there are now serious concerns for the effects of poverty upon the rural population, the low waged, the elderly, children and on Native Americans.

Health and Social Care

There is a wide gap in the quality of treatment between those who can afford health insurance, or who have it provided as an employee benefit, and those who do not. The ageing population is encountering rapidly rising medical costs, insurance costs and pension shortfalls which will bring many more into welfare dependency. There are also approximately one million people with HIV/AIDs in the U.S. (and already 40,000 related deaths) in need of long-term health and social care. Now and for the foreseeable future, there will be a role for charitable organisations in the U.S. to provide a lifeline for those "battered women, immigrants, homebound senior citizens, AIDS patients, the 43 million Americans without health insurance, and countless other constituencies who all too often fall through this nation's safety net".[276]

Multicultural Issues/Immigration etc.

The U.S. has a long-standing reputation as the destination of choice for immigrants, coupled with a legal presumption that racial discrimination is contrary to public policy. It was in *United States v. Carolene Products Co*.[277] where Stone J. in his

[275] See US Census Bureau, 'Poverty in the United States', 2005.

[276] See Berry, J., 'A Needless Silence: American Nonprofits and the Right to Lobby', Berry, J. and Arons, D.F., *A Voice for Nonprofits*, Brookings Institution, Tufts University, 2005. Also, see Council on Foundations <www.cof.org>.

[277] 304 US 144 (1938). There are three aspects to this test – there must be a compelling state interest, the law or policy must be narrowly tailored to meet it, and the law or policy must be the least restrictive means for achieving it.

famous footnote 4, declared that one of the grounds on which legislation could be subjected to "more exacting judicial scrutiny" was if it was directed at particular religious, national or racial minorities or expressed prejudice against "discrete and insular minorities".[278] This approach has since been followed by the IRS in a number of rulings which have upheld the charitable status of organisations that: are set up to eliminate the discrimination that limited employment opportunities for qualified minority workers[279]; to educate the public on the merits of racially integrated neighbourhoods[280]; to investigate the causes of deterioration in a particular community and informed residents and city officials of possible corrective measures[281]; and to conduct investigations and research on discrimination against minority groups in housing and public accommodation.[282] However, it remains the case that racism, segregation of neighbourhoods and sometimes vitriolic antagonism towards new immigrants (especially the illegal ones), are significant social problems in this jurisdiction.

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[278] *Ibid*., p. 152.

[279] See Rev. Rul. 68-70, 1968-1 C.B. 248. "This organisation's activities are designed to eliminate prejudice and discrimination in the community by various means. Its lectures and forums are intended to educate potential employers in the advantages of hiring qualified workers without regard to race or creed." The organisation also arranged interviews with potential employers for qualified workers.

[280] See Revenue Ruling 68-655, 1968-1 C.B. 248. "By education [*sic*] the public about integrated housing and conducting intensive neighborhood educational programs to prevent panic selling because of the introduction of a non-white resident into a formerly all-white neighborhood, the organisation is striving to eliminate prejudice and discrimination and to lessen neighborhood tensions. By making mortgage loans to families that cannot obtain such loans commercially but that otherwise are considered desirable residents, the organisation is trying to break down the barriers of prejudice and gain acceptance of integrated housing within the community. It accomplishes this same objective by purchasing homes and reselling or leasing them on an open occupancy basis to families that will be compatible to a neighborhood and demonstrate the feasibility of integrated communities. By stabilizing the neighborhood, the organisation is combatting potential community deterioration."

[281] See Revenue Ruling 68-15, 1968-1 C.B. 244. "The work of the organisation's committees is charitable since it is designed to contribute directly to lessening neighborhood tensions, eliminating prejudice and discrimination, and combatting community deterioration and juvenile delinquency. The dissemination of information to residents of the community and other interested people of the city at large is educational because the material instructs the public on subjects useful to the individual and beneficial to the community." The Ruling also established that the group did not engage in propaganda, attempt to influence legislation, or intervene in political campaigns.

[282] See Revenue Ruling 68-438, 1968-2 C.B. 209. "The organisation's activities of investigating the existence of discrimination and seeking compliance with applicable laws directly contribute to the elimination of prejudice and discrimination, the defense of human and civil rights secured by law, and the lessening of neighborhood tensions. The information that is disseminated to individuals and groups within the community through the organisation's publication program and speakers' bureau instructs the public on subjects useful to the individual and beneficial to the community." It was also noted that the group did not "engage in economic boycotts, reprisals, or picketing," nor did it attempt to influence legislation or disseminate propaganda.

Native Americans

The success of casinos in Native American communities demonstrates the viability of commercial ventures in that context and suggests their potential to support more broadly based community development projects.[283] The failure to extend and diversify from that base would seem to indicate an absence of modern philanthropic models involving partnership arrangements between charity, government and business.[284]

However, involvement in the gambling industry has been at a price and has brought with it the associated problems of addiction, family and community conflict.[285] Moreover, the incidence of domestic violence among this minority group is now alarmingly high while they are also over represented in prisons and in national statistics for unemployment, poor housing, alcoholism, heart disease and diabetes. As in other common law jurisdictions (notably Canada, New Zealand and Australia) there may also be constraints emanating from the blood-link basis of relationships in indigenous communities which by breaching the 'public' component of the public benefit test could compromise eligibility for charitable status. The Native Americans continue to be one of the most socially disadvantaged minority groups in the US.

Human Rights

At present, particularly since 9/11 and the ensuing global war against terror, human rights in the U.S. have been under continual threat. The litany of human rights infringements includes considerable invasions of privacy and intrusive inspections under the USA Patriot Act, as well as allegations of torture at prisons in Iraq, Afghanistan, Guantánamo Bay and elsewhere. These developments have been particularly corrosive and divisive for the fabric of U.S. society, and have had led to a dramatic drop in the nation's prestige in the court of world opinion.

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[283] See the discussion of the Choctaw Nation and the way in which its casinos support health care and other service institutions in text.

[284] A less than rosy picture of Indian gambling was painted by an 2002 exposé in *Time magazine*, where it was noted that "Instead of regulating Indian gambling, the act has created chaos and a system tailor-made for abuse. It set up a powerless and underfunded watchdog and dispersed oversight responsibilities among a hopelessly conflicting hierarchy of local, state and federal agencies. It created a system so skewed – only a few small tribes and their backers are getting rich – that it has changed the face of Indian country." See Bartlett, D.L. and Steele, J.B., 'Wheel of Misfortune', *Time*, Sunday, December 8, 2002, available at http://www.time.com/time/magazine/article/0,9171,1101021216–397526,00.html.

[285] Some of these problems have existed for years, even before casino gambling was allowed on reservations.

Conclusion

The struggles for the dominant themes in the life of the nation are the direct result of deep political divisions about what the proper role of the State should be, who should make decisions about education, primary health care, etc., what should be done about illegal immigration, who has ultimate responsibility for domestic ills, etc. As the above sections on the role of charity and charity law in helping to define those outcomes reveal, the United States remains deeply troubled about what social structures best fit the new American dream.

It seems a fairly common belief among many individuals in the United States that charity cannot meet significant social policy needs. This is because most people know that it is much easier to raise money for priorities of the rich (museums, opera companies, etc.) than for charities engaged in poverty alleviation, immigrant education, etc. A recent study, based on statistics from 2005 highlights these facts.[286] The Executive Summary includes the following statistics[287]:

> This analysis finds that less than one-third of the money individuals gave to nonprofits in 2005 was focused on the needs of the economically disadvantaged. Of the $250 billion in donations, less than $78 billion explicitly targeted those in need.
> Only 8 percent of households' donated dollars were reported as contributions to help meet basic needs–providing food, shelter, or other necessities. An estimated additional 23 percent of total private philanthropy (including donations from foundations, corporations, and estates) went to programs specifically intended to help people of low income–either providing other direct benefits (such as medical treatment and scholarships) or through initiatives creating opportunity and empowerment (such as literacy and job training programs).

The study, along with other studies cited by it, suggest that the deep ambivalence in American society with regard to how to address social policy problems will continue to require reliance on direct State funding as well as State funding of charities in order to meet social ills.

Looking at this from the perspective of the technical charity law outlined here, it seems appropriate to suggest that the law has by and large made it possible for charitable organizations to address the domestic social policy agenda. They are, for example, not inhibited from fund raising through the performance of a relatively modest amount of commercial activities; they are permitted wide latitude with regard to the definition of what is charitable; and they are also permitted to engage in advocacy for the disenfranchised populations they serve. But because social service organizations receive such a small proportion of the funds donated to charity, they cannot support themselves without government grants, making out-sourcing by government almost a foregone conclusion if the sector is going to survive and

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[286] See The Center on Philanthropy, Indiana University, Patterns of Household Charitable Giving by Income Group 2005 (Summer 2007), available at http://www.philanthropy.iupui.edu/Research/Giving%20focused%20on%20meeting%20needs%20of%20the%20poor%20July%202007.pdf.

[287] *Ibid*.

address the social policy agenda (and this of course brings with it the strings discussed here and in Chap. 14).

It is difficult to be sanguine about the possibility that more contributions will come the way of the charities working to address this agenda and match the government support. This is in part because of the "upside down" effect of the income tax charitable contribution deduction.[288] Although it would be possible to make the benefit fairer by creating a tax credit as exists in Canada, there is virtually no chance that such a proposal would survive – just as the restrictions on charitable giving were repealed because of the pressure of lobbying by large tax exempt cultural and educational institutions, Congress would be unlikely to withstand the political process and enact a tax credit.

This means that the needs of the poor, Native Americans, immigrants and the like all require a higher profile among the wealthy and prominent donors. Affecting this sort of change in the giving culture will take years, if it is ever achieved. Leaders such as George Soros, Bill Gates, and Warren Buffet are showing how to proceed, but there is still a long way to go.

[288] Those paying taxes in the highest brackets benefit the most from it.

Chapter 10
Singapore

Introduction

This chapter examines how the common law legacy, a remnant of its colonial past, has survived in Singapore and how the charity law aspect of that legacy now fits with the contemporary social policy challenges that are particular to this tiny jurisdiction. It is both a good and a bad time to conduct such an exercise.

For the several decades that have elapsed since it acquired independence, the regulatory framework governing charity in Singapore offered an interesting contrast with other common law jurisdictions. A very conservative and tightly controlled regime provided a stifling environment for philanthropy and failed to generate a significant culture of giving and volunteering. This may now be about to change. Following a scandal concerning governance in a leading Singaporean charity,[1] one with a prominent international profile, the government instituted a charity law reform process the outcomes of which are now partially in place. A further legislative phase is anticipated and at this point it is difficult to be certain as to the full extent of the change that will be incorporated in statute form. At this stage, however, it is possible to gauge the broad direction and nature of reform and to conclude that the future legal framework for charity in Singapore will differ in some important respects from the model that has prevailed since independence.

A Socio-economic Profile

This island city-state, situated at the southern tip of the Malay Peninsula, attained self-governance from the British in 1959 and achieved independence as the Republic of Singapore in 1965 as a constitutionally enshrined representative

[1] The National Kidney Foundation scandal occurred in July 2005 and concerned allegations surrounding false declarations on how long NKF's reserves could last, its number of patients, installation of a golden tap in the CEO's private office suite, his salary, his use of company cars and first class air travel.

K. O'Halloran et al., *Charity Law & Social Policy*,

democracy. It has since successfully exploited its strategic location as a trading centre and this has seen it's the standard of living rise dramatically. A centralist authoritarian style of government has brought Singapore a level of social stability and prosperity that is the envy of its Asian neighbours.

The Modern State

There is a view that Singapore's undoubted success as centre of commerce and international trade has been at the price of establishing an authentic democracy. Arguably, PAP, the ruling political party, has had such a firm on government for almost five decades, reinforced by rigorous suppression of dissent, that it has in effect turned Singapore into a one-party State.

Population and Composition

The smallest country in south-east Asia, Singapore is also one of the most densely populated in the world with a population estimated in June 2006 as at about 4.5 million. After two decades of a successful family planning policy, it is now facing the threat of an ageing population with declining birth rates and only the large numbers of migrants from China, India, Sri Lanka, Indonesia and other parts of the world keep its population from declining. Many thousands of foreigners are employed and reside in the city-state. The dominant ethnic groups are the Chinese (76.7%), Malays (14%) and Indians (7.9%) while others (Eurasians, Arabs, Jews) comprise 1.4% of the population.

The National Economy

Foreign investment, entrepreneurial skill and government-led island-wide industrialization have created a modern market based economy specialising in electronics and in manufacturing which constituted 28% of GDP in 2005. The manufacturing industry has diversified into electronics, petroleum refining, chemicals, mechanical engineering and biomedical sciences manufacturing.

Singapore is the world's fourth largest foreign exchange trading centre after London, New York City and Tokyo.[2] Along with Hong Kong, South Korea and Taiwan, Singapore was one of the Four Asian Tigers. In 2001, a global recession and

[2] Singapore is ranked first in the *Doing Business Report 2006* by the World Bank (cited in Wikipedia).

slump in the technology sector caused the GDP to contract by 2.2% and this was further adversely affected by the SARS outbreak in 2003. Singapore has since recovered from the recession, largely due to improvements in the world economy; its economy grew by 8.3% in 2004 and 6.4% in 2005.[3] The island-state achieved Asian Tiger status after four decades of intense and open capitalist industrialization. However, as a country with no natural resources, it has become very dependent upon international commerce and therefore particularly vulnerable to global trends.

Singapore now has a foreign reserve of S$212 billion (US$139 billion) and in terms of GDP per capita is the 17th wealthiest country in the world.[4] The per capita GDP in 2005 was US$26,833 and the unemployment rate was 2.7% in 2006, with 173,000 new jobs being created in 2006, a record high. The economy grew by 7.9% in 2006 and reached 7.2% in the first quarter of 2007.

The Charitable Sector

Currently there are about 1,800 registered charities in Singapore of which some 53% are established for religious purposes. More than half of these have annual incomes (including donations and government grants) of less than $250,000 and 292 or 17% have total annual incomes of $50,000 or less. In contrast, some 47 large charities have annual incomes in excess of $10 million.

There are also currently about 900 Institutions of a Public Character (IPCs) i.e. organizations that are authorized to receive tax-deductible donations (see, further, below). There has been a steady increase in tax-deductible donations to IPCs, particularly from corporations, which attained a record $512 million in 2003. Overall, however, as the government has acknowledged, "countries such as the United States and the United Kingdom have a stronger culture of giving".[5]

The culture of volunteerism is also weak but is now growing steadily in Singapore.[6] Voluntary welfare organizations, for which there is no legal definition, provide welfare services and/or services that benefit the community at large and are not profit making; they are typically registered under the Societies Act or as a trust (under a trust deed). In Spring 2007 the Government pledged to inject $30 million into a VWO Capability Fund over five years, to be administered by the National

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[3] *Per capita* GDP at Current Market Prices, Singapore Department of Statistics 2006-02-16 (cited in Wikipedia).

[4] According to the IMF, Singapore is rated 17th after Luxembourg, Ireland, Norway, United States, Iceland, Switzerland, Denmark, Austria, Canada, The Netherlands, UK, Finland, Belgium, Sweden, Qatar and Australia (as cited in Wikipedia).

[5] See The Ministry of Community Development and Sports & the Ministry of Finance, January 27, 2004 <http://app.mof.gov.sg/news_press/pressdetails.asp?pressID=128>.

[6] See, for example, The National Volunteer & Philanthropy Centre (NVPC), first ever IPC survey which reported in February 2007 that although 86% of IPCs surveyed used volunteers in 2004 only 53% of their pool of volunteers were active.

Council of Social Service, in order to further enhance the professional and services capacity of the voluntary welfare organizations providing social services in Singapore. While in 2000 the volunteer participation rate was 9.3% (compared with 56% in USA, 48% in UK and 25% in Japan)[7] it reached 14.9% in 2002[8] and 15.2% 2004.[9] Volunteer manhours compare well with those in USA and UK, with weekly average standing at 3.8 for Singapore and 3.5 for USA and 3.2 for UK.

A current discernible trend in this jurisdiction is the exponential growth in 'Asia Giving to Asia' as evidenced in the work of such major organizations as the Shaw Foundation, the Lee Foundation and the Li Ka Shing Foundation. In early 2007, for example, Temasek Holdings established the $500 million Temasek Trust while the estate of Tan Sri Khoo announced an $80 million gift in support of the new Duke-NUS Graduate School of Medicine.

Charity and Social Policy: A History

Given the location of this city-State, sandwiched between Indonesia and Malaysia, it was perhaps inevitable that any government with a mission to develop Singapore as a hub of Asian trade and an international finance centre would also be deeply concerned about the potential for underlying racial and religious tensions to destabilize the country and undermine its goals. The history of Singapore since independence is one in which the authoritarian regime of the ruling PAP government has exercised tight control to manage any risk to social stability. This has meant that the growth of civil society in Singapore has been compromised by restrictions on freedom of speech, freedom to form associations and freedom of expression.

Relevant Social Policy Milestones

Charities/IPCs form part of the nonprofit sector in Singapore, the development of which as is helpfully outlined in *Philanthropy and Law in Asia*,[10] can be divided into three phases: the growth of Chinese NPOs in colonial Singapore, a decline of NPOs following independence, and the emergence of reformist groups in the mid-1980s.

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[7] See The National Volunteer & Philanthropy Centre (NVPC), '2000 Benchmark Study of the Local Volunteer Scene', Singapore, 2000.

[8] See The National Volunteer & Philanthropy Centre (NVPC), '2002 Survey on Volunteerism in Singapore'.

[9] See The National Volunteer & Philanthropy Centre (NVPC), '2004 Individual Giving Survey in Singapore'.

[10] See Corinna Lim, C., Swaminathan, D., and Tan Siew Ping, N., 'Singapore' *Philanthropy and Law in Asia*, Silk, T. (ed.), Jossey-Bass, San Francisco, 1999.

The first significant NPO activity was that of early Chinese immigrants who came together to form clan associations, dialect associations, and secret societies. This arose as a result of the colonial government's neglect of the welfare of these immigrants and their need to find kinship in a foreign land.

In 1965, Singapore, led by the People's Action Party (PAP) government, gained independence. The PAP government proved to be effective and strong, providing the country with rapid economic growth and the necessary social services and thus minimizing the role of NPOs such as trade unions and student organizations. As a result, NPOs with an interest in social policy took a backseat in Singapore until the mid-1980s. During this period, parapolitical organizations played an important mediating role between the people and the state, displacing, in part, the role usually assumed by NPOs. The three main parapolitical (or 'grassroots') organizations, the community centers, citizens' consultative committees, and residents' committees are government-sponsored organizations under the control of the Prime Ministers' office. They act as channels of communication between the government and the people, provide welfare and social services, and provide opportunities for people to participate and become involved in the community.

In the mid-1980s, as a result of higher education and the developing maturity of the society, a new breed of NPOs started to emerge. These were formed by people who had an interest in social issues and who wanted to generate change in society through their involvement and through the education and mobilization of people. Groups such as the Association of Women for Action and Research, the Nature Society, and the Association of Muslim Professionals fall into this category. The last 20 years have also seen the development of State-initiated NPOs, such as the community self-help groups set up along ethnic lines (for example, the Singapore Indian Development Association, the Chinese Development Assistance Council, the Council for the Development of the Singapore Muslim Community and the Eurasian Association), welfare organizations linked to the National Council of Social Services (for example, the Society for Aid to the Paralyzed), and professional associations (for example, the Singapore Professional Center). Many of these have informal rather than formal links to the government.

Current Social Policy Themes and Charity

Since independence, the government of this relatively prosperous country has been primarily concerned with risk management i.e. to prevent or suppress any form of stress that might threaten social stability and compromise continued economic growth.

Poverty

From the circumstances of abject poverty, mass unemployment and chronic housing shortage that prevailed when it acquired independence, Singapore rapidly

attained economic success only to slip, at the turn of the century, into the worst recession in four decades. As it now emerges from that recession, issues of poverty and unemployment[11] have come to the fore. The combination of an ageing population, declining birth rates and a successful national family planning policy has led to a situation where poverty is becoming a social issue for those elderly without an employment income.[12] It is the recent immigrants, both legal and illegal, who are now the most disadvantaged members of society. For a government that prides itself on the very real achievement of having made Singapore a showcase of capitalist entrepreneurship in Asia, the rising spectre of structural poverty presents a serious challenge for future domestic policy.

Multi-culturalism

The population of Singapore comprises 77% Chinese, 14% Malay and 8% Indians. Of these 42% are Buddhists, 15% Muslims, 14% Christians, 9% Taoists and 4% Hindus. The languages widely spoken are Chinese, Malay, Tamil and English, which are the four official languages. This small city-state is clearly a multi-cultural and multi-religious country where the strongest ethnic and cultural associations are with China.

Following serious racial riots in the 1950s and 1960s, the control and surveillance subsequently exercised by government bodies in respect of all manner of associations in such a small country has ensured that ethnic tensions are not allowed to generate further social unrest. There is, however, evidence of social polarization along ethnic lines, with the ethnic Chinese community considered better off than the Malay community. Social polarization exists also in education particularly as regards access to private schools. In formulating social policy, the government always has to take issues of race and religion into consideration.

Human Rights, Anti-terrorism and Social Justice

Singapore is not a signatory to the European Convention on Human Rights and Fundamental Freedoms, it has chosen not to ratify many international human rights treaties such as the Convention on the Rights of the Child and its courts impose harsh punishments for certain anti-social offences including the death penalty for crimes such as drug smuggling. However, Article 14 of the Constitution of Singapore does give all citizens the right to form associations. This right is subject

[11] In 2005, the rate of unemployment in Singapore was 3.4%.

[12] See, for example, Singapore Department of Statistics, Occasional Paper on Social Statistics, *Household Income Growth and Distribution 1990–1997*, Singapore, December 1998.

to such restrictions Parliament may impose by law, as it considers necessary or expedient, to protect the security of Singapore, public order, or morality. In fact Parliament has introduced several statutes that severely restrict that right.

- *The Penal Code 1872*[13]

This is a codification of the criminal law of Singapore. The code makes unlawful assembly an offence. An unlawful assembly is an assembly of five or more persons whose common objective is the resistance of any legal process; commission of mischief, criminal trespass, or any offence; 'overawing' the government or the exercise of lawful power by a public servant by means or show of criminal force; interference with a person's rightful enjoyment of property by means or show of criminal force; or compelling a person to commit an illegal act or omission by means or show of criminal force. An intentional participant in an unlawful assembly is considered a member of the unlawful assembly and is liable to penalties as such.

Criminal sanctions are also imposed on persons who commit or provoke rioting and persons who have an interest in premises in which unlawful assembly or rioting takes place.

An NPO that has for its purpose the promotion of gay or lesbian rights may be considered 'unlawful' or contrary to the 'national interest' and denied registration under the Societies Act and the Companies Act.

- *The Internal Security Act 1960 (ISA)*[14]

This was enacted to provide for the internal security in Singapore and to prevent subversion. The ISA confers various powers on the authorities, including the power to detain persons without warrant or trial, the power to take possession of any land or building, and the powers of seizure, closure, entry, and investigation without warrant. Although the ISA applies to both individuals and organizations, it is particularly germane to the latter, as they have greater potential to disrupt the internal security of Singapore.

Of specific relevance to NPOs, the ISA confers on the authorities the power to, inter alia, prohibit any publication that appears prejudicial to the national interest, public order, or security in Singapore; require the delivery of the subversive documents; and prohibit subversive exhibitions or entertainment. There is no right of appeal to the courts against the authorities's exercise of their wide powers under the ISA.

- *The Maintenance of Religious Harmony Act 1992*[15]

This fairly recent piece of legislation, enacted to prohibit acts that cause feelings of enmity between different religious groups and to prevent people from

[13] This Act (Chapter 224) was revised in 1970 and 1985 has been amended several times principally in 1973 and 1984.

[14] This Act (Chapter 143) was revised in 1970 and 1985 with multiple amendments.

[15] Chapter 167A.

promoting political causes in the name of religion, was deemed necessary in view of Singapore's vulnerable position as a young, small, densely populated, multiracial, multireligious, and multicultural country.[16] It provides for the maintenance of religious harmony and empowers the Minister of Home Affairs to make restraining orders against officials or members of any religious group or institution, or any other person, if the Minister is satisfied that such party has:

- Caused feelings of enmity, hatred, ill-will, or hostility between different religious groups
- Carried out activities to promote a political cause or a cause of any political party while or under the guise of propagating or practicing any religious belief
- Carried out subversive activities under the guise of propagating or practicing any religious belief
- Incited disaffection against the President or the government of Singapore while or under the guise of propagating or practicing any religious belief
- Attempted any of the above

Restraining orders may also be made against any person who, in the opinion of the Minister, incites or encourages any religious group or any member or official of a religious group to carry out any of the activities mentioned above. The orders so made could, inter alia, restrain the persons from addressing audiences; distributing, editing, or in any way contributing to the publications of a religious group; or making statements on religious matters.

Decisions of the Minister made under the above legislation cannot be called into question in any court. Arguably, the decisions of the various authorities under the Societies Act, the Charities Act, the ISA, and the Maintenance of Religious Harmony Act should all be subject to court supervision.

Charity and the Law

Charity law in this jurisdiction, as Ter Kah Leng has rightly pointed out, "is derived primarily from English law, local case law and local statutes".[17] Since attaining independence in 1965, Singapore has begun to actively develop its own body of law. Many of these developments are unique to Singapore, while others owe their origins to England and such other common law countries as Australia, New Zealand, Canada, and the United States.

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[16] See further, Khun Eng Kuah, 'Maintaining ethno-religious harmony in Singapore', *Journal of Contemporary Asia*, 28: 1, March, 1998, pp. 103–121.

[17] See Ter Kah Leng, *The Law of Charities – Cases & Materials, Singapore & Malaysia*, Butterworths, Singapore, 1985, p. 3.

The Relationship Between Law and Charity: An Overview

In Singapore there are charities and there are Institutions of a Public Character (IPCs). The latter are a sub-set of charities authorized to receive tax-deductible donations from the public i.e. charities may be but are not necessarily IPCs, but the latter are also always charities.[18] The legal origins of charities/IPCs lie in Singapore's common law heritage.

The Common Law: Definitional Matters

The common law legal system, based primarily on English law, provides the regulatory framework for charities. Section 2(1) of the Charities Act 1994, continuing the approach adopted in the 1982 Act, defines 'charity' as any institution, corporate or not, that is established for charitable purposes and is under the jurisdiction of the High Court with respect to charities while 'charitable purposes' is in turn defined as purposes that are exclusively charitable according to the law of Singapore.[19] To interpret the meaning of these terms the courts rely on the common law, as established largely through English precedents, and derived essentially from the four categories of 'charitable purposes' as first propounded by Lord Macnaughton in *Income Tax Special Purposes Commission v. Pemsel*[20] and as subsequently developed through application of the 'spirit and intendment' rule.[21] In Singapore, as elsewhere in the common law world,[22] this means that to be a charity an organization or trust must operate on a not for personal profit basis, be set up exclusively for charitable purposes and be carrying out activities to achieve these purposes for the benefit of a sufficient portion of the community while a purpose is only charitable if is for the relief of poverty, for the advancement of education, for the advancement

[18] This is very similar to the distinction made between charities and Public Benefit Institutions in Australia.

[19] In the Memorandum entitled 'Setting up a Charity, Responsibilities and Duties of Charity Trustees' issued by the Commissioner of Charities, it is stipulated that the constitution of a charity must state that its objects are *exclusively* charitable and that any power to carry out activities in support of the main objectives should be provided under an incidental clause.

[20] AC 531 (1891).

[21] The rule holds that even if a purpose cannot be defined as coming under one of the established heads of charity, it will nonetheless be construed as charitable if it can be interpreted as falling within the 'spirit or intendment' of the Preamble to the 1601 Act.

[22] Note that there are some points of difference in terms of the common law heritage: for example, at common law charity trustees have the power to sell trust property, whether or not such sale is authorised by the trust instrument, as long as such a sale is for the benefit of the charity and is not in breach of trust. In England, this common law power has been superseded by statute and charity trustees are not allowed to dispose of any landed property without an order of the court or the Charity Commissioner. However, this statutory prohibition does not apply in Singapore; see further, *Chileon Pte Ltd v. Choong Wai Phwee & Ors (Trustees of Cheng Liam Um Vegetarian Temple* [2001] 2 SLR 223.

of religion, or is otherwise beneficial to the community. This is the basis on which the Commissioner of Charities (see, further, below) relies for guidance in determining whether an organization or trust qualifies to be registered as a charity. There is little evidence that in doing so the Commissioner places much reliance upon the 'spirit and intendment' rule, nor is there a history of the courts doing so, to creatively broaden the interpretation of charitable purposes to fit contemporary patterns of social need. There is evidence, however, that in applying the 'public benefit test' to determine charitable status the judiciary will not accept trusts for ancestor worship nor for other ceremonies to be held in commemoration of a testator's soul.[23]

Legal Structures

Generally any organization seeking registration as a charity/IPC will first need to be registered as a society under the Societies Act, be incorporated as a company limited by guarantee under the Companies Act or form a trust under the Trustees Act. As of November 2005, approximately 58% of all charities were registered as societies, 18% as limited companies and only 4% as trusts (which contrasts with the UK where most charities are now companies limited by guarantee). The suggestion that a new legal structure be created specifically for charities such as a Charitable Incorporated Organisation (as now introduced in England & Wales by the Charities Act 2006) has been considered but rejected.[24]

The Common Law: Institutional Infrastructure

The range of agencies involved in regulating charities and their activities is not unlike that of other common law nations although there is an additional regulatory regime for IPCs (see further, below). The regulatory model does include a Commissioner of Charities, this though does not compare with the role of the Charity Commission in England & Wales as the central regulatory authority has always rested with the Inland Revenue Authority of Singapore (but, see further, below). The High Court, Attorney General and a range of government agencies perform much the same roles in relation to charities in this jurisdiction as elsewhere in the common law world.

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[23] See, for example, *Choa Choon Neoh v. Spottiswoode* (1869) 1 Kyshe 216; *Ong Cheng Neo v. Yeap Cheah Neo* (1872) 1 Kyshe 326, PC; *Re Hadjee Esmail bin Kassim* (1911) 12 SSLR 74. See further, Ter Kah Leng, *The Law of Charities*, *op. cit*., pp. 65–101. Note the contrast with Irish charity law where gifts dedicated to masses for the dead, the upkeep of tombs and graveyards, and for the benefit of closed religious orders have consistently been found charitable.

[24] See IMC report, 2006, *op. cit*., paras 56–59.

In keeping with its centralized style of government, the regulatory environment in Singapore has operated in a controlling manner that may have inhibited the growth and independence of all voluntary organizations, including charities, more so than in other such nations. This has been largely addressed in the recent charity law reform process.

Developmental Milestones in the Charity Law of Singapore

The law governing charities/IPCs has remained very largely as derived from its common law origins. In the relatively short period that has elapsed since independence, the indigenous development of legislation and case law in this small jurisdiction has produced few if any singular characteristics.

Case Law Milestones

The courts in Singapore have not been overly exercised in respect of charity law issues. Such litigation as there has been has tended to concern matters of fraud, governance and *cy-près*. Since independence there have been, at most, only four or five cases that have revolved around definitional issues.

- *Tan Jiak Kim v. Tan Jiak Whye*[25]

This case determined that the *Accumulations Act 1800* was and still is part of the law of Singapore.

- *Nai Seng Hiang & Ors v. Trustees of the Presbyterian Church in Singapore Registered & Ors*[26]

In this case it was held that the general charitable intention of the settlor could be inferred from the trust deed and hence the charitable trusts were valid and a *cy-près* scheme could be ordered to give effect to the settlor's intent.

- *Lam Joon Shu v. AG*[27]

In this case the court said that 'other purposes beneficial to the community' was a term of art to which the law attached meaning. The settlor in his indenture (1918) set out a trust for the education of Chinese children and adults of a particular

[25] (1879) 4 SSLR 141.

[26] 988 MLJ LEXIS 700; 1988-3 *MLJ* 311.

[27] [1993] 3 *SLR* 649. As cited by Mary George, 'An Overview of Charity Litigation in Malaysia 2001', *IJNL*, 4: 1, USA, 2001.

sect in the Chinese language and other languages as the trustees deemed advisable. Provisions were also made for a students' residence, and a classroom, lecture room or meeting room for any educational, charitable or other purposes beneficial to the particular Chinese community or any other community the trustees deemed fit in Singapore provided however, that the said premises were not used for any purpose that was inimical to the welfare or contrary to the laws of the Settlement of Singapore. The Indenture referred to the term 'other purposes beneficial to the community'. Based on this Indenture, a school was set up in 1906. In 1947, the trustees bought more property and a conveyance was signed by the four trustees. It stated that the property was held in trust for the use and benefit of the school. In 1949, another deed was signed which sought to vary the terms of the 1947 Conveyance. The 1949 deed stated that one-third of the property was held in trust for the association and the remaining two-thirds for the school. Another deed followed in 1973, which purported to release the property from the trusts set up by the 1947 Conveyance and the 1949 deed. It declared that all interests should thereafter be held in trust for the association. In 1984 the school was closed down. The issue was whether there was a valid charitable trust and if not, whether a *cy-près* scheme could be applied. The Court of Appeal ruled that a *cy-près* scheme be applied to the two third share of the trust property held on trust for the school for educational or like charitable purposes as the trustees in their discretion governed by the association, thought fit. The Court held that the 1973 deed of purported release was ineffective, as a public charitable trust once constituted could not be so terminated. The lower court's rulings on both issues were affirmed.

- *HWA Soo Chin v. Personal Representatives of the Estate of Lim Soo Ban, deceased*[28]

This was a trust case. Among the issues raised was the status of property purchased by a trust for use as a children's crèche; the object of the crèche being to provide care for children and promote their welfare. The court held that this object was beneficial to society and therefore that the crèche was a charitable trust within the fourth head of the definition of charity in Pemsel. When the trust ceased to function the property therefore represented the assets of a defunct charity and as such ought to have been applied *cy-près*, under s 11 of the Charities Act.

Legislative Milestones

As the authors explain in *Philanthropy in Asia*,[29] the body of nonprofit law developed almost independently of the development of NPOs in Singapore. The only

[28] [1994] 2 SLR 657.

[29] Silk, T. (ed.) *Philanthropy and Law in Asia*, *op. cit*.

piece of legislation that was enacted specifically for NPOs was the Societies Act. This is still the main legislation governing NPOs, although it has outlived its original purpose and, arguably, inhibits rather than promotes the growth of NPOs. The recent charity law reform process will introduce new legislative provisions specifically to promote the growth of charities/IPCs and to regulate their activities. The following legislation, however, continues to have a bearing on charities/IPCs in Singapore.[30]

The House-to-House and Street Collections Act 1947[31]

This legislation provides the authority for regulating public collections. It requires a licence to be obtained in advance of any promotion for a collection or appeal to the public, made by means of visits from house to house or of soliciting in streets or other places or by both such means, for money or other property.

The Societies Act 1966[32]

The earliest version of this act was the Societies Ordinance, enacted in 1889 by the Legislative Council of the Straits Settlement as a response to unlawful activities carried on by the secret societies, or triads, which were then rampant in Singapore. The act makes it mandatory for all associations to register with the government. Those that do not are deemed unlawful, and their members are liable to penal sanctions. In 1966, Parliament passed an amended version of the act. Secret societies are no longer a major problem yet the Societies Act continues to apply and to require all NPOs to be registered under this act, unless they are registered under the Companies Act or any other legislation. The Societies Act restricts the purposes and activities of registered societies. Prohibited purposes under the Societies Act include unlawful purposes and purposes prejudicial to public peace, the public welfare, or good order in Singapore.

The Registrar of Societies can, at any time, require a registered society to produce any such information concerning the society as may be required or any documents, accounts, or books relating to the society. The obligation to provide such information is binding on every officer of the society and on every person managing or assisting in the management of the society in Singapore.

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[30] See further, Silk, T. (ed.) *Philanthropy and Law in Asia*, *op. cit*., pp. 288–289.

[31] This Act (Chapter 128) was revised in 1970 and 1985, and amended in 1958 and 1959.

[32] This Act (Chapter 311) was revised in 1985 and amended in 1982, 2001, 2003, 2004 and 2005.

The Companies Act 1967[33]

This legislation is modelled on an equivalent statute in New South Wales, Australia, Instead of registering under the Societies Act, NPOs may choose to incorporate under the Companies Act as a company limited by guarantee or by shares.

The Companies Act restricts the purposes and activities of registered companies. The Registrar of Companies has the power to refuse to register a company that is likely to be used for an unlawful purpose or for purposes prejudicial to public peace, the public welfare, or good order in Singapore or whose registration would be against national security or interests. Similarly, the courts may, on the petition of the Minister of Finance, order the dissolution of a company that is being used for an unlawful purpose or for purposes prejudicial to public peace, the public welfare, or good order in Singapore or against national security or interests. The act does not specify the types of objects or activities that might fall under these categories. A company is required to operate within the objectives and powers specified in its constitution.

The Trustees Act 1967[34]

There are no restrictions on investment under the Societies Act and the Companies Act, but the Trustees Act contains certain restrictions. The Trustees Act sets out in its First Schedule an extensive list of investments in which a trustee is allowed to invest (at his discretion) the funds for which he is responsible.

All incorporated trustees are to keep full and true records of all money received and paid on account of their body or association.

Charities Act 1982

Modelled on the English 1960 statute, this legislation provided the basic foundation for regulating charities/IPCs in this jurisdiction.

Income Tax Act 1992[35]

Under this legislation, legal authority for the assessment and collection of income tax is vested in the Comptroller of Income Tax. A charity, club, or association must satisfy the conditions for obtaining tax exemption every year.

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[33] This Act (Chapter 50) was revised in 1988, 1990, 1994 and 2006 with multiple amendments.

[34] This Act (Chapter 337), originated as the Trustees Ordinance 1955, was revised in 1970, 1985, 1999 and 2005.

[35] This Act (Chapter 134), derived from the Income Tax Ordinance 1947.

The Charities Act 1994[36]

This legislation was introduced in response to concerns repeatedly expressed by the Commissioner of Charities that tighter regulatory controls and investigative powers were needed to address abuses in matters such as administrative malpractice and fundraising methods and to provide for preventative rather than retrospective intervention by his office in the affairs of charities. The 1994 Act enhanced the Commissioner's powers particularly in respect of investigating and checking abuses, controlling fundraising, improving the administration of charities and to appoint or remove trustees. Section 25, amending s 15 of the 1982 Act, empowers the Commissioner to intervene to prevent mismanagement and protect the assets of charities and identifies a number of circumstances in which he may, with the consent of the Attorney General, act to protect the interests of charities. Sections 27 and 28 equip the Commissioner with preventative powers to act in respect of trustees convicted of fraud or dishonesty.

Parts VII and VIII enhance the protective legal function by imposing more stringent controls upon fundraising, specifically on the involvement of professional fundraisers and commercial participators, and by regulating public charitable collections through the use of permits.

Property Tax Act 1997[37]

This legislation provides for the imposition of a property tax payable upon the assessed annual value of all houses, buildings, lands and tenements included in the valuation list. Under s 6(5)(c) of this Act premises used exclusively for charitable purposes, whether or not confined to the territorial limits of Singapore, are exempt from property tax.[38]

Charity Law Reform

In Singapore the present legal framework is made up of laws that have either outlived their purpose or do not relate specifically to NPOs and were not made to meet society's needs in relation to them. The only statute specifically enacted to regulate associations (the Societies Act) is outmoded, in the sense that the original reason

[36] This Act (Chapter 37) was promulgated in 1994, revised in 1995 and amended in 1999, 2001, 2004 and 2005. For a full account and analysis of the changes introduced by this legislation see Ter, K.L., 'Changes to Charity Law', *Singapore Academy of Law Journal*, 7, 1995, pp. 291–302.

[37] This Act (Chapter 254), has since been amended by the Property Tax (Amendment) Act 2004.

[38] See *Ramakrishna Mission v. Comptroller of Property Tax & Anor* [1998] 2 SLR 666.

for its enactment no longer applies. The Charities Act 1995 is similarly inappropriate as definitional matters and regulatory provisions are inadequate to address contemporary social need and related charitable activity. Other laws that affect NPOs are not specific to and were not enacted specifically for NPOs.

The Prime Minister, Goh Chok Tong, in his speech on July 7, 1997 to Parliament outlining his vision for Singapore in the 21st century, emphasized the need for a civil society where "people participate actively and become involved in community and national issues." In his speech he expressly acknowledged that for civil society to grow, "the government itself must be prepared to take a back seat, especially on local community issues, and allow some free play to develop." It was acknowledged that one of the ways the government could promote the growth of a strong civil society was to review and revise the legal framework governing NPOs.[39]

In October 2005, following the considerable media exposure given to scandals involving the National Kidney Foundation[40] and other organizations which highlighted problems of governance in the sector, the Inter-Ministry Committee on the Regulation of Charities and Institutions of Public Character was duly set up with a remit to:

(a) Develop a regulatory framework for charities and review the regulatory environment for charities and IPCs, with a view towards helping the sector to grow
(b) Rationalize existing regulations and the roles and powers of the various regulatory agencies involved in overseeing charities and IPCs
(c) Streamline processes to facilitate the registration, reporting and fundraising requirements of charities and IPCs

In its final report submitted on 2 March 2006, which the government accepted, the IMC stated its view that:[41]

> … our regulatory approach should nurture a charitable sector that remains driven by the community with dedication and passion for charitable causes. The government should put in place minimum regulatory requirements that will neither place undue burden on the sector nor stifle volunteerism. However these minimum rules should be enforced strictly to maintain standards and hence uphold public confidence in the sector.

Applying the Legal Functions of Charity Law

Following the government's acceptance of the recommendations made by the Inter-Ministry Committee for charity law reform, progressive developments have recently occurred which indicate a new governmental commitment to strengthen

[39] Council on Governance of IPCs submitted its report in 2005 recommending that the standards of governance, fund-raising practices and financial reporting be raised.

[40] July 2005, *op. cit*., n. 1.

[41] *Op. cit*., para 25.

the governance of charities and sustain community support for the charitable sector. This process has some way to go but already the regulatory framework for charities in Singapore has undergone significant change.

Charities have and will continue to have their status determined and their activities regulated by the Commissioner of Charities while the Comptroller of Income Tax has until recently borne a similar responsibility in respect of IPCs. The provisions of the Charities Act and the Tax Act have provided regulatory authority for the supervision of charities and IPCs. Until 2007, both the offices of Commissioner and Comptroller have been located within the umbrella of the Inland Revenue Authority of Singapore and appointments to these posts were made by the Minister of Finance.

In 1993 the regulation of IPCs was devolved to eleven sectoral agencies known as Central Fund Administrators appointed by the Minister of Finance under the Income Tax Act. The Income Tax Act (Central Fund Administrators) Regulations 2004 sets out the conditions for the approval and renewal of IPC status.

Following government acceptance of the IMC recommendations, the regulatory responsibilities in respect of both charities and IPCs are now consolidated under the Commissioner of Charities and a revised Charities Act[42] will similarly consolidate the relevant provisions and regulations of the Charities Act and the Tax Act. This outcome of an admirably brief charity law reform process carries considerable long-term implications for the balance traditionally struck between the functions of the law as they relate to charity.

Protection

This legal function has not had a particularly high profile as in practice it has been superseded by the primacy given to policing.

The Courts and Attorney General

The protective function is traditionally most strongly associated with the Attorney General. The role of this official, an aspect of the common law legacy as shared with all other nations that once formed part of the British Empire, is to initiate a suit on behalf of a charity. On referral from the Commissioner of Charities of a case alleging misconduct or maladministration in the affairs of a charity the AG can take

[42] Note that the Minister of State for Finance, Mr Lim Hwee Hua, when moving the second reading of the Accounting Standards Bill referred to "The Ministry of Community Development, Youth and Sports would in the meantime, conduct a holistic review of the Charities Act." (08.10.07). See further, at http://www.channelnewsasia.com/stories/singaporebusinessnews/view/296309/1/.html.

action to protect its interests. In the absence of such a referral it would be highly unusual for the Attorney General to initiate intervention.

The Commissioner of Charities

The transfer of the office of Commissioner to the Ministry of Community Development, Youth and Sport (MCYS) has been accompanied by an increase in the Commissioner's capacity to protect a charity/IPC while it is under investigation or following completion of investigation by empowering the Commissioner to suspend or prohibit all forms of fundraising being conducted by, for or on behalf of that charity/IPC, by new powers in respect of trustees and by powers to give directions regarding the management of property on the dissolution of that charity/IPC.

Policing

In Singapore, the legal emphasis has traditionally been upon supervising and maintaining the accountability of NPOs including those that happen to be charities/IPCs; as illustrated in the level of media concern and government response to a number of fundraising and governance scandals involving charities. The fact that for the past four decades the Commissioner of Charities has been located within the purview of the Inland Revenue Authority of Singapore clearly demonstrated the government's primary interest in safeguarding its tax revenue base by ensuring effective policing of charities and their activities. Indeed, the Commissioner of Charities often concurrently served as the Commissioner of Inland Revenue. A number of government agencies had already been positioned and empowered to scrutinize the affairs of NPOs, including charities, and their capacity to give effect to this legal function will be strengthened in the future as the government implements the recommendations of the Inter-Ministry Committee. Among its recommendations is the proposal that the government adopt a tiered approach which will impose more stringent rules on larger charities/IPCs and less on smaller such entities. Additional requirements regarding higher levels of disclosure and standards of compliance are imposed upon the larger IPCs.

The Courts and Attorney General

In Singapore, as in England & Wales, the traditional role of the High Court in relation to charities has become more marginal as its traditional jurisdiction has been shared with and in effect subsumed within the office of Commissioner. Similarly,

the traditional role and powers of the Attorney General remain largely dormant unless and until triggered by the Commissioner.

The Inland Revenue Authority of Singapore

Formerly known as the Inland Revenue Department, this body was made a statutory board in 1992, is now known Inland Revenue Authority of Singapore (IRAS), and has borne overall responsibility for ensuring proper standards and checking abuse in the charitable sector. It rather than the Comptroller of Income Tax has assessed the income tax returns of charitable institutions. The primary obligation of this body, to protect the tax revenue base, is apparent for example in the fact that charities are not generally tax-exempt but have to apply for exemption from income tax for each year. Also, while a charity/IPC will be eligible for income tax exemption it will remain liable to other taxes such as stamp duty and goods and services tax. Moreover, the fairly rigorous policing powers of this body are evident in relation to IPCs and overseas charitable causes.

- *Charitable status*

While responsibility for registering an organization as a charity has always rested with the Commissioner, the fact that the latter was located within and directly managed by the tax collecting agency meant in effect that the Island Revenue Authority acted as gatekeeper for charitable status. The very recent separation of the office of Commissioner from the Inland Revenue Authority of Singapore may result in the Commissioner having a greater degree of autonomy in determining charitable status.

- *Institutions of a Public Character*

All IPCs are subject to the Income Tax Act and must comply with the Income tax (Approved Institutions of a Public Character) Regulations 2004 which regulates the use of tax-deductible donations, the issue of tax deduction receipts, the keeping of related records and public disclosure requirements.

- *Overseas charitable causes*

There are certain restrictions on the use of funds raised for foreign charitable purposes under the extensive provisions of the Charities (Fundraising Appeals for Foreign Charitable Purposes) Regulations 1994.

The Comptroller of Income Tax

This official is appointed by the Minister of Finance and authorised under the Income Tax Act to levy and collect tax. All persons and organisations, unless

exempted, must furnish income tax returns to the Comptroller. Until very recently, responsibility for determining the status and regulating the activities of IPCs had lain with the Comptroller of Income Tax on delegation from the Minister for Finance. This responsibility now lies with the Commissioner of Charities.

The Commissioner of Charities

Until very recently the role of the Commissioner, who previously reported to the Minister of Finance, was very largely concerned with tax issues. The transfer of the office of Commissioner to the Ministry of Community Development, Youth and Sport (MCYS) has been accompanied by an increase in the Commissioner's responsibilities which now include: requiring more detailed background information from applicants for charitable status; monitoring newly registered charities more closely through semi-annual reports in their first year of operations; specifying the conditions for refusing to register and for de-registering charities; and undertaking audits and investigations into the affairs of charities and IPCs on a random basis and as and when this is deemed necessary. The Commissioner is to regulate the sector in a more structured and systematic fashion focusing largely on the larger charities/IPCs (i.e. those with an annual income exceeding $10 million).

In addition, the Commissioner will now be assisted by an adequately resourced and dedicated Charity Unit that will monitor charity/IPC compliance with the regulations, work with the Sector Administrators[43] to enhance consistency, carry out investigations into the affairs of charities/IPCs and take enforcement action where necessary.

However, the office of Commissioner of Charities does not bear comparison with the Charity Commission of England & Wales as it is not similarly resourced or empowered nor does it have as broad a statutory remit. Although in Singapore, as in England & Wales, the policing function has been strengthened by vesting the Commissioner with a jurisdiction in respect of charities that is concurrent with that of the High Court.[44] Like its English counterpart, this is a government body and all charities (whether a society, company, or trust) are required by s 5 of the 1994 Act to register with it; compulsory registration being a necessary prerequisite for effective policing. Charity trustees are duty-bound to apply to register a charity that is not an exempt charity, in default of which they would be guilty of an offence and would, on conviction, be liable to a fine, imprisonment, or both.

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[43] A Sector Administrator has been appointed with responsibility and powers delegated by the Commissioner of Charities for each of six designated sectors – social services, education, arts and heritage, community and youth, health and sports – and will advise the Commissioner on sector issues.

[44] Concurrent jurisdiction is now vested in the Commissioner under s 24 of the 1994 Act, which re-enacts a similar provision in the 1982 Act.

- *Reporting requirements*

Once registered a charity then falls under the supervision of the Commissioner and is required to maintain proper records and submit annual accounts and audited financial statements unless exempted. The statutory duties of the Commissioner of Charities have always prioritized the policing function and included responsibilities for conducting investigations and checking abuses. The Commissioner has extensive powers of inquiry and may order any person to: furnish accounts and statements; return answers in writing to any question or inquiry and verify any account, statement, or answer by statutory declaration; furnish copies of documents in his custody or control and verify such copies by statutory declaration; and appear personally to give evidence or produce documents.

Save for an excepted charity, the Commissioner may, with the consent of the Attorney General, suspend or remove any trustee, charity trustee, officer, agent, or employee of the charity if satisfied that there is or has been any misconduct or mismanagement in the charity and that such action is necessary or desirable to protect the property of the charity or the application of that property.

- *Accounting standards*

Parliament has passed a bill to set up an Accounting Standards Council (replacing the Council on Corporate Disclosure and Governance and issuing accounting standards that applicable to both corporate and non-corporate organizations) which will provide a separate set of accounting standards for charities. The Accounting Standards Council will be responsible only for the issue and promulgation of such standards while the related monitoring and enforcement duties remain the prerogative of the respective regulators: the Accounting and Corporate Regulatory Authority (ACRA) for companies; the Commissioner of Charities for charities; the Registrar of Cooperatives for cooperatives; and the Registrar of Societies for societies. As explained by the Minister of State[45]:

> Currently a charitable organisation may be set up as a company, a society or a trust, before registering with the Commissioner of Charities as a charity. In future, a charity, regardless of the legal vehicle it uses, will have to comply exclusively with the accounting standards for charities.

This would seem to be in line with the general policy objective of consolidating a charity specific regulatory approach under the supervision of the Commissioner of Charities.

- *Fundraising*

The Commissioner of Charities is also vested with rigorous powers to facilitate the policing of fundraising for overseas charitable causes. Any organisation wishing to

[45] See announcement by the Minister of State for Finance, Mr. Lim Hwee Hua, when moving the second reading of the Accounting Standards Bill (08.10.07) at http://www.channelnewsasia.com/stories/singaporebusinessnews/view/296309/1/.html.

conduct or participate in any fundraising appeal for foreign charitable purposes must apply for a permit 30 days before the fundraising appeal from the Commissioner of Charities who may impose certain conditions for the granting of the permit, such as requiring that the accounts of the appeal be audited by a qualified auditor and submitted to the Commissioner within 60 days of the close of the appeal. The Charities (Fundraising Appeals for Foreign Charitable Purposes) Regulations also impose requirements on the permit holder.

Further, the Commissioner will be given new powers to regulate fundraising activities.

The Registrar of Societies

All societies, including those that happen to be charities, are required to register with the Registrar of Societies. This requirement arose to curb the proliferation of secret societies. The Registrar of Societies exercises a great deal of discretion in the registration of societies under the Societies Act. Following registration, the Registrar requires annual returns, audited statements of accounts, notice of any changes (e.g. location, establishing or closing branches, use of logos, dissolution etc.). When the Registrar rejects an application for registration of a society, he usually does not give reasons for his decision. Further, appeals against the Registrar's decision may be made only to the Minister of Home Affairs and not to the courts.

As has been said "the spirit of the Societies Act, with its penal sanctions for non-registration, presumptions of proof against unregistered societies, lack of transparency, and lack of recourse to the courts, does not give rise to a conducive climate for the growth of NPOs".[46] Arguably, other existing legislation such as the Penal Code, the Internal Security Act, and the Maintenance of Religious Harmony Act should provide sufficient safeguards against the use of societies for unlawful purposes.

The Registry of Companies and Businesses

The RCB is responsible for the registration of companies including those that happen to be charities/IPCs. The criteria for registration as set out in the Companies Act are wide, namely:

- Association for a lawful purpose
- Subscription of names to a memorandum
- Approval and reservation of name
- Lodgment of the memorandum and articles, together with the payment of fees

[46] See Silk, T. (ed.) *Philanthropy and Law in Asia*, *op. cit*., p. 287.

Aside from the above requirements, the Act also sets out grounds for refusal of registration where:

- the proposed company is likely to be used for an unlawful purpose or for purposes prejudicial to public peace, the public welfare, or good order in Singapore; and
- registration would be contrary to national security or the national interest.

Registration under the Companies Act can be a lengthy process because the applicant must satisfy the RCB on many issues. Following registration, charities and IPCs must abide by the requirements of the Accounting and Corporate Regulatory Authority as set out in the Companies Act.

If the RCB refuses registration on grounds other than the public policy grounds under Section 20(2) of the Companies Act, this decision may be appealed to the court.

Mediation and Adjustment

It cannot be said that Singapore has any history of developing charitable purposes to meet contemporary social need. The necessity among all common law nations for a continuous case flow through the courts, or through an alternative forum vested with judicial powers, in order to permit creative intervention under the 'spirit and intendment' rule has not been addressed in this jurisdiction. Neither the Inland Revenue Authority of Singapore, nor the office of Commissioner of Charities while it was under the direct management of that Authority, held any brief for creatively extending the grounds for tax exemption on charitable grounds.

The Courts and the Attorney General

Although the Commissioner of Charities, like the English Charity Commission, is vested with High Court powers, those powers have never been exercised in a proactive fashion to develop charitable purposes. The burden of giving effect to that function has therefore remained with the courts and the Attorney General both of which are no longer able to continue their traditional role of fitting the law to contemporary social need as the flow of relevant litigation has dried up.

The Commissioner of Charities

The *cy-près* mechanism is an important means of introducing flexibility and facilitating adjustment in the deployment of charitable resources. The powers of the

Commissioner in relation to *cy-près* schemes, significantly increased under the 1982 Act, were further amended by s 22 of the 1994 Act to simplify the process of dealing with the property of unknown donors.

The recent transfer of this office from the Ministry of Finance, where it was directly managed by the Inland Revenue, to the Ministry of Community Development, Youth and Sport (MCYS) signals a broadening of the responsibilities of that office. In addition to the typical policing functions as outlined above, the Commissioner will now address issues of governance, growth of the sector and the maintenance of public confidence in charities/IPCs.

Support

In this jurisdiction there has been a recent and relatively marked shift away from the traditional approach that concentrated on improving methods of government control and surveillance over all NPOs towards one that facilitates and encourages the growth of charities/IPCs.

Government Support

Evidence of a new government commitment to cultivating a more supportive environment for philanthropy can be seen in the transfer of the Commissioner of Charities from the Inland Revenue Authority of Singapore to the Ministry of Community Development, Youth and Sport (MCYS) and the formation of the Charities Unit in MCYS instead of in the Inland Revenue. These changes would seem to signify a corresponding transfer in emphasis from the policing to the support function. Government support is evident in other areas.

- *Overseas charitable causes*

The long-standing requirement that 80% of the proceeds of fundraising for an overseas charitable cause must be retained and spent in Singapore was removed in the 2007 Spring budget. This is a strong indication of Singapore's intention to become a 'regional hub' for philanthropic organisations – incentives are offered to attract charities (e.g. the Association of Fundraising Professionals) to set up bases in Singapore. Such government initiatives will do much to create a more supportive environment for established charities in Singapore and to facilitate the involvement of international organisations.

- *Matched funding for education projects*

The government provides matched funding programs that encourage private donations for philanthropic organizations to construct and or resource schools and third

level education facilities.[47] This is reinforced by an award of additional tax relief to any donors who make gifts to further any projects undertaken within the matched funding programme.

The Inland Revenue Authority of Singapore

The main form of support to charity comes in the shape of preferential tax concessions (including donor incentive schemes for IPCs) and in the modernizing of fundraising regulations to facilitate new methods.

- *Income tax concessions*

The Inland Revenue Authority of Singapore grants income tax exemptions to charitable institutions on a year-by-year basis. Where any trade or business is carried on by a charitable institution, the income derived from it will be exempt from tax only if it is applied solely for charitable purposes and either the trade or business is conducted in the course of the actual carrying out of a primary purpose of the charitable institution or the work in connection with the trade or business is mainly carried on by the persons for whose benefit the charitable institution was established. In early 2007, the long-standing rule – that the income of the charitable institution will be exempt from tax only if the institution spends, in any year of assessment, not less than 80% of its donations (in money or money's worth) and income on charities and charitable objects in Singapore, unless the Comptroller otherwise permits – was removed in the Spring budget.[48] This so-called '80/20 spending rule' had tied the hands of those charities that had wanted to accumulate money to run bigger, more meaningful social projects and trapped them in a cycle of constant fundraising. Its removal is an important concession to the support function that will greatly assist established domestic charities and attract the involvement of foreign philanthropists.

Charities also enjoy tax exemption on property used exclusively for charitable purposes.

- *Donations*

An outright cash donation to an organization specifically designated as an IPC qualifies for a tax deduction under s 37(2)(c) of the Income Tax Act. Under this

[47] See, for example, the University Endowment Fund developed to encourage philanthropic support for the National University of Singapore and the Nanyang Technological University. The program was expanded in 2000 to include the then new Singapore Management University. In addition, private donations to the AmCham Scholarship Program, developed in 2000 by the city government and the American Chamber of Commerce, were made eligible for double tax deductions.

[48] See The Straits Times Interactive, 'Turning Singapore into Global Charities Centre', February 16, 2007 <http://straitstimes.com>.

legislation IPCs include charitable institutions. In another important change, introduced as a budgetary measure in Spring 2007, double tax deductions are to be allowed for all donations made to philanthropic organizations provided they are channeled to IPCs.[49]

The Commissioner of Charities

The role of the Commissioner of Charities includes a statutory duty to promote the effective use of charitable resources by encouraging the development of better methods of administration and by giving charity trustees information on any matter affecting the charity. The Commissioner also has the power under s 30 of the Charities Act 1994 to empower charity trustees to deal with trust property including authorizing their sale of such property.[50] The decisions to remove the office of Commissioner from direct management by the Inland Revenue and instead make that office the central regulator of charities and IPCs is itself indicative of a government willingness to build a new regulatory framework for the sector.[51] The positioning of the Commissioner in a more appropriate administrative context, closer to community need and services, will facilitate the support function and future partnership arrangements between government bodies and charities.

The additional decisions to transform the eleven Central Fund Administrators into six Sector Administrators, equipped with powers to supervise both charities and IPCs and assist the Commissioner, and to establish a Charity Council to promote self-regulation and good governance amongst charities and IPCs will strengthen the support function as will the power of the Council to advise the Commissioner of Charities on key regulatory issues. Again, setting up a Charity Portal[52] within the Commissioner's office to provide both a one-stop resource centre for the public who want to know more about charities in Singapore, including those interested in setting up charities and IPCs, and a one-stop "paper-less" process for determining the status of organizations as charities and IPCs similarly indicate government commitment to support as well as supervise the charitable sector.

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[49] *Ibid*. Double tax deductions had for some time been allowed for donations to IPCs, this measure extended that privilege to all charities.

[50] See, for example, *Chileon Pte Ltd v. Choong Wai Phwee & Ors (Trustees of Cheng Liam Um Vegetarian Temple* [2001] 2 SLR 223.

[51] The separation of the Commissioner of Charities from the Inland Revenue Authority of Singapore (formerly the Inland Revenue Department) had been recommended by the Auditor General in 1990.

[52] The Charity Portal may be found at http://www.charities.gov.sg.

Non-government Agencies

Singapore, unlike most other common law jurisdictions, does not seem to have a tier of umbrella or apex organizations with the capacity and independence to represent the interests of charities in particular and the sector as a whole. The National Volunteer and Philanthropy Centre does play a significant role as a resource for the sector but it is difficult to identify it or any other NPO as having an established lobbying role. The absence of members from any such body on the Inter-Ministry Committee and the failure of that Committee to consult with the sector prior to submitting its report are telling indicators of the relationship between government and the sector. It is probable that this gap has been filled by Sector Administrators who, representing the interests of the government to the sector, tend to control and stifle any reverse flow of communication.

The IMC report did, however, indicate concern regarding possible over-regulation of the charity sector. To address this concern, the Commissioner has decided not to create additional rules but to instead devolve responsibility for formulating and enforcing good practice guidelines to the charity sector. This approach, of promoting a culture of self-regulation rather than resorting solely to authoritarian measures, may prove conducive to creating a new environment that in time will encourage the growth of umbrella organizations.

Charity Law and Social Policy: The Fit with Contemporary Circumstances

In Singapore, the thrust of the IMC report was that government should: encourage self-regulation within the charitable sector; help build a culture of better governance and transparency among charities and IPCs; apply regulatory requirements in a manner that differentiates between large and small organizations; and otherwise only intervene in the affairs of charities as a last resort. The very recent government implementation of the IMC recommendations, together with the important above mentioned changes to the institutional infrastructure, suggest the emergence of a wholly different approach to charities/IPCs in this jurisdiction. It will be necessary to await new charity legislation and the consequences of the re-positioning of the Commissioner of Charities to be certain that this new approach can fulfill its promise.

The Legal Functions

Clearly, since independence, charities/IPCs in Singapore have been subject to the government's overriding concern that all forms of NPOs should be closely supervised

to ensure that their membership did not foster dissent. Government priority has been to prevent possible subversive activity and to manage the sector towards compliance with its policy though mechanisms such as the deployment of eleven Central Fund Administrators. Although this approach is now undergoing a process of change, which may prove to be quite radical, at present the functions of the law as they relate to charity/IPCs in this jurisdiction remain very true to their initial common law formulation.

Differential in Functional Weighting

In charity law as in other areas, the primacy given to the policing function in Singapore outweighs all other considerations. For the past five decades methods such as mandatory registration, a requirement for annual reports, use of Central Fund Administrators and overview of the Commissioner's office by the Inland Revenue Authority of Singapore were among the means of giving effect to this function. The focus on policing was sharpened by the NKF case in 2005 which highlighted weaknesses in the capacity of the regulatory framework to detect and address issues of poor governance. This approach has been accompanied by a dearth of investment in the protection function as evidenced by the lack of court cases and the very marginal involvement of the Attorney General. The mediation/adjustment function has also been neglected due to the absence of any forum for developing charitable purposes and judicial concentration on litigation concerning irregularities in governance, fundraising and other activities rather than on definitional matters. The support function has, however, been given significant legislative effect through measures that include establishing the office of Commissioner with specific responsibilities in relation to advising and assisting charities, and the introduction of tax deductible donation schemes for IPCs. The above mentioned changes relating to matters such as the Charity Unit, Charity Council and Charity Portal etc. will increase the weighting given to this function.

The Functional Imbalance in Charity Law

Unlike charity law reform in other common law jurisdictions, the Singaporean process has so far avoided any consideration of legislative change to definitional matters and to the forum designated to determine charitable status. While it is possible that the anticipated new charity legislation will address these crucial areas it is probable, given the lack of any preparations for a public consultation process or evidence of any intent to formally engage with the sector on a need to broaden existing charitable purposes, that it will not. Singapore does not seem ready to follow the example set in England & Wales, New Zealand and Canada where the

mediation/adjustment function has been strengthened by legislative provisions identifying a new range of charitable purposes.

It rather looks as though charity law reform in this jurisdiction, which was launched on evidence of deficiencies in the policing function, has largely settled for introducing tighter regulatory controls with some reinforcing of the support function including increasing the Commissioner's capacity to offer support to charities/IPCs.

The Resulting Social Policy Deficit

In Singapore the overriding social policy concern continues to be that of maintaining social stability in the face of destabilising tensions generated by traditional difficulties in the field of race and religion as compounded by the contemporary risks arising from international terrorism. These and other strands in government social policy might be expected to have a future relevance for charities/IPCs.

Racial Harmony

The number of distinct ethnic groups in this heavily populated, highly competitive city-state does give rise to periodic social unrest. The work of charities/IPCs occurs in a context where the government's primary objective is to maintain order and for that reason, perhaps inevitably, those agencies in common with all associations find that the policing function more than any other legal function has a direct bearing on their activities. Paradoxically, being subject primarily to the policing function does keep charity in alignment with government policy in much the same way as initially framed in the Preamble. However, it could be argued that a modern, consensual and inclusive political frame of reference requires a social policy that aims to facilitate rather than suppress ethnic forums in which representatives from different racial groups would be encouraged to express their differences and negotiate any conflict of interests. The work of charities/IPCs in Singapore would then benefit from an emphasis on mediation/adjustment rather than policing, with charitable purposes broadened to permit lobbying/advocacy on behalf of minority groups and to allow charities to be established for purposes such as the advancement of racial harmony, reconciliation and the promotion of justice.

Religious Tolerance

The fact that the majority of Singapore's charities are registered for religious purposes may, at first glance, seem to indicate an appropriate alignment between the resources

of charities and a key strand of the government's social policy. In fact the reverse is probably the case. In societies characterised by religious division, as in Northern Ireland, the tendency is for religious charities to be very active and very partisan thus serving to emphasise differences, increase social polarization and raise tensions. In such a society it is seldom acceptable for a charity of one denomination to use its resources for the benefit of another, nor to do so for the purpose of building conciliatory bridges of communication between rival religious groups. Again, a broadening of the present range of charitable purposes to facilitate the work of intermediary charities/IPCs and the involvement of international agencies with the resources and expertise to promote reconciliation would enable the charitable sector to complement the government's policy of managing a pluralist society. This would be further assisted by effective policing of the public benefit principle so as to ensure that the resources of religious charities/IPCs were not in fact directed towards member benefit.

Anti-terrorism

Singapore already has an array of legislative provisions, most obviously in its Internal Security Act and Maintenance of Religious Harmony Act, which should provide more than sufficient authority for the government to protect its citizens and maintain social stability. Within that framework of security legislation it should be possible for the government to relax the current authoritative regime as it relates to charities/IPCs. If the recent emphasis on improving the effectiveness of the policing function could be counterbalanced by measures such as equipping the Commissioner to review and adjust charitable purposes in line with contemporary patterns of social need but subject to the 'spirit and intendment' rule and ensuring unrestricted enjoyment of the constitutional right to form associations, this would create a more conducive operating environment for charities/IPCs and thereby assist in resolving social tensions and reducing opportunities for terrorism.

Poverty and Social Service Provision

The emergence of long-term structural poverty issues relating to an increasing segment of the population who are ageing, unemployed and dependant upon welfare benefits, occurring in a context of an overall fall in birth rates, suggests that the government will need to initiate new strategies to ensure care for the vulnerable if it is to prevent a stalling in its programme for sustained economic growth. As in other common law nations, a formal partnership arrangement with the charitable sector such as was implied in the Preamble would seem an appropriate component for government social policy. This would, however, require the government to prepare

the ground by cultivating a more consensual and less directive relationship with the sector in which an open public consultation process could take place.

Voluntary Sector Entrepreneurship

The authoritative regime maintained by the government since the independence of Singapore has, understandably, had the effect of suppressing acts of initiative and creativity in the voluntary sector. The type of charities, their legal structures and their mode of operating are somewhat conservative with an emphasis on traditional roles. If this jurisdiction is to have a voluntary sector that matches the business sector in vibrancy, domestic effectiveness and international relevance then the government will have to create conditions more conducive to the growth in the former sector of the entrepreneurship that made the latter so successful. This will require appropriate legislative changes, particularly as regards the present balance between the legal functions as they relate to charities/IPCs.

Conclusion

The legal framework for philanthropy in Singapore is currently experiencing its greatest and most auspicious process of change since the establishment of this nation state. A good deal of important adjustment, already made to the institutional infrastructure, has significantly altered the traditional emphasis on the policing function. This has most recently been supplemented by the introduction of changes to the tax regime which will strengthen the support function in relation to entrepreneurial philanthropy. New legislation, of uncertain scope, is anticipated in the near future that will further develop the charity law reform process. This is therefore not the best time to rush to judgement on the relative effectiveness of the law as a means of addressing contemporary social policy issues.

However it must be noted that, in keeping with well established practice, the government is acting conservatively and in a prescriptive fashion. It is eschewing any consultation with the sector, is not showing any readiness to consider introducing changes to definitional matters, particularly as regards broadening the range of charitable purposes, and shows no inclination to vest the powers and discretionary capacity in the Commissioner of Charities necessary to equip that office to provide a mediating forum similar to that of the Charities Commission in England & Wales. The government would seem content to place its trust in the traditional recourse to more efficient policing, backed up with tax adjustments, as the best formula for creating an environment conducive to promoting philanthropy in Singapore.

Chapter 11
New Zealand

Introduction

This chapter begins with a brief overview of the country, its primary socio-economic indicators, a history of the charitable sector and a depiction of its current characteristics. It then considers the background to the present relationship between charity and social policy, identifying the more salient issues that have emerged. This is followed by an outline of the history of the relationship between charity and the law in New Zealand as developed through its case law and legislative milestones. The common law foundations of the charity law framework are examined.

The template of legal functions (see, further, Chap. 3) is then applied to identify and assess the distinctive features of charity law as it has evolved and currently operates in New Zealand. This is matched with the primary social policy issues and the deficit, in terms of those areas of social policy that are not addressed or are inappropriately/insufficiently addressed by contemporary charity law, are identified and the implications considered. The chapter examines the outcomes of the protracted charity law review process, considers the actual and potential role for the Charities Commission and analyses the significance of the Charities Act 2005 for social policy issues. It concludes by reflecting on the distinctive characteristics of the relationship between charity law and social policy in New Zealand.

A Socio-economic Profile

This small nation, consisting of two main islands and a number of smaller ones (constituting approx 268,680 km^2) is heavily dependent on trade, particularly in agricultural products, as almost 28% of the country's output is exported. Traditionally an agrarian economy it has, over the past two or three decades, undergone considerable socio-economic changes. The successive waves of ethnic groups following after the Maori who arrived some 700 years ago from the Pacific – including large numbers of British and Irish immigrants from 1850 to 1960, the Dutch in the

K. O'Halloran et al., *Charity Law & Social Policy*,

1950s and more recent immigrants from Asia and the Pacific – are in the process of transforming New Zealand from a bi-cultural to a multicultural society.

The Economy

Since the mid-1980s, the deregulation of the economy, removal of tariff protections, privatisation of state assets, labour market reform and the rise of the free market ethos have combined to secure for New Zealand the strong competitive role in the global marketplace it needs if trade profits are to continue to fund social progress. In order to further this process of economic reform, government policies have stressed the need to achieve and maintain low inflation, remove economic distortions, lower taxes and exercise fiscal prudence with the primary purpose of enhancing the growth of Gross Domestic Product. By the end of the 1990s, a low inflation rate was achieved and per capita income was increasing annually. By 2004 unemployment stood at 4.2% and exports accounted for 20% of GDP which by 2006 had reached $106 billion.

Population and Composition

New Zealand has a population of about 4.2 million, of which approximately 78% identify with European ethnic groups, mostly British or Irish, while the indigenous Maori people, the largest non-European ethnic group, account for 14.6%. According to the 2006 census, some 53% of the population are Christian and 32% are 'non-religious'.[1]

The Charitable Sector

New Zealand has a proud tradition of self-reliance: of looking to family and community based organisations rather than to government for support in times of need.[2] This has allowed or required charities, in common with other not-for-profit bodies, to find their own space and develop as independent entities relatively free

[1] The 2001 census revealed a population consisting of: European, 70%, Maori 8%, Asian 5.7%, Pacific Islander 4.4%, other 0.5% and mixed 7.8%; of whom 80% are resident in towns. Also, see Statistics New Zealand at http://www.stats.govt.nz/products-and-services/hot-off-the-press/counting-non-profit-institutions-in-new-zealand/counting-non-profit-institutions-in-nz-2005-hotp.htm.

[2] See Tennant, M., *Paupers and Providers: Charitable Aid in New Zealand*, Allen & Unwin, Wellington, 1989, cited in Dal Pont, G., *Charity Law in Australia and New Zealand*, Oxford University Press, Melbourne, 2000, p. 78 *et seq*. Also, see Thompson, D., *A World Without Welfare: New Zealand's Colonial Experiment*, Auckland University Press, Auckland, 1998.

from regulatory restraint. Not unlike Ireland, from an early stage the prevailing policy was to encourage charities, usually church-based community groups, to fill the gaps in public services by providing the health and social care facilities for the poor, ill or otherwise disadvantaged that the government could not afford.

Brief History

The 500 years of Maori community building that preceded European settlement prepared the ground for nonprofits to flourish in New Zealand. A warrior race, often preoccupied with inter-tribal warfare, Maori have also always taken great pride in their highly structured society built on family and extended family relationships with strong blood links and a binding sense of community in which the property, rights, needs and transgressions of individuals are governed by the collective will. That sense of collective responsibility and accountability, so characteristic of Maori communities, provided a fertile environment for the growth of the common law model of charity founded on the principle of public benefit.

From 1840, settlers from the UK to New Zealand brought a philanthropic attitude that was initially manifest in local activities such as Oddfellows and Friendly Societies. Friendly Societies practised ideals of self-help and self-reliance that became part of the colonial ethos.[3] By 1884, there were 281 Friendly Societies in New Zealand with 21,000 members. Gradually church orphanages, refuges for prostitutes, private and public schools for uncontrolled children, and a patchy system of charitable aid administered through hospitals developed.[4] In 1884, the Society for the Protection of Women and Children was first established with a Dunedin branch. A New Zealand based charity to help mothers with babies, the Plunket Society, was later established in 1907. In 1885, the government passed the Hospitals and Charitable Aid Act. Old people's homes, hospitals and other charitable institutions were developed under the aegis of this Act, while the churches were also setting up City Missions, with the Salvation Army and Methodist Churches offering soup kitchens. Tennant[5] suggests that although organized settlement in New Zealand coincided with a pendulum swing against public welfare, centralization of government in New Zealand enabled welfare policies to be implemented in a less contested way than other countries. The small size of settler New Zealand and

[3] See Cordery, C. J. and Baskerville, R. F., 'Charity Financial Reporting Regulation: A Comparative Study of the UK and New Zealand', *Accounting History*, February 2007; citing Oliver, W.H., *The Oxford History of New Zealand*, Clarendon Press, Oxford, 1981, p. 136.

[4] *Ibid*., Oliver, W.H., 1981, p. 137.

[5] Tennant, M., Governments and Voluntary Sector Welfare: Historians Perspectives', *Social Policy Journal of New Zealand*, 17, December 2001, pp. 147–160.

subsequent strong personal relationships resulted in a mixed economy of welfare and close links between state and private charity.[6] Fries[7] in his analysis of charity in New Zealand suggests that through the early and mid-20th century, New Zealand's welfare state policies followed the example set in Great Britain by suppressing some private philanthropy "with the 'nationalisation' of some parts of the charitable sector".

As well as indigenous charities, churches and government activities, there were also some imported organisations. The last two decades of the 19th century saw the Women's Christian Temperance Union well established in settler New Zealand.[8] But it was not until the 20th century that some of the extant international organizations extended branches into New Zealand. For example, the Red Cross was established in 1859, but was not introduced in New Zealand until 1914. Other international not-for-profit activities were those assisting children, such as Barnados, the Girl Guides and Scout movements; and the Royal Society for the Protection of Animals.[9]

Current Scale of Charitable Activity

Because of the lack of any system for registering their existence, it has been difficult to estimate the number of charities in New Zealand let alone gauge their impact.[10] However, the most recent data available suggests that in 2005 there were some 97,000 nonprofit institutions operating in New Zealand, that non-profit institutions contributed 2.6% to New Zealand's GDP in 2004 and that whenever volunteer labour is included, non-profit institutions' contribution to GDP increases from 2.6% to 4.9%.[11] In the financial year 2005/2006 the funds given for philanthropic causes in New Zealand totaled $1.27 billion or approximately 0.81% of New Zealand GDP. The sources of these funds were as follows[12]:

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[6] Cordery, C. J. and Baskerville, R. F., *op. cit*., citing Tennant, M., 'Governments and Voluntary Sector Welfare: Historians' Perspectives', *Social Policy Journal of New Zealand*, 17, December 2001, pp. 147–160.

[7] Fries, R., 'The Charities Commission: The Concept in the Light of English Experience', *Philanthropy New Zealand*, 2: 34, 2003, pp. 8–9.

[8] Cordery, C. J. and Baskerville, R. F., *op. cit*., citing Oliver, W.H., 1981, *op. cit*., p. 263.

[9] This overview account is taken from Cordery, Carolyn J. and Baskerville, Rachel F., 'Charity Financial Reporting Regulation: A Comparative Study of the UK and New Zealand', *Accounting History*, February 2007.

[10] See Hawke, G. and Robinson, D. (eds.), *Performance Without Profit: The Voluntary Sector in New Zealand*, Institute of Policy Studies, Wellington, 1993. Also, see reports commissioned by Philanthropy New Zealand in 1996, 1998 and 2002 to measure philanthropic funding and the most recent and comprehensive source of information, Robinson and Hanley's report *Funding New Zealand* (2002).

[11] See further, Statistics New Zealand, 'Non-profit Institutions Satellite Account 2004': http://www.stats.govt.nz/people/communities/non-profit-institutions/default.htm.

- Trusts and foundations funded just under three fifths (58%) of total estimated giving. Statutory trusts provided approximately five sixths of this funding, and voluntary trusts and foundations contributed one sixth.
- Personal donations and bequests contributed just over a third (35%) of total estimated giving.
- Businesses accounted for approximately one fourteenth (7%) of total estimated giving. However, it is probable that businesses contributed almost twice this amount again to charitable organisations through sponsorship.[13]

The largest proportion of grants made, in terms of value, were to culture and recreation activities, which accounted for 26.6% of total grants. This category was followed by education and research activities at 24.2%, and then by social services at 15.8%.

As the Revenue Minister Peter Dunne said recently:[14]

> New Zealanders are generous people. An estimated 1.3 million people take part in voluntary activities, and donations to charities and other non-profit organisations amounted to $356 million - and that's just from the people that claimed tax rebates for their donations.

Charity and Social Policy: A History

In this jurisdiction, the primary social policy strand has always been the accommodation to be reached between the indigenous population and others. While domestic policy continues to be Maori centred it is by no means restricted to such matters. As the report of the Human Rights Commission (see, further, below) makes clear, New Zealand shares with other modern common law nations a concern for much the same range of contemporary social issues.

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[12] See Slack, A. and Leung-Wai, J., *Giving New Zealand Philanthropic Funding 2006*, Business and Economic Research Limited, March 2007, p. 8. Note that from the Non-profit Institutions Satellite Account 2004 (released by Statistics New Zealand on 28th of August 2007), it was estimated that non-profit institutions contributed 2.6% to New Zealand's gross domestic product (GDP) in 2004. This publication described, for the first time, the size and financial contribution of non-profit institutions and their volunteers.

[13] The *Funding New Zealand* report of 2002, *op. cit*., estimated corporate giving at $80 million based on the percentage of income charitable organisations in other countries obtained from businesses. Inflating this value to 2006 dollars gives an estimate of $86.8 million. After removing assumed sponsorship of almost two thirds, this equates to business giving of $31.5 million. The figure in this report, estimated from observed giving at $89.2 million, indicates that corporate giving rates in New Zealand are higher than those overseas (see the *Giving New Zealand 2006* report, *op. cit.,* p. 35).

[14] When announcing Budget 2007. See further, *Fostering a Culture of Charitable Giving*.

Relevant Social Policy Milestones

In New Zealand, the efforts of government to address issues of social policy must be set against the principles[15] embodied in that country's founding document the Treaty of Waitangi[16] as interpreted and applied in a contemporary context. As has been said: "the Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas."[17] Although its initial terms of reference were confined to the interests of the parties concerned, the Treaty has provided a 'constitutional' basis for recognizing legal rights and for testing government policy in respect of all citizens: Treaty compatibility is now a political if not a legal imperative for all social policy initiatives. The broad umbrella of the Treaty has come to accommodate the common law and international conventions. In recent years there has been considerable debate regarding the relevance of the Treaty of Waitangi to contemporary social life in New Zealand.

Maori

The indigenous people of New Zealand, currently comprising some 523,000 persons or approximately 15% of the population, are expected to constitute nearly 20% of the population by the year 2031. The median age for Maori is around 22 years and 55% of the population is under 25 years compared with only 34.6% of non-Maori. More than half of all Maori live in the northern part of North Island, mostly around Auckland (46%). In general, they have lower incomes and larger households than non-Maori and are more likely to be living in one-parent households. Relative to the non-Maori, they are disadvantaged by age, geographical distribution, by low standards of education and skills and by levels of unemployment.[18] Though constituting less than 15% of the population, they make up almost 50% of the total prison population and have higher numbers of suicides than non-Maori.

Maori have a well-developed communal culture. However, the strength of their communities, built on networks of blood relationships, is also a considerable weakness in terms of charity law. The common law framework has operated to obstruct philanthropic activity on behalf of the socially disadvantaged Maori as acknowledged by the government in its discussion document *The Taxation of Maori*

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[15] See for example, New Zealand Maori Council (*New Zealand Maori Council v. Attorney-General*) [1987] 1 NZLR 641.

[16] Signed on February 6, 1840 by representatives of the British Crown, and Maori chiefs from North Island at Waitangi on the Bay of Islands in New Zealand and eventually consolidated by the Treaty of Waitangi Act 1975.

[17] See *New Zealand Maori Council v. Attorney-General*, *op. cit*., *per* Cooke, P.

[18] See Statistics of New Zealand, *Census of Population and Dwellings*, Wellington, 1996.

Organisations, published in April 2002.[19] Nonetheless, the law, as interpreted in the light of the Treaty of Waitangi, has proven to be a useful mechanism for asserting Maori rights as has been successfully demonstrated in several cases.[20]

Current Social Policy Themes and Charity

The social policy issues currently challenging New Zealand have been candidly acknowledged by the government:[21]

> Average material living standards have fallen relative to most other OECD countries; income inequality increased particularly in the late 1980s; the incidence of household poverty is too high; there are wide gaps in ethnic averages across a range of social indicators, there are poor outcomes in health and education among lower socio-economic groups; there are quite sharp divisions in values and attitudes on key socio-economic issues; and there are institutional weaknesses that trouble Crown-Maori aspirations and our levels of social capability more generally. Added to this is a regional picture of increasing deprivation in Northland and parts of Auckland, and stagnation in East Cape. Finally, there is the threat of more skilled young New Zealanders leaving for what they see as more prosperous foreign countries that are putting out the welcome mat for them.

Government and the Charitable Sector

As in other developed common law nations, partnership with government has been thrust upon the charitable sector in tandem with the former's withdrawal from public service provision. As noted by Tennant, the social and political changes of the 1970s moved New Zealand away from a welfare state towards a "mixed economy

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[19] This report contains proposals to amend the tax rules for Maori authorities, including the Maori Trustee, and to clarify how charity law applies to all organisations, especially iwi-based and hapu-based organisations and marae. It states the government's intention to relax the public benefit test so that blood ties among members of a Maori organisation will not in future automatically prevent it from obtaining charitable status for tax purposes. In addition, marae situated on Maori land will qualify for charitable status for funds applied solely to the administration and maintenance of the marae.

[20] See, for example: *Te Heuheu Tukino v. Aotea District Maori Land Board* [1941] NZLR 590, [1941] AC 308; *New Zealand Maori Council v. Attorney- General* [1987] 1 NZLR 641 (*Lands*); *New Zealand Maori Council v. Attorney-General* [1989] 2 NZLR 142 (*Forests*); *Tainui Maori Trust Board v. Attorney-General* [1989] 2 NZLR 513 (*Coal*); *Huakina Development Trust v. Waikato Valley Authority* [1987] 2 NZLR 188; *Attorney-General v. New Zealand Maori Council (No 1)* [1991] 2 NZLR 129 and (No 2) 147 (Radio Spectrum); *New Zealand Maori Council v. Attorney-General* [1992] 2 NZLR 576 (*Broadcasting Assets*); *Te Runanga o Wharekauri Rekohu Incorporated v. Attorney-General* [1993] 2 NZLR 301; and *New Zealand Maori Council v. Attorney General* [1994] 1 NZLR 513.

[21] The Treasury, 2001, p. 62.

of welfare" thereby allowing a greater role for "private provision for social need".[22] The extent of the transfer of responsibility from government to charity can to some extent be gauged by the flow of government funds from various sources to non-government service providers. Robinson and Hanley, for example, estimated that central and local government accounted for 58% of funding to the non-profit sector in 2002.[23] The *Giving New Zealand 2006* report provides more concrete evidence of the extent and direction of government funding noting that the biggest contributors to total giving in the year 2005/2006 were statutory trusts, with $617 million, or 48.5% of the total. The report adds that of total funds given for philanthropic causes in that year, 15.8% went to charities with a social services orientation, 10.3% for those in health while the development and housing category accounted for 7.8% (this includes recipients such as the Child Poverty Action Group, Healthy Homes trusts and marae committees). The transfer of responsibility can also be seen in the emergence of charity hospitals which are now needed to address the considerable problem of those left on hospital waiting lists for elective surgery. This has now become such a low priority for government that charities are having to step in and resume their traditional role of supplying an essential public health service.[24]

The Government's policy of creating a formal partnership with community, voluntary and iwi/Maori organisations was officially proclaimed in November 2001. The Prime Minister then signed a statement of intent on behalf of the Government to signal the Government's recognition of the fact that community, voluntary and iwi/Maori organisations interact across a range of ministries and departments. By so doing the Government committed itself to giving priority to working with the not-for-profit sector to develop co-ordinated, inter-sectoral policies and programmes.[25] The Government's vision for the future is one where the State performs its role as a facilitator of a strong civil society based on respectful relationships between government and community, voluntary and iwi/Maori organisations. The latter are, however, hampered by the absence of powerful umbrella bodies that in other jurisdictions are able to forcefully represent the interests of the sector in the context of partnership negotiations.

The Charities Act 2005 is seen as a cornerstone of the government's partnership policy. As a minister declared:[26]

> This legislation is a symbol of this government's commitment to growing the relationship between government and the charitable sector.

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[22] See Tenant, M., *op. cit*., 2001.

[23] See Robinson and Hanley, *op. cit*., 2002.

[24] See Canterbury Charity Hospital Trust which performed its first operation (on an elderly man who had been on a hospital waiting list for three years) in August 2007.

[25] See Ministry of Social Policy, *Communities and Government – Potential for Partnership Whakatopu Whakaaro*, 2001.

[26] From media statement made by the Hon. Judith Tizard, Associate Minister of Commerce announcing the new legislation on 14 April 2005.

Range of Contemporary Domestic Issues

In the first comprehensive assessment of the status of human rights in New Zealand the Human Rights Commission noted that the most pressing issues were those relating to:[27]

- the poverty and abuse experienced by a significant number of New Zealand children and young people;
- the pervasive barriers that prevent disabled people from fully participating in society;
- the vulnerability to abuse of those in detention and institutional care;
- the impact of poverty on realisation of the most basic human rights;
- the entrenched economic and social inequalities that continue to divide Maori and Pacific people from other New Zealanders; and
- the challenge of the place of the Treaty of Waitangi now and in the future.

The action plan proposed by the Commission to address these issues rests very much on a strategic approach to what it views as structural social problems. So, for example, it suggests direct and systematic participation of disabled people in policy development and decision-making. It insists that there should be a focus on the elimination of poverty and that ways are developed to improve democratic participation, including that of children and young people, and widening access to justice. These problems and the proposed methods for tackling them present a real challenge for the future role of philanthropy in New Zealand. The outcomes of the charity law reform process must be set against the nature and scale of this challenge.

Health and Social Care

Arguably, success in the pursuit of economic growth has been at the price of cutbacks in public sector spending. The welfare state underwent a radical overhaul in the late 1980s and throughout the 1990s. In 1991, most benefits, such as the Sickness, Domestic Purposes Benefit and Unemployment Benefit were cut by between 5% and 27%.[28] Certain health subsidies, formerly universal, were restricted to low-income families through the introduction of the Community Services Card. The move towards an ever more tightly targeted welfare state proceeded.

The extent of government withdrawal from public service provision is evident in the current low rate of income tax (39% compared with the OECD average top rate

[27] See the Human Rights Commission, *Human Rights In New Zealand Today/NgÇ Tika Tangata O Te Motu* (the status report), 2004.

[28] See the 1991 Budget document *Welfare That Works* and Shipley, H.J., *Social Assistance: Welfare That Works*, Government Printer, Wellington, 1991.

of 47.8%) and of government spending (36.4% of GDP compared with UK 37.8%, Norway 43%, Denmark 52.4% Germany 44.8% and Canada 42%). Income redistribution through the tax system is facilitated by an uncompromised VAT regime that allows for no concessions to charities. The resulting negative impact on the socially disadvantaged in New Zealand society has been charted by various commentators,[29] in reports published by national and international non-government organisations[30] and in regular reports by government agencies.[31]

Multi-culturalism

A sustained policy of actively encouraging immigration has resulted in New Zealand's present multicultural society. The early settlers, predominantly English and Irish, were followed by the French in the late 19th century, then by the Chinese gold miners in the Otago gold rush, the Dutch in the 1950s and the Pacific Island peoples in the 1970s. More recently, migrants have flowed in from non-traditional sources such as India, Africa, China and Thailand. By 2001 only 70% of people living in New Zealand were exclusively of European blood, compared to over 90% 30 years before. The 2001 Census revealed that 10% of the population is comprised of ethnic minorities other than Maori and Pacific peoples, a figure projected by Statistics New Zealand to rise to 18% by 2021. Given current demographic trends, dominated by the fact of an ageing population, it can be confidently predicted both that the government's policy towards immigration will continue and that questions will be raised about New Zealand's approach to ethnic diversity.[32]

A number of agencies including Te Puni Kkiri, the Ministry of Pacific Island Affairs and, more recently, the Office of Ethnic Affairs have been set up to advise the government on issues relating to their respective sectors. The latter's work in the community involves engaging with communities in order to provide advice, increase the development of networks within communities and enhance the development of social capital within the sector for the benefit of all New Zealanders. Its remit has been recently extended to include:

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[29] See for example: Dalziel, P., *New Zealand's Economic Reform Programme Was a Failure*, unpublished manuscript, Christchurch, 1999; Easton, B., *The Commercialisation of New Zealand*, Auckland University Press, Auckland, 1997 and *In Stormy Seas: The Post-war New Zealand Economy*, University of Otago Press, Dunedin, 1997; Jesson, B., *Only Their Purpose Is Mad*, The Dunmore Press, Wellington, 1999; and Kelsey, J., *Rolling Back the State*, Bridget Williams Books, Wellington, 1993 and *The New Zealand Experiment* (2nd ed.), Auckland University Press/ Bridget Williams Books, Auckland, 1997.

[30] See *Human Rights Commission, Human Rights In New Zealand Today/NgÇ Tika Tangata O Te Motu* (the status report), 2004.

[31] See for example, Commissioner for Equal Employment Opportunity, *Framework for the Future: Equal Employment Opportunities in New Zealand*, Christchurch, 2004.

[32] See Singham, M., 'Multiculturalism in New Zealand – The Need for a New Paradigm', *Aotearoa Ethnic Network Journal*, 1: 1, June 2006.

building intercultural awareness; raising visibility of ethnic communities and their contributions; and promoting dialogue on ethnic community issues amongst communities, particularly amongst youth. Again, the recent Reducing Inequalities Project led by the Ministry of Social Development has been aimed at assessing, monitoring and preventing the development of disadvantage based on ethnicity and other characteristics.

These government initiatives may have prevented the racial tensions erupting into the violence witnessed in Sydney but they have not avoided the drift towards ethnic ghettoes that in England and France have proved to be the precursor of such eruptions. As a nation with one of the world's highest rates of immigration coupled with a large indigenous and significantly disadvantaged population, New Zealand clearly needs to develop a social policy that prevents poverty, ghettoisation and marginalisation from becoming embedded along ethnic lines.

Human Rights, Anti-terrorism and Social Justice

New Zealand has in place a not untypical platform of equality legislation including the Equal Pay Act 1972 and the Employment Relations Act 2000. It has ratified a number of international conventions relating to non-discrimination and to fundamental rights for all citizens including minority groups[33] and has introduced domestic legislation and other policy frameworks to ensure equality.[34] However, most recently, it was one of only four countries to refuse to sign the recent UN Declaration of Rights of Indigenous Peoples.[35] Its social justice legislation includes the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. The Human Rights Amendment Act 2001 restructured the Human Rights Commission and introduced additional safeguards against discrimination on grounds such as age, disability or sexual orientation in the policies and practices of government agencies. The primary functions of the Human Rights Commission, as stated in the 2001 Act, are:

(a) To advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society
(b) To encourage the maintenance and development of harmonious relations between individuals and among the diverse groups in New Zealand society

[33] International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Civil and Political Rights; International Covenant on Economic Social and Cultural Rights.

[34] Equal Pay Act 1972; Citizenship Act 1977; Immigration Act 1987; State Sector Act 1988; Bill of Rights Act 1990; Human Rights Act 1993; Ethnic Perspectives in Policy 2003.

[35] On 13 September 2007, the General Assembly adopted a landmark declaration outlining the rights of the world's estimated 370 million indigenous people and outlawing discrimination against them: 143 Member States voted in favour; 11 abstained and four – Australia, Canada, New Zealand and the United States – voted against the text.

Against that context the recent spate of anti-terrorism measures may seem disproportionate. In marked contrast to its traditional laissez faire approach to fundraising for public benefit causes, the government has put or is now putting into place a comprehensive legislative framework to ensure rigorous supervision of possible opportunities for funds to be used for contrary purposes. For example, the Terrorism Suppression Act 2002 deals with the financing of terrorism and was subsequently amended by the Terrorism Suppression Amendment Act 2005 which criminalises the financing of terrorist entities and complements existing terrorist financing offences. This has been reinforced by the Criminal Proceeds and Instruments Bill which was introduced in Parliament in June 2005 to provide for the forfeiture of assets in relation to criminal activity such as money laundering.

Charity and the Law

The law relating to charities in New Zealand reflects the history of a non-regulatory but facilitative government approach to organisations established to provide public benefit services.

The early colonial experience promoted self-reliance and the government encouraged the vulnerable to look to their families rather than to the state for assistance.[36] This was illustrated, for example, in the early proliferation of societies and the growth of a rich culture of associations (adopting the route of incorporation rather than charitable trusts) which lead to the Unclassified Societies Registration Act 1895 and the Incorporated Societies Act 1905. It was illustrated also in the Destitute Persons Ordinance 1846 which imposed obligations on the relatives of the needy and enforced deductions from employers wages for this purpose. This approach seemed to experience a revival in the last decades of the 20th century as the government withdrew its support for an inclusive, non-contributory, welfare state and instead introduced means testing for many health and welfare benefits. At both stages it was an approach that proved conducive to promoting the role of community based health and social care charities.

The common law was transplanted to New Zealand as part of the process of British colonisation. The understanding of what constitutes a charity has been developed by the common law and is based on the Preamble to the Statute of Charitable Uses[37] as enacted by the English Parliament in 1601, even though the statute never had any direct applicability to New Zealand. This heritage, as extended by case law precedents under the 'spirit or intendment' rule[38] within the

[36] See Thompson, D., *A World Without Welfare: New Zealand's Colonial Experiment*, Auckland University Press, Auckland, 1998.

[37] Statute of 43 Eliz. 1 cap. 4.

[38] This rule provides that even though a purpose cannot be defined as coming under one of the established heads of charity, it will nonetheless be construed as charitable if it can be interpreted as falling within the 'spirit or intendment' of the Preamble to the 1601 Act. See *Commissioner of Inland Revenue v. Medical Council of New Zealand* [1997] 2 NZLR 297 when Thomas, J, expressed the view that the 'spirit and intendment' rule should be used with more attention to contemporary circumstances than to case precedents.

classification of charitable purposes set out by Lord Macnaghten in the *Pemsel* case[39] (see, further, Chap. 3), formed a foundation for the development of charity law in this jurisdiction.

The Common Law: Definitional Matters

Until the introduction of the Charities Act 2005, a definition of 'charity' and 'charitable purpose' required a referral to s 2 of the Charitable Trusts Act 1957 which provided that charitable purpose meant "every purpose which in accordance with the law of New Zealand is charitable; and, for the purposes of Parts I and II of this Act, includes every purpose that is religious or educational, whether or not it is charitable according to the law of New Zealand". Therefore, in the context of Parts I and II of the Act, which deal with vesting of trust property and incorporation of trust boards respectively, "religious purposes" do not need to satisfy common law requirements such as "public benefit" in order to qualify as "charitable purposes".[40]

The characteristic common law hallmarks of charity law as established in England & Wales (see, further, Chap. 3) have played their customary role and, subject to some specific adjustments, will continue to do so in the new era inaugurated by the 2005 Act. While retaining its responsibilities in relation to donee status (for reasons that are not clear), the Inland Revenue Department has transferred to the newly established Charities Commission the power to grant an organisation "charitable status" for income tax purposes only if that organisation satisfies four requirements:

- It must be carried on exclusively for charitable purposes.
- It must not be carried on for the private pecuniary profit of any individual.
- It must have a provision in its rules requiring the assets of the organisation to be transferred to another entity with charitable purposes if the organisation ceases to exist.
- It must not have the power to amend its rules in such a way as to alter the exclusively charitable nature of the organisation.

Charitable Intent

The presence or absence of a charitable intent will be as determinative in cases of doubt in this jurisdiction as it is in England & Wales.

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[39] See *Income Tax Special Commissioners v. Pemsel* [1891] AC 531.

[40] The authors are grateful to Michael Gousmett for this observation.

Public Benefit

In this jurisdiction, the traditional presumption continues that the public benefit test is satisfied by gifts made under the first three heads but will require to be proven in relation to the fourth. The test is applied objectively; the fact that a testator believed that a gift was for the public benefit will not prevent the courts from concluding otherwise and denying it charitable status. This contrasts with the position in England & Wales where, since the passing of the Charities Act 2006, that presumption has been removed requiring all charitable gifts to now satisfy the test and which, unlike New Zealand, has used the opportunity of new charities legislation to introduce a redefined concept of 'public benefit' to address contemporary manifestations of social need.

Exclusively Charitable

As in England & Wales and other common law jurisdictions, a purpose must be exclusively charitable if it is to come within the legal definition of 'charity' in New Zealand.[41]

Independent

The independence of charities, a characteristic derived from trust law, is as important in this jurisdiction as in all others that share the common law legacy. However, as Rickett has noted,[42] government awareness of the issues involved has not prevented it from ignoring this fundamental charity law principle when politically expedient to do so. The statutory transformation of the New Zealand Railways Staff Welfare Society into the New Zealand Railways Staff Welfare Charitable Trust, notwithstanding the latter's member benefit purpose, being an example of the misuse of government power in relation to charity. In contrast, the Crown Forestry Rental Trust established by statute in 1989 was ultimately found not to be charitable[43] (see, further, below).

Non-governmental

Again, maintaining independence entails avoiding surrendering autonomy of decision-making by becoming purely an agent of government. This can be as real a

[41] See for example, *Molloy v. Commissioner of Inland Revenue* [1981] 1 NZLR 688.

[42] See Rickett, C., 'A Statutory Charitable Trust', *New Zealand Law Journal*, March 2000, pp. 59–61.

[43] *The Crown Forestry Rental Trust v. CIR* [2002] 1 NZLR 535.

danger for charities in New Zealand as in England & Wales and elsewhere in the common law world. The government has issued guidelines intended to encourage the use of better contracting practices by all departments and Crown entities involved in negotiating arrangements with non-government organisations.[44]

Non-profit Distributing

In this jurisdiction, as in other common law nations, it is essential that a charity does not permit any individual to gain a private pecuniary profit or advantage. Where a pecuniary advantage is gained by the charity but this is incidental to its main purpose and does not constitute private profit then its status may be safe.[45]

Charitable Purposes

As first identified in the 1601 Act and later classified in *Pemsel*, the well-established common law test for charitable purposes continues under the 2005 Act to require a charitable organisation to have a purpose that: advances education; advances religion; relieves poverty; or is otherwise beneficial to the community. Furthermore, the charitable organisation's object must be of benefit to the public. A charitable organisation will not be disqualified from registering if it also has a secondary or supplementary non-charitable function (such as advocacy) as part of its charitable purpose if that is not an independent purpose. The development of charitable purposes, unlike the position in England & Wales, is strictly by analogy in keeping with the 'spirit and intendment' rule (see, further, below) and remains unaltered by the 2005 Act.

The Common Law: Institutional Infrastructure

In this jurisdiction, the institutional infrastructure relating to charities is of a traditional common law character. Although a Charities Commission has been inserted as the centerpiece of a new regulatory framework it remains to be seen whether this will in practice alter the established conservative approach to charities and their activities (see, further, below).

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[44] See the Treasury, *Guidelines for Contracting with Non-government Organisations for Services Sought by the Crown*, 2001.

[45] See *Centrepoint Community Growth Trust v. Commissioner of Inland Revenue* [1985] 1 NZLR 673. See further, Rickett, C., 'Centrepoint – a Charity Gone Wrong?', *New Zealand Law Journal*, March 2001, pp. 57–59.

Developmental Milestones in Charity Law

Charity law in New Zealand has remained true to its common law origins. Its development has been largely a consequence of 'reading across' the case law precedents established in England & Wales and other common law jurisdictions. Contemporary legislation continues this traditional thread by maintaining its established emphasis on societies, trusts and institutions as legal structures for charitable activity and by not deviating from the common law definition of charitable purpose in the recently introduced Charities Act 2005.

Case Law Milestones

Although the flow of charity litigation has slowed to a trickle in New Zealand, presenting its judiciary with few opportunities to consider issues of principle, the issues arising and the decisions taken conform closely to the pattern in other common law countries.

- *Re Bingham*[46]

In this case it was held that a gift for the care of aged women was for the relief of poverty and therefore charitable.

- *Re Mason (deceased)*[47]

This case concerned trustees of a trust established 'for the constitution and maintenance of a [law] library or libraries' who wished to purchase 'all kinds of books' for the Auckland Law Society. Finding that the trustees could make such grants, Mullin J explained:

> The test of whether a library is a charity is whether it tends to the promotion of education and learning for the public or a sufficiently wide section of the public or whether it benefits only a more limited number of persons. If it is in the first class it will be charitable, if in the second class it will not be charitable.

- *Molloy v. Inland Revenue Commissioner (NZ)*[48]

In this case a society for protecting the unborn was held not to be established for charitable purposes. The court found the society's objects were aimed at preventing abortion law reform and said that a purpose being aimed at frustrating an obvious political object must itself be a political object for charities law. The Court of Appeal referred to "the inability of the Court to judge whether a change in the law will or will not be for the public benefit".[49] The verdict provides authority for the view that a purpose of seeking to maintain the existing law is not charitable.

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[46] [1951] NZLR 491.

[47] [1971] NZLR 714.

[48] (1977) 8 ATR 323; *Molloy v. Commissioner of Inland Revenue* (1981) 12 ATR 93.

[49] *Ibid*., *per* Somers, J., pp. 695–696.

- *Auckland Medical Aid Trust v. Commissioner of Inland Revenue*[50]

The court found that medical services per se were charitable and therefore the provision of "a comprehensive health and welfare service related to the human reproductive process and its control" was a charitable purpose and that the contraception, sterilization and abortion services provided by the plaintiffs were charitable and the income derived from such service provision was entitled to charitable exemption from tax.

- *Commissioner of Inland Revenue v. New Zealand Council of Law Reporting*[51]

The court then held that the publication of law reports by the Council of Law Reporting (a non-profit body) was charitable as this activity was one that advanced education.

- *Centrepoint Community Growth Trust v. Commissioner of Inland Revenue*[52]

In this case, Tompkins J found that the trust, which had as one of its purposes the advancement of the spiritual education and humanitarian teaching of Herbert Thomas Potter, was charitable as being a trust established for the advancement of religion. For the purposes of the law, criteria for any religion require belief in a supernatural being, thing or principle and the acceptance of certain canons of conduct in order to give effect to that belief.

- *New Zealand Society of Accountants v. Commissioner of Inland Revenue*[53]

The court in this case held that fidelity funds operated by the New Zealand Society of Accountants and the New Zealand Law Society pursuant to legislation were not charitable because only persons in a contractual or fiduciary relationship with the defaulting practitioner benefited therefrom.

- *Educational Fees Protection Society Inc. v. Commissioner of Inland Revenue*[54]

An incorporated society that had as its objective the payment of the fees of school pupils on the death of a parent was held to be charitable under the advancement of education head.

- *Re Tennant*[55]

This case demonstrates judicial capacity and willingness to broaden the law relating to charitable purposes. The provision of a creamery to assist a small new rural community to become economically viable was found to be charitable.

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[50] [1979] 1 NZLR 382.
[51] [1981] 1 NZLR 682.
[52] [1985] 1 NZLR 673.
[53] [1986] 1 NZLR 147.
[54] [1992] 2 NZLR 115.
[55] [1996] 2 NZLR 633.

- *Commissioner of Inland Revenue v. Medical Council of New Zealand*[56]

In this case Thomas J expressed the view that the 'spirit and intendment' rule should be used with more attention to contemporary circumstances than to case precedents.

- *DV Bryant Trust Board v. Hamilton City Council*[57]

This case concerned a retirement village in Hamilton which charged rent for units at well below market rates so that it was available to the elderly of moderate means. The court found the trust that ran the project was a substantial benefactor to the people of the Waikato and did not confer private benefits to any person. It held the trust to be established for the relief of poverty and therefore a charity.

- *Commissioner of Inland Revenue v. Dick*[58]

This case concerned a foundation established to operate gaming machines, which can only lawfully be operated in New Zealand if the income is distributed to authorized purposes, and the profits are distributed to charitable purposes. Finding that the foundation was charitable, the court ruled that past behaviour of the entity can be a guide as to whether in practice the income and other advantages derived from the trust were distributed for the benefit of trustees.

- *The Crown Forestry Rental Trust v. CIR*[59]

The Crown Forestry Rental Trust ("the Trust") was established jointly by the Crown and Maori to assist Maori claimants in the preparation, presentation and negotiation of claims before the Waitangi Tribunal. The Crown received rental income from forestry assets. The income was passed on to the Trust as capital. The interest earned by the investment of the rent was to be made available to assist Maori making claims involving land before the Waitangi Tribunal. The Trust was to be wound up after 80 years, at the latest, and any net proceeds were to be returned to the Crown. The issue was whether investment income earned by the Trust was taxable in the Trust, or exempt under the provisions relating to charitable entities.

The High Court ruled in favour of the Commissioner on the basis that the Trust was not established exclusively for charitable purposes, as one of its purposes was receiving and holding the rental proceeds, which was not a charitable purpose. The Court of Appeal stated that the relevant test was not whether the Trust was established exclusively for charitable purposes, but rather whether the money was applied exclusively to charitable purposes. It held that the fact that any surplus investment income derived by the Trust was to be distributed to the Crown when

[56] [1997] 2 NZLR 297, p. 314.

[57] [1997] 3 NZLR 342.

[58] (2001) 20 NZTC 17.

[59] [2002] 1 NZLR 535.

the Trust was wound up deprived the Trust of its charitable status, as this was not a charitable purpose. The Privy Council held that whether the purposes of the Trust are charitable depends not on the intention of the settlor, but on the purposes for which trust money may be applied. Further, it is not necessary for a trust to be established for charitable purposes; it is sufficient that the funds are applicable for charitable purposes. This confirmed the view of the Court of Appeal.[60]

Legislative Milestones

In New Zealand, as in other common law jurisdictions, the history of charity law can essentially be traced to the 1601 Act. By the time this jurisdiction acquired a measure of independence in 1840, the development of its legal framework for charities[61] was rooted in common law principles and now, under the auspices of the Charities Act 2005, it is clear that its future will continue to be so.

The Religious, Charitable and Educational Trusts Legislation

Beginning with the Religious, Charitable and Educational Trusts Act 1856, a series of statutes set out the government's recognition, support and encouragement of charitable trusts established for public benefit purposes. The 1856 Act was extended in 1863 from conveyances to trustees in respect of freehold and leasehold property to also include mortgages and loans. In 1884 legislation provided for the incorporation of the bodies established by such trustees.

The Charitable Funds Appropriation Act 1871

Although introduced to cope with fundraising problems, this statute made a significant contribution to the development of charity law by specifying a list of 11 categories of charitable purposes comprising an uneven mix of health, social care and educational services for the poor or otherwise disadvantaged, with provision of public service utilities, religious activities and insurance schemes. It also introduced provisions to allow funds raised by an organisation for a particular charitable purpose, that had subsequently become 'impossible or inexpedient' or 'uncertain or

[60] See KPMG New Zealand, Issue 1, March 2004 for the full version of this account http://www.kpmg.co.nz/download/102094/104311/taxmail.pdf.

[61] For further information on the legislative history see Dal Pont, G., *Charity Law in Australia and New Zealand*, Oxford University Press, Melbourne, 2000, p. 78 *et seq*.

illegal' for the organisation to deal with as it had intended, to be applied instead to other charitable purposes. This provision marked the beginning of a process that saw the functions of *cy-près* schemes being accommodated by a statutory procedure.

The Hospitals and Charitable Institutions Act 1885

As the name suggests, this legislation was concerned with health and social care infrastructure. It sought to organise facilities on a localised basis. Included among the schedules to the Act, however, was a list of purposes and objects deemed to be charitable.

The Charitable Trusts Extension Act 1886

This statute further developed the measures addressed in the Acts of 1871 and 1885. In particular it continued the process of providing a statutory procedure to enable charities to redirect assets to other charitable ends when original purposes had become impossible, impractical, uncertain or illegal.

The Unclassified Societies Registration Act 1895

This permitted any society of not less than 15 persons associated for any lawful purpose (and not being for pecuniary gain) and not registered or incorporated under any other enactment to obtain incorporation by registration with the Registrar of Friendly Associations. It required associations to have a registered office and permitted both voluntary dissolution and the involuntary cancellation of registration. It was amended in 1906 to require a set of rules to be filed on registration.[62]

The Incorporated Societies Act 1908

Replacing the above Acts of 1895 and 1906, this legislation retained and consolidated their primary features while imposing a heavier administrative burden on associations. The regulatory intent of this legislation was, as the Prime Minister then explained,

[62] See further, Fletcher, K.L., *The Law Relating to Non-profit Associations in Australia and New Zealand*, The Law Book Company Limited, Australia, 1986, pp. 215–217.

"improve the measure of control over incorporated societies, particularly by requiring them to file annual financial statements and to provide for their dissolution".[63]

The Religious, Charitable and Educational Trusts Act 1908

This Act, as subsequently amended in 1928, consolidated the law relating to charitable trusts. The latter, as Dal Pont notes, introduced two important measures:[64]

> First, by section 3, 'charitable purpose' was defined as every other purpose which in accordance with the law of England is a charitable purpose.
> Secondly, a judge of the Supreme Court or the Attorney-General could, under section 5, alter the purposes of an approved scheme under the procedure laid down in the principal Act and even restore the original purposes.

The Hospitals and Charitable Institutions Act 1909

This legislation sought to bring the localised facilities established under the 1885 Act into a country–wide health care scheme. Thereafter, legislation gradually introduced the basic elements of a national health, welfare and benefits system.

Current Legislation

In this jurisdiction, the history of legislation relating to charities is one devoid of any intent to subject such entities to a specific regulatory regime; the few controls in existence were established and exercised in recognition of ancillary characteristics not because of charitable status. This produced a situation where the dearth of statistical data was accompanied by a presumption that standards of transparency and accountability did not fully apply to the charitable sector which in turn generated the concern that ultimately lead to the charity law reform process.

In June 2001 the government issued its discussion document *Tax and Charities*[65] and in October of that year the Minister for Finance announced a decision in principle

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[63] An anomaly that the Charities Act 2005 corrects is the requirement for charities to – finally – be publicly accountable. While incorporated societies with charitable purposes were required, under the ISA 1908 s. 23, to file financial statements, charities incorporated under the Religious, Charitable and Educational Trusts act 1908 then the Charitable Trusts Act 1957 were not required to do so. The authors are grateful to Michael Gousmett for drawing this to their attention.

[64] See Dal Pont, G., *Charity Law in Australia and New Zealand*, *op. cit*., p. 81.

[65] See Inland Revenue Department, Policy Advice Division, *Tax and Charities*, Wellington, 2001.

to introduce registration, reporting and monitoring requirements for charities claiming tax-free status. In November 2001 the Working Party on Registration, Reporting and Monitoring of Charities was appointed to make recommendations on the type of registration, reporting and monitoring arrangements that should be introduced, consider the issue of the public benefit test in relation to Maori organisations, comment on possible improvements to the definition of "charitable purpose" and consider the standardisation of the various tax assistance rules applying to New Zealand charities with overseas purposes. The Working Party reported with its final recommendations on 31 May 2002.[66] On 5 March 2003 the details relating to the proposed Charities Commission were agreed and the Charities Act was approved by parliament on 13 April 2005. As the staged introduction of the Charities Act 2005 gradually takes effect, it is becoming clear that in New Zealand the law relating to charities is not, at least in the foreseeable future, going to be radically transformed. Charity law will continue to rely heavily on the provisions of earlier legislation.

The Charitable Trusts Act 1957

This statute, which remains unaltered by the 2005 Act, provided further consolidation of previous legislative provisions and the rudiments of a supervisory system.

Section 2 explains that 'charitable purpose' means every purpose which in accordance with the law of New Zealand is charitable; and, for the purposes of Parts I and II, includes every purpose that is religious or educational, whether or not it is charitable according to the law of New Zealand. Parts I and II regulate the vesting of property and the incorporation of trust boards.

Section 61A explains that it is charitable to provide, or to assist in the provision of, facilities for "recreation or other leisure-time occupation, if those facilities are provided in the interests of social welfare. The requirement that the facilities be made available "in the interests of social welfare" is not satisfied unless:

(a) The facilities are provided with the purpose of improving the condition of life for the persons for whom the facilities are primarily intended
(b) Either:

    (i) Those persons have need of those facilities by reason of their youth, age, infirmity, disablement, poverty, race, occupation or social or economic circumstances
    (ii) The facilities are to be available to the members of the public at large, or to the male or female members, of the public at large

This section specifically retains the principle that a trust or institution must be for the public benefit to be charitable.

[66] The Working Party issued its first report on 28 February 2002 and its second on 31 May 2002.

In Part IV of the Act, which deals with charitable funds raised by voluntary contributions, an expanded interpretation of the common law definition of 'charitable purposes' applies. In this context the term is defined to mean every purpose which in accordance with the law of New Zealand is charitable and includes a number of listed purposes such as 'the promotion of athletic sports and wholesome recreations and amusements', and 'encouragement of skill, industry and thrift' whether or not they are beneficial to the community or to a section of the community.

This legislation imposed no specific financial reporting duties nor did it put in place any other mechanism for registering or regulating charities.[67] Accountability and transparency requirements were limited to those charities incorporated under the Incorporated Societies Act 1908 and under relevant Companies Acts which were required to file financial accounts with the appropriate Registrar.

Charity Law Reform

In 1979, after an 11 year study, the New Zealand Property Law and Equity Reform Committee released a report that concerned changes to the law to facilitate control and supervision of charitable trustees. It found that the only regulators of the charitable trust were the Attorney-General and processes of the common law, both of which were described as leading to the position, that charitable trusts were "uniquely free of supervision." It went on to suggest that there was no significant evidence of any maladministration, most donations were channelled through larger charities, which they assumed were most unlikely to maladminister the donations and most charities, even small ones were subject to an audit. The audit of such charities was believed to be performed by honorary auditors who as a general principal of auditing, checked payments against the terms of the trust, although they offered no evidence that this was in fact the case. L. McKay commented in a telling remark that "without the machinery that provides a guarantee of revealing what abuse there is, we surely cannot use the present lack of evidence as an argument for not perfecting our supervisory methods". After reviewing the English Charity Commission model of regulation, it concluded that it would be difficult to justify the setting up of a body of officials to supervise charitable trusts in New Zealand and that, "there is at present no justification for recommending any change to the law in this area".

[67] However, international financial reporting standards (IFRS) will shortly be imposed upon many charities, particularly the 'larger' ones, by the Institute of Chartered Accountants. The Charities Commission will eventually issue regulations on financial reporting by charities but whether there will be adequate debate within and without the sector on appropriate standards, given the IFRS issue, remains to be seen. Increasing pressure by chartered accountants with respect to audit standards is another issue that charities will in future be faced with. The authors are grateful to Michael Gousmett for drawing this to their attention.

In the late 1980s, the government first sponsored a Working Party on Charities and Sporting Bodies (the 'Russell Report'). The Working Party noted that "there is very real difficulty in ascertaining what abuse is occurring, in that the Inland Revenue Department does not pursue a policy of requiring returns from tax-exempt bodies as a matter of course" and that "the oversight of charities has been largely ineffective through the Charitable Trusts Act, and it does not apply to associations formed under the Incorporated Societies Act of 1908". It strongly recommended that a commission similar to the Charity Commission in England be established and called for greater accountability while offering incentives through changes to charities' taxes.[68] This was not received well by the sector and the Report's major recommendations were not implemented. Implementation of the Russell Report's recommendation to establish a Commission for Charities to register, provide supervision and advice to charities was indefinitely deferred.

In 1990, Philanthropy New Zealand was established which then formed and set up a Working Party to determine a consensus on the means of improving accountability in the charitable sector. Although self-regulation was preferred, the Working Party perceived that increased formalization of accountability was necessary for legitimacy and offered two alternatives: self-regulation with legislative underpinning, or formal donor protection systems underpinned by a uniform set of financial reporting standards for charities. However, neither option was adopted by the sector, perhaps because of sector diversity, lack of leadership and funding, or absence of a dominant group of advocates to organize and drive a regulatory entity.

In 2001, some 12 years after the Russell Report, the government launched a discussion document entitled 'Tax and Charities' and set in motion the reform process that would eventually conclude with the Charities Act 2005.[69]

The Charities Act 2005[70]

Part I of the Charities Act 2005, which came into effect on 1st July 2005, has placed the definition of 'charitable purposes' onto a statutory footing. However, in the absence of any alteration to the substance of the definition or to the categories of purposes to be recognised as charitable in that statute, the existing interpretation of 'charity' and 'charitable purpose' will continue. This statute neither repeals nor significantly amends any previous legislation; it inserts only slight amendments to the Estate and Gift Duties Act 1968, the Incorporated Societies Act 1908, the Tax

[68] See New Zealand Working Party on Charities and Sporting Bodies, 1989.

[69] See further, Cordery, Carolyn J. and Baskerville, Rachel F., February 2007, *op. cit*.

[70] The Income Tax Act 2004, the Tax Administration Act 1994 and the Estate and Gift Duties Act 1968 are technically amended by the 2005 Act to refer as appropriate to 'registered charities' and to the 'Charity Commission' and appropriate amendments are made to the Incorporated Societies Act 1908.

Administration Act 1994, the Income Tax Act 2004, the Crown Entities Act 2004 (2004 No. 15) and the Ombudsmen Act 1975 (1975 No. 9). In particular it does not supersede the Charitable Trust Act 1957, so charitable trusts will still need to register with the Charities Commission if they wish to receive or maintain tax-exempt status and become a 'registered charitable entity.' It does not displace the need to comply with the registration requirements of either the Charitable Trust Act 1957 or the Incorporated Societies Act 1908.

- *Interpretation*

Under s 4(1), 'charitable entity' means a society, an institution, or the trustees of a trust that is or are registered as a charitable entity under this Act while 'entity' means any society, institution, or trustees of a trust.

Under s 5(1), repeating the definition in s OB 1 of the Income Tax Act 1994, 'charitable purpose' is defined as including:

> … every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.

Under s 5(2)(a) charitable entities will be required, as before, to demonstrate "public benefit", though the wording implies that an activities test may now be applied to confirm objects.

- *Charities Commission*

In a break with tradition, the 2005 Act has established a new government body to manage a new registration, support and supervisory system for charities. The duty to determine charitable status will now fall to this body rather than, as formerly, to the Inland Revenue Department. However, the Commission is not independent. As a Crown entity it will be subject to government policy and will function under direct Ministerial control with its members appointed and discharged at the Minister's discretion.

In relation to the Charities Act 2005, a government minister has declared:[71]

> "This legislation is a symbol of this government's commitment to growing the relationship between government and the charitable sector."

Legal Structures for Charities

The main vehicles or legal structure for charities are the unincorporated association, the charitable trust, the incorporated society, the trust board and the limited

[71] From media statement made by the Hon. Judith Tizard, Associate Minister of Commerce announcing the new legislation on 14 April 2005.

company. At 30 November 2000 there were 21,444 registered incorporated societies and 11,582 registered trust boards in New Zealand.

Types of Structure

Charities normally take the form either of an association, a company or a trust board.

- *Unincorporated association*

In New Zealand, an unincorporated association or 'a group of people defined and bound together by rules and called by a distinctive name'[72] is not recognised by common law, statutes or rules of court as a separate legal entity.

- *Company*

A society that has a minimum of 15 members who are associated for any lawful purpose but not for pecuniary gain, may apply to become incorporated under the Incorporated Societies Act 1908. To incorporate the group must be registered at an office of the Registrar of Incorporated Societies. Both charities and not for profit organisations may incorporate under the Incorporated Societies Act, 1908 but only societies which exist exclusively or principally for charitable purposes may apply for incorporation as a Board under the Charitable Trusts Act, 1957. Following introduction of the Companies Act 1993, companies limited by guarantee were abolished and were required to reregister as companies limited by shares.[73] The traditional distinction between private and public companies was also removed and as a consequence all companies are treated equally.

- *Incorporated society*

In New Zealand, an association that has a constitution with specified exclusively charitable objects can be incorporated under the Incorporated Societies Act 1908. This is an indigenous legal structure that, from early beginnings in the late 19th century, has proved to be a strong and popular form for charitable activity in New Zealand.

- *Trust board*

The trustees of a charitable trust or the members of an unincorporated society that exists, exclusively or principally for charitable purposes may incorporate as a board under the Charitable Trusts Act, 1957.

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[72] *Re Macauley's Estate* [1943] Ch 435 at 436 *per* Buckmaster, L.J.

[73] Companies Reregistration Act, 1994 (NZ) s 3.

Applying the Legal Functions of Charity Law

Until the partial introduction of the Charities Act in July 2005 there was no system of registration,[74] no regulatory framework and no central regulatory body for charities in New Zealand. This may have been due to an implicit understanding between government and the charitable sector that a self-regulatory approach from within the sector rather than an imposed State system was more appropriate. The charity law reform process, which concluded with the Charities Act 2005, has introduced some change to the established and typical common law regulatory framework, if rather less than anticipated. The Charities Commission is now in place as the centerpiece of a new framework but there is some way to go before this system is fully operational. More recently the government has embarked upon further reform by developing a new rebate regime for charities as evidenced by the changes introduced in the 2007 budget. This ongoing process of reform would seem to carry significant, if indirect rather than direct, implications for the legal functions as they relate to charity.

Protection

This, the legal function most usually associated with charity (see, further, Chap. 4), has been weakly represented within the regulatory framework although this may change in the future as the newly established Charities Commission builds a new role for itself.

The Attorney General

The *parens patriae* functions of the Crown to protect and ensure the proper administration of charities devolves to the Attorney General in New Zealand as it does in other common law countries. The Attorney General may institute proceedings, but must always be joined as a party to proceedings, involving a charity and also has authority under s 58 of the Charitable Trusts Act 1957 to examine and inquire into all or any charities in New Zealand, including trusts for charitable purposes within the meaning of Part IV of the Act, and to examine and inquire into the nature and objects, administration, management, and results thereof, and the value, condition,

[74] There was no systematic system of registration. Some, but probably not all, charities could be found on the Companies office website and many charities are listed with incorporated societies, but not identified as one or the other, as donee organisations in Staples Tax Guide, that listed being compiled from data held/supplied by the IRD from its Technical Rulings Manual, Chap. 53. The authors are grateful to Michael Gousmett for drawing this to their attention.

management, and application of the property and income belonging thereto. However, there is little evidence that the Attorney General has ever used the powers available under the inherent or statutory jurisdiction to exercise any substantial control over or scrutiny of charities. Reported cases involving the Attorney General show, almost without exception, that the proceedings were instigated privately rather than from that office.

The Inland Revenue Department

In keeping with the essentially revenue driven government approach to charities, the initial vetting and approval of charitable status was, until the introduction of the 2005 Act, the responsibility of the Inland Revenue Department which did not maintain a register of such organisations though it did keep a limited register of 'donee organisations'.[75] The evidence indicates that this body adopted a traditional policing role in respect of charities, determining and monitoring entitlement to tax exemption, rather than developing and applying any protection functions. Its capacity to assume any such function in the future has been effectively ended by the transfer of its responsibilities (excepting those relating to donee organizations) to the Charities Commission under the 2005 Act.[76]

The Charities Commission

Although the Working Party recommended the transfer of 'defender of charities' role from the Attorney General to the Charities Commission, there is little indication in the statutory duties assigned to the latter of it being equipped to undertake that role. However, the fact that New Zealand now has a statutory regime specific to charities with the Commission as its centerpiece does itself suggest a new government willingness to establish protective boundaries affording recognition for the special position of such entities within the wider not-for-profit sector and at a remove from the regulatory environment for commercial enterprises.

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[75] The records of Inland Revenue are not public due to secrecy provisions in the Tax Administration Act, 1994 and information regarding tax rebates claimed and paid by Inland Revenue can only be obtained under the Official Information Act.

[76] See Inland Revenue Operational statement 06/02 'Interaction of tax and charities rules, covering tax exemption and donee status' (December 2006) which outlines how the Charities Commission and the Inland Revenue Department will monitor and advise charitable entities of the requirements for income tax and gift duty exemptions and donee status following the opening of the Charities Commission register on 1 February 2007. See, further, at www.ird.govt.nz/technical-tax/op-statements/os-interaction-tac-charities-rules.html.

Policing

The policing function in respect of charities has historically been set almost exclusively within a legislative framework for taxes consisting, most recently, of the Income Tax Act 2004, the Tax Administration Act 1994 and the Estate and Gift Duties Act 1968. Until the partial introduction of the Charities Act in July 2005, the Inland Revenue Department led the policing emphasis with its traditional role of protecting the tax base by gatekeeping access to charitable status but no formal system of registration existed except for the records of incorporated societies with charitable purposes and those charities incorporated as boards that were held at the Companies Office.

At present, while the Charities Commission has been put in place as the centerpiece of a new framework and vested with lead responsibility for the policing function, there is some way to go before this system is fully operational. For example, a considerable weakness in the policing function continues to lie in the absence of any specific accounting standard with application to the preparation of accounts of charities.[77] Registration will be a useful first step towards a more effective policing function only if it is followed up with explicit accounting standards for charities enabling the sector to be demonstrably more transparent and accountable to government, donors and beneficiaries than formerly.

The High Court and Attorney General

The inherent jurisdiction of this court in relation to charitable trusts applies in New Zealand as in other common law countries. Part III of the Charitable Trusts Act 1957 sets out the court's powers in respect of *cy-près* schemes. In practice, however, and for the same reasons that prevail in other common law jurisdictions, the High Court no longer plays a prominent role in the regulatory framework for charities in New Zealand while inquiries[78] reveal that, although charged with the responsibility of

[77] See the Institute of Chartered Accountants of New Zealand, *Financial Reporting by Voluntary Sector Entities* (R-120), 1999. The purpose of this bulletin was to provide "guidance on the application of generally accepted accounting practice and recommendations as to good external reporting practice by not for profit and voluntary sector entities". It does not have the authority of a financial reporting standard but would provide guidance to members of the Institute preparing or auditing accounts for charities. It compares unfavourably with SORP 2 in England & Wales which seeks to tailor accounting standards and reporting requirements to the specific nature of nonprofit organizations. See further, Gousmett, M., 'The Charitable Sector in New Zealand', *New Zealand Law Journal*, 2002, pp. 278–281 and Institute of Chartered Accountants, *Report of the Not-for-profit Taskforce*, November 2005.

[78] See Property Law and Equity Reform Committee, *Report on the Charitable Trusts Act 1957*, Department of Justice, Wellington, 1979, p. 2.

supervision, the Attorney General rarely engages the judiciary in any supervisory role in respect of charities and very few actions are ever brought by that office against charities.

The Inland Revenue Department

Until the introduction of the 2005 Act, such few regulatory powers as existed were exercised by the Inland Revenue Department, and then only rarely (e.g. the Crown Forestry Rental Trust case[79]). Organisations seeking tax exemptions on grounds of their charitable activity had to first satisfy the Inland Revenue Department of their entitlement to 'charitable status'. If the Department had reason to believe that the funds of a gift-exempt body were being applied for a purpose that was not charitable, benevolent, philanthropic or cultural, then the Minister was informed[80] and all gift-exempt bodies had to keep sufficient records to enable the Commissioner of Inland Revenue to determine both the source of donations made to the organisation and the application of its funds whether in New Zealand or overseas.[81]

The new registration duty now vested by the 2005 Act in the Charities Commission has relieved the Inland Revenue of its power to determine the activities that constitute charitable purposes. The Department remains responsible for administering the revenue acts, retains the right to audit charitable entities to ensure they continue to be eligible for tax exempt status and also remains responsible for assessing whether donations to a charitable entity are eligible for rebates and deductions. Once registered, however, charities will generally be eligible for exemptions from income tax on some, or all, of their income and will not need to apply to Inland Revenue for those exemptions.

The Charities Commission

Part I of the Charities Act 2005, now in effect, established a new Autonomous Crown Entity (ACE),[82] the Charities Commission, to implement and maintain a registration, reporting and monitoring system for charities and for investigating complaints.[83] Registration, the cornerstone of New Zealand charity regulation, was

[79] [2002] 1 NZLR 535.

[80] Section 89 of the Tax Administration Act, 1994.

[81] Sections 32, 58 and 89 of the Tax Administration Act, 1994.

[82] An ACE is an organisation that is independent of Government but must 'have regard' for government policy when directed by the responsible Minister.

[83] As recommended by the Working Party and earlier by the 1989 Spencer Russell report, the report of the Accountability of Charities and Sporting Bodies Working Party and in the more recent Statement of Government Intentions.

launched with the opening of the 'Charities Register' on 1 February 2007. The voluntary registration procedure triggers the crucial legal function of determining charitable status, thus placing the cutting edge of the policing function in the hands of the Charities Commission rather than, as formerly, with the Inland Revenue Department.

The Commission is now responsible for the administration of the Charitable Trusts Act 1957 while amendments to the Income Tax Act 2004 and the Estate and Gift Duties Act 1968[84] ensure that from 1 July 2008 only those registered with the Charities Commission as 'charitable entities' are exempt from income tax and exemption from gift duty is restricted to donors of gifts to registered charities. Organisations with income from public donations of over $100,000 in the previous year, excluding church collections and grants from grant making bodies, will be required to supply a copy of their audited annual financial statements.

Once registered a charity falls under the supervisory remit of the Commission which, has the authority to: impose administrative penalties; issue warning notices; publicise instances of non-compliance; undertake further investigations; and deregister charities that have seriously or repeatedly failed to comply with the Act. The Commission's authority extends beyond financial matters to ensuring that the activities of charitable organisations are, and continue to be, charitable and accord with their stated objectives. Evidence will be required that the activities of an organisation are in keeping with and demonstrably further its stated charitable purposes. This simple, clear and useful monitoring mechanism will also assist targeting by new charities and service selection by those in need. It is envisaged that the Commission will have a light regulatory role.

The Commission is required to have a good working relationship with the Inland Revenue Department. While the two bodies are obliged to act in conjunction, there is no suggestion that the latter has to take its lead from the Commission as is the case in England & Wales. In fact, at this stage, the jurisdictional differences in the regulatory role assigned to the respective Commissions are striking. In particular the emphasis in England & Wales on investigatory powers to equip the Commission to ensure transparency and accountability, enable it police standards of practice and prevent opportunities for abuse are noticeably underplayed in this jurisdiction. In New Zealand the Charities Commission does not operate at 'arm's length' from government and would seem set to assume a role that primarily focuses on regulatory and monitoring functions, a point underlined by Dal Pont who says of the 2005 Act:[85]

> That it is chiefly a bureaucratic exercise is evidenced by the fact that of its over 150 sections almost half concern the operation of the Commission and 24 are about registration. Only six or so sections concern obligations outside of registration for charitable entities.

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[84] The Charities Act Commencement Order 2006 came into force on 1 July 2008 inserting amendments to the Income Tax Act 2004 (sections 64–68) and an amendment to the Estate and Gift Duties Act 1968 (section 72).

[85] See Dal Pont, G., 'The Charities Bill' in *The New Zealand Law Journal*, March 2005, p. 55.

The Registrar of Incorporated Societies

Section 33 of the Incorporated Societies Act, 1908 requires the Registrar of Incorporated Societies to keep a register of incorporated societies in which all incorporated charities are required to register. Section 28(1) of the Charitable Trusts Act, 1957 requires the Registrar of Incorporated Societies to keep a register of Boards. The Registrar is based in the Companies Office which is under the auspices of the Ministry of Economic Development. There is no requirement for the registration of either unincorporated associations or charitable trusts.

The Registrar of Incorporated Societies

The Registrar requires annual accounts to be completed by those charities that are incorporated societies.[86] There is no requirement for these accounts to be audited. Incorporated Societies are also obliged to update constitutional records maintained by the Registrar of Incorporated Societies. Trust boards have no ongoing reporting obligations under the Charitable Trusts Act, 1957, either to the Registrar or the Inland Revenue Department, other than to record constitutional changes on the public register. Trustees would be subject to the general law obligation to maintain accounts. In the future the Charities Commission will promulgate accounting requirements by regulation which in turn will be influenced by both Part II of the Review of the Financial Reporting Act 1993 and the introduction of International Financial Reporting Standards.

The Solicitor General's Office

Some functions of the administration of the Charitable Trusts Act 1957 are presently undertaken by the Solicitor General's Office.

The Companies Office

Charitable companies are subject to the usual corporate reporting obligations under the Financial Reporting Act 1996 and the Companies Act 1993.

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[86] Section 23 of the Incorporated Societies Act 1908.

Mediation/Adjustment

Judicial case law, the practice guidelines issued by the Inland Revenue Department and more recently also by the Charities Commission,[87] reveal a dearth of capacity for any independent exercise of the mediation/adjustment function in the regulatory framework for charities in this jurisdiction equivalent to that performed by the Charity Commission in England & Wales.

The Courts and the Attorney General

This jurisdiction, in keeping with all other common law nations excepting England & Wales, has remained wholly dependent upon a continuous case flow through its courts to provide opportunities for developing charitable purposes to meet contemporary patterns of social need. As that flow has dried to a trickle, accompanied by the resolute avoidance of proactive intervention by the Attorney General, so the traditional means of introducing flexibility and change to the law as it applies to charity have become increasingly redundant.

- *Cy-près*

In New Zealand the jurisdiction to settle *cy-près* schemes has always been exclusively judicial which makes the process cumbersome, very expensive, time consuming and prevents the use of *cy-près* to flexibly divert assets for better use. Section 31 of the Charitable Trusts Act, 1957 essentially provides that the property, income or funds of a charity may be disposed of for "some other" charitable purpose. However, there is a consistent line of judicial authority that a scheme should accord as closely as possible, in the changed circumstances, to the terms of the original trust, i.e. in accordance with the *cy-près* rule.[88]

The lack of a forum, such as that provided by the Charity Commission in England & Wales, to swiftly and inexpensively apply the assets of a defunct charity to other charitable purposes has been a constraint on philanthropy in this jurisdiction.

The Inland Revenue Department

As lead body for the policing function, which it exercised in a traditional manner, the Inland Revenue Department never held a brief for developing a more

[87] See Charities Commission, *Update*, October 2007, where with respect to advocacy, the Commission states that it "will apply the charitable purpose test using the same criteria as the courts have applied for the last 400 years." See, further, Gousmett, M., 'Charities and Political Activity', the *Chartered Secretary*, 7 February 2007.

[88] See for example, *Re Goldwater (deceased)* (1967) NZLR 754.

contemporary interpretation of charitable purposes and will not be in a position to do so in the future.

The Charities Commission

In theory, transferring the gatekeeper role for charitable tax exemption from the Inland Revenue Department to the Charities Commission is a move with considerable strategic significance for the future balance of legal functions within the regulatory framework for charities in New Zealand. In practice, as the Commission is at present statutorily equipped with neither the powers nor resources equivalent to those of its counterpart in England & Wales, it is improbable that it will be in a position to develop a corresponding role. In particular the Commission has chosen to proceed with a registration process rather than conduct a review of those entities currently entitled to charitable tax exemption, thereby avoiding the opportunity seized by its English counterpart to examine and adjust, where practicable, the fit between charity and contemporary patterns of social need.[89] The fact of its existence, however, together with the role model provided by its British counterpart, must place the Commission in a position to gradually assume a leadership role in respect of the mediation/adjustment function but that potential is unlikely to be realized anytime soon.

Support

It has to be acknowledged that the setting up of a Charities Commission indicates a government willingness to move away from its traditional tax driven approach towards charities and their activities. However, the reluctance to establish the Commission on the same terms of reference as the England & Wales model does give rise to concern as to whether that willingness will ever be reinforced with appropriate resources.

Government

A significant form of support for charities comes from fundraising which in New Zealand has remained free from any form of legislative control. The fact that the government has not, whether by omission or policy, enacted legislation directed

[89] Of an estimated 24,000 charities, only 1,000 had registered with the Commission by early September 2007, which raises some doubt as to whether the remainder will succeed in doing so by the deadline of July 2008.

specifically to the control of fundraising or collections has allowed charities free rein to seek public donations subject only to the general law of contract and fair trading legislation.[90] In addition, the government has enabled financial support to be channeled to charities from the New Zealand Lotteries Grant Board.[91]

The transfer of lead responsibility for charities from the Inland Revenue Department to the Charities Commission signifies a government commitment to place a greater future emphasis on the support than on the policing function of the law as it relates to such entities. This has since been reinforced by the initiatives announced in Budget 2007.

The Courts and the Attorney General

In this jurisdiction there is little evidence of either the courts or the Attorney General being in a position to contribute effectively to the support of charities.

The Inland Revenue Department

As in all other common law jurisdictions, the main form of support to charity in New Zealand comes from the tax-exempt status of such entities.[92] The exemption includes non-business income derived by a trust, society or institution established exclusively for charitable purposes and business income derived by such a charitable body, subject to certain exceptions. The exemption does not, however, extend to VAT (or GST as it is referred to in this jurisdiction). Fringe benefits tax does not apply to benefits provided by or on behalf of a charitable organisation to its employees, except to the extent that such benefits are used, enjoyed or received principally in relation to, in the course of, or by virtue of, any employment that consists of any activity performed by the employees in the carrying on of a business by the charitable organisation.

- *Tax exemption*

Income tax exemptions are available to trusts, societies and institutions that meet the requirements of the Income Tax Act 2004 in terms of deriving income for charitable

[90] In 1979, the Property Law and Equity Reform Committee recommended that every charity making a public appeal for funds be required to have its accounts audited, so that the auditor can advise the Attorney-General of malpractice.

[91] The New Zealand Lotteries Grant Board is a Crown entity the role of which is to determine the proportions in which the profits of New Zealand Lotteries are allocated for distribution.

[92] The Report of the Committee of Experts on Tax Compliance, 1998 recommended that the law and practice relating to the income tax exemption for amateur sports bodies should be reviewed.

purposes. Registered charities are exempt also from stamp and cheque duties under section 18 of the Stamp and Cheque Duties Act 1971. A gift creating a charitable trust, or establishing any society or institution exclusively for charitable purposes, or any gift in aid of any such trust, society or institution is not subject to gift duty nor, for most purposes, is conveyance duty payable on any instrument of conveyance establishing any such body.

- *Donation incentives*

For purposes of tax deductibility of donations, the New Zealand government has created the concept of 'donee organisations' the definition of which is a society, institution, association, organisation, or trust which is not carried on for the private pecuniary profit of any individual and the funds of which are, in the opinion of the Commissioner, applied wholly or principally to any charitable, benevolent, philanthropic, or cultural purposes within New Zealand. Eligibility has in the past qualified such an organisation for a 33.3% rebate on maximum donations by an individual of $1,890 per fiscal year. However, in the recent Budget 2007, the Revenue Minister Peter Dunne announced the removal of the $1,890 cap on rebates for charitable donations (and the 5% deduction limit on donations made by companies and Maori authorities) with effect from April next year. Under the changes, donations of any amount, up to an individual's total net income, would be eligible for a 33.3% rebate. This initiative should do much to support charitable giving in New Zealand.[93] Further legislative changes are intended that will allow unlisted companies with five or fewer shareholders to have access to company deductions for donations.[94]

The Charities Commission

The legal function of support has now been entrusted to this new body. One of the two main functions of the Commission is to provide support and education to the charitable sector on good governance and management.[95] It will be a 'one-stop shop' for the legislative requirements of charities and is required to provide an educative function for charities; for example by developing best practice, research and training resources and trust documentation templates. It holds a pivotal role as it is required to report annually to the sector, and to government about the sector, through the Minister of Finance and the Minister responsible for the Community and Voluntary Sector.

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[93] See further, http://www.ourcommunity.com.au/files/OCMNATIONALJUNE2007.pdf.

[94] In July 2006 the Inland Revenue Department released a discussion document, ED0088 Interaction of tax and charities rules, covering tax exemption and donee status.

[95] As stated on the Commission's website at http://www.charities.govt.nz/news/updates/electronic-guide.htm

Charity Law and Social Policy: The Fit with Contemporary Circumstances

The law reform process in New Zealand concluded with the Charities Act 2005 which made changes to the institutional infrastructure and to the common law basis of the regulatory legal framework for charities. It is arguable whether these changes have in themselves achieved any significant adjustment to the relationship between charity law and social policy such as would enable charities to better address contemporary patterns of social need in this jurisdiction. There are, however, indications from Budget 2007 and from the early activities of the Charities Commission that perhaps the government is prepared to slowly build on its modest legislative change and allow a realignment of law and social policy to unfold over the long term.

The Legal Functions

Historically, the development of charitable purposes has been left to the random and infrequent judicial determinations that transferred principles from England & Wales but did not always best fit the pattern of social disadvantage in New Zealand. This occurred within a very traditional institutional infrastructure designed and maintained to ensure that legal functions are given effect in the customary conservative manner with primacy accorded to policing. The introduction of a new institution, with a central role in a more coordinated regulatory framework governed by the provisions of the Charities Act 2005, will cause some re-balancing of the legal functions. The difficulty lies in gauging, from the present restrained legislative initiative, the extent and likely impact of that re-balancing in the longer term.

Differential in Functional Weighting

As elsewhere in the common law world, except for England & Wales, the primacy given to the policing function in New Zealand outweighs the relative impact of all other legal functions as they relate to charity. The effectiveness of the primary function, historically obstructed by the absence both of data in respect of charities and charity specific standards of accounting and reporting, has now been improved by the introduction in the 2005 Act of a system of registration that, although voluntary, is a pre-requisite for entitlement to charitable tax exemption. The protection and the mediation/adjustment functions have in particular been diminished by the fading relevance of the institutions that traditionally gave effect to them and by the absence of any legislative requirement that such functions should be applied specifically to

charities. The support function has perhaps been facilitated by an absence of statutory controls on fundraising but, arguably, the lack of any official regulatory supervision may have a contrary effect by inhibiting donations because of a lack of public confidence in the fundraising process and in the use made of the proceeds raised.

Under the 2005 Act, the legislative demarcation of charities from the remainder of the not-for-profit sector provides, for the first time, an opportunity for all legal functions to relate specifically to the distinctive needs and issues of charities.

The Functional Imbalance in Charity Law

The legislative intent underpinning the Charities Act 2005 differed greatly in scope from that which drove charity law reform in Britain and Australia. The New Zealand government seemed content to settle for placing the existing common law onto a statutory basis, putting into position a new body as the centrepiece of a statutory regulatory framework specifically for charities, transferring responsibility for determining charitable status from the Inland Revenue Department to that body and introducing certain other anciliary measures such as a registration system.

The most obvious casualty in this legislative overhaul has been the failure to address the absence of a forum able to develop charitable purposes to meet emerging forms of contemporary social need. The political decision not to equip the Charities Commission with powers that would enable it to effectively lead application of the mediation/adjustment function, in a manner similar to that exercised by its counterpart in England & Wales, has left the emphasis in the new statutory framework resting much as before on the policing function with some additional reinforcement given to the support function. In particular, and unlike the position in England & Wales, the Inland Revenue Department is not statutorily obliged to follow the lead of the Commission and this may well result in the latter's interpretation of charitable purposes being challenged by the department as it asserts its traditional role as protector of the tax base. Other measures that could also have helped redress the current functional imbalance by reinforcing the support and mediation adjustment functions include: the creation of new vehicles for charitable activity, which would have had particular significance for the Maori; the modernizing of the law relating to fundraising and trading; and vesting the Charities Commission with a jurisdiction concurrent with that of the High Court or at least increasing its powers in respect of *cy-près* schemes. These possibilities were ignored.

However, as noted above, the government would seem prepared to build further nuances into the new functional balance achieved by the 2005 Act. The nature of the additional steps taken in Budget 2007 indicate that by such cautious incremental advances the government may well in time significantly alter that balance. The initiatives taken may demonstrate a commitment to using the tax regime as a means of lending emphasis to the support function. The danger is of viewing adjustments to the tax regime as being sufficient to create a regulatory environment conducive

to encouraging philanthropy in New Zealand as this in turn would detract from or obviate any potential for the Charities Commission to assume a more strategic and holistic approach to cultivating such an environment. As Fries has pointed out, effective charity requires more than tax adjustments.[96] While the issue of policy guidelines by the Commission suggests a government willingness to allow that body some freedom as it creates its own space, it is to be hoped that this will be followed in time by a vesting of the resources and responsibilities necessary to enable the Commission to give more emphasis to the functions of protection and mediation/adjustment, thereby permitting the appropriate development of charitable purposes and recognition for the distinctive needs and potential contribution of charities within the not-for-profit sector.

The Resulting Social Policy Deficit

Charity law reform in this jurisdiction has conspicuously failed to grasp the opportunity thus provided to statutorily realign charitable purposes with contemporary social need, an omission adroitly presaged by Dal Pont in his comment:[97]

> The challenge for government, to the extent that it plans to broaden the concept of charity, and thus broaden the availability of privileges (tax exemption, *sic*) is to target these in areas that are presently deficient and that should be encouraged in society … And yet it is curious that under the Charities Bill the targeting of areas for this purpose is aligned to a concept of charity that differs little or not at all in substance from that of nineteenth century England.

The resulting Charities Act 2005 bore out these misgivings by making no concession to any perceived need to broaden the legal meaning of 'charity'. While the Working Party's recommendations regarding 'charity' and 'charitable activities' have been acknowledged in the form of statutory provisions it cannot be said that these provisions add anything to the existing common law interpretation. No attempt has been made to statutorily extend the range of charitable purposes and the issues relating to the current uneven application of the 'public benefit' test across the four *Pemsel* heads, which have so exercised other common law nations, failed to attract any proposals for reform in this jurisdiction. Nor has any alteration been made to the institutional infrastructure that would permit a forum such as the Charities Commission to further develop these crucial concepts. Charitable purposes in the post-2005 Act era are set to be interpreted in the same way as previously. The consequences are likely to be apparent in terms of an ongoing lack of fit between charity law and contemporary social policy issues.

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[96] See Fries, R., 'Charity, Charity Law and Civil Society', Institute of Policy Studies, Victoria University of Wellington, 2001.

[97] See Dal Pont, G., 'The Charities Bill', *op. cit*., p. 57.

Maori

There has been an obvious and longstanding fundamental difficulty in fitting the charity law framework to Maori needs due to the fact that their communities are organised around blood relationships. This was acknowledged as a significant social policy issue by the government in its discussion document *The Taxation of Maori Organisations* (see, further, above).

Section 5(2) of the 2005 Act represents a legislative initiative to resolve this difficulty by addressing the blood relationship issue. It also makes special provision for a marae[98] to be recognised as having a charitable purpose if the physical structure of the marae is situated on Maori land as referred to in Te Ture Whenua Maori Act 1993 (Maori Land Act 1993) and the funds of the marae are not used for a purpose other than: the administration and maintenance of the land and of the physical structure of the marae; and a purpose that is a charitable purpose other than under this paragraph. For the avoidance of any doubt, the provision concludes:

> … if the purposes of a trust, society, or an institution include a non-charitable purpose (for example, advocacy) that is merely ancillary to a charitable purpose of the trust, society, or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity.

However, the public benefit test may still pose problems for the Maori people. Under s 5 (2)(a) the purpose of a trust, society or institution is a charitable purpose under this Act *if the purpose would satisfy the public benefit requirement* apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood (emphasis added). This may conflict with s 38 of the Charitable Trusts Act 1957 and therefore constitute a constraint on social inclusion for any minority group that is not a significant part of the community.[99] The failure of the 2005 Act to adjust the law to satisfactorily address this technical deficiency, thereby facilitating a more effective channeling of charitable resources towards the country's primary and longstanding social policy challenge, is a considerable setback for New Zealand's most disadvantaged citizens.

The Relief of Poverty and Other Forms of Social Disadvantage

The 2005 Act does not attempt to alter the common law focus on the effects rather than causes of poverty. Nor has it been found necessary to single out particular socially disadvantaged groups as warranting charitable intervention. The particular groups that currently constitute the domestic social inclusion agenda in this juris-

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[98] The *marae* is the sacred open meeting area that is associated with a traditional meeting house. It is the customary focal point for meetings, discussions, funerals, and for welcoming visitors to the area.

[99] The authors are grateful to Michael Gousmett for drawing this to their attention.

diction (as identified in the report by the Human Rights Commission[100]) for reasons of youth, age, ill-health, disability or financial hardship etc., have not been statutorily acknowledged and their circumstances will remain untouched by the new legislative provisions.

The Advancement of Religion

The Charities Act 2005 would seem to leave unaltered the presumption that gifts and organisations for the advancement of religion or education satisfy the public benefit test; though this may be affected by the legislative caveat that registration requires evidence of objects compliant activity.

The Advancement of Education

Again, the 2005 Act would seem to have ignored the problems restricting public access to expensive charitable facilities. The fact, for example, that the current application of the public benefit test in the context of the advancement of education permits some schools with charitable status to charge prohibitively expensive fees restricts the educational opportunities for many socially disadvantaged children.[101] This issue is equally relevant in relation to those hospitals and residential care facilities which by imposing service charges in effect discriminate against equal access by the socially disadvantaged.

Other Purposes

Given the pressing social policy issues identified earlier, the absence of any indication of a legislative intent to ensure that the first charity law statute in this jurisdiction addressed those issues is curious. For example, against the background of its extensive anti-terrorism legislative programme and the high profile reports of its Human Rights Commission, the absence of any provisions acknowledging a need by the government to address human rights concerns on either a national or international basis is striking. Nor has it been found necessary or desirable to make specific provision for organisations, gifts and activities that are conducive to

[100] See the Human Rights Commission, *Human Rights in New Zealand Today/NgÇ Tika Tangata O Te Motu* (the status report), 2004.

[101] See *Educational Fees Protection Society Inc. v. Commissioner of Inland Revenue* [1992] 2 NZLR 115.

promoting the growth of social capital and advancing civil society through purposes such as facilitating religious or racial harmony, equality and diversity, civic responsibility or community development. Further, although provision has been made for an organisation to register as a charity, even if it also has advocacy as a secondary or supplementary function as part of its charitable purpose, the opportunity to statutorily clarify the law and firmly recognise advocacy/political activity as a charitable purpose in its own right has been pointedly rejected.

Conclusion

In New Zealand the decision has clearly been taken that the content if not the institutional framework of the common law legacy offers an appropriate and sufficient basis for the future of charity law in this jurisdiction. The absence of any provisions to correct either the well-recognised functional deficits attributable to this legacy or to address contemporary circumstances is most apparent in relation to charitable purposes which will continue to rest on the *Pemsel* classification. The lack of a forum or body with the capacity to engage in an ongoing developmental role with the charitable sector, extending the range of charitable purposes and broadening the interpretation of matters constituting the public benefit has in the past restricted the effective use of philanthropy. Its effectiveness has also been constrained by the interpretation and application of the public benefit test to Maori circumstances.

The fact that the Charities Act 2005 has established a Charities Commission may indicate the beginning of a change process that will lead to significant adjustments in the legal framework for philanthropy. However, there is no provision in the 2005 Act that clarifies, adds to or articulates the government's expressed policy of partnership with the community, voluntary and iwi/Maori organisations which it claims is symbolised by this legislation. Given the limitations on the Commission's statutory powers and terms of reference, combined with the manner of appointment and the composition of the Commission, it is unlikely that this new body will be in a position to improve the fit between charity and contemporary social policy issues in the short-term.

Chapter 12
Canada

Introduction[1]

The name *Canada* comes from a St. Lawrence Iroquoian word meaning "village" or "settlement." Canada is currently a country of slightly more than 33 million inhabitants. It occupies the northern portion of the North American continent and is the world's second largest country in land mass.

Originally inhabited by Aboriginal peoples,[1] Canada was settled by Europeans as early as the latter part of the 15th century, and these Europeans included both French and English.[2] Evidence of Basque cod fishermen and whalers in Labrador and Newfoundland, a few years after Columbus, has also been found, with a large settlement at Red Bay station. Shortly after these settlements, John Cabot landed either in Newfoundland or Cape Breton Island in 1497 and claimed the territory for King Henry VII of England. Under the leadership of Jacques Cartier, the French began to explore further inland and set up colonies in 1534. The first French settlement was made in 1605 at Port-Royal (today's Annapolis Royal) under Samuel de Champlain. In 1608 Quebec City, the town that became the heart of New-France, was established. The French claimed Canada as their own and 6,000 settlers arrived, settling along the St. Lawrence River and in the maritime areas flanking the Atlantic Ocean. Britain also continued to have a presence in Newfoundland and with the advent of actual British settlements, it claimed the south of Nova Scotia as well as the areas around Hudson Bay.

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[1] This section draws on several histories of Canada available on the web, including Wikipedia, canadahistory.com, and canadaonline. Because it deals with readily known information, no specific source citations are included.

[1] In Canada there are three groups of aboriginal peoples in terms of their ethnic origins. These are First Nations people, Inuits and Métis. The Constitution Act of 1982 recognized these three groups, granting them special status.

The complexity of Canadian aboriginal culture is discussed in various publications in hard copy and on the web. One important web-based resource is the Aboriginal Canada Portal, available at http://www.aboriginalcanada.gc.ca/acp/site.nsf/en/index.html.

[2] Evidence of earlier Norse settlements was definitively settled in the 1960s, when a Viking settlement was excavated at L'Anse aux Meadows.

K. O'Halloran et al., *Charity Law & Social Policy*,

The early history of Canada was thus shaped by the rivalry between these two Europeans powers. France, on the one hand, was involved in industries, such as cod fishing and fur trading, that had little need for large-scale settlement. Britain controlled only a small part of the land mass, but did control 13 colonies to the south that later became the United States and it was by far the stronger naval power. Britain and France repeatedly went to war in the 17th and 18th centuries, and fought their wars in their colonial empires. Numerous naval battles were fought in the West Indies, while the main land battles were fought in and around Canada.[3]

It was not until the Treaty of Paris was signed in 1763, that France ceded almost all its territory in North America, leaving Britain largely in control of the territory that became Canada. The new British rulers left much of the religious, political, and social culture of the French-speaking *habitants* intact. Nonetheless, violent conflicts continued into the next century, leading residents of Upper Canada (Ontario) and Lower Canada (Quebec, Newfoundland, and Labrador) into the War of 1812. This war, instigated by the United States to drive the British out of North America, was important in Canadian history as a unifing event for the European population.

In 1837/38 there were rebellions against British colonial rule in both Upper and Lower Canada. These eventually resulted in the merger of the two parts of Canada (including the provinces of Ontario, Quebec, Labrador, Newfoundland) into a single, quasi-federal colony, the United Province of Canada with the Act of Union (1840).[4] Canada grew after the United States agreed to establish the border at the 49th parallel, with the addition of two new provinces British Columbia and Vancouver Island, which were eventually unified.

On July 1, 1867, with the passage of the British North America Act[5] by the British Parliament, the Province of Canada, New Brunswick, and Nova Scotia became a federation. The term *dominion* was chosen to indicate Canada's status as a self-governing colony of the British Empire, the first time it was used in reference to a country. The British North America Act or Constitution Act legislation has special significance for the voluntary sector[6] in Canada because in the distribution of legislative powers as between the federal government and the provinces, the voluntary sector is within the provincial realm.[7]

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[3] There were four wars fought in this manner, two of which had a profound impact on Canada, Queen Anne's War (known in Europe as the War of Spanish Succession, 1702–1713), and the French and Indian War, 1754–1763, the North American version of the Seven Years' War.

[4] 3 & 4 Vict., c. 35 (U.K.) *[23d July 1840]*.

[5] Now known as the Constitution Act. 30 & 31 Vict., c 3.

[6] This is the preferred terminology for the sector in Canada.

[7] Costitution Act, para 92 (7). On the other hand, since the taxing authority is federal, the federal government is necessarily involved with the voluntary sector.

A Political and Socio-economic Profile

Political Overview

Canadians recognize the Queen as Head of State. She is represented by a Governor General,[8] who carries out Her Majesty's duties in Canada on a day-to-day basis and is Canada's de facto Head of State. Canada also has a Prime Minister, who is the Head of Government and the leader of the party with the most seats in the House of Commons. The other house of Parliament, the Senate, has become an increasing focus of lobbying for charity legislation.[9]

The current Canadian provinces are Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan. The three territories are Northwest Territories, Nunavut, and Yukon. Each province and territory has its own legislature. The heads of the governments in each state and territory are called premiers.

The poor economy in the late 1980s and early 1990s increased support for sovereignty in Quebec, the only province where French is the principal language. A separate Quebec was finally rejected in the 1995 referendum on Quebec,[10] but there have often been rumblings about the issue since that time.

Population and Composition

Canada's population, which has grown increasingly diverse in recent years, was just over 33 million residents in July 2007.[11] As of the 2001 census,[12] when total population was more than 29 million, the aboriginal population comprised 976,000 individuals. Canada had a higher rate of population growth (+5.4%) than any other G8 country between 2001 and 2006. Two-thirds of Canada's population growth was attributable to net international migration. The current ethnic mix in Canada is as follows: British Isles origin 28%, French origin 23%, other European 15%, Amerindian 2%, other, mostly Asian, African, Arab 6%, and mixed background 26%.[13] According to Jean Chrétien, "[i]n the 2001 Census, Canadians reported

[8] Although both English and French are official languages of all of Canada, no attempt will be made here (except in materials about Quebec) to use the analogous French titles, etc.

[9] Bob Wyatt pointed this out to the authors. The Senate has a Standing Committee on Social Affairs, Science and Technology.

[10] For more information, see materials, available at http://archives.cbc.ca/IDD-1-73-1891/politics_economy/1995_referendum/.

[11] The figure for the 2006 census is 31.5 million.

[12] Breakdowns for the 2006 census are not available as yet.

[13] CIA statistics.

more than 200 ethnic origins and more than 100 languages as their mother tongue."[14]

In 1971, Canada announced a policy of multiculturalism, which aimed to resolve tensions between the French and English-speaking populations in addition to making it easier for white Canadians to accept the increasing numbers of non-white[15] immigrants.[16] The Canadian Charter of Rights and Freedoms underscored this policy in 1982,[17] and it was strengthened in 1988 by the adoption of the Multiculturalism Act.[18]

The National Economy

Canada has a rural and resource (oil, logging) based economy although much of its current economic wealth is generated by the service sector, banking, and real estate investment. One of its consistent struggles as a nation has been to avoid domination by its southern neighbor, and much of Canada's economic policy reflects that. After the end of World War II, there was at first a large expansion in the Canadian economy. The capacity for wartime production was turned over to the manufacture of much-desired consumer goods. In the late 1980s and early 1990s, however, Canada experienced a deep recession, which led to high unemployment, high government deficits, and all-around dissatisfaction. A brief recovery in 1994 was followed by a return to recession in 1995–1996. Since that date, the Canadian economy has improved markedly, in step with the boom in the United States. Much of Canada's economy is invested in exports, approximately 85% of which go to the United States.

The Role of the State Sector in Addressing Various Social Policy Issues

During the post-war period, Canada, along with many Western nations, firmly established itself as what some have described[19] as a 'welfare state', with

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[14] Jean Chrétien, Immigration and Multiculturalism in Canada, Presented by at the Progressive Governance Summit, 2003, available at http://www.pco-bcp.gc.ca/default.asp?Language = E&Page = archivechretien&Sub = newsreleases&Doc = proggovtpaper.20030712_e.htm.

[15] In Canada the practice is to refer to such people as "visible" minorities.

[16] See About Canada, Multiculturalism in Canada, available at http://www.mta.ca/faculty/arts/canadian_studies/english/about/multi/#immigration:.

[17] Part I of the Constitution Act, 1982, enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, which came into force on April 17, 1982, available at http://laws.justice.gc.ca/en/const/annex_e.html.

[18] R.S., 1985, c. 24 (4th Supp.), available at http://www.canadianheritage.gc.ca/progs/multi/policy/act_e.cfm. Received Royal Assent in 1988.

[19] There is internal debate within Canadian society as to whether this term is correctly applied.

publicly-funded health care,[20] the Canada Pension Plan, and other programs. Canada's health care system, known as "Medicare" is a group of socialized health insurance plans providing coverage to all Canadian citizens. It is primarily publicly funded and administered on a provincial or territorial basis, within guidelines set by the federal government. The system is described in more detail below.

On the general matter of State support for social welfare, recent research by Steven Pressman, an American economist, indicates that Canada, unlike many other rich countries, is experiencing growth in its middle class due not so much to growth in employment across sectors or to generally increasing salaries, but rather to continuing government "handouts, tax benefits, subsidies and rebates that transfer money into middle-class pockets (not including pensions)."[21] The extent to which these developments have not assisted people living in poverty has been documented in the Urban Poverty Project by the Canadian Council on Social Development (CCSD). This study shows how little they gained in the decade 1990–2000, when "the erosion of key income security programs" contributed along with "fundamental changes in the Canadian labour market" to an increase in income inequality in Canada.[22]

A further study, accompanying the larger Urban Poverty Project, looks at the issue of homelessness and the failure of the Canadian government to address its root causes. The author of the study clearly believes there has been a failure of State sector policy making and government spending:[23]

> Until 1993, a national affordable housing strategy created over 650,000 housing units, homes which now house over 2 million Canadians. After cutting its national affordable housing program in 1993, Canada's collective response to the boom in homelessness since the early 1990s has largely been to create homeless shelters, emergency services and other "front line" services which have managed the homeless crisis and, in some cases, facilitated the rapid growth of homelessness in Canada.
>
> New investment in affordable housing was introduced in 2005, but without a national strategy on homelessness and housing affordability, there are no guarantees that this money will be well-spent.

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[20] Canada Health Act, 1984 (R.S., 1985, c. C-6). See also Madore, O., 'Canada Health Act: Overview and Options', Library of Parliament, PR 94-4E, available at http://www.parl.gc.ca/information/library/prbpubs/944-e.htm.

[21] See Saunders, D., 'The Secrets of Canada's World-Leading Middle-Class Success', *Globe and Mail*, August 4, 2007, available at http://www.theglobeandmail.com/servlet/story/RTGAM.20070803.doug04/BNStory/International/columnists, reviewing Pressman, S., *The Decline of the Middle Class: An International Perspective*. This does not accord with earlier perspectives, which describe the welfare state in Canada as being in decline. See, for example, Blake, R.B., Bryden, P.E., and Strain J.F. (eds.), *The Welfare State in Canada: Past, Present and Future*, Irwin, Toronto, 1997.

[22] See *A Lost Decade*, in CCSD, Urban Poverty Project 2007, available at http://www.ccsd.ca/pubs/2007/upp/Lost%20Decade%201990–2000.pdf, p. 4.

[23] See Laird, G., SHELTER, 'Homelessness in a Growth Economy: Canada's 21st century Paradox', p. 6, available at http://www.ccsd.ca/pubs/2007/upp/SHELTER.pdf.

Thus although it seems that the welfare state in Canada continues to exist and to have a positive effect on the Canadian economy as a whole and on the middle class, some have argued that it does not use its spending effectively in favour of a social policy of inclusion of a variety of marginalized populations.

The Specific Issue of Health Care

Under the health care system in Canada, individual citizens are provided with preventative care and medical treatments from primary care physicians as well as access to hospitals, dental surgery and additional medical services. With a few exceptions, all citizens qualify for health coverage regardless of medical history, personal income, or standard of living.[24] In a number of provinces residents pay premiums for health care, and employers pay a health care tax.

Canada's health care system is the subject of much political controversy and debate in the country.[25] Some question the efficiencies of the current system to deliver treatments in a timely fashion, and advocate adopting a private system similar to the United States. On the other hand, there are worries that privatization would lead to inequalities in the health system with only the wealthy being able to afford certain treatments.

Medicare is also a relevant factor in the decisions of employers to locate businesses in Canada (where government pays most of employees' health-care costs) as opposed to the United States (where employers are forced to pay most of these costs). Conversely, the system has led to a "brain drain" of Canadian doctors and nurses, who have left Canada to pursue careers in the United States.

The Charitable and Voluntary Sector[26] – Its Current Role in Canadian Society

There have been two recent studies of the charitable and voluntary sector in Canada. One, the National Survey of Nonprofit and Voluntary Organizations (NSNVO) carried out by Statistics Canada and eight not-for-profit organizations, with the Canadian Centre for Philanthropy as the lead organization, cites the following statistics:[27]

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[24] See Madore, O., *op. cit*.

[25] *Ibid*.

[26] The legal terms for the different types of organizations that are legally registered are non-profit organizations and charities. The sector is, however, generally referred to as the voluntary sector. See Voluntary Sector Initiative, 'Working Together, A Government of Canada/Voluntary Sector Joint Initiative' (hereafter VSI Report), available at http://www.vsi-isbc.org/eng/knowledge/working_together/pco-e.pdf, p. 16.

[27] Statistics Canada, 'National Survey of Nonprofit and Voluntary Organizations', available at http://www.nonprofitscan.ca/pdf/NSNVO_Report_English.pdf, p. 8.

> An estimated 161,000 nonprofit and voluntary organizations operated in Canada in 2003. They include a wide variety of organizations, such as day-care centres, sports clubs, arts organizations, social clubs, private schools, hospitals, food banks, environmental groups, trade associations, places of worship, advocates for social justice, and groups that raise funds to cure diseases. Just over half are registered as charities by the federal government, which allows them to be exempt from a variety of taxes and enables their donors to claim tax credits for donations made.

According to Imagine Canada, this research also demonstrates the following:[28]

- Canada's nonprofit and voluntary sector is the 2nd largest in the world; the Netherlands is the largest; the United States is the 5th;
- half of the non-profits and charities (54%) are run entirely by volunteers;
- 2 million people are employed by these organizations representing 11.1% of the economically active population;
- the sector represents $79.1 billion or 7.8% of the GDP (larger than the automotive or manufacturing industries);
- smaller provinces have a higher number of organizations relative to their populations; and
- the top 1% of organizations command 60% of all revenues.

The other major study, coordinated by the Johns Hopkins University Comparative Nonprofit Sector Project, resulted in a report published in 2005. *The Canadian Nonprofit and Voluntary Sector in Comparative Perspective* (hereafter Johns Hopkins study), fills in some important details about the economic and social aspects of the sector in Canada. Of interest are the following:[29]

- the sector contributes importantly to Canada's GDP; when service organizations in the fields of health and education are excluded from the statistics, it contributes 4% of GDP;
- nonprofit and voluntary organizations employ 12% of Canada's economically active population and provide 13% of its non-agricultural employment;
- much of the sector is involved with social service provision and is highly dependent on government sources of revenue;
- government support is also important for civic organizations and advocacy organizations;
- philanthropic support for the sector is about 9% of revenue for the sector and 20% when the value of volunteer input is included; and
- when compared to other common law countries discussed in this book, Canada's sector is somewhat like the "welfare partnership" model found in Ireland, but it retains a high level of philanthropic support, which characterizes the sectors in the U.K. the U.S. and Australia.

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[28] Imagine Canada website, available at http://www.imaginecanada.ca/?q = en/node/32..

[29] See Hall, M.H., Barr, C.W., Easwaramoorthy, M., Sokolowski, M.S.W., and Salamon, L., *Canada's Nonprofit Sector in Comparative Perspective*, available at http://www.nonprofitscan.ca/Files/misc/jhu_report_en.pdf, pp. III–IV.

All in all, the picture of the voluntary sector in Canada is a healthy one, with a robust group of organizations working in all parts of the sector to address social needs.

Giving and Volunteering

A report published by the Minister of Industry[30] in 2006 describes the results of a 2004 study by Statistics Canada and Imagine Canada into the giving and volunteering habits of Canadians.[31] This survey indicates that Canadians all over the country are involved with the voluntary sector, and that actual amounts of time spent working in the sector and money donated to the sector have risen over prior years. On the other hand, "it shows that the bulks of the charitable dollars and volunteer hours are provided by a relatively small percentage of the population."[32]

Some of the interesting annual statistics are as follows:

- Some 22 million Canadians (85% of the total population) donate to charities;
- The amounts donated in the prior year totaled $8.9 billion, with an average amount of $400 per individual;
- Religious charities received the largest percentage of the amounts donated (45%), followed by health organizations (14%), and social services organizations (10%);[33]
- Almost 12 million Canadians (45% of the total population) volunteered their time;[34]
- This amounted to almost 2 billion hours, the equivalent of one million full-time jobs; and
- Volunteers contributed an average of 168 hours over the course of a year.

Clearly a sector that has so much participation through giving and volunteering is a strong sector, and the question for this chapter is whether the current legal framework allows it to address important issues of social policy in the way it should.

The Rural-Urban Divide

One aspect of the sector in Canada that is not well-researched is how the various measures of sector financial independence, human resources capacity, and the giving

[30] The Minister responsible for Statistics Canada.

[31] Statistics Canada, *Canada Survey of Giving, Volunteering and Participating* (GSGVP), available at http://www.givingandvolunteering.ca/pdf/CSGVP_Highlights_2004_en.pdf.

[32] *Ibid*., p. 7.

[33] *Ibid*. Giving statistics are found at p. 9.

[34] *Ibid*., p. 10. This includes mandatory community service. All the volunteering statistics are found on p. 10.

and volunteering behavior apply in rural Canada. One study, in rural Ontario, was published in 2004, and it gives a very helpful analysis of the differences in aspects of the sector between rural and urban Canada (noting, however, that rural Ontario differs from other provinces).[35] Some key findings are:

- rural voluntary organizations have a lower financial capacity than their urban counterparts;
- there is more reliance on volunteers in rural areas, leading to concerns for both retention and recruitment;
- there are also fewer specialized skills, which means there is a greater need for training volunteers and staff members; and
- rural organizations are characterized by informal linkages and lack the technological capacity to establish better and more effective networks.

The study concludes that work needs to be done to improve the structural capacity of the rural voluntary sector in Canada, and that further research needs to be done to ascertain more fully what the needs are.

Charity and Social Policy: An Overview of the Sector in Canada

Role of the Aboriginal Peoples

The Aboriginal peoples (First Nations, Inuit, and Métis[36]) have inhabited the area that is now Canada for thousands of years and have their own diverse histories. Indigenous peoples of all origins contributed significantly to the culture and economy of the early European colonies and as such have played an important role in fostering a unique Canadian cultural identity to this day.

Aboriginal peoples also had a significant influence on the development of the Canadian approach to philanthropy. As the Johns Hopkins report notes, the "concepts of giving and sharing were deeply embedded in Aboriginal culture."[37] The cosmology of some Aboriginal cultures contributed to the communal holding of land and hence to the responsibility of the community for all its members.[38] Some

[35] See Barr, C., McKeown, L., Davidman, K., McIver, D., and Lasby, D., 'The Rural Charitable Sector Research Initiative: A Portrait of the Nonprofit and Voluntary Sector in Rural Ontario', available at http://www.frl.on.ca/frl/Rural_Report_Final.pdf.

[36] The Métis are not strictly Aboriginal but rather are a mixture of ethnically Aboriginal people (such as Ojibwa, Cree, etc.) and (principally) the French settlers.

[37] See Johns Hopkins Study, *op. cit*. 19, p. 21.

[38] See Berry, M.L., *Native-American Philanthropy: Expanding Social Participation and Self-determination*, available at http://www.cof.org/files/Documents/Publications/Cultures_of_Caring/nativeamerican.pdf,, 43 ff.

researchers suggest, for example, that the Northwest Coast potlatch indicates "that Native Americans[39] were traditionally suspicious of accumulations of wealth and sought to disperse or destroy personal property upon the death of its owner or distribute it to those in need."[40]

European Influences

As the Europeans gradually assumed control of the entire territory that is now Canada, they changed the ethos, bringing with them notions of private property, philanthropy, charity, etc. One of the striking things about Canada is the extent to which the diverse cultures of France and England and other European countries have by now melded into a consensus view of the role of the sector in society and the extent to which it should work with the State to achieve social policy goals. Nevertheless, Canadian culture with regard to non-profit organizations was fragmented until the mid-20th century.

Prior to Confederation, non-Aboriginal Canadians generally participated in a loose set of voluntary organizations, including churches, and social service organizations. As Samuel Martin has pointed out, however, "every church and every ethnic and interest group had its own charitable society or charitable foundation."[41] In Quebec, which is now the principal French-speaking province, the part played by the Roman Catholic Church in the provision of charity (especially with regard to poverty relief, social services, and the like) dominated the ethos of the sector. In other parts of Canada, the English notions of charity, derived in large part from the 1601 Preamble were pre-eminent. Reflecting this heritage, in some English-speaking provinces, such as Nova Scotia and New Brunswick, poor laws were enacted.[42]

The Constitution Act 1867 and Its Impact on Provincial and Federal Involvement with Voluntary Organizations

The legal framework at Confederation contributed to the fragmentation. In distributing the legislative power in the newly federated Canada, the Constitution Act of 1867, gave the provinces authority over "the establishment, maintenance and management of

[39] The term is one used in the U.S, rather than Canada.

[40] See e.g., Kidwell, C.S., *Indian Giving*, a paper delivered at the Researchers Roundtable Seminar of the Council on Foundations, 1989, available at http://www.cof.org/files/Documents/Publications/Cultures_of_Caring/bibnaam.pdf.

[41] See Martin, S.A., *An Essential Grace: Funding Canada's Health Care, Education, Welfare, Religion and Culture*, McClelland and Stewart, Toronto, 1985, p. 62.

[42] See Johns Hopkins Study, *op. cit*. p. 22.

hospitals, asylums, and eleemosynary institutions."[43] At the same time, access to the principal sources of revenue was given to the federal government.[44] As will be described later, provincial incorporation of societies and other non-profit entities has led to some important interpretations of charity law at the level of the provincial courts.

After the turn of the 20th century, the Canadian federal government first began to be involved with the voluntary sector. According to the VSI, that support consisted at first:[45]

> … of small grants usually meant to help organizations buy supplies needed to do what governments of the time could not. Government also entered into formal agreements with some voluntary organizations to deliver services to vulnerable groups of Canadians, through, for example, orphanages, schools, and group homes. The first grant was $1,000 to the Canadian Lung Association in 1902. Over the next two decades, the government extended its support to the Victorian Order of Nurses and St. John Ambulance. After the war, support was extended to the Canadian National Institute for the Blind.

Financial support for the sector increased markedly over the remaining years of the 20th century and into the 21st. The Johns Hopkins study discusses the phenomenon of increased government support in mid-century, its petering out in the later part of the century, and the problems these swings in government funding have created in some detail:[46]

> The retrenchment of the Canadian welfare state [in the 1990s] had profound implications for the nonprofit and voluntary sector. Levels of funding for many organizations declined—in some cases dramatically—while need and demand for services increased. The form of funding also changed. Whereas many organizations had previously received grants that allowed them to operate according to their own principles, they were often required to compete—sometimes with for-profit companies—to deliver services according to strict government guidelines. Government retrenchment brought into sharp relief both the role that nonprofit and voluntary organizations were playing in Canadian communities and the extent to which many relied on government funding to provide their services.

These developments necessarily have had a substantial impact on the ways in which both the State and voluntary organizations can address the social policy issues that will be considered in the next section.

Current Social Policy Themes and Charity Law

The pattern of social policy themes currently forcing the pace and direction of change in the charity law of Canada is a product of two competing sets of pressures.

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[43] British North America Act, 1867, as re-enacted in 1982, para. 92 (7).

[44] See *ibid*., para 53.

[45] *Working Together*, a Government of Canada/Voluntary Sector Joint Initiative, Report of the Joint Tables, August 1999, available at http://www.vsi-isbc.org/eng/knowledge/working_together/pco-e.pdf.

[46] See Johns Hopkins Study, *op. cit*. p. 23.

One set is those typical of modern developed nations, including their need to participate in foreign aid and assistance to poorer countries. The other set of pressures arises from Canada's own particular domestic circumstances, as described above.

Poverty and Inequality

A 2000 study of poverty in Canada published on the website of the Ministry of Human Resources and Social Development in Canada[47] is useful in describing poverty for purposes of this discussion. In *Low Income (Poverty) Dynamics in Canada: Entry, Exit, Spell Durations and Total Time*,[48] Ross Finie's research reveals that there are two different types of Canadian populations living in poverty. Some live in poverty for a short period of time, while others experience it over the longer term. As to the latter group of individuals, he suggests that:

> … findings also reveal that personal characteristics and past low-income experience could help policymakers identify the population at risk of chronic low-income status and thereby effectively target policy measures. To this end, a mixture of interventions — both "carrots" and "sticks" (but in a "kinder, gentler" form than found in recent US reforms) and a strong labour market — are needed to reduce poverty in Canada, thus serving both equity and efficiency goals to which individuals across the political spectrum might agree.

Since the publication of *The Canadian Factbook on Poverty* in 1994[49] there has been a debate about the definition and measurement of poverty in the country. In researching the issue one finds different approaches on the right and on the left. For example, the conservative Fraser Institute asserted in its "2006 Update of Poverty in Canada," that the proportion of Canadians living in poverty fell to an all-time low in 2004 (the last year for which statistics are available).[50] The same statistics are cited to reveal a decline in child poverty.

On the other side of the political spectrum, an international study published in 2005 indicated that inequality and homelessness are rising in Canada – despite a sustained economic boom and repeated federal promises to cut poverty. According to the study by Social Watch,[51] poverty is rising among children and new

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[47] www.hrgc.gc.ca.

[48] Available at http://www.hrsdc.gc.ca/en/cs/sp/sdc/pkrf/publications/research/2000–000167/page02.shtml.

[49] See Ross, D.P., Shillington, R., and Lochhead, C., *The Canadian Factbook on Poverty* 1994, highlights available on the website of the Canadian Council of Social Development at http://www.ccsd.ca/pubs/archive/fb94/factbk.html. The modern recognition of the extent of poverty in Canada dates from the publication in 1968 of the Economic Council of Canada's Fifth Annual Review, which gave currency to an approach to measuring poverty that had been developed at Statistics Canada by Jenny Podoluck.

[50] See Sarlo, C., *Poverty in Canada: 2006 Update*, available at http://www.fraserinstitute.ca/admin/books/files/PovertyinCanada2006.pdf.

[51] Social Watch is a coalition of 400 non-government organizations from 50 countries.

immigrants, the middle class is finding it increasingly difficult to afford education and housing, and there are 250,000 Canadians living on the streets. The Canadian section of the study was written by an economist with the Canadian Centre for Policy Alternatives (CCPA), Armine Yalnizyan.[52] These observations are borne out for the urban areas, by CCSD's Urban Poverty Project discussed above. A 2007 study also by Armine Yalnizyan indicates that the income gap in Ontario is at an all-time high.[53] Ontario's gap, the largest in Canada, has been rising steadily in recent years.[54]

Another take on this is provided by UNDP's Human Development Report Country Index for 2005, according to which Canada has a ranking of 5th with regard to overall wealth (HDI) and 9th with regard to high income OECD countries in terms of income inequality (HPI-2). Those figures had changed to 6th (HDI) and 5th (HPI-2) in 2006. Given these numbers, it appears that the liberal statistics are more accurate – even though overall wealth is not increasing in Canada, income inequality is, and issues with regard to populations in poverty are not at present adequately addressed by either the State or the voluntary sector.[55]

There are many charities involved in poverty alleviation in Canada as well as research about various poverty issues. Given the expansive definition of poverty alleviation used by the Canada Revenue Agency (CRA) and the courts, the only potential issue with regard to their status remains that of advocacy. For a discussion of the ways in which CRA has addressed political activities, see below.

Welfare Reform

The development of new models of welfare and the creation of a "welfare to work" paradigm in developed countries in the 1980s and 1990s was relevant to Canadian thinking and implementation of provincial/territorial as well as federal attempts to alleviate unemployment. Two provinces pioneered efforts to create new models – Alberta and Ontario. The efforts to reform welfare came from increasing government deficits due to declining financial circumstances. As evidenced by research

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[52] See Yalnizyan, A., *Divided and Distracted Regionalism as Obstacle to Reducing Poverty and Inequality*, available at http://policyalternatives.ca/documents/National_Office_Pubs/2005/Social_Watch_2005.pdf.

[53] See Yalnizyan, A., 'Ontario's Growing Gap Time for Leadership', available at http://policyalternatives.ca/documents/Ontario_Office_Pubs/2007/ontariogrowinggap.pdf.

[54] *Ibid*.

[55] See National Council of Welfare (NCW), 'Solving Poverty: Four Cornerstones of a Workable National Strategy for Canada' (Poverty Report), Winter 2007, Vol. 126, available at http://www.ncwcnbes.net/documents/researchpublications/ResearchProjects/NationalAntiPovertyStrategy/2007Report-SolvingPoverty/ReportENG.pdf.

provided in a report by the National Council of Welfare (NCW) in 1997, welfare had become "leaner and meaner in most parts of Canada" over those decades.[56]

In a report published in 2006, the NCW noted that welfare incomes in 2005 "continued to be well below the poverty line."[57] In fact, welfare incomes were also well below average incomes or median incomes in Canada, though there were provincial differences and differences among types of populations.[58] Most discouragingly, welfare incomes declined in real and inflation adjusted numbers between 1994 and 2005.[59] It is accordingly not surprising that the NCW called in 2007 for a comprehensive strategy to reduce poverty in Canada, which would be led by the federal government but would also include many charities and other non-profit organizations.[60]

Multiculturalism

As noted above, Canada adopted a policy of multiculturalism in 1971, which it further amplified by legislation in 1988. Nevertheless, all the reports on poverty and inequality note that many immigrant populations suffer disproportionately from the effects of poverty. Andrew Jackson, writing in 2001, attributed this to racism:[61]

> Poverty rates among visible minority persons in Canada, particularly recent visible minority immigrants, are unacceptably high - greater than 50% for some groups, such as recent black immigrants. The major causes of poverty include barriers to equal participation in the job market and lack of access to permanent, skilled, and reasonably well-paying jobs. Racism also seems to be a significant cause of poverty among these groups.

He also suggested that this must be attacked as a separate social issue if Canada wants to avoid "a U.S.-style urban underclass that is marginalized and racially defined."[63]

In another study, published a bit later, the authors state the problem fairly starkly:

> We are witnesses, therefore, to a real and growing contradiction between Canada's official policies of multiculturalism, anti-racism and immigrant citizenship acquisition, and the growing reality of social exclusion for Canada's newcomers.

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[56] See NCW, 'Another Look at Welfare Reform', available at http://www.ncwcnbes.net/documents/researchpublications/OtherPublications/1997Report-AnotherLookAtWelfareReform/ReportENG.htm.

[57] See NCW, 'Welfare Incomes 2005 Report', Vol. 125, available at http://www.ncwcnbes.net/documents/researchpublications/ResearchProjects/WelfareIncomes/2005Report_Summer2006/ReportENG.pdf.

[58] *Ibid*., p. xi.

[59] *Ibid*., p. 48.

[60] See NCW, *Poverty Report*, *op. cit.*

[61] See Jackson, A., 'Poverty and Racism, in Perception', the *Canadian Council on Social Development*, 24: 4, Spring 2001, pp. 6–7.

[62] *Ibid*.

[63] Omidvar, R. and Richmond, T., 'Immigrant Settlement and Social Inclusion in Canada', *Working Paper Series of the Maytree Foundation*, January 2003, available at http://www.maytree.com/PDF_Files/OmidvarRichmond.pdf.

This has a necessary impact on charities and other non-profit organizations, because it is they that provide almost all of the social services for new immigrants in Canada. Although the State sector is the major source of funding, private non-governmental organizations are the principal agencies involved in service delivery.[64]

Aboriginal Peoples

Aboriginal peoples are among the most disadvantaged groups in Canada. The 1991 post Census Aboriginal Peoples Survey indicates that they experience poorer health, lower levels of education, lower average incomes, and higher rates of unemployment, compared with the non-Aboriginal population.[65] High incarceration levels and increasing youth suicide rates indicate the presence of serious social difficulties as well. The 2001 post Census Aboriginal Peoples survey indicates that the percentage of Aboriginal peoples in the population of Canada is growing, which suggests that these problems are growing as well.[66] In addition, since many of these people do not live on reserves but rather in urban areas, the same concerns raised in the Urban Poverty Project report are relevant to them. Many charities and non-profits seek to address these needs, but the slippage appears to be quite severe despite their interventions.

Violence Against Aboriginal Women

Recognized as a special problem in Canada as well as in the United States and Australia, this deserves particular mention because it has only recently received the kind of media attention it deserves. The high rate of family violence in Aboriginal communities has been documented in several reports.[67] In fact, violence and abuse of women and children has been described by Aboriginal women as reaching

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[64] *Ibid*.

[65] See 'Aboriginal Peoples Survey' report, published by Statistics Canada, 1991, available at http://www.stats.gov.nt.ca/Statinfo/Census/apsurvey91/reports/rnewaps.pdf.

[66] See Statistics Canada, 'Aboriginal peoples of Canada: A demographic profile', available at http://www12.statcan.ca/english/census01/Products/Analytic/companion/abor/pdf/96F0030XIE2001007.pdf.

[67] See, for example, Hamilton, A.C. and Sinclair, C.M. (Commissioners), *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, Chapter 13: 'Women', Public Inquiry into the Administration of Justice and Aboriginal People, Winnipeg, 1991), and LaRocque, E.D., *The Royal Commission on Aboriginal Peoples, The Path to Healing*. Canada Communications Group, Ottawa, 1994.

epidemic proportions.[68] A survey conducted by the Ontario Native Women's Association in 1989, found that 80% of Aboriginal women had personally experienced family violence, while 50% of the participants in a survey by the Indigenous women's collective indicated that they had been physically abused.[69] It is not difficult to conclude that Aboriginal women are the most vulnerable and marginalized women within Canadian society, particularly in regard to violence.

Most studies recommend that these issues need a community-focused solution to family violence in Aboriginal communities.[70] This may create a problem for organizations seeking charity status because of differences in cultures among the different communities. The approach taken by the Canada Revenue Agency in its advice with regard to when an organization will meet the public benefit test when it provides services to Aboriginal communities is as follows:[71]

> An organization cannot qualify for registration with purposes established to assist Aboriginal Peoples of Canada if it further restricts its beneficiaries to a limited class of eligible persons, also known as "a class within a class." For example, limiting beneficiaries to a particular nation that excludes members of other nations does not meet the necessary element of public benefit. An organization cannot qualify unless it can demonstrate that it addresses a charitable need particular to that limited group, for example, a problem faced only by the Métis or by one specific nation.

Clearly violence against women is a pervasive problem faced by all Aboriginal groups in Canada, and unless this test would allow limitations of geography and blood-relationships to be imposed, it could cause problems in classifying community organizations addressing needs of specific communities as charities.[72]

It is probable, however, that the earlier CRA approach needs to be read in conjunction with the policy announced in 2005, with regard to ethnocultural communities, where CRA states as follows:[73]

> It may be acceptable for [organizations that provide assistance to an ethnocultural community or communities] to limit services to a particular ethnocultural or grouping of ethnocultural communities. However, under the category of charitable purposes known as "other

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[68] Hamilton, A.C. and Sinclair, C.M. (Commissioners), *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, Chap. 13: 'Women', Public Inquiry into the Administration of Justice and Aboriginal People', Winnipeg, 1991, p. 7.

[69] *Ibid*., p. 9.

[70] See e.g., Pauktuutit, *Research Report: Applying Inuit Cultural Approaches in the Prevention of Family Violence and Abuse*, 2005, available at http://www.pauktuutit.ca/pdf/publications/abuse/InuitAbusePrevention_e.pdf.

[71] See CRA, 'Policy Statement, Benefits to Aboriginal Peoples of Canada', CPS-012, 1997, available at http://www.cra-arc.gc.ca/tax/charities/policy/cps/cps-012-e.html.

[72] A rational way to read this would be to say that a charity focused on Inuit women living on reserves in Nunavut would not need to address issues with regard to First Nations women living in Ontario or British Columbia. But an organization aimed at addressing violence against Aboriginal women in Toronto could not limit its services to one specific class within a class, meaning that it would need to hire Inuit counselors to provide a specifically Inuit perspective, along with counselors from other nations to provide those special perspectives as well. Some commentators also believe that the requirement that a "significant portion" of the public be benefited would be met by the charity focusing on the Inuit women living on reserves in Nunavut.

[73] See Charitable Work and Ethnocultural Groups-Information on registering as a Charity, available at http://www.cra-arc.gc.ca/tax/charities/policy/ethnoe.html.

purposes beneficial to the community", an organization can only restrict access to its programs or services to a specific group if the reasons for doing so are justified by the purposes.

Human Rights, Anti-terrorism, and Social Justice

- *Human rights*

Canada has both a Charter of Rights and Freedoms from 1982[74] and a Human Rights Act from 1985.[75] The Human Rights Act creates a Human Rights Commission and a Human Rights Tribunal. Several provinces and territories have similar legislation. There are also additional pieces of legislation that deal with special issues, such as the Employment Equity Act.[76] Thus, the human rights of Canadians are well-protected at the level of both federal and provincial/territorial governments, and there is considerable litigation with regard to rights protection when the issues cannot be resolved in the Tribunal or through alternative dispute resolution. Recent issues of concern for the Commission include the use of the Internet to disseminate hate messages and section 67 of the Human Rights Act, which has been interpreted to place restrictions on access to living space on reserves for Aboriginal women.[77] Human rights organizations in Canada are generally qualified as charities, whether they work in Canada or in foreign countries.

A recent case of some import both for human rights of Canadians and foreign nationals in Canada and the validity of recent anti-terrorism legislation involved the application of Charter principles to the procedures adopted to declare foreign nationals inadmissible to Canada under the Immigration and Refugee Protection Act to stand constitutional scrutiny. Holding that the procedures adopted by the relevant agencies were in violation of the Charter, the Supreme Court struck them down.[78]

In another case where Charter rights were held to trump anti-terrorism legislation, the Ontario Superior Court voided a section of the legislation defining terrorism as a crime committed with religious, ideological, or political motives. Justice Douglas Rutherford said in his opinion that the definition is "an essential element

[74] Canadian Charter of Rights and Freedoms, enacted as Schedule B to the *Canada Act 1982* (U. K.) 1982, c. 11, which came into force on April 17, 1982, available at http://laws.justice.gc.ca/en/Charter/index.html.

[75] Canadian Human Rights Act (R.S., 1985, c. H-6), available at http://laws.justice.gc.ca/en/H-6/index.html.

[76] Employment Equity Act (1995 c. 44).

[77] See Canadian Human Rights Commission, 2006 *Annual Report*, available at http://www.chrc-ccdp.ca/publications/ar_2006_ra/page1-en.asp#21.

[78] See *Charkaoui v. Canada*, 2007 SCC 9 (February 27, 2007), available at http://scc.lexum.umontreal.ca/en/2007/2007scc9/2007scc9.html.

that is not only novel in Canadian law, but the impact of which constitutes an infringement of certain fundamental freedoms," including "those of religion, thought, belief, opinion, expression and association."[79]

- *Anti-terrorism*

A human rights concern in Canada, along with the U.S. and the U.K, has been the enactment of anti-terrorism legislation that may have a rights-restricting impact on groups of Canadian citizens. Canada's Anti-terrorism Act (Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to Enact Measures Respecting the Registration of Charities, In Order to Combat Terrorism* ("Bill C-36" or "Anti-terrorism Act" (ATA)),[80] has been criticized by noted charity lawyer Terrance Carter. He stresses its potential limitations on legitimate acts by legitimate charities, which, when viewed through the lens of a post-September 11 world might seem suspicious.[81]

He points out that:[82]

> … the concern may not be what the authorities *will do* in enforcing anti-terrorism legislation, but rather that they *may* enforce such legislation. As a result, part of the impact of Canada's anti-terrorism legislation may have as much to do with coping with a fear of the law as it will with coping with the law itself. This "shadow of the law" effect has already created and will continue to create a chill upon charitable activities in Canada, as charities hesitate to undertake programs that might expose them to violation of anti-terrorism legislation, and with it the possible loss of their charitable status.

Similar concerns have been raised by other lawyers active in charity law, such as Blake Bromley.[83]

The *ATA* specifically enacted the *Charities Registration (Security Information) Act* (*CRSIA*) to suppress and prevent support for terrorism and to protect the integrity of the registration system for charities under the *Income Tax Act*.[84] Under the new provisions, the Minister of Public Safety and the Minister of National Revenue are permitted to issue a certificate stating that, based on the security or criminal intelligence information before them, it is their opinion that there are reasonable grounds to believe that an organization has made, is making or will make its resources, directly or indirectly, available to a terrorist group. Once signed, the certificate is automatically subject to judicial review before the Federal

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[79] *R v. Khawaja*, Ontario Superior Court of Justice, October 24, 2006, available at http://www.theglobeandmail.com/special/audio/Rutherford.pdf.

[80] S.C. 2001, ch. 41

[81] See Carter, T.S., 'Canadian Charities: the Forgotten Victims of Canada's Anti-terrorism Legislation', presented to the ICJ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, Canada National Hearing, 2007.

[82] *Ibid*.

[83] Speech at ISTR meeting in Bangkok, Thailand, July 2006.

[84] ATA, *op. cit*.

Court, with the affected organization being given a summary issued by that Court of the information available and the right to defend itself in a hearing before the Federal Court.[85] To date no charities have been de-registered as a result of the Act.[86]

- *Social justice*

A lack of social justice in health can be seen as a risk factor for increased illness, disease (morbidity) and mortality. Creating a health care system that is congruent with the goals of social justice appears to have the potential to contribute to the well-being of all Canadians. Although there is a well-regarded public health system in place, it is not necessarily adequate to meet the needs of all populations, particularly the poor and underprivileged,[87] as well as some women.[88]

Lack of access to adequate education is also an important social justice issue in Canada. As noted in many of the studies already cited, there are significant disparities in access to education between the white Canadian population and Aboriginal, minority, and immigrant populations. This means that many of those people do not have good access to meaningful employment and, even with higher education, they face discrimination in the workplace that results in difficulty obtaining senior level jobs.[89]

The environment may also have a disparate effect on the poor and underprivileged, as is demonstrated by various discussions in Canada around the topic of environmental justice or environmental racism.[90] These focus on urban issues as well as issues in Canada's reserves for Aboriginal peoples and settlements of minority populations.[91]

Non-profit organizations are prominent in Canada's social justice movement, but many of them cannot qualify as charities because of their advocacy work. On the other hand, many of them are advised by lawyers to remain as non-profit organizations so as to avoid conflicts with Revenue Canada on this issue.

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[85] *Ibid.*

[86] This statement is valid as of July 2007. See http://www.justice.gc.ca/en/anti_terr/perspective/perspective_page7.html#viiicrsia.

[87] See 'Urban Poverty Project', *op. cit.*

[88] Hankivsky, O., 'Social Justice and Women's Health: A Canadian Perspective, Maritime Centre for Excellence in Women's Health', 1999, available at http://www.acewh.dal.ca/eng/reports/havkivsky-justice.pdf.

[89] See 'Unequal Access A Canadian Profile of Racial Differences in Education, Employment and Income', prepared by the Canadian Council on Social Development for the Canadian Council on Race Relations, 1999, available at http://www.crr.ca/divers-files/en/pub/rep/ePubRepUneqAcc.pdf.

[90] Some of the concerns are summarized at http://www.trentarthur.info/archives/001621.html.

[91] A fairly graphic photo of what the people termed environmental racism in the form of a landfill can be found at http://savelincolnville.nspirg.org/images/savelincolnvillepamphletfinal.pdf.

Foreign Aid

The Canadian government has taken a strong stand with respect to foreign aid aimed at reducing poverty, promoting human rights, and increasing sustainable development.[92] The Canadiance International Development Agency (CIDA) frequently outsources its foreign aid to:[93]

> Canadian voluntary sector organizations, [which] are important partners in Canada's international development programs. These organizations include non-governmental organizations (NGOs), volunteer cooperation agencies, academic and educational institutions, provincial and regional councils, membership and specialized training institutes, cooperatives, unions, and professional associations. They all play significant roles in humanitarian assistance, health and education, governance, human rights, Canadians' engagement in international development, and achievement of the Millennium Development Goals (MDGs).

The law permits organizations involved in such international assistance to be charities,[94] assuming all other legal requirements are met.

Charity and the Law

The Relationship Between Law and Charity: An Overview

Canada is a bijural jurisdiction, with the common law applicable in all the other provinces and territories and the civil law applicable in Quebec.[95] Although the English-speaking parts of Canada, unlike some jurisdictions, never adopted English statutory law at the time of colonization, much of the charity law in Canada reflects both the common law of charitable trusts as well as the Preamble to the Statute of Charitable Uses of 1601 (Statute of Elizabeth).[96] Thus, although the courts were never bound by the Statute, the Preamble "proved to be a rich source of examples and the law of charities has proceeded by way of analogy to the purposes enumerated [therein.]"[97] Justice Iacobucci thus felt confident when he stated that the "conception of charity" in the Income Tax Act (ITA) is "uniform federal law across the country."[98]

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[92] Mission statement, Canadian International Development Agency (CIDA), available at http://www.acdi-cida.gc.ca/index-e.htm.

[93] CIDA website at http://www.acdi-cida.gc.ca/cidaweb/acdicida.nsf/En/JUD-112912183-NAU.

[94] See *Re Levy Estate* (1989), 69 O.R. (2d) 385 (C.A.).

[95] This was sanctioned in 1774 with the passage of the Quebec Act.

[96] 43 Eliz. I, c.4.; this act is a modification of a prior Statute of Uses in 1597, 39 Eliz. I, c. 6.

[97] *Vancouver Society of Immigrant & Visible Minority Women v. M.N.R.,* [1999] 1 S.C.R. 10, para 146 (dissent by Justice Gonthier).

[98] *Ibid*., para 28.

On the other hand, various provinces, including Quebec,[99] have their own definitions of what constitutes a charitable purpose. For example, the Prince Edward Island Charities Act, which deals principally with fund-raising, defines a "charity" as "any person, association, institute or organization under whose auspices funds for benevolent, educational, cultural, charitable or religious purposes are to be raised."[100] David Duff points to other examples in his excellent article, 'The Federal Income Tax Act and Private Law in Canada: Complementarity, Dissociation, and Canadian Bijuralism.'[101] Nevertheless, the view expressed by both the majority (Justice Iacobucci) and the dissent (Justice Gonthier) in *Vancouver Society* seems to have captured the popular imagination, and it is at this point fruitless to argue about its validity.

One aspect of the English common law that did not carry over into Canada was the reliance on the trust form for organizing charities. Although trusts can be used, most Canadians incorporate their charities, either as not-for-profit corporations or societies. There are generally three different ways to achieve legal entity status for charities – by a provincial charter issued under the provincial corporations acts or societies acts, by a federal corporate charter issued under the federal corporations act, or by special act of the provincial or federal legislature. Most charities are incorporated using the first method.

The Common Law: Definitional Matters

As in other common law jurisdictions, it is the four "heads" of charity set out by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax Act v. Pemsel*,[102] that generally govern the current definition in Canada, whether for Income Tax Act (ITA) purposes or the provincial[103] level determination of whether an organization is a charity[104] or whether provisions of charitable trusts must be

[99] For example, the Quebec Civil Code uses the term "socially beneficial purpose" in defining a foundation in article 1256, and the term "social utility" in describing one type of trust in article 1266. The Civil Code goes on to say in article 1270 that a "social trust is a trust constituted for a purpose of general interest, such as a cultural, educational, philanthropic, religious or scientific purpose."

[100] Prince Edward Island Charities Act, Chapter C-4, 1 (a)

[101] *Canadian Tax Journal*, 1: 1, 2003, p. 1, footnote 145.

[102] [1891] A.C. 531 (H.L.).

[103] Excluding, of course, Quebec, where the civil law pertains instead to define what is a public benefit organization.

[104] Some "common law" provinces have gone beyond the *Pemsel* categories. In Alberta, for example, the Charitable Fundraising Act refers to other classes of purposes: " 'charitable purpose' includes a philanthropic, benevolent, educational, health, humane, religious, cultural, artistic or recreational purpose, so long as the purpose is not part of a business." See Alberta Fund-raising Act, Chapter C. 9, 1 (1) c, available at http://www.qp.gov.ab.ca/Documents/acts/C09.CFM.

enforced.[105] The *Pemsel*[106] quadripartite division of the charity law is used in Canada, with some nuances that will be amplified in the following paragraphs.

Application of a Public Benefit Requirement

Following several of the legal reform discussions described below (which had leveled some serious criticisms), the CRA began to issue more policy advice to assist organizations seeking to become registered charities. One of these, 'Guidelines for Registering a Charity: Meeting the Public Benefit Test,'[107] is extremely useful[108] for understanding the extent to which the public benefit test must be met in Canada.[109]

In seeking to address the ways in which the public benefit requirement interplays with the four heads of charity, CRA states that "the broader public benefit test, which is the subject matter of [its] guidelines, is essentially concerned with the question of "who" will benefit."[110] It goes on to described in exacting detail the application of the public benefit requirement as requiring two things: "an objectively measurable and socially useful benefit;" and "that the benefit have a public character, that is, be directed to the public or a sufficient section of the public."[111] Going further, CRA states that a presumption in favor of public benefit exists with regard to the first three categories of charities, but not with regard to the fourth. It then goes in great detail into the question of when the presumption "can be challenged" and how an organization in the fourth category that is not similar to an organization previously granted charity status may show proof of benefit.[112]

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[105] This was the issue in *Canada Trust v. Ontario Human Rights Commission*, 69 DLR (4th) 321 (OCA). Similar to the *Bob Jones University* case in the U.S. (see, further, Chap. 9), this case imposes a "public policy" rule with regard to charitable trust law in Canada. It is discussed further in Phillips, J., 'Case Comment: Anti-Discrimination, 'Freedom of Property Disposition and the Public Policy of Charitable Educational Trusts, A Comment on Re Canada Trust Company and Ontario Human Rights Commission', *The Philanthropist*, 9: 3, 1990.

[106] *Ibid*.

[107] *Guidelines for Registering a Charity: Meeting the Public Benefit Test* (hereafter Public Benefit Guidelines), CPS-24, March 10, 2006, available at http://www.cra-arc.gc.ca/tax/charities/policy/cps/cps-024-e.html.

[108] Other commentators have said that the Guidelines are of "great assistance" even though they contain some ambiguities. See Carter, T.S. and Cooper, K.J. 'CRA Releases New Policy on Meeting the Public Benefit Test', *Charity Law Bulletin No. 93*, April 2006, available at http://www.carters.ca/pub/bulletin/charity/2006/chylb93.htm.

[109] Differences in application of the public benefit test across jurisdictions will be discussed in Chap. 13.

[110] Public Benefit Guidelines, supra note 96, 2.0.

[111] Public Benefit Guidelines, supra note 96, 3.0.

[112] *Ibid*.

Political Activities

As in other common law jurisdictions, a charity in Canada needs to make sure that it does not violate specific prohibitions on political purposes and political activities. As a result, CRA issued a policy statement in 2003 to clarify its views on when and to what extent charities can engage in a variety of political activities.[113] What is perhaps the most interesting part of this policy statement is the guidance it gives on how to conduct "public awareness campaigns" and make representations to public officials which are considered to be charitable if properly carried out.[114] While making sure that its communications are subordinate to its charitable activities, a charity may, for example, make:[115]

> … a representation, whether by invitation or not, to an elected representative or public official, the activity is considered to be charitable, [as long as the representation is related to its purpose and meets other tests.] Even if the charity explicitly advocates that the law, policy, or decision of any level of government in Canada or a foreign country ought to be retained, opposed, or changed, the activity is considered to fall within the general scope of charitable activities.

The Pemsel Heads

- *Relief of poverty*

Canadian courts and CRA have given a fairly expansive definition to "relief of poverty," and that generally includes purposes having to do with poverty prevention through community economic development.[116]

- *Advancement of education*

Advancement of education has received a broad interpretation by Canadian courts. Donald Bourgeois writes that "[t]he advancement of education is not restricted to teaching, but includes research, provided that the research if of educational value to the person conducting the research or advances knowledge, which may in turn be

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[113] Policy Statement Political Activities, CPS – 022, September 2, 2003, available at http://www.cra-arc.gc.ca/tax/charities/policy/cps/cps-022-e.html#P107_9478.

[114] This change in policy of CRA came about in response to criticisms leveled at it by all the law reform studies, beginning with the Ontario Law Reform Commission, discussed further below in text.

[115] *Ibid*.

[116] See 'Summary Policy Community Economic Development', CSP-C03, October 25, 2002, available at http://www.cra-arc.gc.ca/tax/charities/policy/csp/csp-c03-e.html and materials cited there.

taught." (footnote omitted).[117] The issue of how broadly the courts should interpret "education" was an issue in the *Vancouver Society* case, which is discussed below as a "milestone" in the legal development of charity law in Canada.

An aspect of this category of charitable purpose that has not received much attention in Canada compared to the debate in the U.K. has been the extent to which private schools will qualify as charities.[118] Given that the "public benefit test" set out by CRA leaves in place the presumption with regard to private schools, it is unlikely that they would be subject to scrutiny even if they did not provide scholarships, etc. to poor students.

- *Advancement of religion*

Here again commentators describe the approach of the Canadian courts as being expansive, with Prof. Monahan noting, however, that there is "a dearth of Canadian case law relating to the definition of religion.…"[119] Jim Phillips, in analyzing the meaning of religion in Canada for purposes of the Income Tax Act, refers to statements by CRA officials that:[120]

> … such organizations as the Khalsa Diwan Society, the Hindu Society of Manitoba, the Zoroastrian Society of Ontario, and the Spiritualist Church of Divine Guidance [have been registered. It did not, however, register the Edmonton Grove of the Church of Reformed Druids or the Mouvement raelian canadien; the latter was apparently rejected because it did not have a belief in God.

Following the U.K. decision in *Gilmour v. Coats*,[121] CRA applies the public benefit requirement to disallow charity status to purely contemplative religious orders.[122]

- *Other purposes beneficial to the community*

With regard to this category of charitable purposes, the important thing to bear in mind is that it must be qualified by the language: "in a manner which the statute or common law regards as charitable." Thus, although providing jobs is surely beneficial to the community, the fact that a for-profit business does so does not cause it

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[117] See Bourgeois, D., *The Law of Charitable and Not-for-Profit Organizations* (3rd ed.), Butterworths, London, 2002. This quote is from the Introduction, p. 20. But see Monahan, P. (with Roth, E.S.), *Federal Regulation of Charities* York University, Toronto, 2000, p. 37, where it is asserted that courts have given this classification a "restrictive interpretation." The difference of opinion may simply reflect the timing of the two views, with Prof. Monahan's views heavily influenced by the pre *Vancouver Society* line of cases restricting education to "formal training of the mind" or "the improvement of a useful branch of knowledge." It is unquestioned that the Canadian formulation prior to *Vancouver Society* was much more restrictive than the interpretation of education in either the U.K. or the U.S.

[118] See U.K. chapter, in text.

[119] See Monahan, P., *Federal Regulation*, *op. cit*., p. 45.

[120] See Phillips, J., 'Religion, Charity and the Charter', *Between State and Market*, *op. cit*., p. 338, note 27, citing to discussions with Carl Juneau, CRA's assistant director of the Charities Division.

[121] *Gilmour v. Coats, et al*., [1949] 1 All E.R. 848. The extent to which this interpretation might violate the Charter of Rights and Freedoms is analyzed by Prof. Jim Phillips in 'Religion, Charity and the Charter of Rights', in *Between State and Market Essays on Charities Law and Policy in Canada* (hereafter, *Between State and Market*) (Phillips, J., Chapman, B., and Stevens, D., eds., McGill-Queens University Press, Montreal, Quebec, 2001), p. 316. See further discussion of the current definitional issues involved in advancement of religion.

[122] See Public Benefit Guidelines, *op. cit*., n. 29.

to fall within the definition of the fourth head of charity. In other words, they must fit the spirit and intendment of the Preamble.

Expansive interpretations by the Canadian courts of this category discuss the meaning of the spirit and intendment requirement and include *Native Communications Society v. M.N.R.*,[123] *Vancouver Regional FreeNet Association v. M.N.R.*,[124] and *Everywoman's Health Centre Society v. Canada*.[125] Collectively the cases demonstrate an approach by the courts that recognizes the importance of allowing charity law to develop flexibly as times change and as needs must be addressed that were not thought of at an earlier time[126] (see, further, below).

The Common Law: Institutional Infrastructure

Two things are of over-riding importance in assessing whether it would be viable for Canada to move to a system like that in England and Wales. The first is the constitutional allocation of authority with regard to charities to the provinces, and the likelihood of their giving up these powers is rather limited.[127] On the other hand, as will be seen, there is a need in Canada for provincial Attorneys General to better assume duties to advise charities on issues of governance and fiduciary responsibility, which are matters within the constitutional authority of the provinces.

The other matter is the extent to which existing government agencies can and do exercise appropriate oversight of charities, their directors, and their boards. In that regard, it is important to look at responsibilities vested in: the CRA[128]; the provincial and territorial Attorneys General; and to a much lesser extent in self-regulatory bodies.[129]

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[123] *Native Communications Society v. M.N.R*, [1986] 3 F.C. 471 (development of radio and television productions relevant to native peoples, etc.)

[124] *Vancouver Regional FreeNet Association v. M.N.R.*, [1996] 3 F.C. 880 (providing free access to the Internet).

[125] *Everywoman's Health Centre Society v. Canada*, 92 D.T.C. 6001 (operation of an abortion clinic as being analogous to a hospital).

[126] Prof. Jim Phillips would not agree with this comment. In a piece published in 2001, he analyzes the jurisprudence of what he calls Canada's "charities court" (the Federal Court of Appeal), finding that it "has been unwilling to expand the meaning of charity." See Phillips, J., 'The Federal Court of Appeal and the Legal Meaning of Charity: Review and Critique', *Between State and Market*, *op. cit*., p. 219.

[127] Monahan, P., *op. cit*.

[128] Although the provinces and territories have revenue raising capacity alongside that of CRA, research discloses no evidence that they have attempted to discipline charities that violate fiduciary duties, etc.

[129] The use of self-regulatory bodies to supervise the sector is championed by some (see e.g., Fleischman, J.L., *The Foundation: A Great American Secret*, 2007), but it is no substitute for non-intrusive government oversight. See e.g., King, S.P. and Roth, R.W. '*Broken Trust-Greed, Mismanagement and Manipulation at America's Largest Charitable Trust,* 2006.

The CRA

CRA's principal job is to deal with charities in the context of the Income Tax Act; and this limits its capacity, for example to provide guidance on governance, etc. Nonetheless with regard to CRA,[130] its capacity to levy sanctions against charities that are behaving improperly increased significantly with the addition of "intermediate sanctions" to the ITA in 2005[131] (see, further, below).

Provincial and Territorial Attorneys General

The *parens patriae* authority of the Attorney General to intervene in matters relevant to charities seems to have gone missing entirely in some jurisdictions within Canada. The Ministry of the Attorney General in Ontario has delegated power over charities to the Public Guardian and Trustee (OPGT), but her 2006 Annual Report makes absolutely no mention of any activities with regard to trustees and directors of charities.[132] On the other hand, her office has produced a Bulletin on the 'Duties, Responsibilities and Powers of Directors and Trustees of Charities.'[133] The Ministry of Attorney General in British Columbia has no listing for "Charities" either on its main site[134] or on the website of the Public Guardian and Trustee.[135] Although it

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[130] The Federal tax exemption for charities began with the first Income Tax Act, enacted to finance Canada's role in World War I. See Income War Tax Act, 7-8 Geo 5, c. 28 (Can.), s. 5(d). A discussion of the role of federal regulation, including under the Income Tax Act and other legislation, can be found in the Ontario Law Reform Commission (OLRC), *Report on the Law of Charities*, OLRC, Toronto, 1996), pp. 249–286. The role of the tax agency in charity oversight was not systematized until the amendments to the Income Tax Act in 1967, which required them to register and to issue receipts for donations. See Sossin, L., 'Regulating Virtue: A Purposive Approach to the Administration of Charities', *Between State and Market*, pp. 373, 376.

[131] Bill C-33, *A Second Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 23, 2004*, which received Royal Assent on May 13, 2005. Prior to the intermediate sanctions legislation, CRA had resource to only one sanction and that was revocation of registered charitable status, a remedy that it only imposed in particularly egregious cases.

[132] See 2005–2006 Annual Report, available at http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/2006report/.

[133] See Ministry of the Attorney General, Ontario, *Charities Bulletin No. 3*, available at http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charbullet/bullet3.asp. A comparable situation in the United States would be New York State, where a large number of charities are subject to oversight by the Office of Attorney General, Charities Division, which has an elaborate website dealing with issues relevant to charities. It has also published an interesting booklet, entitled 'Internal Controls and Financial Accountability for Not-for-Profit Boards', available at http://www.oag.state.ny.us/charities/internal_controls.pdf.

[134] See Ministry of the Attorney General, British Columbia, available at http://www.gov.bc.ca/ag/.

[135] Public Guardian and Trustee, Province of British Columbia, available at http://www.trustee.bc.ca/services/index.html.

does not have a general listing for charities on its website, the Prince Edward Island Ministry of Attorney General's Office of Consumer Services does have a fairly informative booklet with respect to charitable gaming.[136]

Despite these lacunae in the current provincial oversight schemes, there is growing awareness that something really needs to be done to ensure that charities are more accountable to their beneficiaries and other stakeholders. An example of increased provincial attention to the issues can be found in Alberta, where a Roundtable was held in 2000 to discuss better measures for accountability for charities in that province.[137] As of 2007, fund raising charities are required to register online to solicit funds in the province, but no other issues raised in the 2000 report seem to have been attended to.[138]

Self-Regulation

There is a certain amount of standard setting for the voluntary sector in Canada, which is carried out by Imagine Canada,[139] formerly known as the Canadian Centre for Philanthropy (CCP), and the Canadian Council of Better Business Bureaux (CBBB).[140] Imagine Canada publishes a variety of "codes of practice and ethical standards in the nonprofit sector." It also has a variety of publications on board governance that are available for purchase. None of this amounts to actual self-regulation as there are no sanctions for non-compliance.

Lawyer education with regard to advising clients on their responsibilities has increased in recent years. For example, in 2007, the Canadian Bar Association and the Ontario Bar Association hosted the 5th annual "Charity Law Symposium," one of whose discussion topics was "*Capacities and Powers of Charities Across Canada*."[141]

CRA has begun a 'Charities Partnership and Outreach Program', under which it funds registered charities and non-profit organizations in Canada to develop and deliver innovative education and training on compliance to registered charities. The

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[136] See *Charitable Gaming*, Ministry of the Attorney General Prince Edward Island, Services, available at http://www.gov.pe.ca/attorneygeneral/index.php3?number = 1014967&lang = E.

[137] See 'New Directions New Pathways, Report of the Alberta Charities Roundtable', 2000, available at http://www.servicealberta.gov.ab.ca/pdf/charities/Charitiesreport.pdf. In response to this the Alberta government adopted fund raising standards in 2003 (see http://www.servicealberta.ca/pdf/charities/cfra_standards_of_practice.pdf) but it is not clear that anything else along the lines of what had been proposed had been implemented. Other developments in Alberta are discussed infra under Reform Proposals.

[138] See 'Service Alberta, How to Register a Charitable Organization', available at http://www.servicealberta.gov.ab.ca/consumer/business/charitable_org.cfm.

[139] Available http://www.imaginecanada.ca/?q = en/node/153.

[140] Available at http://www.ccbbb.ca/.

[141] See Symposium brochure, available at http://www.cba.org/cba/cle/pdf/char_2007brochure.pdf.

overall objective of the program is to increase compliance with the ITA, but this effort is, of course, carried out by voluntary sector organizations.[142]

Despite some efforts by the provincial/territorial and federal regulators and attempts at self-regulation, these are seen as not being adequate to address the possibilities for and actualities of fraud and abuse by charities. Writing in his newsletter "Canadian Fundraiser" in June 2007, Jim Hilborn noted that:[143]

> … the problems are massive, among them:
>
> - CRA, even with a doubled staff, can't begin to monitor all of the 82,000 Canadian charities adequately;
> - CRA can't hold the feet of the bogus nonprofits they do uncover to the fire of public exposure and shame;
> - the charities do their own annual reporting, and in their reports make their own decisions as to what is classed as fundraising or program expense (there's no check on their truthfulness or lack of it regarding anything they say); and
> - the vast majority of donors don't know what questions to ask the fundraisers who knock on their doors or ring their telephones.

He adds that there is a laundry list of what could be done, in addition to strengthening the enforcement of existing fiduciary standards across Canada. Another commentator, Hugh Kelly, a lawyer at Miller Thomson, suggests as follows:[145]

> In Canada, there is renewed legislative interest in modernizing the legislation governing not-for-profit organizations, federally and in British Columbia and Ontario (Saskatchewan has already done so). With the likely adoption of good governance policies as part of these up-dating efforts, it may be speculated as to the constitutional appropriateness of Canada Revenue Agency ("CRA") embarking upon a process similar to what the IRS has done in producing the Governance Draft.[144] But appropriate or not, one may wonder how long it will be before CRA decides to follow the lead of the IRS, and produce its own version of the Governance Draft.

Developmental Milestones in Canadian Charity Law

According to Donald Bourgeois, one of the best known professionals in the field of the law governing charities and non-profit organizations,[146]

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[142] The program is described on the CRA website at http://www.cra-arc.gc.ca/tax/charities/funding/menu-e.html.

[143] See *Canadian Fundraiser*, June 15, 2007, available at http://www.canadianfundraiser.com/newsletter/article.asp?ArticleID = 2328. One of the principal issues that troubles Canadians is the percentage of funds raised by various charities that are spent on fund raising instead of on charitable activities.

[144] See discussion in U.S. chapter.

[145] Kelly, H., 'When the IRS Steps into Governance, Can CRA Be Far Behind?', August 2007, Miller Thomson, *Charities and Nonprofit Newsletter*.

[146] See Bourgeois, D., *Charity Law*, *op. cit*., p. 4.

> The law governing charitable and not-for-profit organizations is very confusing and generally underdeveloped. It is far from clear on a number of issues, including the liability of directors, officers[,] and members. The statutory provisions at the federal and provincial level are antiquated. Unlike the business corporation statutes, they have not been modernized for decades.

He goes on to comment that the law as it exists today, despite the reform movements discussed below, does not take into account changes in Canadian society. Others comment that there are "major shortcomings with the current regulatory framework."[147] This section examines the recent milestones in the development of the law in Canada to assess whether these judgments are accurate. It looks at developments in the case law (both federal and provincial), the legislative landscape), and the advice and policy statements issued by the CRA.

Case Law Milestones

- *Provincial cases*

Although much of the case law development of charity law in Canada has occurred in the context of revenue cases about qualification of organizations for registration as charities, there are some provincial cases that stand out. One of these is *Minister of Municipal Affairs of New Brunswick v. (Maria F.) Ganong Old Folks Home*,[148] which considered the definition of relief of poverty for purposes of the meaning of charity in Canada. In deciding that the home could be considered to be a charity even though some of the persons served by it were not poor, the Chief Justice of the New Brunswick court held that "the words 'aged, impotent, and poor' in the Preamble" to the Statute of Elizabeth are to be read disjunctively so that aged persons need not also be poor to come within the preamble.[149] This is consistent with other decisions holding that individuals are not disqualified from receiving benefits under a charitable bequest because they also receive government assistance.[150]

- *Federal cases*

The federal cases that involve the meaning of charity in Canadian law are ones that generally conclude in the Federal Court of Appeal, to which appeals from denial or removal of charitable status are made. It is important to note that charity cases are rarely litigated in Canada, in large part because of the expense of doing so, a fact that has been lamented by many practitioners and legal scholars. In addition, the cases that have been litigated normally have resulted in victory for the government.[151]

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[147] See Monahan, P., *Federal Regulation*, *op. cit*.

[148] (1981), 129 D.L.R. (3d) 655, pp. 663–664 (B.C.S.C.).

[149] *Ibid*.

[150] *Re Forgan* (1961), 29 D.L.R. (2d) 585 9 (Alta. S.C.)

[151] See Phillips, J., *op. cit*. Writing in 1999 (the book was published in 2001), Prof. Phillips states that only 17 cases had been appealed and 14 judgments were in favor of the revenue agency. *Ibid*.

One line of cases stands out because it discusses and develops the meaning of the "special legal position" of Aboriginal peoples in Canadian society as it applies in the context of the voluntary sector. There are additional cases that have had and are expected to have an important impact on the field – Supreme Court of Canada cases, including the *Vancouver Society* case, already mentioned, and the *Alliance for Life* case, discussed below.

- *Cases involving Aboriginal populations*

In *Native Communications Society v. M.N.R.*[152] the court held that an organization involved in publishing a newsletter and in the development of related radio and television productions was charitable under the fourth *Pemsel* category, even though the publication contained some political views. Noting that the organization also has objects that included making the community aware of cultural activities and attempting to foster language and cultures, the judges were quite lenient in their interpretation of what was permissible. The special role of Aboriginal peoples was also discussed in *Gull Bay Development Corp. v. R.*,[153] where the trial division of the Federal Court held that the plaintiff, incorporated as a non-profit organization, was entitled to an exemption from tax pursuant to section 149(1)(l) of the Income Tax Act. The corporation carried on a commercial logging operation, and the profits generated were used for its not-for-profit activities.[154]

- *Supreme Court of Canada cases*

Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.[155] is probably one of the most cited ones in Canada, in part because it was the first decision of the Supreme Court of Canada interpreting the meaning of 'charity' in over 25 years. Moreover, it involved the question of whether the then current definition of the 'advancement of education' category of charity needed to be updated in light of changes in modern society. Because CRA had taken an approach confining the definition to "formal training of the mind" and "improvement of a useful branch of human knowledge,"[156] both the majority, which denied the appeal, and the dissent, which would have allowed it, were faced with the question of how to broaden the interpretation. Justice Iacobucci, writing for the majority, concluded that:[157]

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[152] [1986] 3 F.C. 471 (C.A.).

[153] [1984] 2 F.C. 3 (T.D.).

[154] Although this not a case dealing with classification as a registered charity, it serves to illustrate the principal point – that courts have been lenient with regard to Aboriginal cases. On the other hand, the 'destination of funds' test has now been overturned in Canada as it has also been in the United States. See CRA, Summary Policy on Business Activities, available at http://www.cra-arc.gc.ca/tax/charities/policy/csp/csp-b02-e.html.

[155] [1999] 1 S.C.R. 10.

[156] And its position had been upheld in a line of cases beginning with *Positive Action Against Pornography v. M.N.R.*, [1988] 2 FC 340 (FCA).

[157] *Vancouver Society*, *op. cit.*

> To limit the notion of "training of the mind" to structured, systematic instruction or traditional academic subjects reflects an outmoded and under inclusive understanding of education which is of little use in modern Canadian society. As I said earlier, the purpose of offering certain benefits to charitable organizations is to promote activities which are seen as being of special benefit to the community, or advancing a common good. In the case of education, the good advanced is knowledge or training. Thus, so long as information or training is provided in a structured manner and for a genuinely educational purpose – that is, to advance the knowledge or abilities of the recipients – and not solely to promote a particular point of view or political orientation, it may properly be viewed as falling within the advancement of education.

It is also important to note that Justice Iacobucci firmly rejected the notion that it was the role of the court to adopt a completely new definition of charity for purposes of the ITA. He referred again and again to the fact that only Parliament should enact such a change.[158]

A more recent Supreme Court of Canada case involving the definition of charity demonstrates once again the conservative approach the Court took in the *Vancouver Society* case. In *A.Y.S.A. Amateur Youth Soccer Association v. Canada*,[159] decided unanimously in October 2007, Mr. Justice Marshall Rothstein concluded:[160]

> … that although some sports organizations, other than registered Canadian amateur athletic associations ("RCAAAs"), might be found to be charities under the common law, the appellant did not qualify for charitable registration because its purposes and activities were not charitable. The majority judgment confirms the existing common law with respect to the determination of what is charitable in the context of sports organizations, indicating that recognition of an organization, such as the appellant, would result in a significant change to the common law beyond the incremental changes mandated by the jurisprudence and would be best left to Parliament.

Alliance for Life v. M.N.R.[161] is an important case because it describes how a charity can engage in political activities through a "sister" organization and not run the risk of losing registered charity status. The organization had been a registered charity, but CRA was proposing to revoke the status because it had engaged in a good deal of grass roots political activity.[162] After discussions between the organization and CRA, it was agreed that Alliance would set up a non-profit organization to carry on its non-charitable (political) activities. This was done, but Alliance nonetheless was eventually removed as a registered charity because it continued to use funds raised by the charity for carrying out its political activities. Like the *Taxation with*

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[158] *Ibid*.

[159] *A.Y.S.A. Amateur Youth Soccer Ass'n v. Canada*, 2007 SCC 42.

[160] See Cooper, K.J. and Carter, T.S., 'Supreme Court of Canada Confirms the Common Law with respect to Charity and Sports Organizations', Carters *Charity Law Bulletin No. 126*, available at http://www.carters.ca/pub/bulletin/charity/2007/chylb126.htm.

[161] *Alliance for Life v. M.N.R.*, [1999] 3 F.C. 504, available at http://decisions.fca-caf.gc.a/en/1999/a-94-96/a-94-96.html.

[162] A small amount would have been acceptable, but not to the extent involved in the situation at hand.

Representation[163] case in the U.S., this case makes it clear that limiting the political activities of charities is acceptable because there is no need to subsidize the actions of a charity to the extent it engages in politics. Thus the restriction on political activities could not be held to violate paragraph 2 (b) of the Charter of Rights and Freedoms.[164]

Legislative Milestones[165]

The following provide the main federal milestones in the evolution of modern charity law in Canada:

- *The Constitution Act 1867*

Section 92(7) of this Act directed that the jurisdiction for " … the establishment, maintenance and management of hospitals, asylums, charities and eleemosynary institutions … " was to be a matter for provincial rather than federal legislature.

- *The War Charities Act 1917*

This legislation was enacted to control fraudulent fundraising and encourage efficiency in charities supporting the war effort. It was the first federal legislation to govern charitable organisations.

- *An Act to Amend the Income Tax Act 1950*

This statute laid the foundations for the present differentiation between legal structures for charities by dividing them into charitable organisations, charitable trusts and charitable corporations.

- *The Canada Corporations Act 1970*

This identified the terms and conditions for incorporating non-profit organisations.

- *The Income Tax Act reforms 1972*

Following the report of the Carter Commission[166] the federal government made some minor amendments[167] to the Income Tax Act 1950.

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[163] Discussed in U.S. chapter.

[164] The court relied on the earlier case *Human Life International v. M.N.R.* [1995] 2 F.C. 3 (C.A.).

[165] This outline of the general legislative framework is taken principally from O'Halloran, K., *Charity Law and Social Inclusion*, Routledge, London, 2007, pp. 348–350.

[166] See *Report of the Royal Commission on Taxation*, Ottawa, 1966.

[167] SC 1970-71-72, c 63.

- *The Income Tax Act reforms 1976*

Following the issue of its Green Paper entitled *The Tax Treatment of Charities*,[168] the federal government introduced legislation[169] in a major reform of the federal tax regime applicable to charities. In addition to measures dealing with disbursement quotas, the statute introduced the present distinction between operating charities (charitable organisations) and granting charities (foundations); the latter being further divided into public and private foundations.

- *An Act to Amend the Income Tax Act and related statutes 1984*[170]

Following its discussion paper entitled *Charities and the Canadian Tax System*,[171] the federal government introduced legislation dealing with the definition of charity, the political activities of charities, the possibility of extending tax exempt status to "citizen interest groups", the federal registration procedures and other matters.

Other federal legislation with an important if indirect bearing on charities included:

- *The Competition Act 1985*

This prohibited deceptive fundraising practices.

- *The Personal Information Protection and Electronic Documents Act 2000*

This statute specifically prohibited the sale of donor, membership and other fundraising lists without the active consent of individuals on such lists.

It should be noted that in 2001 the federal government passed the *Federal Law – Civil Law Harmonization Act, No*. 1[172] and s 8.2 of the *Interpretation Act*,[173] which requires provincial law to be applied when interpreting a federal statute involving the law of property and civil rights.[174]

As the federal case law and the analytical materials frequently note, there is no federal statutory definition of charity in Canada under the ITA, which has meant that the common law is applied in federal tax cases. As a result, much of the discussion about revising charity law in Canada has centered around the question of whether it would be useful to amend the ITA to create a definition.[175] That has not

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[168] See the Department of Finance, *Charities and the Canadian The Tax Treatment of Charities: A Discussion Paper*, Ottawa, 1975.

[169] SC 1976-1977, c. 4.

[170] c. 45.

[171] See the Department of Finance, *Charities and the Canadian Tax System: A Discussion Paper*, Ottawa, 1983.

[172] S.C. 2001, c. 4, brought into effect June 1, 2001.

[173] R.S.C. 1985, c. I-21.

[174] The authors are grateful to Blake Bromley for bringing this to their attention.

[175] In the *Human Rights International* case, *op. cit*., p. 149, Mr. Justice Strayer of the Federal Court of Appeal commented that charity "remains an area crying out for clarification through Canadian legislation for the guidance of taxpayers, administrators and courts."

been done, and legislative amendments have been limited to changes in the federal tax environment for charities. That has had a very important result, which is that CRA has undertaken to address some of the issues by issuing new policy statements, which are discussed in the next subsection.

Intermediate sanctions. As noted above, 'intermediate sanctions' were added to the ITA in 2005,[176] and CRA issued Guidelines for applying the new rules in 2007.[177]

Changes in appeals process. Since 2005, there is a new process within CRA, which permits appeals with regard to charitable status to be made to the Appeals Directorate of CRA. After that, appeals from refusals to grant charitable status will continue to be made to the Federal Court of Appeal. Other issues, such as imposition of sanctions and penalties can be appealed to the Tax Court of Canada.[178] This arrangement is one that has been the subject of ongoing criticism from both charities and lawyers. Allowing registration/deregistration cases to originate in the Tax Court was one of the recommendations made by the Joint Regulatory Table.[179]

Changes in disbursement quotas. Prior to the March 2004 budget, the disbursement quotas were as follows:

> … a charitable organization was required to spend 80% of receipted donations from the prior year in each year; and
>
> a charitable foundation was required to spend the sum of 80% of receipted donations from the prior year and 4.5% of investment assets.

The budget amends this system by reducing the 4.5% obligation to 3.5% and extending it to new charitable organizations immediately and to existing organizations after 2008.[180]

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[176] Bill C-33, *A second Act to implement certain provisions of the budget tabled in Parliament on March 23, 2004*, which received Royal Assent on May 13, 2005. Prior to the intermediate sanctions legislation, CRA had resource to only one sanction and that was revocation of registered charitable status, a remedy that it only imposed in particularly egregious cases.

[177] See 'Guidelines for Applying the New Sanctions', available at http://www.cra-arc.gc.ca/tax/charities/policy/newsanctions-e.html. A good discussion of the new rules is available in Cooper, K.J. and Thomas, P.J., "Guidelines for Applying the New Intermediate Sanctions for Charities," *Charity Law Bulletin No. 117*, June 14, 2007, available at http://www.carters.ca/pub/bulletin/charity/2007/chylb117.htm.

[178] See 2004 Federal Budget, available at http://www.fin.gc.ca/budget04/bp/bpa9e.htm.

[179] Joint Regulatory Table, *op. cit*.

[180] Reporting on this in the Miller Thomson 'Charities and Not-for-Profit Newsletter', Robert Hayhoe adds, "The budget also makes a host of technical amendments to the disbursement quota, not all of which appear to be well considered or even workable." See Hayhoe, R., 'New Charity Tax Regime', Miller Thomson, *Charities and Not-for-Profit Newsletter*, June 2005, available at http://www.millerthomson.com/mtweb.nsf/wnd?readform&PageID = kdse6d5jwc.

CRA Milestones

- *Ethnocultural*

In June 2005, CRA released a policy statement entitled 'Applicants Assisting Ethnocultural Communities' which sets out guidelines on attaining charitable status for community organizations that assist ethnocultural communities in Canada.[181] It is impossible to tell, however, whether CRA will now recognize as charitable – under the "other purposes beneficial to the community" head – the services of Vancouver Society that were held in 1999 not be to "educational," e.g., the job placement activities.

- *Magazines*

On February 3, 2006, CRA issued a Policy Commentary[182] "[t]o clarify the Directorate's policy regarding organizations publishing magazines in furtherance of educational purposes." This commentary definitely reflects the Supreme Court's decision in *Vancouver Society*, in that is gives an expansive definition to what constitutes an educational activity:[183]

> The Income Tax Act requires that a charity devote its resources to exclusively charitable activities. The CRA accepts that registered charities can achieve the recognized charitable purpose of advancing education through the use, creation, publication and distribution of magazines, however, to be considered an acceptable charitable activity, the contents of that publication must be predominantly educational in the sense understood by charity law.

Thus, the current position of CRA is consistent with earlier decisions such as *Briar Patch*,[184] but it gives greater lee-way in this area of the law than had previously been allowed.

- *Political purposes/activities*

Unlike the United States, which recognizes the charitable status of such organizations as Amnesty International and Human Rights Watch, Canada adheres to the static doctrine of English courts set out in *McGovern v. Attorney General*.[185] The result in that case, distinguishing between charitable purposes and political purposes, has been applied in such Canadian cases as *Positive Action Against Pornography v. M.N.R.*[186] That said, the application of the political purpose doctrine in Canada needs to be considered in light of one case, *Everywoman's Health Centre v. M.N.R.*,[187] and CRA's 2003 'Policy Statement on Political Activities'.[188]

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[181] Available at http://www.cra-arc.gc.ca/tax/charities/policy/ethno-e.html.

[182] CPC – 027, available at http://www.cra-arc.gc.ca/tax/charities/policy/cpc/cpc-027-e.html.

[183] The magazine that was at issue was a literary magazine, a likely candidate for charitable status in many other jurisdictions.

[184] *Briarpatch, Inc. v. The Queen*, 96 D.T.C. 6294.

[185] *Mcgovern v. Att'y General*, [1981] 3 All ER 493.

[186] [1988] 2 F.C. 340 (C.A.).

[187] [1992] 2 F.C. 52 (C.A.).

[188] CPS–022, available at http://www.cra-arc.gc.ca/tax/charities/policy/cps/cps-022-e.html #political_purpose.

Everywoman's is an interesting case, because it considered the political purpose doctrine in the context of a very controversial purpose – conducting an abortion clinic.[189] Unlike *McGovern*, where an uncontroversial purpose was held to be political because of the means of achieving it, *Everywomen's* focused on the provision of health care rather than the controversy surrounding the type of care involved. Since the organization operated a clinic like other health clinics and provided a "legally recognized health care service," the Justices felt comfortable distinguishing *McGovern*.[190]

The CRA Policy Statement is even more enlightening as to the state of law in Canada on this issue today. First, the statement makes clear that no charity in Canada can engage in any partisan political activity. Second, the document provides considerable detail about what are considered to be charitable activities (including public awareness campaigns about an organization's "work or an issue related to that work") and what activities are not.[191] An organization is engaged in political activity if it:[192]

1. explicitly communicates a call to political action (i.e., encourages the public to contact an elected representative or public official and urges them to retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country);
2. explicitly communicates to the public that the law, policy, or decision of any level of government in Canada or a foreign country should be retained (if the retention of the law, policy or decision is being reconsidered by a government), opposed, or changed; or
3. explicitly indicates in its materials (whether internal or external) that the intention of the activity is to incite, or organize to put pressure on, an elected representative or public official to retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country.

In addition, the document contains the normal test for the amount of permissible political activities (10%),[193] as well as a modified rule for smaller charities.

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[189] As Abraham Drassinower has said, this purpose is "certainly more controversial than the abolition of inhuman and degrading treatment and punishment." See Drassinower, A., 'The Doctrine of Political Purposes in the Law of Charities', in *Between State and Market*, *op. cit*., pp. 288, 301.

[190] *Everywomen's*, supra note, p. 70.

[191] Ancillary political activities are permissible under the Income Tax Act subsections 149.1(6.1) and (6.2), which were amended to reflect the Court of Appeal decision in *Scarborough Community Services*, [1985] 2 F.C. 555.

[192] Policy Statement Political Activities, *op. cit*.

[193] Patrick Monahan has criticized this rule as being too strictly applied. See Monahan, *op. cit*., pp. 70–71.

- *Public benefit*

Issued in 2006, after earlier circulation of a draft and submission of comments, the CRA 'Guidelines for Registering a Charity: Meeting the Public Benefit Test'[194] clarify the extent to which charities falling within the first three categories must meet a test of public benefit. The Guidelines state explicitly that a presumption of public benefit exists with respect to these first three categories, even though that presumption can be challenged. With respect to the fourth category – other purposes beneficial to the community – the statement indicates the difficulty CRA faces in developing a clear doctrine with regard to "novel" cases. Because the ordinary manner of developing the law in this area is to reason by analogy, courts (and presumably the CRA) must look to similar fact patterns where organizations have or have not been classified as charities.

In describing the way in which the test works in Canada, CRA has noted that it has two different aspects – the "benefit" test and the "public" test:

- The first part of the test generally requires that a tangible benefit be conferred, directly or indirectly. (More recently, and in the Canadian context, this requirement has also been described as an "objectively measurable and socially useful benefit.")[195]
- The second part of the test requires that the benefit have a public character, that is, be directed to the public or a sufficient section of the public.

CRA provides significant additional details on how the test is supposed to be applied.

Charity Law Reform

Beginning in the 1990s efforts began in Canada[196] and other developed countries[197] to assess the role of the not-for-profit sector in society and whether regulatory reforms could further promote ways for the sector to engage with social policy development.

Following its review of the tax regime in the late 1980s, the federal government in 1990 published the above discussion paper which dealt with: the definition of 'related business'; disclosure concerning fundraising costs; the foreign activities of charitable organisations; political activities; public disclosure requirements; and the annual filing requirement.

The first Canadian report was undertaken by the Ontario Law Reform Commission in 1996.[198] This exhaustive report concluded that there was much

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[194] See, Guidelines for Registering a Charity: Meeting the Public Benefit Test, CPS-024, March 10, 2006.

[195] See Gonthier, J., *Vancouver Society*, *op. cit*.

[196] See Revenue Canada, *A Better Tax Administration in Support of Charities 1990: A Discussion Paper*, Ottawa, 1990.

[197] See, e.g. Industry Commission, *Charitable Organisations in Australia*, Report No. 45, AGPS, Canberra, 1995.

[198] Ontario Law Reform Commission (OLRC), *Report on the Law of Charities*, OLRC, Toronto, 1996.

confusion about charity law in Canada, and it made several recommendations[199] that "the Government of Ontario seems to have largely ignored."[200] That was true until quite recently, as is indicated below.

A national report was then developed by a panel of national voluntary organizations,[201] headed by Ed Broadbent, which looked more closely at governance and accountability issues. The 1998 interim report of the VSI, *Helping Canadians Help Canadians: Improving Governance and Accountability in the Voluntary Sector*, and the final report, *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector*, the report (the Broadbent Report) noted the strength of the sector at the time of its publication in 1999 and made 41 substantive recommendations aimed at increasing good governance and accountability. It also suggested that "joint tables" of voluntary sector and government officials be convened to discuss the issues it raised. Significantly the Broadbent Report recommended that the CRA (then called CCRA) have "enhanced" authority to regulate charities, and that there also be an "advisory" agency developed that would encompass the advisory functions of an entity like the English Charity Commission.

Following the release of the Broadbent Report, the federal government, in cooperation with the voluntary sector, set up seven "joint tables" to discuss ways in which the government and the sector could work together more effectively. Issues addressed included financing, sector identity, and policy development, in addition to regulatory reform. Among the regulatory reform discussions was one regarding the type of agency that should be involved in charity regulation and oversight in Canada, and the Joint Table came up with four possible models that it elaborated on, but it was not asked to make a recommendation. In the event, the decision was made to remain with the current structure (not a Charity Commission with any authority) but a much improved CRA (with a new appeals process, improved compliance measures, and improved accountability). As can be seen from the discussions above, the federal government enacted legislation in response to the first two recommendations, and CRA has itself made changes in the transparency of its processes.[202]

In addition to the various recommendations, the VSI produced an 'Accord Between the Government of Canada and the Voluntary Sector,' whose purpose is to

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[199] The report did not recommend that the system of charity oversight in Canada be changed in any substantial way. Noting that the division of oversight responsibilities between the provinces and the CRA, it doubted whether an independent entity with quasi-judicial powers (like the Charity Commission) would actually be viable in Canada). Although commentators such as Arthur Drache have suggested to the contrary (see Monahan *op. cit*., 99 ff), they have been criticized for failing to appreciate the complexity of moving to such a system. (*Ibid*., p. 101.)

[200] Bourgeois, D., *op. cit*., p. 2.

[201] The Voluntary Sector Roundtable (VSR) had been formed in 1995 by thirteen national, umbrella voluntary sector organizations. The VSR was established to bring about collaboration in the voluntary sector on issues of common concern. The VSR was the first cross-sectoral group in Canada to work on the shared issues related to being a voluntary sector organization. In 1997 the VSR convened the Panel on Accountability and Governance in the Voluntary Sector.

[202] CRA is currently publishing not only policy documents but often the underlying private letters that led to the development of the publicly stated policy. These are called Information Letters or CIL's.

strengthen the ability of both the voluntary sector and the Government of Canada to better serve Canadians.[203] According to the website describing it,[204]

> The Accord represents a public commitment to more open, transparent, consistent and collaborative ways of working together. When working together, the Government of Canada and the voluntary sector seek to fulfill the commitments set out in the Accord and in so doing enhance the quality of life of all Canadians.

Recent Reform Discussions and Their Results[205]

- *Federal developments*

In 2000 Industry Canada's Corporate Policy Law Directorate, issued two reports titled *Reform of the* Canada Corporations Act: *Draft Framework for a New Not-for-Profit Corporations Act* and *Reform of the* Canada Corporations Act: *Discussion Issues for a New Not-for-Profit Corporations Act*, as well as registration forms and other information.[206] Public consultations on the following issues were held in 2002: making the [existing] Act more flexible; encouraging organizational innovation; promoting efficiency for not-for-profit organizations; increasing the transparency and accountability of not-for-profit corporations; and ensuring fairness for directors, officers and members of not-for-profit corporations.[207] Drawing on the reports and consultations, the federal government proposed in 2004 that provisions of the Canada Corporations Act[208] applying to not-for-profit corporations be reformed. Bill C-21, which would have created a national Not-for-Profit Corporations Law,[209] died on the Order Paper November 28, 2005, when the 38th Parliament was dissolved, and it is not clear whether it will be revived, though some speculation

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[203] See 'Accord Between the Government of Canada and the Voluntary Sector', available at http://www.vsi-isbc.org/eng/relationship/the_accord_doc/index.cfm. This document is similar to the 'Compacts' in the U.K.

[204] *Ibid*.

[205] This listing is not entirely comprehensive as there are other efforts that are more limited in their scope. In addition, the Uniform Law Conference of Canada (ULCC) is participating in an international project to harmonize the laws in North America governing Unicorporated nonprofit associations, which may have some impact on provincial developments. See Unifor Law Conference of Canada, at http://www.ulcc.ca/en/civil/index.cfm?sec=2.

[206] See Industry Canada, Corporate Policy Law Directorate, *Reform of the* Canada Corporations Act: *Draft Framework for a New Not-for-Profit Corporations Act* and *Reform of the* Canada Corporations Act: *Discussion Issues for a New Not-for-Profit Corporations Act*, Ottawa, 2000 (hereafter Industry Canada reports).

[207] See Industry Canada website at http://www.ic.gc.ca/cmb/welcomeic.nsf/ffc979db07de58e6852564e400603639/ 85256a220056c2a485256bad0048f489!OpenDocument.

[208] Information on the current legislation and how to incorporate a not-for-profit corporation under it can be found at http://www.canadabusiness.ca/servlet/ContentServer?pagename = CBSC_FE%2Fdisplay&lang = en&cid = 1081944192585&c = Regs.

[209] *An act respecting not-for-profit corporations and other corporations without share capital*, which would have created a national Not-for-Profit Corporations Law, was introduced in November 2004 (1st Sess., 38th Parliament).

insists that it will be.[210] The recent reform proposals in Ontario, which are discussed below, have looked to the draft legislation for guidance.

- *Provincial efforts*

1. Incorporation. One of the principal issues in Canada has involved deciding whether to have special laws for incorporating entities in the not-for-profit sector[211] or to use the general corporations laws to regulate them, albeit in separate chapters because of the different issues that may arise with regard to them. Manitoba[212] and Newfoundland and Labrador[213] have chosen the alternate structure, while the reform efforts discussed here generally seek to provide special legislation for not-for-profit legal entities.

Saskatchewan. The first province or territory to engage in substantial reform of the legislation governing the sector in Canada was Saskatchewan, which enacted a *Non-profit Corporations Act* in 1979; this was substantially revised in 1995,[214] and regulations were issued under the Act in 1997.[215] This Act is a comprehensive regulation of the manner in which not-for-profit entities are established and dictates aspects of the ways in which they must carry out their business. It touches on such significant issues as conflicts of interest[216] and the duty of care.[217] It permits director (presumably also officer) indemnification and allows the corporation to carry insurance to protect directors from having to pay damages.[218]

Alberta. The Alberta Law Reform Institute (ALRI) produced a report in 1987, titled *Proposals for a New Alberta Incorporated Associations Act*, which included a draft of possible legislation.[219] The draft legislation found its way into proposed legislation, which died in the provincial legislature after its first reading.[220]

Quebec. There has been discussion in Quebec regarding a reformed associations law,[221] but that seems to have stalled after initial efforts. It is important to note as

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[210] See British Columbia Law Institute, current text of n. 224, p. 14, n. 73.

[211] Nunavut has a special Societies Act for not-for-profit entities. See Nunavut Societies Act (1999) http://www.canlii.org/nu/laws/sta/s-11/20061207/whole.html.

[212] Manitoba, The Corporations Act, R.S.M. 1987, c.225 (Part XXII applies to "corporations without share capital").

[213] Newfoundland and Labrador, Corporations Act, R.S.N.L. 1990, c. C-36 (Part XXI applies to "corporations without share capital").

[214] The Non-Profit Corporations Act, 1995, c. N– 4.2 of the Statutes of Saskatchewan.

[215] See The Non-profit Corporations Regulations, 1997, available at http://www.qp.gov.sk.ca/documents/English/Regulations/Regulations/N4-2R1.pdf.

[216] Section 107.

[217] Section 109.

[218] Section 111.

[219] Alberta Law Reform Institute, 'Proposals for a New Alberta Incorporated Associations Act' (ALRI Report No. 49), The Institute, Edmonton, 1987.

[220] Bill 54, *Volunteer Incorporations Act*, 2nd Sess., 21st Leg., Alberta, 1987.

[221] See Registraire des Enterprises de Quebec, *Propositions pour un nouveau droit québécois des associations personifies – Document de Consultation* (September 2004), available at http://www.registreentreprises.gouv.qc.ca/documents/publications/consultation.pdf.

well that despite some of the broader reform efforts in both Canada and the United States, the Quebec report envisioned a limited review process of the existing legislation affecting charitable associations.

Ontario. The Government of Ontario, Ministry of Government Services, Policy Branch has issued two consultation documents with regard to possible reforms of the Not-for-Profit Corporations Law in the province. The first of these, which was issued in May 2007,[222] deals mainly with more general questions, such as a right to incorporate,[223] definitions and requirements (including the application of the non-distribution constraint), and corporate powers and capacities. The second, which was issued in August 2007, addresses fundamental aspects of governance, such as director duties and conflicts of interest, as well as provisions designed to protect directors (presumably including officers) who serve in that capacity as volunteers.[224] The provincial government has made clear that it is now looking seriously at the question of introducing reformed legislation, although at this stage there are many open questions as to its form and content.

British Columbia. A project to reform the British Columbia Society Act was announced in 2006[225] by the Law Foundation of British Columbia and the initial report was made available in August 2007.[226] The major proposal contained in the consultation paper is that there be developed a provincial law that is up-to-date and that affects all not-for-profit organizations set up in the province.[227] The proposed legislation will be called the Society Act.[228] Discussions about the proposals have only recently begun, and the extent to which they will be accepted remains unclear.

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[222] See Ministry of Government Services, Consultation Paper #1, 'Modernization of the Legal Framework Governing Ontario Not-for-Profit Corporations', May 7, 2007, available at http://www.gov.on.ca/MGS/graphics/132791.pdf.

[223] Incorporation of a not-for-profit entity in Ontario requires the issuance of letters patent, which grants considerable discretion to the government with regard to when it will allow incorporation. The Saskatchewan legislation allows incorporation as a matter of right, and it is one of the models being examined in Ontario.

[224] See Ministry of Government Services, Consultation Paper # 2, 'Modernization of the Legal Framework Governing Ontario Not-for-Profit Corporations', August 22, 2007, available at http://www.gov.on.ca/MGS/graphics/166168.pdf.

[225] One of the most helpful documents produced by this study was a comprehensive chart comparing the existing provisions of the Society Act of 1977 with reform proposals already undertaken in Canada or under discussion. See 'Comparative Chart No. 2', available at http://www.bcli.org/pages/projects/society/Comparative_Chart_No._2_(2006-09-05).pdf.

[226] See 'Consultation Paper of the British Columbia Law Institute' (BCLI), Society Act Reform Project, announced August 24, 2007, and available at http://www.bcli.org/pages/projects/society/Society_Act_Consultation_Paper.pdf.

[227] *Ibid*., p. 18. This approach will be different from the approach in other provinces because it will use the old legal form "society" instead of "not-for-profit corporation." However, the project specifically aims to differentiate societies from business corporations and harmonize the rules applicable to them to the BC Business Corporations Act.

[228] *Ibid*.

Importantly the proposals also address issues with regard to director (presumably including officer) duties[229] and potential conflicts of interest.[230]

2. Prudent investor standards. The Alberta Law Reform Commission (ALRI) is considering whether to adopt a project on the investment standards that apply to not-for-profit bodies having charitable or other public purposes.[231] Like the developments in the U.S. with regard to the UMIFA and the UPMIFA,[232] the issues straddle the boundary between trust law and corporate law.

3. Special purpose gifts to charity. British Columbia's *Charitable Purposes Protection Act* was proclaimed in force by the provincial government in March 2007.[233] The legislation was originally introduced in 2004 to remedy what many perceived to be difficulties occasioned by the *Christian Brothers of Ireland* case.[234] The Ontario Court of Appeal held in that case that all assets of a charity, whether they are owned beneficially by a charity or they are held by the charity pursuant to a special purpose charitable trust, are available to satisfy claims by tort victims upon the winding-up of the charity – even if the basis for the claims has no relationship to the property in question. The Supreme Court of Canada denied leave to appeal this decision.[235]

The legislation attempts to address all the problems created by the decision, but critics suggest that there are problems with the enactment.[236] It provides additional protection where donors intend to provide a gift for a specific charitable purpose. To receive this protection, a gift must qualify under the CPP Act as "discrete purpose charitable property." To qualify, the donated property in question must be: given to a charity for a specified charitable purpose (whether or not it is stated to be given in trust); identified with certainty by the donor, either expressly or through some formula or method; and, donated with the express or implied intention that it will be kept and administered by the charity separately from any other property, and used exclusively to advance the specified charitable purpose, rather than to assist or support the charity generally or to assist or support the charity in advancing any of its goals, purposes or objects.

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[229] *Ibid*., p. 54.

[230] *Ibid*., p. 56. Interestingly, the BC proposal would also deal with potential conflicts of senior managers, while at the present time the Saskatchewan legislation and the proposed Ontario legislation do not do so.

[231] See ALRI website at http://www.law.ualberta.ca/alri/Work-in-Progress/Current-Projects/Prudent-Investor–Not-for-Profits.php.

[232] See further Chap. 9.

[233] Charitable Purposes Preservation Act, S.B.C. 2004, c. 59 ("CPP Act".) The full text of the CPP Act is available at http://www.leg.bc.ca/37th5th/3rd_read/gov63-3.htm.

[234] *Re Christian Brothers of Ireland in Canada* (2000), 47 O.R. (3d) 674 (C.A.), rev'g (1998), 37 O.R. (3d) 367, application for leave to appeal to the Supreme Court of Canada dismissed 16 November 2000.

[235] The decisions in the case were criticized by the British Columbia Law Institute (BCLI), in a report on *Creditor Access to the Assets of a Purpose Trust*, which is available at http://www.bcli.org/pages/projects/trustee/CreditorPurpose.pdf.

[236] See Claridge, N.E. and Carter, T.S. assisted by Ross, D.B.M., 'A Review of the New B.C. Charitable Purposes Preservation Act', *Charity Law Bulletin No. 122*, August 2007, available at http://www.carters.ca/pub/bulletin/charity/2007/chylb122.htm.

This is the first provincial legislation dealing with the issues raised by the *Christian Brothers* case, and it remains to be seen whether other provinces will adopt similar laws.

4. Volunteer protection and director and officer liability. Uniquely in Canada, Nova Scotia has followed the U.S. precedent and adopted volunteer protection legislation that applies not just to officers and directors of not-for-profit organizations but to all volunteers.[237] Having abrogated the doctrine of charitable immunity and being concerned about liability issues for officers and directors, other provinces have addressed themselves to these issues in a more general way.[238]

5. Social enterprises. While all discussion of creating a new legal form for social enterprises that would be similar to the CIC in England[239] has thus far been essentially academic in that no "law reform commission" has taken up such matters, this issue is being mooted in Canada at present. For example, the Fraser Valley Centre for Social Enterprise published a lengthy paper in 2006[240] arguing that such a legal form is necessary in Canada. The author of the report argues in conclusion:[241]

> …the creation of a new business type enables the government to take concrete measurable steps to legitimize social enterprise as a strategy, a tool, and a mechanism to achieve social goals. With the restrictions currently in place that prevent charities from owning or operating unrelated businesses, the adoption of these recommendations clearly puts all NPO's on a level playing field insofar as social enterprise is concerned.

The proposal contained in another paper is that Canada establish a 'Company for Social Enterprise' (CSE) legal form.[242]

Applying the Legal Functions of Charity Law

As recently as 2002, when the Joint Table Reform proposals were made, one of the central themes was that CRA should explore with the provinces opportunities to ensure that charities are effectively regulated. Importantly, however, CRA would, in any event, retain its role to administer the charity provisions of the Income Tax Act so as to reflect the intent of Parliament. Consequently, the traditional legal function of policing would also remain prominent.

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[237] S.N.S. 2002, c. 14.

[238] See Frederick, M.R., 'Supreme Court of Canada Draws Distinctions in Abuse Cases', Miller Thomson *Charities and Not-for-Profit Newsletter*, December 2005, available at http://www.millerthomson.com/mtweb.nsf/wnd?readform&PageID = kmdd6jll4z.

[239] See also Chap. 15.

[240] See Gould, S., 'Social Enterprise and Business Structures in Canada', available at http://www.fvcse.stirsite.com/f/SEandBusinessStructures.doc.

[241] *Ibid*.

[242] See Davis, K., 'The Regulation of Social Enterprise', *Between State and Market*, *op. cit*., p. 485 for a similar proposal.

Protection

The roots of the protective jurisdiction of the courts in relation to charities, their property, their donors, and their activities, lie in the ancient *parens patriae* responsibilities of the Crown. In jurisdictions like Canada, where the revenue agency has increasingly developed responsibilities in that regard, the issue is always how the two levels of government (provincial Attorneys General and courts as well as federal tax regulators) interact with each other. In practice, there is little coordination nor is there much evidence of proactive effort at either level to ensure a continued application of the *parens patriae* responsibilities.

The Courts and Attorneys General

Some provinces have legislation, thereby providing recourse to the courts, including most recently Saskatchewan,[243] to deal with aspects of governance and accountability. For example, although the 1980 Societies Act of Alberta contains no provisions whatsoever as to fiduciary responsibilities of officers and directors, it does provide for an annual meeting and filing of information about changes in officers and directors.[244] On the other hand, the CRA has indicated in an advice letter that the Province of Ontario will not issue Letters Patent to an organization that pays its trustees fees for serving as such.[245]

Two special aspects of protection deserve some mention, and they have to do with setting accounting standards for charities and with fund-raising. Both of these issues involve protection of donors, both large and small.

- *Accounting*

Ontario has comprehensive legislation to regulate accounting for charities – the Charities Accounting Act Ontario.[246] Under this legislation all incorporated charities are deemed to hold assets in trust, which means that the trustee standards of fiduciary responsibility apply in lieu of the more lenient corporate standards.

- *Fund raising*

One of the most significant issues of consumer protection in the field of charities regulation has been how to protect the ordinary consumer from charitable

[243] Saskatchewan Charitable Fund-raising Businesses Act, C 6.2 of the Statutes of Saskatchewan, which consolidated prior legislation in 2003.

[244] See Alberta Societies Act, S-14, RSA 1980. Alberta's Charitable Fund Raising Act was enacted in 1995.

[245] See CIL 1993–2008, available at http://www.cra-arc.gc.ca/tax/charities/policy/cil/1993/cil-008-e.html. Ontario describes this as a "duty to act gratuitously." See http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charbullet/bullet3.asp.

[246] See Charities Accounting Act, R.S.O. 1990, c. C.10

solicitations. Aspects of this concern general solicitation issues, such as disclosure, as well as privacy with regard to electronic and telephonic contact. Several provinces have fund raising legislation, which is quite useful in regard to consumer protection.[247] The Uniform Law Conference of Canada developed in 2005 draft legislation that it recommends be adopted by the provinces, but none seems to have adopted it as of late 2007.[248] Canada was recently adopted national do-not-call legislation that may have some impact on chacitable citation.[249]

The CRA

How CRA engages in oversight of charities with reference to protecting them and their assets is, of course, limited by its remit, which confines it to applying the Income Tax Act. Nevertheless, the new intermediate sanctions discussed under legislative developments allow some lee-way for defining "undue benefits" as well as related terms (such as when a party is acting at arm's length with a charity.) Yet because of a lack of coordination between the CRA and the provincial authorities, Canada is a nation ill-served by its current government structures when it comes to developing a clear and precise role for either provincial or federal authorities with regard to charity protection.

- *Tax shelters*

This is a topic with regard to which only the CRA has jurisdiction, but it is an important one. At the present time schemes are being promoted in Canada attempting to attract donors to make gifts to charities with promises of at least double the value of ordinary tax benefits for donations. CRA has issued explicit warnings about this[250] and is now threatening to audit "all tax shelter gifting arrangements."[251] It also notes that "[e]very audit completed to date has resulted in a reassessment of tax, plus interest. In many cases the CRA has denied the 'gift' completely. Penalties will be considered, especially where an investor was audited and reassessed for

[247] Prince Edward Island's Charities Act is an example. http://www.gov.pe.ca/law/statutes/pdf/c-04.pdf. The Alberta government adopted fund raising standards in 2003 (see http://www.service-alberta.ca/pdf/charities/cfra_standards_of_practice.pdf).

[248] See Uniform Law Conference of Canada (ULCC) Table 1, available at http://www.ulcc.ca/en/us/Table_1_En.pdf.

[249] Bill C-37, First Session, 38th Parliament, 53–54 Elizabeth II, 2004–2005, An Act to amend the Telecommunications Act, availabe at http://www2.parl.gc.ca/HousePublications/Publication.aspx?pub=bill&doc=C-37&parl=38&ses=1&language=E&File=14.

[250] See Taxpayer Alert, 2007, available at http://www.cra-arc.gc.ca/newsroom/alerts/2007/a070813-e.html.

[251] *Ibid*.

previously participating in a 'gifting arrangement.'[252] Earlier schemes involved overvaluation of donations of art[253] and other matters.[254] Recently, CRA won its case against an art overvaluation scheme.[255]

Policing

Policing charities and the charitable sector means ensuring that charity does not subvert the agenda of government, that it does not improperly invade the realm of the commercial sector or place its assets at risk by engaging in commercial ventures, that it contributes value for the benefit of the public that is at least equivalent to the tax revenues lost through the charitable tax exemption and the taxes lost on the tax credit for donations and that it does all this with proper regard to standards of transparency, accountability and good governance. In Canada these functions are carried out by the provincial Attorneys General (through court litigation) and the CRA.

However, as discussed above, most provincial jurisdictions in Canada have lacked adequate enforcement of the policing function, generally leaving that role to the federal regulator. The lack of provincial interest is remarked upon by Donald Bourgeois, who noted that the provincial governments had "largely declined to participate" in the joint efforts of the federal government and the sector to develop a new regulatory framework in Canada.[256] Ontario has the most extensive legislation regarding aspects of the sector, regulating in addition to fund raising under the Charitable Gifts Act,[257] both charity accounting,[258] and charitable institutions.[259] Nonetheless, the provincial government has not responded in ways that many commentators had hoped for, at least until fairly recently.

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[252] *Ibid*.

[253] See 'Canada Customs and Revenue Agency Issues Warning on Art Donation Schemes', 1999, available at http://www.cra-arc.gc.ca/newsroom/factsheets/1999/dec/donation-e.html.

[254] Cooper, K.J. has discussed various aspects of the tax shelter schemes involving charities in the September 2007 issue of the *Carters Charity Law Update*, available at http://www.carters.ca/pub/update/charity/07/sep07.pdf.

[255] On April 20, 2006, the Supreme Court of Canada announced that it would not hear the taxpayers' appeals of the decisions of the Federal Court of Appeal (FCA) in the cases of Frank Klotz and Quinn, Tolley and Nash. See Canada Revenue Agency Tax payer Alert, available at http://www.cra-arc.gc.ca/newsroom/alerts/2006/a061031-e.pdf. These decisions involved buy-low, donate-high art flipping arrangements in which the taxpayers purchased artworks and donated them to charities. The charities issued donation receipts for three or four times the donors' costs, so that the tax refunds exceeded the costs to the donors. The FCA held that the value of the donations was limited to the amount of cash that the taxpayers paid for the artworks.

[256] See Bourgeois, D., *op. cit*., p. 2.

[257] R.S.O. 1990, C. 8.

[258] R.S.O. 1990, C. 10.

[259] R.S.O. 1990, C. 9. This only regulates the financing of half-way houses, etc.

The Courts and Attorneys General

The role of the Attorneys General has become nominal and is now largely of procedural interest only while the courts rarely have the opportunity to exercise their traditional policing function in relation to charities. On the rare occasions when such judicial opportunities do occur, it is largely by way of appeal (an expensive and lengthy process) to the federal Court of Appeal from a CRA decision to: deny an application for registration as a charity; remove such registration; or designate an organisation (as a charitable organisation, public foundation, or private foundation) with a status disputed by that organisation. As noted in the *Strengthening Canada* report:[260]

> Perhaps the most striking thing about the number of appeals that have been launched from the Charities Directorate's decisions is that only 28 charity cases in total have ever gone to court. And of these 28 cases, nearly half have produced judgments that were brief, dealt with procedural issues, or otherwise did not produce precedents in charity law.

The role of the courts and the Attorneys General in policing the boundaries of the charitable sector has not always been easy. The more modern approach to incorporation laws for not-for-profit organizations is to permit them to incorporate for any lawful purpose, including commercial ones, leaving it to CRA to determine whether tax liability for income from such activities is appropriate. An instance when the Canadian courts exercised the policing function occurred in *Alberta Institute of Mental Retardation v. The Queen*[261] when the judiciary upheld a CRA decision that any activity was a related business activity if the profits were used in the charitable activities of that organization; subsequently, the Federal Court of Appeal clearly stated that this "destination of funds" theory is not the law in Canada.[262]

Some of the older provincial legislation contains restrictions on not-for-profit organizations being set up for commercial purposes.

- *Commercial activities*

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[260] *Op. cit*., Chap. 5, p. 3.

[261] [1987] 2 C.T.C. 70, 87 D.T.C. 5306 (F.C.A.). Also, see *Gull Bay Development Corp. v. The Queen, op. cit*., where the income from a logging company was directed towards the economic and social welfare of residents in the Gull Bay Indian Reserve; held charitable.

[262] *Earth Fund v. Canada (Minister of National Revenue), op. cit*. Note, also, that after the Voluntary Sector Initiative a 5% tax was imposed on unrelated business rising to 100% if there is repeated business (see s 188.1).

tax liability for income from such activities is appropriate. Some of the older provincial legislation contains restrictions on not-for-profit organizations being set up for commercial purposes. That legislation is discussed in the first segment, while the tax rules are discussed in the second.

British Columbia. The Society Act makes the traditional purpose/activity differentiation when it comes to business activities, saying that societies are not permitted to be incorporated "for the purpose of carrying on a business, trade, industry or profession for profit or gain."[263] On the other hand, carrying on such an activity "as an incident" to the purposes of the society" is not prohibited.[264] The BCLI says that the section "has not generated much litigation,"[265] but it does cite to one recent case, *Shaw v. Real Estate Board of Greater Vancouver*.[266] There the court held that the Real Estate Board's multiple listing service did not constitute an unlawful business purpose.

Ontario. Although the Charitable Gifts Act of Ontario specifically addresses the question of when a gift is of an "interest in a business"[267] and prohibits most charities in Ontario from holding onto a gift of a greater than 10% interest in a business,[268] there has been no litigation about the issue by the Public Guardian and Trustee. The recent proposal by the Policy Branch of the Ministry of Government Services suggests the possibility of including some provisions with regard to business activities of charities and other not-for-profit entities in a revised Ontario Not-for-Profit Corporation Law.[269] Currently, the Public Guardian and Trustee has sought to establish the doctrine that charities should not conduct an undue amount of commercial activities though litigation. But the courts have found the notion that only ancillary commercial activities are permissible too difficult to apply. Thus, in *Re Public Trustee and Toronto Humane Society et al*., Anderson, J remarked that the difficulty of applying the rule is "a classic understatement."[270] Assistance in making the distinction is provided in Ontario by the Charitable Gifts Act,[271] and cases defining the term "business" have sought to interpret it.[272]

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[263] BC Society Act, Section 2 (1)(f).

[264] BC Society Act, Section 2 (2).

[265] BCLI report, *op. cit*., p. 24.

[266] (1974) 48 D.L.R. 3d 404 (B.C.S.C.), *aff'd* (1975) 67 D.L.R. 3d 364 (B.C.C.A.)

[267] See R.S.O. 1990, c. C.8, s. 4.

[268] *Ibid*., s. 2 (1).

[269] Government of Ontario, 'Not-for-Profit Corporation Law Reforms (Part 1)', *op. cit*., pp. 12–14.

[270] (1987), 60 O.R. (2d) 236, 254 (H.C.).

[271] R.S.O. 1990, c. C.8.

[272] For example, a medical arts building owned by a public hospital is viewed as an investment rather than s business in *Re Centenary Hospital Assn*. (1989), 69 O.R. (2d) 1 (H.C.)

The CRA

The CRA is the gatekeeper to charitable status. The Income Tax Act 1985 places responsibility for registration in the hands of that agency, thereby providing it with the key component of the policing function.[273] In determining whether an organisation is registerable as a charity, CRA will examine its purposes and activities: both must be charitable and all of the organisation's resources must be devoted exclusively to those activities (subject to the 10% rule in respect of political activities). It must also maintain proper records and is required to disburse a certain amount on its charitable activities each year (the "disbursement quota"). Generally, a charity must spend for charitable purposes at least 80% of an amount equal to the "receipted" income received in the immediately preceding taxation year.[274] Approximately 4,000 organisations apply for charitable registration each year of which 3,000 are approved and about 2,500 charities are deregistered.[275]

Every charity must file an annual Registered Charity Information Return with Revenue Canada and its Charities Division conducts between 500 and 600 audits each year.

Until relatively recently, the only regulatory sanction effectively available to the CRA was deregistration which could be imposed for failures such as not meeting disbursement quotas, improper record keeping and infringement of rules relating to business activities.[276] However, as a result of the 2004 Budget, the CRA was provided with new authority to impose intermediate sanctions, including suspension, on registered charities effective for taxation years beginning after March 22, 2004. Under subsection 188.2(3) of the Income Tax Act provides that a registered charity under suspension: may not issue official donation receipts for gifts it may receive; is no longer a qualified donee as defined by the ITA; and must, before accepting a gift, inform the donor that it has received a Notice of Suspension, that it is not a qualified donee, and that no official donation receipt may be issued for gifts received. This authority was used for the first time on November 29, 2007, when

[273] As stated, tax exemption applies to all non-profit organisations, not just charities. There are a large number of organisations (some 90,000 according to the NSNVO) that do fundraising of some sort but are not registered charities. Some government-operated foundations (e.g., Trillium Foundation in Ontario and Wild Rose Foundation in Alberta) make grants to not-for-profit organisations whether or not they are registered charities.

[274] Para. 149.1(1)(e) of the Act. Note: the disbursement quota provisions related to charities changed in July 2005 through a provision that was tacked on to the bill implementing the Joint Regulatory Table provisions. The 80% rule that applied to charitable organisations (as opposed to foundations) has now been supplemented by complex provisions.

[275] According to the Joint Round Table report, an average of five or ten are deregistered for cause. More than 90% are deregistered for failure to file the annual report, with the remainder being voluntary deregistrations or annulments.

[276] See subsections 149.1(2), (3), and (4) of the Income Tax Act 1985. Note: intermediate sanctions were introduced in 2005 as a result of the recommendations of the Joint Regulatory Table.

CRA issued a Notice of Suspension to International Charity Association Network (ICAN), a registered charity under the Income Tax Act.[277]

- *Political activities*

As discussed in more detail above, Canada adheres to the static doctrine of English courts set out in *McGovern v. Attorney General*.[278] The result in that case, distinguishing between charitable purposes and political purposes, has been applied in such Canadian cases as *Positive Action Against Pornography v. M.N.R*.[279] It is clear, however, that CRA has been much influenced by its discussions with the voluntary sector, which has caused it to significantly reduce its scrutiny of some forms of political activities by charities[280] (see, further, below).

- *Conflicts of interest*

With regard to general charity oversight, the most important aspect of the intermediate sanctions permitted in 2005 has to do with conflicts of interest. As explained in the new guidance in respect of the sanctions (which followed in 2007), the CRA is now permitted to levy sanctions if a charity confers an "undue benefit" on: a member of the charity or a member of its board of directors; a person who has given more than 50% of the charity's capital; a person who is not at arm's length to another person who is a member of the charity or its board of directors or who has given more than 50% of the charity's capital; or a person who is not at arm's length to the charity.[281]

In order to avoid being considered as having conferred an undue benefit, a charity can make a reasonable payment for the services or property received from any of these persons. Unless the violation is serious, CRA will normally enter into a compliance agreement with the charity. The penalty for a first infraction is 105% of the benefit. For a repeat infraction, the penalty is 110% of the amount, as well as a one-year suspension from being able to issue donation receipts.

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[277] See 'CRA Issues Notice of Suspension to International Charity Association Network': http://www.cra-arc.gc.ca/newsroom/releases/2007/nov/nr071129-e.html <https://mail.cua.edu/exchweb/bin/redir.asp?URL=https://mail.cua.edu/exchweb/bin/redir.asp?URL=http://www.cra-arc.gc.ca/newsroom/releases/2007/nov/nr071129-e.html. Also, see *Charity Law Bulletin No. 117* entitled 'Guidelines for Applying the New Intermediate Sanctions for Charities,' available at www.charitylawbulletin.ca <https://mail.cua.edu/exchweb/bin/redir.asp?URL = https://mail.cua.edu/exchweb/bin/redir.asp?URL=http://www.charitylawbulletin.ca>, for a detailed discussion of CRA's guidelines for the application of intermediate sanctions.

[278] *McGovern v. Attorney General, op. cit.*

[279] [1988] 2 F.C. 340 (C.A.)

[280] See 'Political Activities Policy Statement', CPS-022, available at http://www.cra-arc.gc.ca/tax/charities/policy/cps/cps-022-e.html#P61_2863. Thus, if no challenges are brought by CRA, it is doubtful that continued overly restrictive applications of the doctrine will apply.

[281] See 'Guidelines for Applying the New Sanctions', available at http://www.cra-arc.gc.ca/tax/charities/policy/ newsanctions-e.html.

In addition to the conflict of interest rules, there are intermediate sanctions for failures to keep books and records and not filing annual returns. With regard to private foundations there are also rules on excess business holdings, which will tend to shore up the conflict of interest provisions.

- *Business activities*

CRA's policy with regard to business activities is quite strict. As stated in a 'Summary Policy' issued in 2002 and updated in 2007:[282]

> Under the *Income Tax Act*, charitable organizations and public foundations can carry on related businesses that accomplish or promote their charitable objects. They can carry on any other business activities if substantially all (*i.e.*, at least 90%) of the staff involved in these activities are volunteers. Private foundations cannot carry on any business activities.

Any organization, whether a private foundation or a charitable organization, that violates this test is subject to a penalty equal to 5% of its gross revenue for a taxation year from any unrelated business that it carries on in the taxation year. This penalty increases to 100% and the suspension of tax-receipting privileges for a repeat infraction within five years.

The test for what is a related business for tax purposes can be met if all the services with regard to the activity are conducted by volunteers or if the activity is "linked to a charity's purpose and subordinate to that purpose."[283] Various specific issues with regard to the conduct of related businesses are discussed in the Policy Statement, all of which indicate a fairly rigorous approach to the issues involved. Application of the rigorous test may be seen in the Hutterian Brethern case,[284] where the organization was held to have both a charitable purpose (advancement of religion) and a business purpose (operation of a commercial farm).

CRA has developed tests for permitted commercial activities that revolve around the issue of whether a business is related or unrelated.[285] These repeat the requirement of relatedness or that the business is ancillary. CRA also focuses on the importance of not having a profit motive because net revenues will be devoted to charitable purposes, the question of non-competition, and whether the business "have been in operation for some time and is accepted by the community."[286] In one

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[282] See CRA Policy Statement, CSP-B02 (2002, 2007), available at http://www.cra-arc.gc.ca/tax/charities/policy/csp/ csp-b02-e.html.

[283] See Policy Statement, *What is a Related Business*? CPS 0-19 (2003), available at http://www.cra-arc.gc.ca/tax/charities/policy/cps/cps-019-e.html.

[284] The case is discussed in Library of Parliament, "Tax Rules Governing Charities and Non-profit Organizations," available at http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/PRB-e/PRB0304-e.pdf.

[285] See, Policy Statement, what is Related Business, *op. cit.*

[286] *Ibid*.

federal case, the Court of Appeal has held that meeting three but not four of the tests is fine. Thus, a hospital that operated a paid parking lot for its patients and their visitors was held to be engaged in a charitable activity despite the fact it competed with commercial lots.[287]

Mediation and Adjustment

This section considers the extent to which courts and the CRA have been involved in the common law process of re-interpreting principles and precedents in the light of changing social circumstances in Canada. Developing charitable purposes is seen by the courts as being largely a function of the legislative branch in Canada,[288] such activities are also conducted by both the federal courts (in particular the Federal Court of Appeal) and provincial courts. In other jurisdictions specific forums may be available for this purpose, most obviously the Charity Commission in England and Wales and similar, if not so robust, Commissions in New Zealand and Singapore. In the case of Canada, the CRA has some of their capacity as it moves to develop more modern roles for the charitable sector. Other aspects of mediation and adjustment are within the common law (and constitutional) powers of the provincial courts.

The Courts and the Attorneys General

In Canada the opportunities for judicial consideration of matters of principle and purpose in charity law arise infrequently.

- *Developing charitable purposes*

Court proceedings are initiated largely by the CRA, which currently litigates most of the cases with regard to charitable purposes, and may be judicially resolved though recourse to the 'spirit and intendment' rule. An interesting example of the latter occurred in *Everywoman's Health Centre Society v. Canada*,[289] concerning a society established to provide "necessary medical services for women for the benefit of the community as a whole" and carrying on "educational activities incidental to the above" in the form of a free-standing abortion clinic, which was found to be eligible for registration as a charity. The court held that the "Society's purposes and activities at this point in time [i.e. the operation

[287] See *Alberta Institute on Mental Retardation v. Canada* [1987] 3 F.C. 286.

[288] See *A.Y.S.A. Amateur Youth Soccer Association v. Canada Revenue Agency* (2006), 267 D.L.R. (4th) 724 (F.C.A.).

[289] [1991] 2 C.T.C. 320, 92 D.T.C. 6001 (F.C.A.).

of the clinic] are beneficial to the community within the spirit and intendment, if not the letter, of the preamble to the Statue of Elizabeth and … the Society is a charitable organisation within the evolving meaning of charity at common law." Again, the court in *Re Vancouver Regional Free Net Association and Minister of National Revenue*[290] utilised the rule to confirm the charitable status of an organisation established to provide free community access to the internet the rationale being that the service could be viewed as a contemporary equivalent to the 'highways' declared charitable in the Preamble.

However, generally the fourth *Pemsel* head has been narrowly interpreted by the courts in this jurisdiction with the result, as pointed out in the John Hopkins study, that it:[291]

> … excludes many organisations that are widely seen as providing public benefits (e.g., environmental organisations, rights groups, organisations providing services to ethnocultural groups). While Canadian charity laws are based on the same legal precedents as those in the United Kingdom and the United States, these countries have taken a broader view of the definition of charitable purpose.

The most recent Supreme Court of Canada decision with regard to the definition of charity (a sports charity), resulted from CRA litigation.[292]

- *Cy-près and deviation*

Application of the doctrines of *cy-près* and deviation is important for charities to function as entities that are reflective of modern views of a concerned society. These functions cannot be exercised by the CRA and fall instead to the judiciary.

Deviation. An application of the doctrine of deviation can be found in Ontario, where the Office of Public Guardian and Trustee promulgated a regulation under the Charities Accounting Act[293] permitting the mingling of special purpose funds with other special purpose funds for investment purposes. The money is no longer required to be kept in separate investments, provided the charity follows the directions set out in the regulation. The regulation does not allow a charity to combine special purpose funds with the charity's general funds. It will not affect the requirement to restrict the use of funds only for the "special purpose" for which they were donated.[294]

Cy-près. The Canadian courts have a long history of applying *cy-près* to charitable trusts, which is detailed in some older articles.[295] The comparatively recent *Canada Trust* case represents the most well-known of the Canadian courts' application of the

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[290] (1996) 137 DLR (4th) 206 Federal Court of Appeal. Also, see *Everywoman's Health Centre Society v. Canada*, [1991] 2 C.T.C. 320, 92 D.T.C. 6001 (F.C.A.).

[291] See the Johns Hopkins study, *op. cit*., p. 36.

[292] See discussion of *A.Y.S.A. Amateur Youth Soccer Association, supra*.

[293] R.S.O. 1990, c. C.10.

[294] This regulation took effect on January 17, 2001. See Charities Bulletin # 6, available at http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charbullet/bullet6.asp.

[295] See, e.g., Water, D.W.M., Comment: Charity–Cy-Prés–Supervening Impossibility, 52 *Can. Bar Rev.* 598 –634 (1974)

cy-près doctrine to remove offensive restrictions on the spending of funds dedicated to charity.[296] The *cy-près* doctrine has been applied in other circumstances as well, such as when the objects could no longer be carried out (impossibility) in *Rector, Wardens and Vestry of the Parish of Christ Church v. Canada Permanent Trust*.[297] In *Toronto Aged Men's and Women's Homes v. Loyal True Blue and Orange Home*,[298] the Ontario Superior Court of Justice exercised its inherent jurisdiction to alter the terms of a charitable trust to address the Trust's inability to meet its disbursement quota under the Income Tax Act due to the rate of return on its capital assets. The court concluded that the administration of the trust in accordance with the intentions of the testatrix was no longer practicable and that a *cy-près* order was appropriate to rectify the problem.[299] The doctrine has also been applied to effectuate general charitable intent in *Royal Trust Corporation of Canada v. Hospital for Sick Children*[300] and *Re Ramsden Estate*.[301]

Statutory modifications to the doctrine can be found in Alberta, British Columbia, Manitoba, New Brunswick and in the British Columbia Law and Equity Act.[302]

The CRA

- *Developing charitable purposes*

In Canada, the role of developing charitable purposes has fallen by default to the CRA and the Federal Court of Appeal, neither of which have a brief to be proactive in that regard. With some notable exceptions, discussed above, CRA has been quite flexible and forward-looking in recent years and has expanded its notion of what is charitable to fit many current social policy needs.

The Legislature

Canada has been engaged in a protracted process of charity law reform which may, ultimately, produce new charity legislation at federal and *province* levels.

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[296] *Canada Trust v. Ontario Human Rights Commission* (1990) 69 D.L.R. (4th) 321 (Ont. CA).

[297] (1985), 18 E.T.R. 150 (NS SC TD).

[298] 68 O.R. (3d) 777, [2003] O.J. No. 5381 (the "Toronto Aged Men's and Women's Homes case")

[299] Further discussion of the case can be found in Carter, T.S. and Claridge, N.E. 'Cy Pres Granted to Enable Charitable Trust to Meet Disbursement Quota', *Carters Charity Law Bulletin No. 53*, 2004, available at http://www.carters.ca/pub/bulletin/charity/2004/chylb53.htm. This recent application of the doctrine reflects long-term court practice in Canada. http://books.google.com/books?id = NikEAAAAQAAJ&pg = PA208&lpg = PA208&dq = ontario±charity±cy±pres&source = web&ots = V9eTDFrv4-&sig = x_tCB69MVt3ZH8xdi0E5L7L5qm0#PPA162,M1.

[300] (1997), 17 ETR (2d) 57 (BCSC).

[301] (1996), 139 DLR (4th) 746 (PEI SC TD).

[302] R.S.B.C. 1996, c. 253, s. 47.

- *Legal structures*

In Canada, like most jurisdictions considered in this book except the U.K., the most common legal form for charitable organizations is the corporation or a society rather than the trust. In the reform efforts discussed above, attention is being paid to the need to modernized the legislation so as to meet the special needs of charities. Much of this has occurred because there have been modifications of the legislation relating to business corporations, without addressing the special concerns of not-for-profits. Looking at some of the drafts, however, one is struck by the comparative lack of attention to director and officer responsibilities.

In addition, as discussed above, scant attention has been given to developing a form to deal with the emerging paradigm of social enterprises, which would presumably not be charities but which should receive special consideration under the law.

Support

Support can be defined to include both financial and other support, such as setting standards and helping charities that find it difficult to work effectively. Both kinds of support are available from a variety of entities in Canada.

The CRA

The primary source of support for charities in Canada, as in the other jurisdictions studied, derives from tax privileges and donation benefits. The support provided by CRA has assisted charities in structuring their affairs so as not to run afoul of the ITA's requirements. In addition, both the ITA and the GST provide means by which charities receive financial support from the Federal Treasury.

- *Political activity*

In 2007, the CRA issued a policy statement a section of which offered guidance on how to conduct "public awareness campaigns" and make representations to public officials which could be considered charitable if properly carried out.[303] While making sure that its communications are subordinate to its charitable activities, a charity may, for example, make:[304]

[303] This change in policy of CRA came about in response to criticisms leveled at it by all the law reform studies, beginning with the *Ontario Law Reform Commission, op. cit*.

[304] *Ibid*.

> … a representation, whether by invitation or not, to an elected representative or public official, the activity is considered to be charitable, [as long as the representation is related to its purpose and meets other tests.] Even if the charity explicitly advocates that the law, policy, or decision of any level of government in Canada or a foreign country ought to be retained, opposed, or changed, the activity is considered to fall within the general scope of charitable activities.

- *Income Tax rules*

Tax exemption. Like their non-profit counterparts, registered charities in Canada are not subject to income tax on income from a variety of sources, including interest, dividends, capital gains, fees, and donations.[305] There are three different types of charities: charitable organizations, public foundations and private foundations. The rules applying to the last category are more restrictive, but they are not of considerable moment for the inquiry here and will not be addressed further.

Donation incentives. The rules relating to donation incentives available under ITA art. 118.1 to 122 are fairly complex. In general the deduction limit is 75% of net income, although some gifts qualify for 100% deductibility.[306] At the federal level a donor is entitled to claim for tax relief the full fair market value of any gift made to a qualified donee. In the case of an individual, the federal level of relief consists of a tax credit of 16% of the value of the gift up to $200 of annual gifting and 29% of the value in excess of this amount. The true value of the tax credit is much higher since it also comprises an addition for applicable surtaxes and for provincial taxes. The net result is that the individual tax credit is equivalent to a full deduction at the top marginal tax rate, aside and apart from the first $200, which acts as a floor. The rules for corporate donors are the same except that for technical reasons corporations take a deduction instead of a tax credit. Each province and territory has its own tax regime with differing rates, but when it comes to charitable donations, the provincial and territorial regimes mirror the federal regime. Consequently, this chapter refers only to federal rules.

In addition to the general rules, special rules apply with regard to the deemed realization of gain upon the transfer of capital gain property to charities. In special instances there will be no deemed disposition of the property, including cultural heritage property and some securities.[307]

- *Goods and services tax (GST)*

Charities do not have to charge GST on many of the services they provide, and they are entitled to a 50% rebate on some purchases of goods and services.[308]

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[305] Art 149 of the ITA.

[306] For example gifts at death, gifts of certified cultural property, etc.

[307] The complex rules are described in Drache, A.B.C., 'The Tax Treatment of Charities in Canada', available at http://www.queensu.ca/sps/current_students/MPA/courses/mpa880/MilanPaper.php. For a more up-to-date description, see Library of Parliament, 'Tax Rules Governing Charities and Non-profit Organizations', PRB 03-04E, available at http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/PRB-e/PRB0304-e.pdf.

[308] See Canada Revene Agency advice, available at http://www.craarc.gc.ca/tax/business/topics/gst/Charities/menu-e.html.

- *Charitable Remainder Trusts (CRT)*

The charitable remainder trust which is a significant tax planning vehicle used in the United States is not specifically mentioned in the Canadian revenue legislation.[309] Uncertainties as to some applications of CRTs prompted the Canadian Customs and Revenue Agency's (now CRA) Interpretation Bulletin IT-226R to clarify their administrative policy. IT-226R, which allows for "an equitable interest in a trust" to be gifted, discusses the law applicable to a:[310]

> Gift to a Charity of a Residual Interest in Real Property or an Equitable Interest in a Trust" under the Income Tax Act. Provision s 110.1(1) provides the tax deduction for corporations and s118.1(3) provides the tax credit for individuals. However, in order for these provisions to apply, the donation must qualify as a gift. A gift is "a voluntary transfer of real or personal property without valuable consideration.

For a residual interest in real property or an equitable interest in a trust to be classified as a gift by CRA, a number of requirements must be met:[311]

> There must be a transfer of property voluntarily given with no expectation or right, privilege, material benefit or advantage to the donor or a person designated by the donor.
>
> The Property must vest with the recipient organisation at the time of the transfer. A gift is vested if:
>
> (i) the person or persons entitled to the gift are in existence and are ascertained;
> (ii) the size of the beneficiaries' interests are ascertained; and
> (iii) any conditions attached to the gift are satisfied.
>
> The transfer must be irrevocable.
>
> It must be evident that the recipient organisation will eventually receive full ownership and possession of the property transferred.

A gift of an equitable interest can be made both through an *inter vivos* trust, or a testamentary trust. CRA considers a gift to have been made when the transfer of the property to the trust has been completed and the equitable interest in the trust has vested in the charity. An example of an *inter vivos* gift of an equitable interest in a trust is where property is transferred to a trust, and the trustee pays an income to the taxpayer from the trust during the taxpayer's lifetime. Upon the taxpayer's death, the property is transferred to the registered charity.[312]

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[309] Pearce, E., *CRTs Offering Great Potential, But Awaiting Clarification from Hesitant Canada Customs & Revenue Agency*, Charity Village Research, available at http://www.charityvillage.com/cv/research/rpg22.html and Kleinman, R, *Charitable Remainder Trusts*, National Jewish Gift Planning Handbook, available at http://www.jcfmtl.org/handbook/pdf/9.%20CRT.pdf.

[310] IT-226R, Gift to a Charity of a Residual Interest in Real Property or an Equitable Interest in a Trust, 1995.

[311] *Ibid*.

[312] See Pearce, E., *op.cit*.

The trustee of a CRT can be an individual, the charitable organisation (if authorised), the donor, or a trust company.[313]

Other Government Agencies

Provinces. Facing constant and growing criticism that they are unable to handle their responsibilities to protect both the public and charitable assets themselves,[314] provincial charity regulators in Canada are currently reviewing approaches to more effective regulation. These are discussed above. In Canada, as in all other countries in the common law world, the main form of support for charity comes primarily in the form of preferential tax concessions (including donor incentive schemes) supplemented by government grant aid, the modernizing of fundraising regulations to facilitate new methods and the creation of customized legal structures for charity etc. These do not seem to be satisfactory to those who work "on the front lines" (the advocacy organizations) in combating poverty and social and economic deprivation. Given that reality, many non-profits and charities have looked to government for support services, which may be thought of as similar to the services provided to the sector by the Charity Commission in England and Wales.

Ontario. The website of the Office of Public Guardian and Trustee in Ontario states quite clearly that in exercising its responsibility for the use of charitable property, it "works with charities to help them deal with the problems (i.e., improper investments, improper use of donated property) they encounter. The Public Guardian and Trustee can also inquire into complaints about charities and can protect the public's interest in how charities raise and use their money."[315] In addition, "the Public Guardian and Trustee can apply to court to prevent those who run a charity from using the assets of the charity improperly."[316] On the other hand, the failure of the Office to take effective action is clear from a recent probing investigative report.[317]

Quebec. The Registraire des Entreprises issued a document in April 2007 giving guidance to charitable and other not-for-profit organizations as to how they must register themselves. *Comment constituer une personne morale san but lucrative*[318] is

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[313] Canadian Fundraiser, *Charitable Remainder Trusts Offer Attractive Benefits to the Right Donor*, June 19, 1996, available at http://www.charityvillage.com/cv/research/rtec5.html.

[314] See e.g., Donovan, K., *Charity Scams Bust Public Trust*, June 2, 2007, theStar.com, available at http://www.thestar.com/News/article/220756.

[315] See *Charities Bulletin No. 1*, available at http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charbullet/bullet1.asp.

[316] *Ibid*.

[317] See Donovan, K., *op. cit*.

[318] Quebec, Registraire des Entreprises, *Comment constituer une personne morale san but lucrative*, LE-50.C5.01.1 (2007–04).

a plain-language guide giving assistance to charities seeking to form in the province, and it should make it possible for entities not represented by counsel easily to go through the process.

The Federal Government. Industry Canada has published a Primer for Directors of Not-for-Profit Corporations (Rights, Duties and Practices), which is available on its website.[319]

The Accord Between the Government of Canada and the Voluntary Sector[320] specifically addresses a variety of issues, including the need to have funding policies and practices that will further the voluntary sector.[321] The extent to which adequate funds have been made available to meet social policy needs is at the very least debatable, given the problems addressed in the first part of this chapter (extreme poverty, needs of immigrants, needs of Aboriginal peoples, etc.)

Non-government Agencies

Both Imagine Canada and the Better Business Bureaux have some standard setting functions that assist charities in performing up to their capacities. There are also sectoral organizations that assist in that regard, such as, for example, the Health Charities Coalition. CRA's Partnership and Outreach Program, as discussed above, will result in the involvement of non-government agencies in compliance initiatives. For example, a signed agreement with the The Centre for Voluntary Sector Research and Development and the Canadian Federation of Voluntary Sector Networks, will assist charities across Canada with the knowledge and tools to file federal tax forms accurately and on time.[322]

Charity Law and Social Policy: The Fit with Contemporary Circumstances

Charity law reform has been underway in Canada for many years: the Ontario Law Reform Commission issued its report in 1996;[323] and the ongoing federal review process began in 2002. However, there are few indications that this will lead to the

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[319] http://strategis.gc.ca/epic/site/cilp-pdci.nsf/en/cl00700e.html.

[320] Available at http://www.vsi-isbc.org/eng/relationship/pdf/the_accord_doc.pdf.

[321] *Ibid*., p. 9.

[322] The project is described on the Partnership and Outreach website at http://www.cra-arc.gc.ca/tax/charities/funding/centre-e.html.

[323] Ontario Law Reform Commission (OLRC), *Report on the Law of Charities*, *op. cit.*

government making any significant definitional changes to the law. Hopefully, this sustained engagement in a process of charity law reform does augur well for a realignment of charity law functions with a social policy that addresses the contemporary pattern of need in Canada but, at a minimum, this will require coordination at federal and territorial/provinceial levels which has so far proved difficult to achieve.

The Legal Functions

The traditional approach in this jurisdiction, administered through the customary institutional framework of courts, Attorneys General and tax collecting agency, is necessarily complicated by the federated constitutional context and the bijural nature of Canadian law. Application of the legal functions within such a system makes any development of charitable purposes nonsystematic.

Differential in Functional Weighting

The Canadian authorities seem to have done a fairly good job of balancing the legal functions of protection, policing, mediation/adjustment, and support. Although the CRA has in the past erred quite a bit on the side of strictly policing the boundaries of the sector, it continues to do so principally with regard to commercial activities, having balanced the strictness of its previous rule with regard to political activities against the need for charities to be heard on policy issues. The major failure in Canada seems to be the historical inability of the courts to grapple with the definition of charity in a way that would permit modernization. Another failure can be seen in the difficulties faced by the federal government and the provinces and territories in dividing up jurisdictional issues and coordinating activities, in particular with regard to protection and mediation/adjustment. Policing is left largely to CRA and there is provincial consistency with regard to the primary form of financial support (income tax donation incentives).

Policing. The differential in functional weighting in Canada seems to be in favor of policing by CRA. This is then the principal issue to discuss because it has even to the present day resulted in the courts' unwillingness to develop new definitions of charity that are more consistent with modern needs and problems. From a social policy perspective, it can be seen most importantly in the *Vancouver Society* case. Even in the most recent case, which involved amateur sports, the court specifically refused to expand the definition of charity because it would invade the realm of Parliament. Thus, according to Justice Marshall, "When courts consider expanding the definition of charity…they must consider whether what is being proposed is an incremental change, or one with more complex ramifications that is better left to the legislature. … I agree with the government that this would

seem to be closer to wholesale reform than incremental change, and is best left to Parliament."[324]

Anti-terror measures. In addition, the recent anti-terrorism legislation may have the effect of chilling certain charitable activities in Canada. The *ATA* enacted the *Charities Registration (Security Information) Act* (*CRSIA*) to suppress and prevent support for terrorism and to protect the integrity of the registration system for charities under the *Income Tax Act*. Charities may be reluctant to undertake programs that might expose them to violation of the new legislation – which might also result in a loss of charitable status under the certification process (described above at notes 34–35).

The Functional Imbalance in Charity Law

The underlying premise in the 2003 *Strengthening Canada* report, that the future regulatory regime for charities should remain governed by the provisions of the Income Tax Act with CRA as the primary regulatory body, has been borne out by subsequent government action. This leaves policing as the primary function of the law as it relates to charity in Canada.

As regards the support function, the Joint Regulatory Table report acknowledged a need to provide charities with a broad education/support or 'nurturing' service and suggested that this should not fall to CRA but that a different body from within the sector should provide such guidance. It also recommended that a ministerial advisory group be established with broad representation from the voluntary sector, national umbrella organisations, lawyers and other allied professionals.[325]

This recommendation resulted in the Charities Advisory Committee, established to provide a forum for ongoing discussion of regulatory issues, which was discontinued by the Conservative government shortly after it came into power in 2006. The opportunity for input from the sector has since been replaced by adhoc consultations with sector representatives, as well as participation by a number of umbrella organizations, such as the Canadian Bar Association, the Canadian Association of Gift Planners and the Association of Fundraising Professionals, in a working group that meets twice a year. This, the Technical Issues Working Group, was established shortly after the termination of the Charities Advisory Committee in 2006. It is proving to be an effective voice of the sector with CRA on technical issues.[326]

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[324] Paras 22 and 49 in *A.Y.S.A.* Case, available at http://scc.lexum.umontreal.ca/en/2007/2007scc42/2007scc42.html.

[325] See *Strengthening Canada's Charitable Sector: Regulatory Reform*, *op. cit*., Recommendation 28.

[326] The authors gratefully acknowledge the clarification provided by Terrance Carter on this matter.

Do the functional imbalances in Canada's charity law result in a 'social policy deficit' or does asking the question this way present a false dichotomy? What CRA has done (in part because it was pushed to do so by the sector) has been salutary – it has, for example,

- Made it easier for charities to conduct certain types of political activities;
- Policed the borders between charities and business organizations in a flexible way;
- Developed workable policies in the area of poverty alleviation, addressing the needs of socially excluded populations, etc.;
- Developed a new definition of advancing education that will make it easier for some organizations to qualify as charities; and
- Created a clear test of the "public benefit" requirement, which is something that will now be done by the Charity Commission for England and Wales as required by the new Charities Act.[327]

Is this enough? It is difficult to say, but it seems that CRA is quite effective at addressing social policy needs in Canada despite the fact that its principal job must be to apply the Income Tax Act.

Although it is slight, there remains in Canada a functional imbalance in charity law at the present time. Because CRA has been quite conservative in its application of the law, legal development of the meaning of charity is slow. This fact is compounded by the difficulty and expense of bringing charity cases to court and by the failure of the provinces to become pro-active in regard to their own definitions (except, for example, Alberta in its Charitable Fundraising legislation). This is probably not what was intended when the Constitution Act vested responsibility for charities in the provinces.

It is virtually certain that the provinces can and should address the current imbalance by concentrating much more attention on the protection and mediation/adjustment functions allotted to them. It seems that the proposed reform efforts – some of which will concentrate more attention on fiduciary duties – will assist in that regard.

The Resulting Social Policy Deficit

In the absence of any statutory broadening of the legal meaning of 'charity' and 'charitable activities', or of a forum able to develop charitable purposes, charity law in Canada will continue to be poorly aligned from a functional perspective with its distinctive pattern of contemporary social need. More than a decade after the report of the Ontario Law Reform Commission and despite the subsequent work of the Joint Regulatory Table, the purposes recognized as charitable in law and the institutional framework for regulating charities remain substantively the same as in the *Pemsel* era.

[327] Discussed further, for example, in Chap. 13.

Aboriginal Peoples

Arguably, charity law is failing the aboriginal peoples of Canada. Endemic poverty, domestic abuse and other indicators of deprivation bear witness to a misfit between charity and need in this context. The 'public' aspect of the public benefit test may well need legislative adjustment if the test is to accommodate the circumstances of Canada's many disadvantaged and marginalized Aboriginal peoples. Specific measures may need to be introduced if charities are to more effectively address the needs of ethnocultural groups e.g. through small, localised community development schemes.[328]

Poverty

There are many areas in which the existing common law approach to matters of public benefit is not accommodating contemporary issues. The prevention of poverty is one such issue, given that so many Canadian citizens are employed but are at or below the poverty level and outside the welfare benefits system. The advancement of human rights, conflict resolution/reconciliation, the promotion of religious/racial harmony and equality/diversity are also activities that might merit specific legislative recognition as being for the public benefit and therefore warranting charitable status.

Multi-cultural Issues

Because of its bifurcated colonial experience, the presence of a considerable indigenous population, the real disparity between urban and rural communities and the vast distances separating them, and the impact of recent waves of immigrants, Canada is comprised of a patchwork of very different cultures. This, as noted earlier, has led to racism emerging as a social issue in urban areas and to racial tensions becoming a contributory factor to poverty. The definition of charitable purposes could usefully be broadened to promote intervention along the lines that failed to convince the court in *Vancouver Society*.

[328] An alternative view has been expressed to the authors by Bob Wyatt: "The recent changes in policy relating to ethnocultural organisations, along with the 2000 policy on community economic development could, if adopted by the sector and funders, go quite a way to achieve this. In other words, I think an argument could be made that the framework is already there and it's the sector's fault that we're not acting on it."

Partnership with Government

The difficulty highlighted in the Johns Hopkins report,[329] whereby government's funding policies threaten to transform some charities into government agencies (the scale of this problem is difficult to estimate, it could be that it is confined to a specific group of 'quangos'), was not acknowledged in the Joint Regulatory Table report.[330] This issue may require legislative provisions to introduce new structures for charities (particularly for 'umbrella organisations') if they are to retain their independence and be in a position to form authentic partnerships with government.

Conclusion

Canada is a remarkable country when it comes to developing and addressing policies to deal with issues of social exclusion, income imbalances, multiculturalism, lack of access to education and health care for minority populations, etc. That the charity law developed in Canada has been successful in addressing many of these issues can be seen from the discussion in this chapter. Although problems remain, it is unlikely that they will not be worked out through the mediating processes that have been developed between the sector, on the one hand, and the government, on the other.

[329] See the Johns Hopkins study, *op. cit*., p. 33.

[330] See Joint Regulatory Table report, *op. cit*.

Part IV
Re-configuring the Social Policy Context for Charity and the Law

Chapter 13
Definitional Problems: Charitable Purposes

Introduction

There is now a pressing concern among many common law legislatures to update the legal definition of charity. This partially stems from public pressure to ensure that the law and resources of 'charity' are adjusted so as to better address contemporary patterns of social need. It is also due to parts of the sector wanting a level playing field: with non-charities seeking inclusion in the fiscal and other benefits enjoyed by charities; and with bodies engaging primarily in advocacy being excluded. Then there is the customary pressure from governments pursuing their traditional objective of imposing more efficient regulatory controls on what has become a wealthy and increasingly independent sector in order to minimise fiscal impropriety and detect and prevent any abuse that may assist terrorism. In the main, however, charity law reform is a government led initiative to position charity to play a more prominent role in its social policy strategy and to provide a better 'fit' with State plans for future public benefit provision particularly as regards social and health care services.

Consequently, for the first time in 400 years, legislation is being introduced to change key definitional matters in the law of charity. Admittedly only a few nations have so far gone wholly down this road but it is probable that others will in due course follow the lead set by the UK jurisdictions. This chapter draws from the experience to-date of legislative change, as examined in the jurisdictions studied, to suggest that there are definitional matters, intrinsic to the common law, which have caused similar difficulties for all such modern westernised societies but the legislative response to which may introduce further complications. In particular, the constraints imposed by the *Pemsel* classification of charitable purposes have become something of a hindrance to the further development of social policy objectives and stand in the way of government's intended partnership arrangements with charity. It considers whether an essentially taxation oriented frame of reference is an appropriate basis for charity law and whether the *Pemsel* categorisation is a sufficient means for identifying charities, focussing charitable donations and activity in our complex modern society. It recognises and discusses issues concerning community development, self-help groups, partnership arrangements and profit distribution

K. O'Halloran et al., *Charity Law & Social Policy*,

etc. Some consideration is also given to the debate as to whether religious purposes should continue to be charitable and to that perennial problem of how to reconcile the regulatory approach taken in the US and Australia (and elsewhere), of restricting charity law to charitable trusts and leaving corporations with charitable purposes to be regulated under non-charity law, with that adopted in the UK jurisdictions where the two regimes are linked and placed under the control of the Charity Commission. While acknowledging that *cy-près* can be seen as an aspect of common law definitional matters, consideration of this device for reconstructing a charity or disposing of its assets is left to Chap. 15 as in practice it functions as part of the regulatory machinery.

Definitional Matters in General

A legacy of imperial rule has left the same set of definitional matters to constitute the characteristic common law hallmarks of charity law, with some differences of emphasis, in all 53 nations[1] that once comprised the British Empire. The social policy agenda fixed by government in 1601 as the basis for its relationship with charity was perpetuated by that set of definitions. In the absence of legislative intervention (with the notable exception of Barbados and, arguably, the US),[2] that agenda has since been replicated, maintained and to a degree developed, with some consistency and uniformity, through the medium of the common law, across the nations concerned. Contemporary charity law has remained largely confined to and by its Preamble footprint: evident in the continuity of the government's agenda of social policy themes as initially set out in 1601; and due to the lack of any statutory broadening of the Preamble terms of reference other than the inclusion of sport and recreation.[3]

Four hundred years later the progenitor of this legal system has introduced legislative change to the core definitional matters. This is itself significant in social policy terms. It is also significant in that it opens up what has been a fairly closed common law system to the prospect of further legislative adjustment. These changes will be of importance for the future of charity law in the entire common law world. The changes that other nations have chosen to make or not to make are also important and revealing.

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[1] The Commonwealth consists of some 53 independent sovereign nations all sharing a common law heritage from their experience as former colonies of the British Empire; though for some, such as Burma, the absence of a democratic context rather negates the value of that heritage, certainly as it applies to charity.

[2] See the Charities Act, *The Laws of Barbados*, Volume VIII, Title XVIII, Chapter 243, LRO 1989 and s 501 (c)(3) of the Internal Revenue Code respectively.

[3] The Recreational Charities Act 1958 in England & Wales was replicated in many commonwealth nations (e.g. s 3 of the Charitable Trusts Amendment Act 1963 (NZ) and s 103 of the Trusts Act 1973 (QLD). See, further, Appendices, *Report of the Inquiry into the Definition of Charities and Related Organisations*, Australia, June 2001.

The Definitional Matters

These are readily recognized (see, further, Chap. 1) and have been tracked through the jurisdictions studied. It has long been established that to be a charity an entity must be confined exclusively to charitable purposes, for the public benefit, independent, non-profit distributing and non-political. While these common law characteristics will remain in place, in some jurisdictions they have now been statutorily defined. So far the charity law reviews in England & Wales,[4] Scotland,[5] Northern Ireland[6] and Ireland[7] have either concluded or are concluding with – and in New Zealand,[8] Australia[9] and Singapore[10] have concluded without – such definitional change. Other nations, including the US[11] and Canada,[12] are still engaged in that process. For the former set of countries this brings the certainty of present change, with which the judiciary and all other forums are required to comply, and the possibility of further change by legislative amendment. For all other common law countries it raises the prospect of similar change being introduced by proxy of precedent: the judiciary in other nations being faced with the choice of following decisions (admittedly non-binding) taken by courts elsewhere in respect of the new, statutorily defined, charitable purposes.

'Charity'

Of the jurisdictions studied, most adhere simply and exclusively to the traditional common law definition while others make a distinction between 'charity' as a genre and a public benefit species of organizations which, for donor tax purposes, are defined as constituting a small subset of that genre. The introduction of charity legislation has really left such basic definitional matters much as they were.

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[4] Concluded with the introduction of the Charities Act 2006.

[5] Concluded with the introduction of the Charities and Trustee Investment (Scotland) Act 2005.

[6] Currently at the stage of a draft Charities (NI) Order 2006, conclusion anticipated in 2007 but now delayed by approximately one year due to referral to the Northern Ireland Assembly.

[7] Currently at the stage of a draft Charities Regulation Bill 2006.

[8] Concluded with the introduction of the Charities Act 2005.

[9] Concluded with the withdrawal of the draft Charities Bill in May 2004 and the introduction of the Extension of Charitable Purpose Act 2004.

[10] Currently at the stage of implementing the recommendations of the Inter-Ministry Committee on the Regulation of Charities and Institutions of Public Character established in October 2005.

[11] Arguably, the US introduced a degree of definitional change many years ago in s 501 (c)(3) of the Internal Revenue Code. For attempts to rationalize US nonprofit law see Brody, E., 'The Legal Framework for Nonprofit Organisations',*The Non-Profit Sector – A Research Handbook* (2nd ed.), Powell, W. and Steinberg, R. (eds.), Yale University Press, New Haven, CT/London, 2006.

[12] See Ontario Law Reform Commission, *Report on the Law of Charities*, Government Publication, Ontario, 1996.

Exclusively Common Law

Of all common law nations, only a tiny minority recently resorted to charity legislation and even then the statutory definition of 'charity' simply restates the legal meaning given to it under the common law. As these nations have left untouched the traditional definition (with its components of exclusivity, public benefit, specified charitable purpose etc.) this fundamental concept therefore remains in place as the standard building block for charity law.

In England and Wales, 'charity' as defined in s 1 of the 2006 Act, means an "institution which: (a) is established for charitable purposes only, and (b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities".[13] This definition is replicated in the prospective legislation for Northern Ireland,[14] is more fully stated in that drafted for Ireland[15] and in Scotland is simply confined to charitable purpose and to public benefit in Scotland or elsewhere.[16] In both New Zealand[17] and Australia[18] 'charity' is defined similarly in terms of legal structure as a charitable institution, a charitable fund, society or any other kind of charitable body. The definition used in Singapore combines both concept and structural approaches by defining 'charity' as "any institution, corporate or not, which is established for charitable purposes and is subject to the control of the High Court in exercise of the Court's jurisdiction with respect to charities."[19]

Additional Tax Classification

The sense in which the concept of 'charity' is a tax driven definition is taken a stage further in some of the jurisdictions studied which have subdivided the concept to earmark a category of charities as eligible for preferential tax treatment. In Canada, for example, a distinction is made between 'charitable organisation', 'private foundation', and 'public foundation' all of which can be a 'registered charity' whereas in the US a 'charitable organisation' may be a corporation, community chest, fund,

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[13] The link with the traditional legal meaning is underpinned by the reference in ss (3) to "any enactment or document to a charity within the meaning of the Charitable Uses Act 1601 (c. 4) or the Preamble to it is to be construed as a reference to a charity as defined by subsection (1)".

[14] See the draft Charities (Northern Ireland) Order 2006, s 3 (1).

[15] See the draft Charities Regulation Bill 2006, s 3(2).

[16] See the Charities and Trustee Investment (Scotland) Act 2005, s 7(1).

[17] See the Charities Act 2005, s 4(1).

[18] See the Extension of Charitable Purpose Act 2004, s 3.

[19] See the Charities Act 1995, s 2. Note, also, that under s 33 1(b) 'charitable institution' means "a charity or an institution (other than a charity) which is established for charitable, benevolent or philanthropic purposes".

foundation or sports association. In Singapore there is the additional category of 'institution of a public character', while in Australia a distinction is made between institutions and funds and the federal government has introduced the concept of a "public benevolent institution". Both IPCs and PBIs serve as adjuncts to charitable status in a strategy that enables government to channel tax free gifts towards certain charitable purposes rather than others. This transparent acknowledgement that specified entities are of such public benefit as to warrant additional tax concessions has much to commend it as a dimension to any partnership between government and charity as it clearly and candidly prioritises some charitable entities and directs revenue streams accordingly. In Singapore, for example, the following nonprofits are singled out as IPCs: hospitals; a public authority or society engaged in research or other work connected with the causes, prevention or cure of disease in human beings; a university or a public fund for the establishment, maintenance, enlargement or improvement of a university; an educational institution or a public fund for the establishment, maintenance, enlargement or improvement of such an educational institution; a public or private fund for the provision, establishment or endowment of a scholarship, exhibition or prize in a university, or an educational institution not operated or conducted for profit; a public fund established and maintained for the relief of distress among members of the public; an institution which is established for charitable, benevolent or philanthropic purposes only; or an organisation not operated or conducted for profit which is engaged in or connected with the promotion of culture or the arts or with the promotion of sports.[20] In Australia, the definition of Public Benevolent Institution (PBI) is a non-profit institution organised for the direct relief of such poverty, sickness, suffering, distress, misfortune, disability, destitution, or helplessness as arouses compassion in the community and will not include animal charities being restricted to human or needs that are to be met by education, training or the promotion of cultural or social objectives as they will not normally arouse community compassion and call forth the giving of benevolent relief. It has been suggested that such a distinction could be usefully introduced to charity law in the UK.[21]

The Public Benefit Test

Of the definitional matters that have long constituted the distinguishing characteristics of charity law in a common law context, none is more important than the requirement that to acquire charitable status and consequent tax exemption privileges an entity must first satisfy the public benefit test. This critical component of the gatekeeper role, aided by the 'spirit and intendment' rule, has also provided the

[20] *Ibid*., s 40A.

[21] See Chesterman, M., 'Foundations of Charity Law in the New Welfare State', *Foundations of Charity*, Mitchell, C. and Moody, S. (eds.), Hart Publishing, Oxford/Portland, OR, 2000.

only means whereby new interpretations of charitable purposes could be introduced to address contemporary and local manifestations of social need. However, the test has not been uniformly applied in the jurisdictions studied nor elsewhere in the common law world.

In the UK jurisdictions, a legal presumption has long held that the test had: no bearing on the first and third of the *Pemsel* heads of charity as these were 'assumed to be for the benefit of the community and therefore charitable unless the contrary is shown'[22]; some but variable bearing on trusts for the advancement of education; leaving only the fourth head to attract a stringent application of the public benefit test in respect of entities claiming charitable status.[23] In Australia, New Zealand and Ireland the position is much the same except that in the latter jurisdiction the judiciary adopt a subjective approach in determining whether or not a gift satisfies the test,[24] a statutory exemption is provided for religious bodies[25] and (in common with Australia) closed religious orders are presumed to satisfy the test. In Canada, the Canadian Revenue Authority, aided by creative judicial interpretation of the spirit and intendment rule, takes the view that such a presumption exists in relation to the first three categories of charities, but not the fourth.[26] In the US a broad definition of 'public benefit' underlies determination of status, tax exemption, and tax deductibility under s 501(c)(3) and there is a legal presumption, though not in legislative form as in Ireland, that religious organisations *per se* satisfy the public benefit test.

In recent years the usefulness of this test has been further reduced by the diminishing opportunities for it to be applied positively and inclusively as the roles of judiciary and Attorney General became steadily more marginal to charity law, while the tax driven ethos of other institutions generally induced a defensive approach towards such opportunities.

The dilution of the public benefit test was not without consequences for the common law world as charity law then tended to ossify around precedents. While these have been identified and examined in the jurisdictions studied, some are so anomalous as to have had a particularly constraining effect in a modern rights conscious, political environment and generated awkward controversy for the governments concerned. So, for example, the 'public' arm of the test was compromised by the 'relationship nexus' rule which in some circumstances permitted indefensible exceptions that favoured donors' descendants but militated against the interests of impoverished indigenous extended family groups in Australia, New Zealand and

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[22] See *National Anti-Vivisection Society v. IRC* [1948] AC 31, *per* Lord Simonds, p. 65.

[23] *Ibid*.

[24] The leading Irish case in this context is *In re Cranston, Webb v. Oldfield* [1898] 1 IR 431. See also, *In re the Worth Library* [1994] 1 ILRM 161.

[25] See the Charities Act 1961, s. 49.

[26] *Canadian Tax Journal*, 1(1), 2003. Also, see CRA 'Guidelines for Registering a Charity: Meeting the Public Benefit Test' which states explicitly that a presumption of public benefit exists with respect to the first three *Pemsel* categories.

Canada.[27] So, also, it had become difficult to justify exceptions to the 'benefit' arm of the test which was exercised to include within charitable status some of the most elite educational establishments in Britain but to exclude closed religious orders. In addition there was an issue about applying the test: arguably, the fact that it was much more likely to be applied by a tax collecting agency than by the judiciary compromised its impartiality and perhaps breached the *audi alteram partem* rule.[28]

Statutory Change

The public benefit test has now been placed on a legislative footing in Barbados,[29] England & Wales,[30] Scotland,[31] New Zealand[32] and prospectively in Northern Ireland[33] and Ireland.[34] Only in England & Wales and Northern Ireland[35] has the test been declared to have an unequivocal mandatory application in respect of all charitable purposes. As stated in s 3 of the Charities Act 2006:

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[27] In relation to Canada, see Revenue Canada, Policy Statement CPS – 012, *Benefits to Aboriginal Peoples of Canada*, 1997.

[28] Loosely translated as 'let no man be a judge in his own cause'.

[29] See s 4 of the Charities Act, *The Laws of Barbados*, Volume VIII, Title XVIII, Chapter 243, LRO 1989. However, this statutory definition merely re-states the common law definition.

[30] In fact it had already been statutorily stated in s 1(1) of the Recreational Charities Act 1958 "… the principle that a trust or institution to be charitable must be for the public benefit" but now, under s 3(1) of the Charities Act 2006, "a purpose falling within section 2(2) must be for the public benefit if it is to be a charitable purpose" and further under s 3(2) (2) "In determining whether that requirement is satisfied in relation to any such purpose, it is not to be presumed that a purpose of a particular description is for the public benefit". This new statutory test is due to come into effect in 2008.

[31] Under s 7(1)(b) of the Charity and Trustee Investment (Scotland) Act 2005, a body will meet the charity test if "it provides (or, in the case of an applicant, provides or intends to provide) public benefit in Scotland or elsewhere".

[32] Section 5 (2)(a) of the Charities Act 2005 states that "the purpose of a trust, society or institution is a charitable purpose under this Act if the purpose would satisfy the public benefit requirement … " See also, Charity Commission, *Consultation on Draft Public Benefit Guidance – A Summary of ResponsesReceived by the Charity Commission*, October 2007 at http://www.charity-commission.gov.uk/enhancingcharities/pbresponse.asp. The public benefit provisions in the Charities Act 2006 and the Commission's implementation of them will be subject to formal review in 2010.

[33] Sections 5 and 6 of the Charities (Northern Ireland) Order 2007.

[34] Under Head 3(b) of the Charities Regulation Bill 2006 the definition of a 'charity' includes the requirement that it "promotes such purposes for the benefit of the community".

[35] Section 5(2) of the Charities (Northern Ireland) Order 2007 states that "In determining whether that requirement is satisfied in relation to any such purpose, it is not to be presumed that a purpose of a particular description is for the public benefit".

> (2) In determining whether that requirement is satisfied in relation to any such purpose, it is not to be presumed that a purpose of a particular description is for the public benefit.

In effect, to obtain charitable status, the Charities Act 2006 now requires organisations to prove both that their purposes are recognised as charitable, and that their purposes are for the public benefit. In Scotland, s 8(1) of the Charities and Trustee Investment (Scotland) Act 2005 states that "no particular purpose is, for the purposes of establishing whether the charity test has been met, to be presumed to be for the public benefit" while this is implied in New Zealand under s. 5(2)(a) of the Charities Act 2005 (subject to certain Maori specific exceptions[36]). In Australia the Extension of Charitable Purposes Act 2004 has introduced a legal presumption that self-help groups and closed or contemplative religious orders are for the public benefit.[37] It is very much a matter of conjecture as to what view the ATO and the courts in that jurisdiction (and the equivalent bodies elsewhere) will take of future precedents established in England & Wales which result from the mandatory application of the public benefit test in circumstances for which there is no corresponding domestic statutory requirement.

In Scotland, unlike other UK jurisdictions, the public benefit test is now given a statutory definition. Under s 8 of the Charity and Trustee Investment (Scotland) Act 2005, in determining whether a body provides or intends to provide public benefit, regard must be had to:

(a) how any –

  (i) benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and
  (ii) disbenefit incurred or likely to be incurred by the public, in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and

(b) where benefit is, or is likely to be, provided to a section of the public only, whether any conditions on obtaining that benefit (including any charge or fee) is unduly restrictive.

In Ireland, the proposed new statutory formulation under s 4(3) of the Charities Regulation Bill 2006 requires the test to be applied to all purposes but continues the previous exemption granted to trusts for the advancement of religion. The statutory treatment of the test in the latter jurisdiction is interesting as, although echoing the above Scottish provision, it goes further by providing a fuller statement of legislative intent as to its actual operation. The draft provision adds that when applying the test regard must be had to:[38] the extent to which the gift may relieve or alleviate the condition giving rise to the charitable purpose; whether the purpose is directed

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[36] However, note that for certain limited circumstances "religious purposes" do not need to satisfy common law requirements such as "public benefit" in order to qualify as "charitable purposes".

[37] Section 5 of the Extension of Charitable Purposes Act 2004.

[38] Under Head 4 of the Charities Regulation Bill 2006.

to the public or an appreciable section of the public; and whether any private benefit is ancillary, reasonable and necessary to the furtherance of the purpose. Further, in determining what constitutes the public or an appreciable section of the public: regard must be had to whether any limitations imposed by the donor on eligibility are justifiable and reasonable, in the light of the nature of the purpose being pursued; and such determination should not be based on any personal connection between the donor and donees. Then, in a firm statement of legislative intent undoubtedly driven by the public school controversy in England & Wales, the provision declares that the imposition of fee charges should not exclude a significant proportion of the beneficiary class or limit beneficiaries to the well off. In assessing the existence of public benefit where fees are charged, due regard should be given to the extent to which the charges restrict access to the purpose and the public benefit consequence thereof.

It is curious that, of all the jurisdictions to embark on charity law reform, only in Scotland and Ireland has the legislature offered a statutory definition of this the most crucial component in determining charitable status and this can only cause further uncertainty when the test is applied to the same issue (e.g. fee charging charitable hospitals) in different jurisdictions. Given the fact that the public benefit test has never been applied to most charitable purposes, in particular that there are no benchmarks for what it might mean in relation to religious and educational purposes, it must give rise to some concern that a process for translating common law into statute has chosen to skirt around the pivotal common law characteristic that sets charity apart from all other forms of beneficial organizations. To leave this test, and the definition of 'charity', open to continued subjective interpretation raises questions as to the veracity of the political will to address social policy issues such as the charitable status of fee paying hospitals and private schools.

Applying the Test

The issue as to which agency in the regulatory framework bears responsibility for applying the public benefit test is of crucial importance to charities and for the development of the charitable sector. Where, in keeping with the traditional policing role, it continues to rest with the tax collecting agency as is the case, for example, in Australia, the US and Canada then the test must to some degree operate in an exclusionary manner as that agency's *raison d'etre* requires it to protect and maximize the nation's tax revenue base. This has been recognized in the UK jurisdictions, Ireland, Singapore and New Zealand where one outcome of their charity law reform processes has been to remove this responsibility from the traditional regulatory agency and assign it instead to a more independent Commission. It remains to be seen whether the transfer will result in the test being applied in a more inclusive fashion. In Ireland, an indication that this might be intended can be found in the explanatory note accompanying the above draft provision stating that "this Head seeks to establish the broad principles of a public benefit test, as legislative

markers for the exercise of discretion by the Regulatory Authority". It would seem that the transfer will be accompanied by a vesting of sufficient autonomy to permit the new agency to interpret the meaning of public benefit in light of modern social and economic conditions. At this stage it is not evident that this will necessarily be the case in Singapore and New Zealand. Only in England & Wales has the responsibility for determining what activities constitute a contemporary interpretation of public benefit sufficient to justify the conferring of charitable status rested with a non-revenue driven government body, the Charity Commission. Further, the Commission is proposing that applying the test will require four key principles to be satisfied: there must be an identifiable benefit; benefit must be to the public or a section of the public; people on low incomes must be able to benefit; and any private benefit must be incidental. This rather anodyne proposal, however, promises little additional clarity to the existing requirement in s 3(3) of the 2006 Act that the test be applied in accordance with established common law principles. In that jurisdiction, as now in Scotland and eventually in Northern Ireland, the legislature has both vested the Commission with High Court powers and given it lead responsibility relative to the tax collecting agency, thereby enabling it to use the public benefit test as a potentially powerful means of supporting charities and developing the sector.

Exclusively Charitable

Case law in the common law jurisdictions has long established that for a trust to be charitable its purposes must be confined exclusively to charitable purposes. The associated problems most often arise where the organisation or donor has a mixture of purposes. Sometimes, and then to a varying degree, the exclusivity requirement may also be accompanied by complications arising from: the 'ancillary and incidental' rule; and the activities test. A further layer of complexity is added when the legal context is one which makes a difference between charitable trusts and corporations but does not provide linkages between the two.

Ancillary and Incidental

To be a charity an entity must have an exclusively charitable purpose.[39] Any other purpose or purposes must be of lesser importance and be in aid of the dominant charitable

[39] See *Commissioners of Inland Revenue v. Yorkshire Agricultural Society* [1928] 1 KB 611, *Inland Revenue Commissioners v. City of Glasgow Police Athletic Association* [1953] AC 380 and *Commissioner of Inland Revenue v. Royal Naval and Royal Marine Officers' Association* (1955) 36 TC 187; in Australia, see *Salvation Army (Vic) Property Trust v. Shire of Ferntree Gully* (1952) 85 CLR 159.

purpose or purposes or, in the form of words long favoured by judiciary throughout the common law world, "a body is a charity even if some of its incidental and ancillary objects, considered independently, are non-charitable."[40] The requirement is not just that objects or purposes described as ancillary, incidental or concomitant to a main charitable purpose are merely minor, as in of lesser importance, they must also lack substance in their own right and amount to no more than something which tends to assist, or which naturally goes with, the achievement of the main purpose.[41] The distinction is one between means and ends. An object will be incidental and ancillary if it assists in achieving the declared charitable purpose.[42] However, if an object is or becomes divorced from that purpose, with its own goals, then it has been transformed into an end in itself, breaching the exclusivity rule with fatal consequences for charitable status.[43]

Activities

Increasingly, legislative endorsement is being extended to a rule, which has attracted varying judicial recognition over the years, that an entity's activities must further its charitable purpose: the reality and substance of its declared purpose must be substantiated (i.e. confirmed, corroborated or demonstrated) by its actual activities.[44] It is not the nature of the activity that is relevant, but its role in supporting

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[40] As stated by Dixon, C.J., McTiernan, Williams and Fullagar, J.J. in *Congregational Union of NSW v. Thistlethwayte* (1952) 87 CLR 375, p. 442. See dicta to the same effect in: *Re White; White v. White* [1893] 2 Ch 41; *Salvation Army (Vic) Property Trust v. Fern Tree Gully Corporation* (1952) 85 CLR 159.

[41] See *Oxford Group v. Inland Revenue Commissioners* (1949) 2 All ER 537 and *In re Harpur's Will Trusts* (1962) 1 Ch 78, p. 87.

[42] See, for example: *Salvation Army (Vic) Property Trust v. Shire of Ferntree Gully* (1952) 85 CLR 159 where trading in the inevitable produce of a training farm established for delinquent boys did not mean the lands in question were not used exclusively for charitable purposes; and *Commissioners of Inland Revenue v. Yorkshire Agricultural Society* [1928] 1 KB 611 where free admission to shows, access to reading rooms, reduced fees for analysis of manures and foodstuffs, special railway facilities, and the like were held not to disqualify the society from being regarded as charitable.

[43] See, for example, *Tennant Plays Ltd. v. IRC* (1948) 1 All ER 506 *per* Macnaghten, J., p. 509 where contractual powers to produce, distribute, rent or otherwise deal in film production were unanimously held to be more than ancillary to an expressed purpose of promoting the arts of 'drama, dance, singing and music' and instead to be independent "seemingly ridiculous objects" of a non-charitable nature that breached the exclusivity rule.

[44] *Inland Revenue Commissioners v. City of Glasgow Police Athletic Association* [1953] 1 All ER 747 *per* Lord Normand, pp. 751–752 who, in finding the Association was not a charity, explained:

"… in order to ascertain what the purposes of an association are, the court is not limited to consideration of its rules or its constituent documents … I begin with the rules… But it will not do to stop there… The question is what are the purposes for which the association is established, as shown by the rules, its activities and its relation to the police force and the public."

Also, see Jessop, J., in *Navy Health Ltd v. DFC of T* [2007] FCA 931, para 25.

the charitable purpose. Applying an activities test may be necessary, for example, where there is doubt about whether a purpose originally stated in a governing document as the main purpose in fact remains the main purpose. Although objects and purposes can change to a degree over time, the test may indicate that an organisation is now acting outside the scope of the purpose which justified the initial award of charitable status. This in turn may also indicate that it is acting *ultra vires* the powers vested in it by statute, charter or under its founding documents on incorporation.[45]

Where there is doubt as to whether or not purposes are charitable, regulatory bodies will now admit extrinsic evidence of actual activity to clarify the matter. In Australia, for example, the ATO from the outset of an application will seek activities evidence to assist determination of charitable status and regard documentary material as merely supportive information.[46] In England & Wales, the courts and the Charity Commission stress the importance of applying an activities test when determining charitable status. The latter, for example, has warned that "where the campaign or other activity is of a political nature (i.e. seeking to advocate or oppose a change in the law or public policy), charity trustees must ensure that these activities do not become the dominant means by which they carry out the purposes of the charity ... these activities must remain incidental or ancillary to the charity's purposes."[47]

Charitable Trusts and Charitable Corporations

The complexities arising from the charity law struggle to accommodate a basic dichotomy that allows charities to be structured as both trusts and corporations, without providing the necessary legal linkages between them, have proved divisive and enduring. This fundamental definitional problem has led to a fracturing of the common law heritage as the UK, Irish and other jurisdictions continue to develop a primarily trust led charity law culture (rooted in equity principles and tied to related regulatory agencies etc.) while the US, Canada, Australia and to a lesser degree other jurisdictions develop a primarily corporate led charity culture (in which charities are treated essentially the same as any other corporation). Whereas in England & Wales the role of the Charity Commission has been able to bridge the differences and cultivate a charity specific regulatory focus that disregards legal structure, this approach has not been adopted elsewhere. In the US, Canada and

[45] In the US, the Model Business Corporation Act excludes corporations from the ambit of the doctrine.

[46] See ATO, TR2005/21 paras 165–177. Also, see *Royal Australasian College of Surgeons v. FC of T* (1943) 68 CLR 436.

[47] See for example, Charity Commission CC9 – *Campaigning and Political Activities by Charities* (Version – September 2004).

Australia in particular, there is now a troubling disconnect between the underpinning common law principles that have traditionally distinguished charities defined as trusts and the governing regulatory machinery that defines charities as just another species of corporation. This in turn leads to uncertainty regarding the appropriateness of any cross-jurisdictional transfer of a precedent binding on one legal form and applying it to equally bind the other.

Statutory Change

The exclusivity rule has long been addressed in some jurisdictions, such as Ireland, by legislation.[48] In all jurisdictions where new legislation has been introduced, the exclusivity requirement has been stated as a continuing component in the legal definition of 'charity'. However, the approach taken to the accompanying rules, relating to ancillary and incidental purposes and the activities test, has varied while little attention has been given to the charitable trust/charitable corporation dichotomy.

So, and again in Ireland, in the proposed Charities Regulation Bill 2006, under Head 3, " 'charity' for the purposes of this Act means any institution, corporate or not, which promotes charitable purposes only … save for resources applied to … such approved ancillary activities." Under Head 2, ss 2, 'approved ancillary activity' will mean –

> an activity designated by the Regulatory Authority under section 3 for the purposes of this Act as being one which a registered charity or class of registered charities may undertake in pursuance of the charitable purposes of the charity without prejudice to its charitable status or registration as a charity.

While, under Head 3, s 5 –

> In determining whether an activity is an ancillary activity for the purposes of subsection (2) the Regulatory Authority may determine that a particular activity is 'ancillary' in the case of different charities or classes of charities notwithstanding that the activity is undertaken to a different extent by such charities or classes of charities.

In England & Wales, s 1 of the Charities Act 2006 unequivocally restates the exclusivity rule by declaring that " 'charity' means an institution established for charitable purposes only." This is echoed in s 7 of Charities and Trustee Investment (Scotland) Act 2005 which states that "(1) A body meets the charity test if— (a) its purposes consist only of one or more of the charitable purposes … " Similarly, in Singapore, under s 2 of the Charities Act 1995 "charitable purposes" means purposes

[48] See the Charities Act 1961, s 49 which provides that:

(1) Where any of the purposes of a gift includes or could be deemed to include both charitable and non-charitable objects, its terms shall be so construed and given effect as to exclude the non-charitable objects and the purpose shall, accordingly, be treated as charitable.

which are exclusively charitable according to the law of Singapore". In New Zealand, under s 13(1) a 'charitable entity' is one "established and maintained exclusively for charitable purposes" while s 5(3) of the Charities Act 2005 declares that "if the purposes of a trust, society or an institution include a non-charitable purpose (for example, advocacy) that is merely ancillary to a charitable purpose of the trust, society or institution, the presence of that non-charitable purpose does not prevent the trustees of that trust, society or institution from qualifying for registration as a charitable entity". For added clarity, under s 5(4), "a non-charitable purpose is ancillary to a charitable purpose of the trust, society, or institution if the non-charitable purpose is (a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society, or institution; and (b) not an independent purpose of the trust, society, or institution". Further, under s 18 when considering whether or not to register an entity as a charity, the Commission "must have regard (1) to the activities of the entity at the time at which the application was made; and (2) to the proposed activities of the entity".

This inconsistency in the translation of the common law exclusivity rule into its statutory definition may prove problematic in the future while the present lack of a uniform approach towards 'ancillary and incidental' and the 'activities test' among those nations that have not subscribed to statutory reform will add to the already considerable uncertainty due to the trust/corporation dichotomy in this definitional area. The difficulties as regards the latter have been offset to some degree by the introduction of new statutory forms of charity specific corporate structures such as the CIO in England & Wales and prospectively also in Ireland (see, further, Chap. 15). However, the basic schism between a charitable trust and charitable corporation orientation – with the accompanying mismatch between equitable principles and company law – that differentiates the UK led branch of the common law heritage from the US/Australian branch, will continue to trouble the future development of charity law.

Independent

A charity is required under common law to be a free-standing, independent entity founded by and bound to fulfill the terms of the donor's gift. There has never been any legislative initiative to transform this matter of trust and proper governance into a statutory provision of charity law. Such statutory duties as exist are to be found expressed with varying degrees of stringency in legislation specific to the type of legal structure (company law, trusts, societies and associations etc.). Some common law countries, notably England & Wales[49] and the US, have recently introduced provisions to relax the legal constraints that traditionally required trustees to be absolutely impartial and without any personal interest in the affairs of their trust.

[49] See s 36 of the Charities Act 2006. For Ireland, see Head 118 of the Charities Regulation Bill 2006.

Non-governmental

The fact that the distinction between the public benefit activities of government and charity has never been particularly clear, a primary theme of this book, is for reasons to do with the legislative intent underpinning the Preamble. This rested on the government presumption that both parties would, in partnership, address the social policy agenda then outlined. The same rationale has, in recent years, led to that distinction becoming more deliberately blurred in several jurisdictions; a trend exacerbated by the switch from common law to statutory definitions.

In England & Wales, the Charity Commission decision in the *Trafford and Wigan* case,[50] granting charitable status to entities established by government to provide what until then had been local authority public services, with almost total government funding, was a significant indicator of government intent to increase the transfer of responsibility to its partner; as was the decision in the *Central Bayside* case[51] in Australia. This has been accompanied by a casual abandoning of the 'additionality' principle, a safeguard to ensure that the proceeds from the National Lottery were not used to substitute for government funding, to subsidise the costs of providing facilities for the Olympic Games in 2010 and other government commitments. In keeping with this approach, the Charities Act 2006 and similar legislation in other UK jurisdictions and Ireland, laid the foundations for further charity encroachment into the heartland of government public service provision. By identifying as charitable purposes a range of what would otherwise be assumed to be government responsibilities, doors have been opened for more extensive partnership arrangements with charity (see, further, below).

Statutory Change

None of the numerous charity law reform processes, either concluded or still underway, have identified and legislatively addressed any need to ensure protection for the independence of charities.

Given the plethora of corporate scandals in the for-profit sector which have been due to lax governance, it may seem a little strange that governments, in the context of charity law reform, have not seized the opportunity to define and embed the principle of 'independence' as a mandatory statutory benchmark for practice in the

[50] See Charity Commission, *Applications for registration of (i) Trafford Community Leisure Trust and (ii) Wigan Leisure and Culture Trus*t, April 21, 2004 at http://www.charitycommission.gov.uk/Library/registration/pdfs/trafforddecision.pdf

[51] See *Central Bayside Division of General Practice Ltd v. Commissioner of State Revenue* [2005] VSCA 168/; a decision which when contrasted with *Metropolitan Fire Brigades Board v. Commissioner of Taxation* (1990) 27 FCR 279, where charitable status was denied a PBI on the basis that fire brigades were a responsibility of government, illustrates the extent of the erosion of this principle in Australia.

charitable sector. However, strong independent charities with a more clearly defined public benefit remit, separate and distinct from that of government, would be contrary to the latter's partnership strategy. The absence of provisions asserting the principle of independence and distinguishing between government bodies and charities as legal entities, in any of the recent charity legislation, should come as no surprise.

Non-profit Distributing

In general, the common law rule is that charities may make profits (or gains) or accumulate surpluses, provided these are not used for the profit or gain of its individual members or for distribution to its owners or members, or to any other person, either while operating or on winding up. The charging of fees for services will normally be consistent with the non-profit requirement. In many situations charities will engage in commercial activities. This is allowed in some circumstances where the charitable purpose is being carried on in a way that is commercial (also known as 'primary purpose trading'[52]) and where the commercial operations are merely incidental to the carrying out of the charitable purpose also known as 'ancillary trading'[53]). Basically, commercial activities, undertaken to make profits, are permissible where they are merely incidental to the carrying out of a purpose that is otherwise charitable.[54] However, where an organisation's purpose has in fact become one of carrying on a commercial enterprise to generate surpluses, then neither the purpose nor the organisation will be charitable.

This common law rule has been under considerable strain in recent years in the jurisdictions studied, as ever more charities are drawn into competitive tendering for service delivery contracts on behalf of government bodies. The conditional right to engage in commercial activity is particularly important for such charities but there are limits to the extent they can allow their purposes to be distorted by the drive to secure and deliver on a succession of short-term and narrowly defined service contracts. Charities dependent upon contract renewal are susceptible to developing a compliant relationship with government bodies and compliance with the latter's

[52] See, for example: *The Incorporated Council of Law Reporting of the State of Queensland v. FC of T* (1971) 125 CLR 659 (the preparation and sale of law reports); *McGarvie Smith Institute v. Campbelltown Municipal Council* (1965) 11 LGRA 321 (the manufacture and sale of animal vaccines); The *Industrious Blind* case, [1968] NI 21 (the manufacture and sale of goods made by blind people); and *Scottish Burial Reform and Cremation Society Ltd v. Glasgow City Corporation* [1967] 3 All ER 215 (providing cremation services).

[53] See, for example: *Salvation Army (Victoria) Property Trust v. Fern Tree Gully Corporation* (1952) 85 CLR 159 (home for neglected boys that also provided training through its farm); and *Trustees of the Dean Leigh Temperance Canteen v. Commissioners of Inland Revenu*e (1958) 38 TC 315 (the promotion of temperance through the running of a canteen).

[54] See, for example, *Commissioner of Taxation v. Word Investments Ltd* [2006] FCA 1414.

agenda can become an implicit criterion for their selection and deselection. The concern that short-term government contracts threatened to compromise the independence of charities was highlighted in two important reports where the authors spoke of their fear that such contracts "may lead to unhealthy dependencies"[55] and has recently been addressed by the Charity Commission.[56] The contract culture may allow government to drip-feed charities but for the latter it can also prompt a creative re-interpretation of objects and purposes to allow pursuit of the next contract as they compete for survival, which may ultimately threaten their claim to charitable status.

There have been attempts in some of the jurisdictions studied to ease the tensions emanating from this common law constraint. In the UK jurisdictions, there has been a tendency for charities with a growing investment in commerce to consolidate this development by establishing a separate trading arm, in which all commerce related activity is housed and designated ancillary and incidental, thereby leaving the organization free to concentrate on its main charitable purpose or purposes. This has been encouraged by the Charity Commission in England & Wales as a strategy for reducing risk to a charity's assets and minimising its tax liabilities while allowing the trading subsidiary to make donations to their parent charity as 'Gift Aid' thereby reducing or eliminating the profits of the subsidiary which are liable to tax.[57] In the US, the UBIT legislation,[58] together with s 1.501(c)(3)-1(e) of the tax code, as amended in 1990, clearly permits charities to engage in commercial activities subject to the above common law caveat and can be seen as a legislative response to the same pressures. In both the UK and Ireland the introduction of CICs is a measure similarly intended to address problems in this area as is the push to develop social enterprise structures, particularly in the UK.

Statutory Change

It might have been expected that the new charities legislation in the jurisdictions studied, predicated as it has been on the need to facilitate future partnership

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[55] See the Commission on the Future of the Voluntary Sector in England, *Meeting the Challenge of Change: Voluntary Action into the 21st century*, NCVO Publications, London, 1996 (also referred to as the Deakin Report) and the Commission on the Future of the Voluntary Sector in Scotland, *Head and Heart*, SCVO, Edinburgh, 1997 (also referred to as the Kemp Report), p. 47, para. 6.5.5.

[56] See Charity Commission 37.

[57] See Charity Commission leaflet CC35 – *Trustees, trading and tax: How charities may lawfully trade* (Version April 2007).

[58] The Unrelated Business Income Tax Act 1950, added to the IRS Code, removed the 'destination of income' test under which charities could claim tax exemption on commercial activities that were unrelated to their charitable purpose if they could show that the profits generated went to further those purposes.

arrangements between government and charity, would address the constraints presented by this common law rule. However, this was not the case.

In England & Wales the Charities Act 2006 makes no reference to charities and trading,[59] nor does either the Charities Act 2005 in New Zealand nor the Charities Act 1995 in Singapore, while in Ireland the Charities Regulation Bill 2006 restricts itself to stating the common law rule that a charity must apply … "all its resources including any annual profit or other surplus assets, to such charitable purposes for the benefit of the community; and … not distribute any profit or asset to its owners, members or charity trustees in the normal course of its activities or in the event of dissolution".[60] In short, governments would seem to be broadly in agreement that this sensitive interface with charities would not benefit from legislative intervention and might be best left to develop within the existing common law framework of rules and principles.

Non-political

The common law rule, that a voluntary organisation seeking to acquire or retain charitable status and qualify for attendant tax privileges must avoid having political purposes and engaging in most forms of political activity, subsists with varying degrees of stringency in all the jurisdictions studied[61] and applies equally to campaigning for such change within the jurisdiction or elsewhere.[62] The rule draws a distinction between bodies with political purposes and bodies that engage in political activities: the former are not charitable; the latter will be charitable if the activities are ancillary but subordinate to and in furtherance of its non-political purposes (see, further, Chap. 1).

In the UK, it has been a controversial focal point in the relationship between government and charity since at least the Nathan report:[63]

> Some of the most valuable activities of voluntary societies consist, however, in the fact that they may be able to stand aside from and criticize State action or inaction, in the interests of the inarticulate man in the street.

More recently, the advocacy role of charities has been further compromised by a hardening of the judicial view that charitable status and lobbying for change in law

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[59] This, presumably, being left to the Charity Commission to address in the form of guidance.

[60] See Head 3 (2) (c) and (d) of the Charities Regulation Bill 2006.

[61] Note that charities may campaign against certain laws provided their goal is to educate the public to do voluntarily that which they may otherwise be statutorily required to do. For example, the purpose in *Jackson v. Phillips* (1867) 96 Mass. (14 Allen) 539 was to end slavery, not by changing the law, but by changing public sentiment through education.

[62] See *Baldry v. Feinbuck* [1972] 1WLR 552; (1971) 115 SJ 965; [1972] 2 AII ER 81 and *Webb v. O'Doherty and Others* (1991) 3 Admin. LR 731, The Times, February 11, 1991 respectively.

[63] See Nathan report, *op. cit*., p. 12, para 53.

or government policy are incompatible activities[64] and by the contract culture.[65] The effect of the latter, as noted above, was a matter of concern in both the Kemp and Deakin reports which stressed the need for equality in any partnership between the voluntary sector and government while also emphasising that "voluntary bodies must be free to be advocates even where they are also partners".[66]

In the US, the common law rule has long been placed on a statutory footing but in a more measured form. Section 501 (c)(3) of the Internal Revenue Code frames the injunction against charities in the following terms:

> ... no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

By imposing more specific limitations on such activities by charities this provision avoids the blanket effect of the traditional common law approach and judicial rulings have also served to point up a jurisdictional difference which allows charities in the US more scope that their counterparts in the UK and elsewhere to campaign for change in law and policy (see, further, Chap. 9).

Statutory Change

Where this matter has been addressed in new charities legislation it has invariably been to restate the common law rule. Neither in England & Wales nor in Scotland is any reference made to this rule in the Charities Act 2006 and in the Charities and Trustee Investment (Scotland) Act 2005 respectively, therefore the legal position continues to be as stated in guidance issued by the Charity Commissioners which reiterates the common law: "an organisation set up for a purpose (or which includes a purpose) of advocating or opposing changes in the law or public policy (in this country or abroad) or supporting a political party cannot be a charity".[67] The resulting problems for processes of democratic accountability have been highlighted in a recent report which stresses that "when restrictions on the ability of charities to engage in political campaigning substantially curtail their contribution to civil society, charity law and regulation is (*sic*) clearly in need of change".[68]

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[64] See for example, *National Anti-Vivisection Society v. IRC* [1948] AC 31 and *McGovern v. A-G* [1982].

[65] *Ibid*., where the view is expressed that "short-term contracts may threaten independence and the ability to speak out or campaign".

[66] See the Commission on the Future of the Voluntary Sector in England, *Meeting the Challenge of Change: Voluntary Action into the 21st century*, NCVO Publications, London, 1996, pp. 13–14.

[67] *Ibid*., para 13.

[68] See Kennedy, H., *Report of the Advisory Group on Campaigning and the Voluntary Sector*, London, 2007.

Similarly, no mention is made of the rule in the Singaporean Charities Act 1995 but the common law rule undoubtedly still remains in force. In New Zealand, the Charities Act 2005 makes only a passing and incidental reference to the rule,[69] which again leaves the common law constraints fully in place. In Ireland, the relevant legislative provision simply restates the established common law rule:[70]

> For the purposes of this Act an institution which is established with the primary object of advocacy, campaigning or lobbying in order to achieve political ends is not a charity.

Further:[71]

> For the purposes of subsection (2) advocacy, campaigning or lobbying may be designated by order of the Regulatory Authority as approved ancillary activities where it can be demonstrated to the satisfaction of the Regulatory Authority that such activities are undertaken solely in furtherance of the charitable purposes of the institution concerned, and notwithstanding the fact that such activities may, as the case may be, relate to issues which might be considered otherwise to be political.

Again, the absence of any legislative intent to adjust a common law definitional aspect of 'charity' that favoured the interests of government is both very clear and unsurprising. Moreover, the effect of this common law constraint has been reinforced by legislative initiatives not directly related to charity.

In all jurisdictions studied, the statutory changes introduced to modernize charity law took place alongside the introduction of tough anti-terrorism provisions intended to address the growing international security imperative but which will undoubtedly also further inhibit the advocacy role of charities. In the UK, for example, over the past decade this role has been affected by the provisions of the Serious Organised Crime and Police Act 2005, the Terrorism Act 2000 and the Protection from Harassment Act 1997. It has been noted that this legislation "has directly restricted the right to protest or campaign but also has had a 'chilling effect' by deterring groups from taking actions which may be deemed criminal".[72] As in other jurisdictions, the efforts of charities to progress social inclusion for ethnic minorities in the UK through advocacy and campaigning are being constrained by new government anti-terrorism measures which by causing further alienation may exacerbate rather than reduce issues of national and international security (see, also, Chap. 15).

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[69] See s 5(3):

> To avoid doubt, if the purposes of a trust, society, or an institution include a non-charitable purpose (for example, advocacy) that is merely ancillary to a charitable purpose of the trust, society, or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity.

[70] See Head 3(3)(2) of the Charities Regulation Bill 2006.

[71] *Ibid*., Head 3(4).

[72] See Kennedy, H., *Report of the Advisory Group on Campaigning and the Voluntary Sector*, London, 2007, para 1.9.

Aside from removing the legal presumptions that had accreted around the application of the public benefit test, thereby impeding its usefulness to government as a regulatory mechanism for sifting eligibility for tax exemptions, the Preamble template for relations between government and charity remains undisturbed by recent legislative attention given to the above definitional matters (see, further, below).

Definitional Matters: Charitable Purposes

The social policy agenda of government, and the nature of its intended partnership with charity in meeting that agenda, were clearly evident in the nature of the purposes it was prepared to recognize as charitable in the Preamble and as subsequently classified in *Pemsel*. It is now equally evident that the extent and type of statutory additions made to the classification of charitable purposes reflect corresponding changes to both agenda and partnership.

Pemsel Purposes

The understandable interest generated by the recent charity law reform processes should not deflect from an appreciation that of all the common law nations only a tiny minority has in fact introduced new charities legislation, of which fewer still have altered the existing charitable purposes by adding to the list.[73] In Canada, for example, the charitable purposes have been largely left to the courts to identify and interpret.[74] In the US the situation is somewhat different: perhaps quite unique among the jurisdictions studied. There, s 501 (c) of the Internal Revenue Code adopts a linear progression approach to tax exempt entities which, by providing a codified list of nonprofit public benefit activities entitled to tax exemption, has in

[73] Barbados, the first nation to do so, introduced legislation that defined 'charitable purposes' in accordance with suggestions made in the Goodman report, by specifying a non-exhaustive list covering 26 main purposes and 14 amplifying sub-headings; they all, however, retained their essential common law character.

[74] Some states and territories have, however, introduced legislation that extends the *Pemsel* purposes: in Alberta, s 1(1)(b) of the *Charitable Fund-raising Act* extends the common law by defining 'charitable purpose' as including 'a philanthropic, benevolent, educational, health, humane, religious, cultural, artistic or recreational purpose, so long as the purpose is not part of a business'; while in Manitoba, s 1(1) of the *Charities Endorsement Act* defines 'charitable purpose' as including 'any charitable, benevolent, philanthropic, patriotic, athletic, artistic, or civic purpose that has as its object the promotion of a civic improvement or the provision of a public service'.

effect extended the range of matters defined as 'charity' beyond the traditional four elements of poverty, education, religion and general community benefit.[75]

Without exception, however, all nations have at least retained as charitable, if not added to, the purposes first identified and listed in the 1601 statute and as classified in *Pemsel*. The bedrock of charity law in the future, throughout the common law world, will therefore remain firmly based on the *Pemsel* classification and on the accompanying vast body of case law principles and precedents. This will also, necessarily, continue into the next century the definitional problems associated with *Pemsel* that have proved problematic in the past.

Jurisdictional Differences in Pemsel Application

The evidence from the jurisdictions studied is that their responses to opportunities for revising and modernizing definitions under the *Pemsel* heads have varied considerably. This has been due to factors such as whether the opportunities are presented before an impartial and disinterested judiciary or a defensive revenue driven tax collecting agency or to a proactive support regulatory body such as the Charity Commission. It is also attributable to jurisdictional differences in the weighting given to the 'spirit and intendment' rule and the relative bearing of the public benefit test under each *Pemsel* head. The result has been a considerable level of inconsistency in jurisdictional interpretation.

- *Relief of poverty*

The relief of poverty has been judicially extrapolated to accommodate a seemingly endless spread of incidences of generosity but is also associated with a lack of judicial rigour. The fact that the public benefit test never had much application in this context caused judicial practice to lean towards saving trusts under the heading of poverty where it seemed likely that they would otherwise fail. So, a trust in danger of not satisfying the more stringent public benefit test under other *Pemsel* headings would be saved under the poverty heading. Inevitably this more relaxed judicial approach towards public benefit in a poverty context produced a good deal

[75] The Regulations state:

> The term charitable is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of charity as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of government; and promotion of social welfare by organisations designed to accomplish any of the above purposes; or (i) to lessen neighbourhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.

of inconsistent case law. Moreover, for the developed nations that were the subject of this study, the existence of sophisticated national systems of government departments charged with duties in respect of the relief of poverty has necessarily impacted upon how the concept of 'poverty' is now defined.

Charities established under this heading have also always been restricted by certain traditional common law limitations such as that the charitable activity be directed towards the effects and not the cause of poverty. In Australia, The ATO, for example, has ruled that:[76]

> In Australia, those lacking the resources to obtain what is necessary for a modest standard of living in the Australian community may be accepted as suffering poverty.[77] To relieve poverty implies that the people in question have a need attributable to their condition which requires alleviating, and which those people could not alleviate or would have difficulty in alleviating by themselves.[78] The ways in which poverty can be relieved include providing money, accommodation,[79] legal or medical aid.

This traditional approach is similarly true of the view taken by the regulatory authority in Ireland, whereas in Canada the fairly expansive definition of the courts and CRA generally includes purposes having to do with poverty prevention through community economic development, while in the US the IRS has held that certain community development organizations that focus their work on preventing the causes of poverty instead of simply providing traditional charitable relief are charitable in nature. In England & Wales the constraint has remained in place (surviving the changes introduced by the 2006 Act) but the Charity Commission narrowed its effects by extending charitable status to purposes such as the relief of the unemployed, rural and urban regeneration etc. This constraint has been reinforced in all the jurisdictions studied, though to a varying degree, by the common law prohibition on charities pursuing political purposes: while dealing with the effects of poverty can be safely deemed to be charitable, questioning its causes would inevitably be to trespass into the political arena.[80] The common law limitation that the relief must not be restricted to a specified group of poor individuals,[81] as this would make it too narrow and exclusionary in nature, has also been quite obstructive in certain

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[76] See ATO, *Income Tax and fringe benefits tax: charities*, TR 2005/21, para 197. The narrowness of the interpretation given to 'poverty' was a primary cause of concern in the Anglicare Australia and Australian Council of Social Service ('ACOSS') submissions to the 2001 Charities Definition Inquiry which state that the current "relief of poverty definition is too narrow and reactive and does not provide adequate scope for a participatory process".

[77] See *Ballarat Trustees Executors and Agency Company Limited v. FC of T* (1950) 80 CLR 350.

[78] See *Joseph Rowntree Memorial Trust Housing Association Ltd and others v. Attorney-General* [1983] 1 All ER 288, p. 295.

[79] See *Re Niyazi's Will Trusts* [1978] 1 WLR 910; [1978] 3 All ER 785.

[80] See Kennedy, H., *Report of the Advisory Group on Campaigning and the Voluntary Sector*, London, 2007.

[81] See *Re Compton* [1945] Ch 123 and the 'poor relations' and 'poor employees' cases.

cultural contexts; preventing the channeling of effective intervention towards small communities of impoverished indigenous people.

- *Advancement of education*

The courts have held fast to the view that if a trust is to be construed as one for the advancement of education then it should be useful and must not, for example, be political or merely recreational: the less vocational the subject the greater the judicial scepticism regarding its intrinsic educational value.[82] Traditionally, this charitable purpose has been constrained by the common law requirement that education be accompanied by dissemination,[83] which has given rise to considerable uncertainty as to the necessary size of the pool of potential beneficiaries and the bearing of the nexus of personal relationship rule: not only must the number of beneficiaries not be numerically negligible they also must not form a group defined by a common relationship to a named *propositus*.[84]

In England & Wales[85] the court found that a trust to provide for the descendants of three named individuals was insufficient, as was the case in relation to three named individuals in Ireland[86] where the court could only suggest that to satisfy a definition of 'public' the number should not be 'negligible'. In Canada, the issue of how broadly the courts should interpret 'education' was an issue in *Re Vancouver Regional FreeNet Association v. Minister of National Revenue*[87] where the court creatively applied the 'spirit and intendment' rule to confirm the charitable status of an organisation established to provide free community access to the internet; the rationale being that the service could be viewed as a contemporary equivalent to the 'highways' declared charitable in the Preamble. Also, in that jurisdiction, by way of contrast, the court in *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue*[88] refused charitable status to a minority group established to provide mutual support for immigrant women because their purposes could be construed as permitting political rather than exclusively educational activities.

In the US, the regulations under §501(c)(3) define educational as (1) the instruction or training of individuals for the purpose of improving or developing their capabilities, or (2) the instruction of the public on subjects useful to individuals and beneficial to the community. The first class of organizations has been treated quite expansively by the government (see, further, Chap. 9).

Perhaps the most contentious issue in the interpretation of 'charitable' within an educational context has arisen in the UK with the conferring of such status on that country's most elite, prestigious and expensive private schools.

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[82] See *Re Pinion* [1965] Ch 85; and *Sutherland's Trustees v. Verschoyle* 1968 SLT 43.

[83] *Re Besterman's Will Trust*, Times, January 22, 1980.

[84] *Oppenheim v. Tobacco Securities Trust Co. Ltd*. [1951] AC 297.

[85] *Re Compton, op. cit*.

[86] *Re Worth Library* [1994] 1 ILRM 161.

[87] (1996) 137 DLR (4th) 206.

[88] (1999) 169 DLR (4th) 34, SC.

- *Advancement of religion*

Historically and currently, the contribution of religious organisations to total charitable activity, to the work of the wider voluntary sector and to establishing and delivering statutory services in all the jurisdictions studied is inestimable. They have been most obviously prominent in activities which serve to advance religion but again this has had contentious outcomes; not least in jurisdictions such as Northern Ireland where the population is divided on religious grounds, where most charitable activity has always been associated with religious bodies but where the net charitable impact has arguably been to reinforce the polarization (contributing to 'bonding' rather than 'bridging' social capital) to the detriment of civil society. Charitable activity for the advancement of religion has in practice been tied to a belief in God and until relatively recently this was most usually interpreted to mean a Christian deity which has been problematic in mixed cultural contexts such as Singapore. Controversy over what constitutes a religion, as illustrated by the varying judicial approach to Scientology, is evident in all the jurisdictions studied.[89]

There is also evidence of contention with regard to the type of activities that might be construed as charitable under this head. In Ireland, for example, gifts for the saying of masses for the dead[90] and for the upkeep of graves have always been regarded as charitable but this is not necessarily the case elsewhere (masses for the dead being viewed for centuries as 'superstitious uses' in England & Wales and are currently so regarded in Singapore). In the UK, the decision in *Gilmour v. Coats*[91] denying charitable status to a closed religious order has been followed in Canada and Northern Ireland but not in Ireland where the opposite view of the Court of Appeal in *O'Hanlon v. Logue*[92] has since prevailed and no longer in Australia where the 2004 Act now provides that such activities are charitable.

- *Other purposes beneficial to the community*

Trusts for 'other purposes beneficial to the community' form the category of charitable gifts to be found under the fourth *Pemsel* heading. It is becoming increasingly anomalous to refer to this body of case law as a category when often the only factor which the cases have in common is that they cannot be readily fitted into either of the other three headings. It is an area of law where definitions abound but little in the way of governing principle or commonality of function can be found. In all jurisdictions studied, however, the case law had a distinct weighting towards service provision under umbrella headings such as 'health', 'social care', 'urban or rural

[89] For an interesting American case where the court examined the constituent characteristics of a religion, see *Malnak v. Yogi* 592 F 2d 197 (1979); also, see *Re South Place Ethical Society* [1980] 1 WLR 1565.

[90] See *Re Howley's Estate* [1940] IR 109; 74 ILTR 197.

[91] *Gilmour v. Coats et al*. [1949] 1 All E.R. 848 which followed *Cocks v. Manners* (1871) L.R. 12 Eq. 574.

[92] [1906] 1 I.R. 247.

regeneration' and 'sport and recreation' within which the number and spread of organizations and activities are now growing and coalescing at an exponential rate. Again, the evidence from the jurisdictions studied points to a lack of uniformity and a good deal of controversy accompanying the regulatory approach to organizations and activities claiming charitable status under this head, perhaps particularly in relation to health/social services and political activity.

Welfare type services have, since the Preamble, been crucially important to the domestic social policy agenda of government. Because of the affinity between traditional charitable welfare services and government public service provision, and the attraction of the former to government as a potential centerpiece for its partnership plans, they generate a good deal of controversy. The trend in the developed nations is for regulatory bodies to circumvent established rules requiring charities to be independent and non-governmental so as to facilitate potential partnership arrangements. In Canada,[93] for example, a society established to provide "necessary medical services for women for the benefit of the community as a whole" and carrying on "educational activities incidental to the above" in the form of a free-standing abortion clinic, was found to be eligible for registration as a charity. The court held that the "Society's purposes and activities at this point in time [i.e. the operation of the clinic] are beneficial to the community within the spirit and intendment, if not the letter, of the Preamble to the Statue of Elizabeth and … the Society is a charitable organisation within the evolving meaning of charity at common law." In Australia,[94] an independent association of general medical practitioners, almost wholly funded by a federal government department, established to deliver a government healthcare scheme within a small geographic area in accordance with the government's national plan was found to be charitable. Similarly in England & Wales[95] where the Charity Commission, having come to the view that charities can deliver public services which public authorities have a statutory duty to provide but have chosen to 'hive off' to voluntary associations, then permitted the Trafford Community Leisure Trust and the Wigan Leisure and Culture Trust to be registered as charities.

By way of contrast, the common law rule that charities should not have political purposes or engage in a political activity that is not ancillary and incidental to its charitable purpose, has remained intact in some jurisdictions but treated with some flexibility in others. So, at one extreme, the courts in Ireland,[96] New Zealand,[97]

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[93] See *Everywoman's Health Centre Society v. Canada* [1991] 2 C.T.C. 320, 92 D.T.C. 6001 (F.C.A.).

[94] See *Central Bayside Division of General Practice Ltd v. Commissioner of State Revenue* [2005] VSCA 168.

[95] See Charity Commission and Applications for Registration of (i) Trafford Community Leisure Trust and (ii) Wigan Leisure and Culture Trust (April 21, 2004).

[96] See for example, *Colgan v. Independent Radio and Television Commission, Ireland and the Attorney General* [1999] 1 ILRM 22.

[97] See for example, *Molloy v. Commissioner of Inland Revenue* [1981] 1 NZLR 688.

Australia,[98] Canada[99] and elsewhere in the UK have followed the ruling in England & Wales[100] to the effect that a political purpose cannot be charitable as the court has no means of determining whether the outcome of policy change would be beneficial or otherwise. In the US, however, as mentioned above, a broader view is taken under the more measured wording of s 501 (c)(3) of the Internal Revenue Code which permits organizations such as Amnesty International and Human Rights Watch to acquire charitable status.

Pemsel Deficiencies

A question this book has sought to address is – how appropriate and sufficient are the *Pemsel* charitable purposes as a statement of contemporary social policy concerns and as a basis for a modern partnership between government and charity? The *Pemsel* deficiencies, in terms of translating the Preamble social policy agenda into the cultural context of the developed common law nations, are generally acknowledged and have been examined in some detail earlier (see, further, Chap. 2). However, this knowledge, gained through the wisdom of hindsight, should not obscure the fact that *Pemsel* has, with relative success, been transmuted across many centuries, nations and cultures. The contemporary shortfall in agenda items is now generally seen as represented, adequately if not wholly accurately and subject to political and cultural limitations, by the additional purposes listed in the 2006 Act of England & Wales (see, further, below).

The *Pemsel* classification and the subsequently generated lists have always been treated as indicative rather than prescriptive,[101] nonetheless any tendency to random proliferation was constrained by the contours of the Preamble footprint. This ensured that certain characteristics remained firmly in place to confine lists not just to specified social policy themes but also to within the readily identifiable parameters that defined the theme (e.g. the effects but not the causes of poverty). It also set limits, or provided a rationale, for the judiciary not to encroach into the legislative sphere: the approach taken by the court in Canada in relation to amateur sport being not untypical of judicial restraint elsewhere to any prospect of a substantive addition to *Pemsel* charitable purposes "Parliament must be taken to have been aware that no association which has, as

[98] See the recent decision of the ATO to revoke the 12 year old charitable status of AidWatch, an organization which it conceded had wholly charitable objectives except for three deemed political: urging the Government to put pressure on the Burmese regime; delivering an ironic 60th anniversary birthday cake to the World Bank; and raising concerns about developmental impacts of the US-Australia Free Trade Agreement.

[99] See for example, *Positive Action Against Pornography v. M.N.R* [1988] 2 F.C. 340 (C.A.).

[100] *McGovern v. Attorney General* [1982] Ch. 321.

[101] See *A.-G. v. Dublin Corp* (1827) 1 Bligh NS 312, *per* Lord Redesdale, p. 347 and *Incorporated Society in Dublin for Promoting English Protestant Schools in Ireland v. Richards* (1841) 1 Dr & War 258.

its main purpose, the pursuit of amateur sport could qualify as a charity under the common law".[102] This and all other social policy themes were of course also subject to the further prohibition against political activity: the social policy themes specified by government and its terms of reference for engaging with charity were not open to challenge by the latter. Such anomalies serve as a reminder that the Preamble and *Pemsel* were creatures of their time and cannot therefore be reasonably criticized for offering an inadequate response to contemporary global issues.

Pemsel and Global Issues

The current globalization approach to issues relating to poverty, religion, education and civil society does, however, unavoidably bring into sharp relief certain *Pemsel* deficiencies. The knowledge that aid and trade form a key part of the equation that maintains most of the nations of Africa and other countries in poverty carries with it an obligation for government and charity to reconsider terms of reference that bind them to deal with effects rather than causes and to develop more joined up intervention strategies. This applies also to dealing with the difficulties of promoting religion and advancing education, with the entailed issues relating to faith based schools, in the current complex world of religious based polarizations and tensions. Then there are the problems faced by all modern developed nations as they struggle to consolidate civil society while accommodating if not assimilating waves of migrants and 'asylum seekers' with their own distinct cultures; problems compounded, in many of the jurisdictions studied, by the need to respond to the alienation experienced by their own indigenous population. This need to accommodate diversity, promote pluralism and provide for equality and non-discrimination sharpened the interface between *Pemsel* purposes and human rights provisions highlighting the inadequacy of *Pemsel* within a modern human rights culture. Again, *Pemsel* deficiencies are apparent in the context of modern public/private finance arrangements when, for example, a Bill Gates type American charity needs to address the realities of Swiss based pharmaceutical companies commercial restrictions on drug availability for Aids sufferers in Africa. In short, while *Pemsel* served its defined purposes well enough over time, countries and cultures, its deficiencies in the modern age of global issues had become widely acknowledged.

Pemsel Plus

The UK jurisdictions, Ireland and to a very limited extent Australia, alone among the common law nations, have chosen to statutorily extend the four *Pemsel* heads of chari-

[102] *A.Y.S.A. Amateur Youth Soccer Association v. Canada Revenue Agency* (2006), 267 D.L.R. (4th) 724 (F.C.A.), para 20.

table purposes.[103] This development, of great significance for the future of charity law, has introduced the first additional statutory definitions of matters to be construed as 'charity' since 'sport and recreation' were so designated half a century ago. Their importance is unlikely to remain restricted to the jurisdictions concerned as others may well either replicate that statutory initiative or transfer its consequences by judicial proxy as the courts elsewhere in the common law world choose to follow new lines of precedents established in the courts of the UK and Ireland. These new definitions now statutorily added to the *Pemsel* classification are, therefore, worthy of some attention.

New Statutory Purposes Common to British and Irish Jurisdictions

The jurisdictions of England & Wales, Scotland, and prospectively Ireland and Northern Ireland, have committed to much the same set of '*Pemsel* plus' charitable purposes. Their respective legislative provisions list as separate purposes a number of activities that have gained judicial recognition over time including the advancement of animal welfare, the advancement of environmental protection or improvement and the advancement of the arts, culture, heritage or science. However, they also and with remarkable consistency identify as additional charitable purposes certain specific matters of such central importance to government as:

- The advancement of human rights, conflict resolution or reconciliation,[104] and promotion of multiculturalism etc.[105]
- The advancement of civil society[106]

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[103] In Barbados, a somewhat different statutory approach has been taken in which the 'benefit' requirement for 'public benefit' and the 'charitable purposes' requirements have been merged into one requirement which in turn provides a gateway to 26 separate heads of charity. Though note that in the US, s 501 (c)(3) of the Internal Revenue Code provides a codified list of tax exempt public benefit activity that extends beyond the four *Pemsel* heads.

[104] Note that the Charity Commission had prepared the ground for statutory endorsement of 'reconciliation' as charitable with its ruling in *Application for Registration of Restorative Justice Consortium Limited*, January 15, 2003 when the applicant organization with its purpose "to promote restorative justice for the public benefit as a means of resolving conflict and promoting reconciliation" was held to be a charity.

[105] The wording in the Charities Act 2006, s 2 (2)(h) "the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity" is exactly replicated in: the Charities and Trustee Investment (Scotland) Act 2005, s 7(2)(j)(k) and (l); the draft Charities (Northern Ireland) Order 2006, s 4 1(h); and in the draft Charities Regulation Bill 2006, s 3 (1)d(v) except that this provision also includes reference to "social justice".

[106] Again, the wording in the Charities Act 2006, s 2 (3)(c) "includes— (i) rural or urban regeneration, and (ii) the promotion of civic responsibility, volunteering, the voluntary sector …" is exactly replicated in: the Charities and Trustee Investment (Scotland) Act 2005, s 7(3); the draft Charities (Northern Ireland) Order 2006, s 4 3(c); and, slightly embellished, in the draft Charities Regulation Bill 2006, s 3 (1)(d)(ii) "the advancement of community development, including rural or urban regeneration, (iii) the advancement of citizenship, including the promotion of civic responsibility, volunteering ..."

- The advancement of health and related services[107]
- Promoting the welfare of specific socially disadvantaged groups[108]

This is a clear and almost identical statement of the additional matters now defined by several governments to be of contemporary public benefit and to deserve charitable status.

It may be open to question as to whether placing these matters on a statutory footing, when they had already gained recognition by the Charity Commission and more generally by the judiciary as charitable purposes, was necessary and has genuinely brought real change to charity law. Why change by statute matters that were already changed or were changing in accordance with the common law processes and the 'spirit and intendment' rule? Will those jurisdictions that have not followed suit be proportionately disadvantaged? The answer, as was the case some 50 years ago in relation to sport and recreation, is that such affirmative government intervention is necessary for several reasons: for the removal of doubt in the face of some judicial equivocation; to create a new and more inclusive statutory platform that will facilitate the future contribution of charity to specific public benefit activity; and to clarify government's social policy in respect of the matters addressed and its intended partnership with charity (see, further, below).

New Statutory Purposes in Australia

Australia presents as an interesting case study for the alternative proposition – that such a statutory updating of the Preamble agenda is an unnecessary step for government. Having spent some years examining the issues and then, when seemingly on the brink of introducing legislation similar to that of the UK and Irish jurisdictions, the government took what must have been the considered step of choosing to abort that initiative and settle instead for the Extension of Charitable Purpose Act 2004 which simply added the provision of child care services on a nonprofit basis as a

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[107] The wording in the Charities Act 2006, s 2(2)(d) "the advancement of health or the saving of lives" is exactly replicated in: the Charities and Trustee Investment (Scotland) Act 2005, s 7 (2)(d) and (e); the draft Charities (Northern Ireland) Order 2006, s 4 (2)(d); but more fully stated in the draft Charities Regulation Bill 2006, s 3 (1)(d)(iv) "the advancement of health, including the prevention or relief of sickness, disease or human suffering".

[108] The wording in the Charities Act 2006, s 2 (2)(j) "the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage" is exactly replicated in the draft Charities (Northern Ireland) Order 2006, s 4 (2)(j); almost exactly replicated in the Charities and Trustee Investment (Scotland) Act 2005, s 1 (2)(n) "the relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage"; and similarly if more fully specified in the draft Charities Regulation Bill 2006, s 3 (1)(d) "other purposes beneficial to the community, which include - (i) the advancement of community welfare and social inclusion, including the relief of those in need by reason of youth, age, ill- health, disability, financial hardship or other disadvantage, which relief includes that given by the provision of accommodation or care".

charitable purpose.[109] Child care services include those of day care, long day care (full-time and part-time), casual care, before and after school hours care, vacation care, occasional care, and similar sorts of care. These services are not limited to pre-school-aged children. The categorisation of services as child care under government programs would commonly be a strong indicator that they qualify as child care services for the purposes of this Act. The provision of child care services includes matters that are merely incidental or ancillary to those services. Also, for the purpose of determining whether an institution is a charity, it declared open and nondiscriminatory selfhelp groups and closed or contemplative religious orders that regularly undertake prayerful intervention at the request of members of the public, to be for the public benefit.[110]

While not doubting the usefulness of this statutory extension to existing charitable purposes, questions inevitably arise as to why embark on such a lengthy process, take the calculated step of introducing reforming charity legislation but then restrict its scope in such a manner? The answer may lie in the fact that for this jurisdiction the premise for charity law reform – the need to update the Preamble social policy themes and engage with charity to negotiate terms of reference for future partnership arrangements – was missing. The Australian government led by Premier Howard perhaps took the view that engaging in debate with the sector was a political price too high to pay for the dubious reward of ultimately being able to share responsibility for future public service provision. In the absence of pressure to enlarge the Preamble agenda and without a need for partnership, government may have decided that the preferable option was to distance itself from the sector and revert to a more directive approach.[111]

Charity law, as mentioned earlier, is sensitively attuned to the prevailing political climate, in particular serving as a barometer for the quality of engagement between representative and participative elements in a democratic political context. If England & Wales can perhaps be seen as achieving a high reading on such a barometer and Singapore a low one, Australia would be positioned nearer to the latter than the former. In all the UK jurisdictions, but not to the same extent in Ireland, the representative body politic has wholly imbued the 'third way' approach and has deliberately cultivated, if not assimilated, the participative element. For such jurisdictions, the outcome of the charity law reform process was unavoidable – it had to be a legislative testament to the strength of the bond between government and the sector, on a par with the UK concordats, which confidently stated the terms of their intended partnership. At the other end of the political spectrum, Singapore is emerging from that process with outcomes arrived at without public

[109] The wording in the Extension of Charitable Purpose Act 2004.

[110] *Ibid*., s 5(1).

[111] As perhaps evidenced by provisions in the proposed Bill for greater control of charity and restrictions on political advocacy and unrelated business activities; indications, also, of a preference for a self-contained code rather – than an extension of purposes – which would have resulted in a break with established UK precedents.

consultation, reflecting the continued hegemony of representative politics, and which will give effect to the government's intentions to improve regulatory controls in respect of the sector and increase the latter's efficiency, accountability and effectiveness. In Australia, as in New Zealand, while the representative and participative elements jointly entered the process and engaged in public consultations, it would seem that this proved to be a testing rather than an affirming encounter. The outcome in New Zealand may have been anodyne and could yet prove retrievable but in Australia only a bare vestige of its promised potential was salvaged. The collapse of the rapprochement between representative and participative elements in the Australian body politic, which marks a setback for the maturing of democracy in this jurisdiction, is appropriately reflected in the paucity of its new charity legislation where any effort to modernise government social policy and to outline the terms of its intended partnership arrangements with the sector are barely discernible.

Australia, in keeping with the US and Canada, also has to deal with the considerable additional complications arising from its constitutional mix of federal and state legislatures. The real difficulties in negotiating nation-wide legislation in such a setting cannot be discounted as a contributing factor to the failure of its charity law reform process.

New Statutory Purposes, Social Policy and Partnership

The new statutory purposes provide hard evidence of a shared commitment by the jurisdictions concerned to address the same set of social policy themes. Collectively, these purposes signify the most fundamental government updating of its Preamble social policy agenda since that agenda was first formulated. Individually, they each identify as a social policy theme an area of contemporary concern for governments in the developed nations and, as they are now designated as charitable, they have become the shared responsibility of government and charity. While accepting that such additional purposes as the advancement of animal welfare undoubtedly form part of that agenda, it is suggested that so much more consideration has gone into framing the clusters of purposes which cohere around certain new social policy themes that these are now clearly revealed as matters central to government's intended new partnership arrangement with charity. Interestingly, the statutory purposes newly born from recent reform processes bear some resemblance to those that have long been codified in s 501 (c)(3) and (4) of the US Internal Revenue Code.

- *Health and social care service provision*

Providing succour to those in need of basic care has always been the bedrock of charity within the common law as in any other context. Given that this aspect of charity has clearly prospered in the jurisdictions studied, generating a spread of welfare type activity and innumerable variations of related organizations, it may

well seem a little disingenuous for government to specify particular elements of health and social care provision, which have either never been denied charitable status or could confidently be anticipated to acquire it through the normal common law process, as now meriting statutory recognition as charitable purposes in their own right. What is clear, however, from the nature of the specified groups (e.g. the aged and the disabled) is that they often require intense and long-term service provision. It is precisely such forms of public services that governments have been keen to share with or transfer to charities. Indeed, this initiative is really only comprehensible when viewed in the light of government partnership strategy: it amounts to a declaration of government intent that in future certain broadly defined areas of social need will not be regarded as the sole responsibility of the State as public service provider; constituting a specification of public benefit services to be shared with or franchised out to charity; a more explicit demarcation between public and private interests in providing for the more vulnerable members of our society. The need for such specification has, so far, not been found necessary in the US.

The traditional emphasis on dealing exclusively with effects rather than also with the causes is very evident in the statutory framing of new statutory purposes. In this context the wording relied upon by the various legislatures stresses 'relief' of need. Only in one instance, occurring in the proposed Irish legislation, is there a government concession that new statutory purposes could permit charities to engage in 'prevention' as well as 'relief'.[112] The new charitable purposes will be set within the old terms of reference for partnership between government and charity: imposing the same constraints as formerly applied to charities; restricting their right to question the political causes of social need and confining them to treating its effects.

- *Civil society consolidation*

Again, the constellation of specified components held to constitute or illustrate this charitable purpose (particularly the references to 'civic responsibility', 'volunteering', and 'effectiveness' of the 'voluntary sector'), leave no doubt as to its importance for the governments concerned as a central component in their plans for creating a binding partnership with charity. If partnership is to work, with the sector able to carry a growing share of public benefit service provision and by promoting civic engagement contribute towards consolidating civil society, then the sector has to be strengthened and prompted to develop in certain areas (e.g. generate more volunteering). As it would seem to be very much in the best interests of government to extend charitable status entitlement to organizations with civil society purposes,

[112] See the draft Charities Regulation Bill 2006, s 3 (1)(d)(iv) "the advancement of health, including the prevention or relief of sickness, disease or human suffering". Admittedly, in England & Wales, in s 2 of the 2006 Act, reference is made to a 'charitable purpose' as being one that is for – "(a) the prevention or relief of poverty" (see, further, Chap. 2).

the question arises as to why all charity law reform processes have not concluded with such provisions?

The recent comment of Baronness Kennedy that "the public's disengagement from organized politics has gathered pace as they have lost faith in the more traditional forms of political engagement",[113] made in reference to the UK, is equally true of all the jurisdictions studied. However, as mentioned above, there is a distinction to be drawn between those jurisdictions where government subscribes to participative forms of democratic politics in conjunction with the traditional representative form and those where the government stands resolutely by the latter. In all probability, that distinction holds the reason for the corresponding jurisdictional difference in approach to the statutory inclusion of measures conducive to consolidating civil society as a desirable charitable purpose. It is perhaps not wholly coincidental that Australia and Singapore, in contrast to the UK jurisdictions, have shied away from making such a frank legislative commitment to strengthening the sector and thereby evidencing the existence of an authentic basis for partnership.

The other factor weighing in the balance is the tension between government's interest in building up a stronger, more engaged sector and its interest in shutting down opportunities for the sector to harbour terrorists. As demonstrated by the amount of anti-terrorism legislation generated in each of the jurisdictions studied, the sector is generally viewed by government as the weak link in its 'global war against terrorism' (GWAT). It will, therefore, be interesting to see what legislative commitments are made to this charitable purpose in the US and Canada and interesting also to await the case law which will inevitably test the willingness of the regulatory bodies in the jurisdictions concerned to work the balance between endorsing as charitable and policing as suspect, those organizations that invest in activities designed to build solidarity and generate independence among marginalized social groups (see, further, Chap. 15).

- *Human rights promotion*

For the governments of the developed nations that comprised the jurisdictions studied, the meshing of *Pemsel* purposes with human rights provisions was an unavoidable political necessity. The fact that in all instances where this has been made a new statutory purpose, it has been achieved by a simple bald reference to 'the advancement of human rights'[114] might suggest that charity is to be given *carte blanche* to interpret and develop this newly defined charitable purpose. As is painstakingly revealed in the Kennedy report,[115] this is a most unlikely scenario. Any

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[113] See Kennedy, H., *Report of the Advisory Group on Campaigning and the Voluntary Sector*, London, 2007, p. 2.

[114] It is noteworthy that in Ireland s 3 (1)d(v) of the draft Charities Regulation Bill 2006 includes reference to "social justice" which would indicate government acknowledgment that matters, other than those enumerated as Convention rights, could also legitimately generate charitable activity; again, how far this can in practice be pursued by charities before they run into the 'political activity' constraint is doubtful.

[115] See Kennedy report, *op. cit*.

charity established to pursue the new purpose will have to surmount the old common law constraint on political activity together with an ever increasing tide of legislative provisions (governing broadcasting, publishing, harassment as well as national security) intended to deny opportunities to those few with anti-social motives but equally effective in stifling the voices of those dedicated to promoting the public benefit.

The interface between charity and human rights, like that between charity and poverty, is acutely political or, as more coyly expressed by the Charity Commission, "the promotion of human rights will often involve engagement with the political process".[116] In England & Wales, the realties of regulating that interface have recently been demonstrated by the Commission's investigation of the charity War on Want for waging its 'Stop the Wall' campaign against Israel's security barrier and for other politically motivated protests against perceived human rights abuses by Israel. In Australia, the ATO has taken similar steps, resulting in the removal of charitable status, against Aidwatch because of its political campaigning against human rights abuses perpetrated by the ruling regime in Burma.[117] In the US, that interface is now governed by legislation such as the USA Patriot Act and by benchmarks for government priorities that include 'extraordinary rendition' and Guantánamo Bay. In the present anti-terrorism climate, it remains to be seen to what extent the listing of human rights as a new statutory charitable purpose will lead to a difference in the established defensive approach taken by the regulatory authorities in the nations concerned.

Conclusion

The charity law reform process in each of the jurisdictions studied has primarily been a government led initiative intended to align charity and its resources more closely with the issues that comprise a contemporary social policy agenda. Other factors have played a part but, in the main, government priority has been to facilitate its partnership arrangements with charity, enable the latter to address a *Pemsel* plus range of charitable purposes and ensure that charity is positioned to play a more prominent role in future public benefit provision particularly as regards

[116] *See RR12 – The Promotion of Human Rights* (Version January 2005), where the Charity Commission states that there are many ways in which a charity might seek to promote human rights, including: monitoring abuses of human rights; obtaining redress for the victims of human rights abuse; relieving need among the victims of human rights abuse; research into human rights issues; educating the public about human rights; providing technical advice to government and others on human rights matters; contributing to the sound administration of human rights law; commenting on proposed human rights legislation; raising awareness of human rights issues; promoting public support for human rights; promoting respect for human rights by individuals and corporations; international advocacy of human rights; and eliminating infringements of human rights.

[117] For Canada, see *Human Life International v. M.N.R.* [1995] 2 F.C. 3 (C.A.).

social and health care services. The conduct of the processes differed according to the maturity of their respective democratic contexts, which in turn was reflected in the detail of the various legislative outcomes. Where mutual trust was established between government and sector, this produced legislative provisions detailing the degree to which charity and its resources will be available to assist government with its social policy agenda; otherwise, taking into account complications arising from federated constitutions, the corollary proved to be true. In addition, the failure of any government to permit an outcome that included removal of the common law constraint on charities challenging that social policy, serves as a reminder of the political reality underpinning any government/charity partnership.

To a large extent, the definitional dimension to the outcome of successful charity law reform processes can be seen as mirroring that of the Preamble, extending the *Pemsel* classification and affirming, with some added rigour, the characteristics that had become associated with the law as it relates to charity in a common law context. Government has emerged from the process with a new statutory framework which clarifies the terms on which organizations may acquire charitable status and accompanying tax exempt privileges while directing and confining their public benefit activities and resources towards certain purposes. It is a framework now susceptible to ongoing statutory amendment. The purposes, where specified, are unsurprising and often already recognized as charitable within the common law system. In the main they represent a contemporary restating of Preamble social policy themes, resting on the same distinction between poverty (and associated basic human needs) and public utility, incorporating the same deference to social order and institutional infrastructure as prevailed then and perpetuating the same uncertainty as to where the line is to be drawn between public benefit matters that are inherently the responsibility of government and those that can be properly assigned or left to charity. If anything, by specifying as a charitable purpose the "relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage"[118] government has thrown the door wide open for future public/private collaboration in the arena of health and social care service provision.

The most significant definitional difference achieved by the new charity legislation has been the reworking of the public benefit test. How this is to be applied will depend very much on jurisdictional adjustments to the regulatory framework and on whether the government strategy to build the basis for a new partnership arrangement with the sector, underpinned by reformed charity law, will now have to give way to the new international security imperative (both of which are considered further in Chap. 15).

[118] As variously worded in: the Charities Act 2006, s 2 (2)(j); the draft Charities (Northern Ireland) Order 2006, s 4 (2)(j); the Charities and Trustee Investment (Scotland) Act 2005, s 1 (2)(n); and in the draft Charities Regulation Bill 2006, s 3 (1)(d).

Chapter 14
Interpretational Problems: Public Service and Charitable Purpose

Introduction

This chapter examines the deep-rooted problems of interpretation that have obscured and sometimes obstructed a clear and more precise application of legal function to charitable purpose. It draws from the international experience examined in Part III to explore and assess how this most basic social policy issue is variously managed.

Recognising that charity blends a mix of public and private interests (see, further, Chap. 1), the chapter begins by considering this as the basis for certain core interpretational problems and analyses the role of charity law, operating as it must within a political context, as a government tool for balancing those interests. The issue of partnership arrangements between government and charity, with accompanying scope for mutual misinterpretation of the terms and consequences of that engagement, is explored with particular attention given to the implications for those charities that become dependent upon government funding and/or are mainly concerned with delivering public services. The impact of charity law reform is considered.

The chapter then reflects on the experience of the countries examined in Part III and considers how core interpretational problems have played out in those jurisdictions, again giving particular attention to the interface between government and charity in public benefit provision. Consideration is also given to the fact that while the interpretation of 'charity' and 'charitable purpose' have retained a common currency in the jurisdictions studied, at least prior to the variable impact of national charity law reforms, the same cannot be said of the regulatory infrastructure. The legal functions approach adopted in this book reveals the nature and extent of change that has occurred over time to the role of the High Court, Attorney General, Charity Commissioner, Inland Revenue, trustees etc. There is now considerable jurisdictional variation in the interpretation given to the responsibilities of these institutions and their inter-relationship which needs to be understood and taken into account in any cross-jurisdiction comparative analysis.

An assessment of the problems and analysis of their jurisdiction specific manifestations suggests that the answer must in part lie in clarifying and protecting the

K. O'Halloran et al., *Charity Law & Social Policy*,

distinction between charity, other non-profit organisations and government bodies in respect of public benefit provision; a distinction that is becoming further blurred by the current proliferation of social enterprises and hybrid bodies. Such a tidying up would remove a good deal of the confusion and scope for political manipulation in the current government/charity relationship and allow the legal functions to positively discriminate in favour of designated charitable purposes. It would also give clear recognition to altruism and free up philanthropy to develop alongside but distinct from government and other hybrid bodies that also serve the public interest.

The Problem: Differentiating Public from Private Interests

The inherent tension in charity, between the binary strands of public and private interests, is probably rooted in charity's ecclesiastic origins when doing public good brought with it the promise of eternal personal salvation and the present certainty of contributing to community cohesion and social stability (see, further, Chap. 1). As a framework for managing the tensions, charity law has always been susceptible to manipulation by a government that chooses to strategically interpret the public benefit test to ensure that private interests align with public service imperatives. This was clearly demonstrated in the agenda set by government for charity in the Preamble (see, further, Chap. 2).[1] As Bromley has rightly observed "it is by studying the legislative agenda surrounding the Statute of Charitable Uses, 1601 that one recognizes that its ostensible benefits extended only as far as the State's agenda."[2] This approach is currently apparent in new statutory provisions emerging from various national charity law reform processes (see, also, Chap. 13).

In the four centuries since the Preamble, charity law in the common law nations and under the stewardship of the judiciary remained largely immune from further direct legislative interference by government. The Preamble agenda continued with some legislative additions (notably in relation to sport and recreation) and a broadening of definitional matters, while a range of new legal structures were absorbed but, broadly speaking and throughout those nations, the balance between the legal functions and in particular the retained emphasis on policing, kept charity within Elizabethan social policy parameters (see, Part II). For so long as the role mutuality of government and charity conformed to the traditional model, with charity providing a supplementary and caring foil to the government's direct management of public service and utility provision, then the political dimension of that relationship did not give rise to serious contention. It was accepted that in all probability there would always be issues regarding a lack of fit between legally defined charitable purposes and contemporary patterns of social need, and issues also regarding the

[1] See Bromley, B., 'The 1601 Preamble: The State's Agenda for Charity', *Charity Law & Practice Review*, 7: 3, London, 2002.

[2] *Ibid*., p. 180.

sharing of responsibility between government and charity for types of public service/utility provision, while the right of charity to challenge government on matters of policy had been problematic since the Reformation. Only in recent years, however, has the relationship between government and charity surfaced as fundamentally a political issue. Why is this?

Government and Charity Partnerships: The Democratic Deficit Argument

Governments in the modern western democracies are undergoing change. As they do so, the extent to which the public interest is being advanced outside the formal political process is being extended. The polarization between parties of the left and right that characterized the established political process for previous generations has been replaced by centre left, or slightly left of centre politics; the hegemony of the 'middle ground' is replacing ideological division and governments are increasingly concerned to consolidate their mandate with a dwindling electorate[3] for whom politics, when of any interest, is more about the nuances of economics than ideology.

Managing Government

In most of the jurisdictions studied, except perhaps Singapore and to a lesser extent Australia, there has been a discernible tendency for government to become less isolationist: the need to win support from an apolitical constituency[4] has led to initiatives for reducing the gap between the governing and the governed; many formal and informal forums and lines of communication have been put in place to involve community representatives in policy formulation, decision-making and implementation. As government steps back – devolving more power to regions and communities,

[3] See the Advisory Group, *Campaigning and the Voluntary Sector*, London, 2007, in which Baroness Helena Kennedy QC observed in the opening lines of her introduction:

> There is a growing crisis at the heart of democratic accountability. The public's disengagement from organized politics has gathered pace as they have lost faith in the more traditional forms of political engagement, p. 2.

[4] Gordon Brown PM, in his 2007 speech to the NCVO, referred to the political system's three great failings: the political parties had not reached out enough to people, it too often ignored or neglected new ideas that flow from outside in Westminster, and participatory democracy is too weak at the local level. At the last general election fewer than 62% voted: 12 in every 20. In the 1950s 1 in 11 people joined a political party, today it is 1 in 88. Better models of consultation were needed, and he announced that the Government would be holding Citizens' Juries around the country to address matters such as the issues relating to children, and crime and communities.

hiving-off public service provision and settling for exercising control through the use of quangos to channel funds and regulate standards and through the introduction of new public management models – it simultaneously brings in consultants, partners and resources to share the burden of formulating policy and providing services for the public benefit. A common characteristic of contemporary government policy in the UK and some countries studied in Part III, particularly the US, has been the eclectic fusion of business, not-for-profit and government resources to address issues of public policy that would formerly have been treated as exclusively matters for government.

This has been accompanied also by an opening up of political and legal processes. Legislation introducing transparency, and with it the means for tracking responsibility and establishing accountability (freedom of information, human rights etc.), has enabled the electorate to see as never before how and why government acts as it does. In relation to the government shunting its public service agenda towards charity – through arrangements for partnership, direct funding and the contract culture etc. – the means for achieving this are now clearly visible. As government has changed so also has the public space occupied by its citizens: philanthropy is now emerging from the bunkers of both Welfare State and capitalism (see, further, below).

Tax Exemption and Double Jeopardy

The taxpayer in a modern common law democracy is placed in double jeopardy by the current government approach to charity. A widening band of tax exemption for the public benefit activities of charities increases the tax shortfall for core State services that must be made up by the taxpayer.[5] At the same time the taxpayer must play silent witness to their taxes being redirected into the funding of charities by the State, many of which are heavily dependent upon government grants or contracts.[6] The chagrin of the taxpayer may be further exacerbated by such typical government practice as: in England & Wales, establishing quangos such as the British Council, a non-Departmental government body; in Australia, setting up its own hospital foundations to raise money for state owned hospitals or foundations for state owned and controlled cultural organizations such as museums etc.; in the US playing political football with regard to allowing "faith-based" charities to receive government funds; the selecting and de-selecting of charities as government

[5] Note, however, the NCVO report that "38% of the sector's income comes from statutory sources, but only 2% of government expenditure on public service delivery is paid to the charitable sector" (see Charity Commission, RS 15, *Stand and Deliver: The Future for Charities Delivering Public Services*, London, 2007, para 2.3).

[6] *Ibid*., where it is reported that "only 8% of charities that said they deliver public services receive no statutory funding", para 2.3.

partners in public service provision; channeling national lottery funds and public donations to charity towards government selected public benefit services; the provision of tax deductible incentives that promote the fortunes of selected charities (e.g. those providing emergency relief in certain underdeveloped countries); and the hiving-off public amenities to become charities (e.g. leisure centres). In the latter instance "it was accepted as a good charitable purpose to relieve the community from general or local taxation provided that such purpose was applied for the benefit of a sufficient section of the community".[7]

It is not just the taxpayers' finances that are placed in jeopardy by this rapidly developing synergy between government and charity.

Government selection and endorsement of certain charities confers status and power on bodies that are neither chosen by nor are accountable to the electorate; policy may now be made and implemented, or at least heavily influenced, by bodies that have bypassed the democratic process. As Seddon has pointed out, many such charities have developed powerful single-issue campaigns (e.g. the NSPCC and 'no smacking', the NSPCA and 'no fox hunting' etc.) and, as he adds, "there's something unsatisfactory about taxpayers' money being used to fund charities that are campaigning for things that we may disagree with …".[8] The taxpayer may well take the view that government not charity was elected to form policy and agree with Seddon that "through taxation we are compelled to pay for something that, since it has not formally been incorporated into government, is not properly within the remit of government … blurring is the issue".[9]

Representative and Participative Democracy

The shift from reliance upon an exclusively representative to a more participative model of democratic politics has become a feature of government in some modern western common law nations, and is perhaps particularly evident in the 'Third Way' approach of the current labour government in the UK (see, also, Chap. 15). In other jurisdictions, such as Australia[10] and Singapore, the traditional insistence on the representative model coupled with a repudiation of any right of input from outside, is more apparent. In the US the debate continues as to the desirability of private groups lobbying or influencing the formal political system.

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[7] Charity Commission, 'Public Service Delivery by Charities – Commission Decision in (i) Trafford Community Leisure Trust ('TCLT') and (ii) Wigan Leisure and Culture Trust ('WLCT'), p. 6.

[8] Seddon, N., *Who Cares?*, *op. cit*., p. 62.

[9] *Ibid*., p. 117.

[10] See Johns, G. and Roskam, J., *The Protocol: Managing Relations with NGOs*, The Institute of Public Affairs, Melbourne, 2004.

Bypassing Representation

There is an argument, in those jurisdictions where some level of accommodation has been reached between representative and participative models, that the right of end users to participate in decision-making affecting their interests has to some extent been allowed to subvert the traditional more closed model of government by elected representatives.[11] Direct engagement of government with community representatives, from both the not-for-profit and the commercial sectors, for the explicit purpose of formulating and delivering upon agreed public benefit policy objectives is a variant of the democratic process that has come to generate some contention.[12] Clearly this process is not without issues and, from the perspective of the not-for-profit sector, some are quite pressing.

- *Legitimacy*

The manner in which government selects and deselects such representatives from the sector, and the correlation between selection and funding, is disquieting. Government claims the right to determine the persons and organizations that are best placed to speak for sectoral interests on policy matters and these tend to be the ones with which it is already engaged through funding arrangements. The fact that it is so engaged means that mutual compatibility of aims and objectives between such a voluntary organization and government is already established and there is an ongoing working relationship to be protected. That compliance with government policy can be linked to funding is demonstrated by the turnover in selected representatives. This leads to a situation, perhaps typified by Australia and New Zealand, where policy is in fact determined by government and merely endorsed by sector representatives.

- *Mandate*

The extent to which government selected sector representatives can speak for and sign up to policies on behalf of their supposed constituency is contentious. How can umbrella bodies sustain a claim to be representative when government reserves the right to pick and choose with whom it will negotiate? The sector may well be suspicious of and distance itself from the views presented by such selected representatives as selection itself carries an implication of acquiescence with government policy. The poisoned chalice of selection may well destroy any mandate that the selected body would otherwise have to represent sector interests.

- *Integrity*

The capacity of organizations that act as sector representatives (usually umbrella bodies or the larger agencies in their particular field), to retain their independence,

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[11] A principle that is not readily accommodated within existing charity law: see Charity Commission Guidance on warning against clients being trustees on boards of charities.

[12] For a fuller discussion, see, for example, Seddon, N., *Who Cares?*, Civitas, London, 2007.

to remain truly at arm's length from the interests of the selecting government body, has become compromised by certain practices developed by the latter. Such organizations are most usually charities and their obligation to be independent is undoubtedly compromised to some degree by acceptance of government appointed members onto their boards and by acceptance of government funding. The principle of *audi alteram partem* ('Let no man be a judge in his own cause') – or the obligation that rests on all charities to remain impartial, objective and independent – is being eroded in respect of those that become complicit with government policy. In some jurisdictions where there is an absence of such umbrella bodies to represent the sector (e.g. Singapore) or where they exist but are usually unable to acquire charitable status (e.g. Australia,[13] Canada and the US[14]) then the problem is not so manifest.

- *Accountability*

There is no process for holding to account those sector representatives who, as a result of their joint negotiations with government, have been responsible for policy outcomes that prove to be not in the best interests of the sector or a significant part of it. Being selected by government avoids the accountability that must be endured by those who are elected to it.

New Public Service Management

In recent years 'New Public Management', which applies to public services the techniques and practices of management developed in the private sector, has become a respected and globally established approach to the dynamics of public benefit service provision.[15] Ostensibly concerned with modernizing and enhancing the efficiency of public services, in reality the driving force has been government concern to reduce costs and increase its control over the sector. Oriented towards increasing outcomes and efficiency through better management of public funds and by introducing competition, new public management incorporates an open market approach. It has introduced the terminology of 'customers' and 'stakeholders', 'purchasers' and 'providers' in substitution for more value loaded clientist language and has been accused, perhaps fairly, of being responsible for promoting a 'commodification' approach to health care provision. The role of government departments, described in terms of New Public Management, adopts private sector management techniques with departments acting as facilitators of public goods

[13] See ATO, TR 2005/21 and *Ziliani and another v. Sydney City Council* (1985) 56 LGRA 58.

[14] Where they are treated as trade associations and exempted from tax under s 501 (c)(6).

[15] See for example, Austin, R.P., 'The Impact of the Human Rights Act on Administrative Law', *Current Legal Problems*, 1999, pp. 200–210. Also, see *R v. Panel on Takeovers and Mergers, ex parte Datafin* [1987] QB 815 (CA).

rather than direct providers.[16] The New Public Management, or New Public Financial Management, has developed from process or procedural accountability to performance measurement with predicted targets and outcomes.[17]

The shift in public service provision or at least delivery from government to the private and voluntary/community sectors that began in the UK in the 1980s is now well advanced in all the jurisdictions studied and has done much to institutionalize the blurring of the public/private boundary in health, education, housing and social care services.[18] This has been accompanied by experiments with public/private finance schemes and hybrid legal structures, some of which have been initiated by government and some not. Again, many court cases generated by complex liability issues have resulted in accountability for breaches of public law being extended to apply also to those private and voluntary sector bodies that are contracted to deliver public services. As the Charity Commission has noted "the users of these services will, in future, be clients of charities, rather than of statutory bodies, which will bring more complex issues of accountability".[19]

These developments have all contributed towards helping to break down, or perhaps just obscure, the former relatively clear demarcation between government and non-government spheres of operation.

The Purposes of Charity

The Preamble, as tidied up by *Pemsel*, broadly identified the matters that would thereafter constitute the main themes in the social policy agenda set by government for its relationship with charity. In the UK and Irish jurisdictions, in contrast to the US and to a lesser extent Australia, that agenda was subsequently moulded by the Welfare State approach to public benefit provision which shaped expectations regarding the separation of government and charity responsibilities for health and social care services somewhat differently. Consequently, there has been some variance in jurisdictional perception of matters that could or should be left to charity: the Preamble/*Pemsel* formula did not play out evenly across the common law countries.

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[16] See Hood, C., 'The New Public Management in the 1980s: Variations on a Theme, Accounting Organizations and Society', 20(2/3), 1995, pp. 93–109; also, see Pollitt, C., 'Partnerships, Networks, Joined-Up Governance, the Information Age (and all that)', *The Essential Public Manager*, Open University Press, Philadelphia, PA, 2003.

[17] See Olson, O., Guthrie, J., and Humphry, C., 'International Experiences with Financial Management Reforms in the World of Public Services New World', *Global Warning: Debating International Developments in the New Public Financial Management*, Olsen, O., Guthrie, J., and Humphrey, C. (eds.), Cappelen Akademisk Forlag, Bergen, 1998.

[18] See Charity Commission, RS 15, *Stand and Deliver, op. cit*.

[19] *Ibid*., para 2.3.

The clearer discourse between government and charity in England & Wales, whether as cause or effect of the Welfare State, led to a more participative style of political engagement, to concordats and to a negotiated partnership with the sector. More recently, however, developments such as those mentioned above in relation to the management and financing of public services, have prompted a general jurisdictional convergence towards contemporary policy and practice in the US.

A 'Hollowed Out' Welfare State

The Beveridge, fully-fledged, Welfare State[20] model never really transcended its UK origins. While aspects of his template for organizing the national delivery of health and social care services, to a uniform specification and standard that was free at point of access, were successfully if variably adopted in some of the jurisdictions studied (e.g. Ireland, New Zealand, Australia and Canada), that model was largely rejected in the US. Only in the UK has there been a correspondingly sharp distinction between government provided services to be availed of as of right – health, education, housing, welfare benefits – and other services accessible at private choice and expense. Elsewhere, the government has not stepped in to pick up so much of the responsibility for such services and a fluid pick-n-mix of public and private provision has been the norm.

In recent years, UK governments and others have moved more toward the approach favoured in US, New Zealand, Canada and Australia. This has, arguably, been largely achieved by stealth: the incremental shedding of responsibility for the delivery of core public benefit provision to both the for-profit and the nonprofit sectors; coupled with a vast increase in the contribution of charities established specifically for the purpose of generating funds for hospital facilities and other public services; while government retains regulatory powers, control over policy and to a lesser degree over funding. This has resulted in a 'hollowing out' of the Beveridge formula, leaving a decreasing proportion of responsibility for service delivery with government. Much of the cost for new public utilities in the UK is increasingly being passed to the private sector while costs for meeting basic health and social care provision is at least defrayed by charity. In short, the clear public/private divide of the Welfare State is now becoming more fudged in the UK as it has long been elsewhere.

In those jurisdictions where the shadow of the Welfare State had fallen, it left behind a clearer perception with matching expectations in respect of the public/private divide in basic service provision. This contrasts with the US where there is no commonly shared view of what should be core government services: there is uncertainty

[20] See William Beveridge (1879–1963) and the 1942 Beveridge Report which led to the establishment of a National Health Service in 1948, with free medical treatment for all, and a national system of welfare benefits.

as to the essential constituents of a public health or education service; different providers deliver in accordance with local market conditions; a competitive and varied range of services can be availed of at individual initiative and expense. Only now in the UK are the same issues arising as the cumbersome institutionalized Welfare State is opened up to create new markets for community services, education etc.

New Charity Entrepreneurs

The phenomenon of modern capitalism converting sizeable proportions of commercial profits to public benefit purposes is confined to neither individuals nor to countries as entities such as hedge funds establish philanthropic foundations and successful businessmen in the UK, Ireland and elsewhere follow the example set by Bill Gates and others in the US. Emulating the example set by commerce and politics, such global philanthropic initiatives can only encourage other charities to be equally global in scale, outlook and impact. The voluntary redistribution of private wealth for the public benefit, coinciding with government retreat from much public service provision, is helping to redraw the traditional balance between public/private interests in modern democratic developed nations. This is leading to a position for example where the public interest in finding a cure and providing treatment for diseases such as malaria and HIV/AIDs is more likely to be met by private philanthropic foundations than by government.

Charity Law Reform and the Public Interest

For all the above reasons, there has been a general unease about the current nature of the relationship between government and charity and an acknowledgement that reform of the law governing that relationship is now desirable. For the governments of those nations sharing the common law tradition charity law reform had come to be viewed as crucial to preparing the ground for future government/charity partnerships.

Common Law Concepts and Modern Public Benefit Service Delivery

The crux of the debate over many generations of proposed charity law reform has been whether or not legislation should be used to expand the legal definition given to ‘charity’ and ‘charitable purpose’ beyond its common law parameters. To do so would bring the clear advantage of aligning the resources of charity closer to contemporary patterns of social need. Yet this, on the face of it an attractive and sensible

proposal, was repeatedly rejected.[21] Now, common law countries are beginning to legislate on definitional matters. Why now?

Essentially, legislation to enlarge these core concepts is acceptable for the first time in 400 years because of changes in the nature of the relationship between government and charity. The retreat of government from direct public service provision in so many modern common law countries and the devolving of some of that responsibility to the private and the voluntary sectors, particularly to charities, have brought various challenges. If governments want to use charity to deliver services they need to: put in place a regulatory regime to provide for accountability; create optimal conditions to encourage the donor public to volunteer gifts of money and time and thus reduce the need for State finance; service provision must deliver more to the citizens over and above that which government could directly provide; citizens must be content with an arrangement whereby community based entities rather than anonymous government bodies respond to their needs, thus bringing responsibility for individual wellbeing closer to home; and ensure that any such arrangements also generate an ongoing entrepreneurial approach in the mould of the classic actor in an open economic marketplace. Moreover, governments need to ensure that charity service provision conforms with that normally provided by government, both for reasons of standard setting and to satisfy recipients expectations. So, in order to engineer a user experience of seamless service continuity, recourse must be had to contracts, accountability systems, service specifications, etc. The objective of making charity look like a government department also requires the former not to be seen to be critical of the latter, so lobbying activities must be accepted as incompatible with public service provision.

All this has in turn required the reform of charity law as the means to that end. For charities to carry more of the public service burden the definition of what they were legally entitled to do, without jeopardizing their charitable status and tax exemption privileges, had to be broadened. A legal obstacle to charities assuming responsibility for public services lay, and arguably continues to lie, in the principle that their funds should not be used to provide services for which citizens have already paid through the tax system and to which they are entitled to as of statutory right. This principle is being eroded.

The outcome of charity law reform processes (so far only in the UK and New Zealand jurisdictions, but with others pending) has been a redefinition of core concepts to fit contemporary social policy agendas, thereby opening the door for charitable resources to assist government in addressing matters of pressing concern, and some adjustments to the regulatory framework. As might be expected, this has not been achieved in a uniform standardized fashion: the resort to legislation has resulted in some nations eschewing their common law platform in favour of new

[21] See, for example, National Council of Social Sciences, *Charity Law and Voluntary Organizations* (the 'Goodman Report') 1976 which proposed a new and more detailed classification of charitable purposes in Appendix I, 'Guidelines in Relation to the Meaning of Charitable Purposes'. It was also rejected by the UK government in its White Paper *Charities: A Framework for the Future*, 1989.

definitions of charitable purpose customized to suit their government's particular social policy priorities; the genii is now out of the bottle, leaving the listing and interpretation of charitable purposes subject to government manipulation. Any future application of the public benefit principle in those jurisdictions is, however, likely to prove more elastic in accommodating the channeling of resources towards basic public utility provision than towards private schools and opera houses. Charity law is being used to formally redraw the line between public and private interests (see, further, Chap. 13).

Legal Protection for Charitable Status

The recent and ongoing process of charity law reform in many common law countries serves to highlight the fact that for four centuries the definition of 'charity' and 'charitable purpose' remained intact, forming a relatively uniform currency throughout the common law world. Although the related regulatory infrastructure also remained much the same over the same period, there were important differences in its application across the common law jurisdictions (see, further, below). However, since 1601, both in terms of definitional matters and regulatory authority, the law has offered singular recognition and protection for charitable status. Only now is this approach beginning to fragment as recent legislation introduces new and varied national definitions of such concepts (see, further, Chap. 13) combined with pronounced jurisdictional differences in the use of regulatory agencies to give effect to the functions of law as these relate to charities (see, further, Chap. 15).

Any discussion of a democratic deficit resulting from the relationship between government and charity must be considered against the new realities of this background – the deliberate blurring of the boundaries between responsibilities of government and community for public benefit service provision and the first legislative initiative in 400 years to rewrite the rule book for that relationship.

Formalising Relations Between Sector and Government

In England & Wales the interests of government and the sector in jointly engaging in projects for the public benefit have been formally recognized and addressed in the national Compact of 1998[22] and subsequently in a series of local compacts. Currently these tend to be statements of principle but the appointment of a Compact Commissioner and the scrutiny of the Office for the Third Sector may in time transform

[22] See *Getting It Right Together* and *Compact: Working Together Better Together* <www.thecompact.org.uk>.

visionary statements into practice guidelines for partnership arrangements between government and the sector. The Compact and its successors offer a framework for future partnerships within which charities can protect their independence and avoid subverting the democratic process. Other jurisdictions either have or are in the process of negotiating formal partnerships, though none are as explicit nor do they provide the same degree of statutory enforcement.

Implications Arising for the Charitable Status of Bodies Dependent upon Government Funding or Mainly Concerned with Delivering Public Services

The reworking of the relationship between government and charity is evident not just in the above broad political terms but also in the very practical consequences that follow for charities and the sector as a whole. This has led to the present situation where the role of charities in the sector now needs to be re-interpreted.

The Price of Partnership

The realities of partnership are that such arrangements occur at the initiative and on the terms set by government. The process whereby some charities are selected or deselected in preference to others has been referred to as the 'government's colonization of the sector'. In many common law countries this process is evident in the extent of government funding of charities; which may well be for reasons of ensuring that limited funds go further as some charities may be in a position to deliver a better or more cost effective service and all will be able to attract added value by involving volunteers and donor contributions. Whether channeled through short-term contract arrangements, direct grant aid, funded research projects, national lottery grants or by other means, the proportion of a charity's income that comes from government has grown considerably in recent years. This has had a major impact upon the sector, on charities and on the relationships between charities and other not-for-profit organizations.

Distortion of the Sector

Government favours contracting with big charities as they have the requisite infrastructure, can employ economies of scale and can absorb change more readily. In the UK, and to some extent in Australia, Canada and the US and elsewhere, this has resulted in the selected big charities becoming bigger, a growing division between big and small charities and also between charities and other not-for-profit

organizations.[23] Ralph Dahrendorf has recently commented on this phenomenon as follows:[24]

> We are in fact witnessing a split in the charity and voluntary sector ... On the one hand, there is a para-governmental third sector, which is independent in status, but part of the public sphere, notably when it comes to public services. On the other hand, there is still a truly non-governmental sector, which makes no contribution to government-led public policy.

While this is true, it is possible that Dahrendorf has underestimated the extent of the distortion caused by government colonization. As the big charities adopt the modes of practice of modern commerce and become more market oriented, they present and behave in a fashion that differs very little from their for-profit counterparts with which they are liable to be drawn into extended partnerships in order to achieve goals dictated by government funding. Their proximity to the commercial world can lead to assimilation within it as some, certainly in the US, convert to for-profit agencies (see, further, below). The distinctive separateness of the third sector, with a strong independent leadership capable of challenging government is, as Dahrendorf suggests, becoming steadily more compromised (see, also, Chap. 15).

Isomorphism

The tendency for the bigger charities to converge in terms of size, structure, bureaucracy, activity and policy with the government department that provides their funding has been termed 'isomorphism' by some writers.[25] Others have referred to 'the 'animal farm syndrome' as the process by which "voluntary agencies grow and change to look more and more like statutory departments whose function they hope to inherit", thereby attracting, as Seddon comments, "the concomitant risk that, in following our enthusiasm for the big public sector contract, third sector organisations will become co-conspirators with government in destroying the very attributes of the sector which, we are both agreed, were precisely the reasons for embarking on this expansionary course in the first place'."[26] This is a difficult issue. Many charities need to become more professional and acquire the infrastructure and managerial systems to function effectively and communicate efficiently with government funding bodies. Assuming the latter's organizational shape, often with its financial assistance, in order to share in the same tasks is usually a perfectly logical developmental process.

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[23] See Charity Commission, RS 15, *Stand and Deliver: The Future for Charities Delivering Public Services*, London, 2007 which notes a "predominance of regionally based charities delivering public services", para 2.3.

[24] House of Lords Hansard, January 29, 2005, Column 938, as cited by Seddon, N., p. 103.

[25] See for example, Leiter, J., 'Structural Isomorphism in Australian Nonprofit Organizations', *Voluntas: International Journal of Voluntary and Nonprofit Organizations*, 16: 1, March 2005, pp. 1–31(31).

[26] Blake, G., Robinson, D., and Smerdon, M., *Living Values*, 2006, pp. 11–12, as cited in Seddon, N., *op. cit*., p. 117.

Problems may arise, however, when the charity goes further by way of adapting to the statutory environment. Some take on the bureaucratic processes, the service and delivery orientation of their mentors, becoming subordinate and dependent upon them and in so doing compromise their charitable mandate and distance themselves from their own constituents. Such a charity risks trading in its unique 'mission and vision' for partnership credits, slipping into a role which supplements or substitutes for rather than complements the government's public service agenda and, from the perspective of their constituents, becoming an adjunct to government.

The pressures on some charities, to protect funding sources and market position, are such that they have little alternative other than to conform to their assigned role. It is these charities that then tend to settle largely for a service delivery function and thereby threaten not just their own independence but that of the sector as a whole. Indeed, the recent explosive spread of small, locality based, social ventures and social entrepreneurship in the UK, bringing innovation and energy to problem solving, could well be a reaction to the institutionalizing effect of the synergy between government and larger charities.

Muting of Dissent

The correlation between the growth of partnership arrangements with government bodies and diminution of criticism of government policy from the charities engaged in or hoping to be engaged in such partnerships has been noted for some years.[27] This entirely logical phenomenon is difficult to prove although the Baring Foundation found evidence that some 'organisations censor themselves, in fear of reprisal'[28] and academics have raised similar concerns in Australia.[29] Any such discouragement of criticism militates against the development of a healthy civil society.

Identity of 'Charity'

There is a view that the charity brand is in danger of being franchised out to suit the vagaries of the marketplace with an associated risk of losing its defining characteristics.[30]

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[27] See for example, Knight, B. and Deakin, N., *op. cit*.

[28] See *Speaking Truth to Power: A Discussion Paper on the Voluntary Sector's Relationship with Government*, Baring Foundation, London, 2000, p. 6.

[29] See Dalton, B. and Lyons, M., 'Advocacy Organisations in Australian Politics: Governance and Democratic Effects', *Third Sector Review*, 11: 2, University of Technology Sydney, 2006.

[30] See for example, Opinion Leader Research for the Charity Commission, *Report of Findings of a Survey of Public Trust and Confidence in Charities*, London, November 2005 at http://www.charitycommission.gov.uk/Library/spr/pdfs/surveytrustrpt.pdf.

The Status of Charity

Arguably, the extent of government subvention of charity is not just subversive of established democratic politics and the electorate system, but is also subverting both the credentials of charity and the distinction between charities and other not-for-profit organizations. Charities stand on a different legal footing from such organizations and their consequent entitlement to considerable tax exemption privileges comes at the price of accepting the well-established common law restrictions (see, further, Chap. 1). Other not-for-profit organizations, denied such privileges, may have good cause for grievance as some charities become progressively more dis-inhibited, assume the behavioural characteristics of commercial enterprises and perhaps use their status to gain an unfair competitive advantage.

While in the UK and Irish jurisdictions, the line between charities and other non-profits is quite clearly drawn and charitable status does carry definite tax privileges and a distinctive cachet that confers a market advantage, this distinction is less clear cut in other jurisdictions particularly the US, Australia and, to some extent, Canada. However, in all jurisdictions, the growing spread of social enterprises and experiments with new hybrid models for philanthropy that are now being launched by entrepreneurs are likely to bring added contention to the debate regarding the privileged status of charity and exactly what it is that sets charity apart from other non-profits and entitles it to preferment. The following charity specific characteristics would seem to be particularly at risk of being undermined in a partnership context.

- *The public benefit test*

The 'public' aspect of this test may be breached by its actual application within the confines of a short-term contract for service delivery by a charity, if that contract unduly restricts beneficiaries to persons categorized by the usual combination of criteria applied by government bodies of need, means and locality.

- *Exclusively charitable/charitable intent*

The primary attraction of partnership for a charity is to acquire funding and to advance or at least protect its established reputation as the champion of the interests of a particular client group. This may not always square with the above *modus operandi* required of charities in common law.

- *Independent*

The realities of the funding tie whether via contracts or through other channels, is that the recipient charity becomes obligated to the government funding body. Where a charity has acquired government sponsored research funding this can tend to produce research findings compliant with government policy, particularly if that body is already being grant aided and/or is also competing for short-term government contracts. Whatever the nature of the assistance received or anticipated, the charity concerned may find restrictions imposed on its legal obligation to remain independent.

- *Profitable*

While charities are clearly obliged to ensure that any profits are not distributed for personal benefit but instead accrue to the benefit of the organization and are reinvested in furtherance of its charitable purpose, this does not mean that they are uninterested in acquiring profits. Increasingly, in competing for government contracts, charities are 'bottom-line driven' which in conjunction with other sectoral advantages delivers market success and profits. This in turn makes some attractive targets for a takeover or merger with commercial bodies.

- *Non-governmental*

As government increasingly hives-off functions and facilities and sets them up as ostensibly free-standing charities, albeit with funding and managerial control remaining relatively undisturbed, the legal requirement that charities maintain their independence and avoid becoming merely 'an arm of government' is becoming more difficult to sustain. The partnership arrangement is, however, also open to challenge at a very basic level: the use of a charity's funds and other resources to defray the cost of services that a governmental body is statutorily responsible for providing is, arguably, a breach of the trust owed to those who have donated to that charity.

Integrity of Charitable Purpose

It is a well-established, often repeated rule that charities must not stray from their objects in pursuit of funding. It is also a rule that in practice is honoured more in breach than compliance as charities creatively reconfigure their objects/purposes to fit with government policy in order to compete for contracts.

Mission Drift

The principles of equity, that have informed trusts for centuries and underpin the modern concept of charity, require the latter to accept and respect the terms on which it was set up, was awarded charitable status and subsequently attracted public donations and tax exempt privileges, by remaining within the confines of its charitable purpose. Failure to do so not only jeopardizes the right to charitable status but also exposes the organization to 'mission drift' as it constantly adapts to meet the requirements of the next government contract and loses both its mandate with stakeholders and its market niche as uncertainty comes to surround its identity.

In recent years, most notably in jurisdictions where the charitable trust is not and has not been the dominant legal structure, notably the US and Australia, this phenomenon has been graphically illustrated in the context of the secularisation of faith

based charities which has seen an exponential expansion in the number and range of organisations spawned by faith based groups. The elasticity of this rule is now also being severely tested in the same context in the UK.

Advocacy

Charities must represent and act as advocates, within established common law constraints, for the best interests of their stakeholders. For those that have succumbed to 'mission drift', have become overly complicit in a failed government policy or service delivery programme, or have conducted a wholly government funded research project on terms set by the funder, their capacity to act as advocates is compromised. This is a serious role failure for any charity as it eviscerates their charitable purpose, robs their stakeholders of their right to an authentic independent champion, betrays the trust of donors and leaves a gap which cannot be readily filled by any other agency.

The Duties of Trustees

The duty to protect the charitable status and assets of an organisation and to protect also the integrity with which it treats its charitable purpose, and its ability to be an honest advocate on behalf of its stakeholders, is vested in its appointed trustees who must act only in the interests of the charity and its beneficiaries. Their capacity to do so is compromised if there is a need to engage in competitive tendering for government contracts, pressure to conduct policy compliant 'research' and to sometimes serve as a mouthpiece for government policy. Where any such trustee of a not-for-profit corporation, is a government appointee then their capacity to act wholly in the best interests of the charity is further compromised (*audi alteram partem*).

Public Benefit and Public Service Provision

When charities enter the statutory arena and engage jointly with government bodies to formulate policy, design health and social care programmes or deliver public services they are crossing an important line. The line is essentially political in nature as it represents the boundaries of authority, drawn by Parliament, within which government has carefully defined responsibilities and for which it is accountable, to act to protect and promote the public interest. As noted above, this line is drawn a good deal firmer in the UK than in other jurisdictions, because the Welfare State so clearly identified the statutory duties of government and demarcated these

from the responsibilities of other bodies. Charities, obliged to act for the public benefit, have no such authority or accountability but are required to honour the terms of the charitable purpose which licensed their entitlement to donations and tax exemption privileges and directs their activities. The issue is – to what extent can the public benefit activities of a charity be harmonized with government's statutory public service duties without that charity unduly compromising its identity and charitable purpose?

Charities and Public Service Provision

The resources and activities of government and charity are required to be directed for the public benefit which both may achieve through public service provision. A charity is free to engage with a government body in a partnership arrangement for the delivery of public services when its charitable purpose coincides with the remit of that body. Equally, a government body may establish a charity to provide such services when the purposes of that charity are exclusively charitable: as has been demonstrated by cases in England & Wales[31] and Australia.[32] The deduction might be that public services are therefore *ipso facto* charitable.

Arguably, however, there is an important distinction between service provision as a mandatory statutory duty by government officials paid for that purpose from public taxes and the choice to provide the same or substitute service by a charity where the market cost has been partially offset by donations, reliance on volunteers and by tax exemption. While the activities of both government and charity are legally required to conform to the same public benefit principle (see, further, below), those of the latter are discretionary and distinguished by a strong altruistic component which demonstrates civic virtues and has the capacity to generate social capital. The recipients, those meeting a statutory definition of social need, have a legal right to access statutorily authorized and tax funded public services and not to be left reliant upon the discretionary choices of independent agencies where funding and authority to disburse funds are essentially sourced in the choices of private citizens. This again brings into focus an important theme for this chapter and the book – the distinction between public and private interests in charity law.

Public benefit is necessary and sufficient both for government delivery and for entitlement to receive public services and is necessary but insufficient for charities to engage in public service provision. Altruism and choice are factors which differentiate charities from government in this context (see, also, Chap. 1). Government

[31] See Charity Commission Decision in (i) Trafford Community Leisure Trust ('TCLT') and (ii) Wigan Leisure and Culture Trust ('WLCT'), May 4, 2007. See further at www.charity-commission.gov.uk/ Library/registration/pdfs/trafforddecision.pdf.

[32] See *Central Bayside Division of General Practice Ltd v. Commissioner of State Revenue* [2005] VSCA 168/.

efforts, often aided and abetted by fund seeking charities, to assimilate the latter into public service provision, risk compromising the identity of 'charity', the integrity of 'charitable purpose' and loosening de Tocqueville's 'moral tie'[33] between giver and receiver with adverse consequences for altruism, social capital and civil society. Partnership in public service provision necessarily involves the parties concerned – government, charity, donor and recipient – colluding in an arrangement that denies the importance of maintaining a distinction between matters that fall to government and those that rest with others. Government, to a varying degree in all jurisdictions studied, for reasons of cost and risk management, is shifting public service responsibilities onto the private shoulders of charity and other non-profits which they in turn, for reasons of survival in an aggressively competitive market place, are willing to accept. Consequently, drawing the line between 'public' and 'private' is becoming increasingly difficult and is not helped by a reluctance on the part of the major players to accept any need to do so.

Jurisdictional Manifestations of the Problem: The Government/ Charity Interface

The balance between public and private interests in the law as it relates to charity and as given effect through the legal functions, varies considerably across the common law world. This has in the main been due to governments' use of the regulatory framework as the mechanism to adjust that balance in accordance with their particular political priorities. The charity law reform processes have more recently provided governments with a unique opportunity to sidestep the common law and strategically enlarge their scope to adjust public/private interests by redefining core concepts and in particular by extending the interpretation of matters constituting 'charitable purposes'.

The Institutional Infrastructure and Adjusting the Regulatory Regime for Charities

Unlike the legal interpretation of definitional matters, the history of the regulatory infrastructure for charities has not unfolded in a uniform fashion. That different jurisdictions use the same terms to denote what appear to be similar institutions can

[33] See de Tocqueville, A., *Democracy in America*, 1835:

Despotism may govern without faith, but liberty cannot. How is it possible that society should escape destruction if the moral tie is not strengthened in proportion as the political tie is relaxed? And what can be done with a people who are their own masters if they are not submissive to the Deity?

give rise to the false assumption that they perform the same legal functions. This is compounded by the fact that the weighting given to a particular legal function can vary greatly between jurisdictions and change over time within a jurisdiction. The jurisdictional differences in the distribution of the legal functions as they relate to charity (protection, policing, adjustment/mediation and support) among the set of regulatory institutions is a crucial indicator of underlying political differences. The lack of jurisdictional uniformity and consistency in the institutional infrastructure does itself, however, give rise to problems of interpretation.

The Revenue

Most obviously the role of the tax collecting agency in relation to charities varies considerably across the common law jurisdictions. Its traditional role of leading the policing function, by gatekeeping access to both charitable status and eligibility for tax exemption, is exemplified by the dominance of this institution in the regulatory regimes of Australia, Canada and the US where the government approach to charity is to treat it as just another not-for-profit category. There the pressures on that agency to administer systems for levying taxes and detecting abuse require it to focus on policing the fiduciary environment to the detriment of any other legal function appropriate to the particular circumstances of charities. The fact that the agency carries responsibility for determining charitable status, and then only for the purposes of clarifying tax liability, places such an emphasis on policing that any legal functions vested in it or other agencies have comparatively little relevance.

Singapore provides an interesting example of a regime which until very recently was primarily revenue driven and where the emphasis was on policing but which is now in the process of reducing this and readjusting the distribution of functions among other relevant institutions. In that respect it is not unlike Ireland which has also had an essentially revenue driven regulatory environment with responsibility for determining charitable status and policing tax exemption firmly vested in the Revenue Commissioners.

In England & Wales, now followed by Scotland and Northern Ireland, this agency has been shorn of its capacity to determine charitable status and is now statutorily required to follow the lead given by the Charity Commission on such matters.

In addition to its traditional gatekeeper role, the tax collecting agency also gives effect to policing and other functions through the more subtle but powerful authority it exercises as administrator of income tax legislation. It is this that enables government to introduce some flexibility on a year-by-year basis through the application of certain legal functions, particularly support and mediation/adjustment, in accordance with its current political priorities.

- *IPCs and PBIs etc.*

The additional category of ‘institution of a public character’ in Singapore and ‘public benevolent institution’ in Australia, as an adjunct to charitable status, is an

interesting technique for government to channel tax free gifts towards certain charitable purposes rather than others. The designation of IPC or PBI ensures that the charity concerned will attract more funds than it would do otherwise and will apply those funds to the government targeted priorities on its social policy agenda.

- *Donor incentives*

Again, donor incentive schemes enabling donors to claim tax rebates for gifts to designated charities or for recipient charities to claim that rebate, and national lotteries not only increase the overall volume of public donations but also channel those donations towards government approved recipients. While a US survey reports that "54% of the richest US donors said that they gave for the tax benefit"[34] it is more probable that tax incentives play a relatively minor role as the motivator in giving[35]; they may allow for more to be given or for the opportunity of financial advisors to raise the issue with wealthy clients.[36]

- *Overseas aid*

Similarly, the structure of gift aid schemes implements a government determined preferential funding flow towards certain countries rather than others.

The High Court and Attorney General

The virtual ouster of the courts and the neutering of the Attorney General's jurisdiction in relation to issues affecting charity, followed with a considerable degree of national variance by the statutory assigning of authority to administrative agencies, has been a matter of considerable significance for charity law. Again, this aspect of change is one that has given rise to some misinterpretation.

In England & Wales, this was accomplished by a full transfer of powers to the Charity Commission intended to allow the Commission to: step into the shoes of both judiciary and Attorney General; deal with issues proactively, flexibly, expeditiously and with minimum cost and media exposure for the charities concerned; while also leaving open a right of referral by the Commission and a right of appeal against a Commission decision, to the High Court. In the US, the role of the judiciary has remained relatively active, more so for example in New York, while that of the Attorney General has been largely ousted and where it still functions it overlaps with the remit of the IRS particularly as regards charitable assets. In that jurisdiction, as in Canada, the diminution if not total dissolution of the Attorney General's

[34] Poll, H., *Chronicle of Philanthropy*, 2002.

[35] On the other hand, in the US, the vast majority of funds given to religious and educational institutions come from persons in the lower income ranks who do not benefit from the charitable benefit deduction.

[36] See http://www.hmrc.gov.uk/research/report29-giving-by-wealthy.pdf.

protective role has not been accompanied by any government initiative to vest the powers and duties of that office in an administrative agency resulting in a functional slippage in protective oversight that has been to the detriment of charities and the sector. In Australia, the fading relevance of the Attorney General to charities has been greeted with government inertia. In the US, Australia and Canada (unlike the UK jurisdictions, Ireland, Singapore and New Zealand where Commissions are being interposed), the assigning of decision making powers, previously exclusively judicial, to the tax collecting agency gives rise to concerns in relation to impartiality and the *audi alteram partem* rule. In those jurisdictions the judicial role in relation to charity has become somewhat residual.

The capacity of the High Court to be an effective regulator is dependent upon a regular flow and volume of relevant litigation. As this has faded in all common law jurisdictions, except to some degree in the US, so too have judicial opportunities to exercise the policing function. In common with the office of Attorney General, the protection function traditionally afforded to charities by the courts has also become of marginal significance (see, further, Chap. 15). Judicial perception of the modern role of the courts in respect of charities being perhaps fairly articulated by Justice Rothstein in a recent Supreme Court case where he endorsed views expressed in an earlier case by Justice Iacobucci[37] to the effect that they were restricted to arbitrating on the scope of possible incremental change in charitable purpose and adding that any "substantial change in the definition of charity must come from the legislature rather than the courts."[38]

Charity Commissioner

Several common law jurisdictions are now establishing, or considering doing so, an agency similar in some but not all respects to the Charity Commission in England & Wales.[39] This body is singular in that it rather than the Inland Revenue is the lead government agency relating to charities, carrying responsibility for giving effect to the full set of legal functions, maintaining a registration system, sharing jurisdiction with the High Court and prioritising the support rather than the policing function. Such a body provides a charity specific focus within the regulatory framework of government agencies: a bridgehead between government and the sector; the point at which government can demonstrate its interest in and responsibility for issues relating to the sector; without it there are communication difficulties in government/charity relationships. In particular, the ability of this agency to apply the

[37] *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10, p. 21.

[38] *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*, 2007 SCC 42, pp. 28–29.

[39] The Commission to be established in Northern Ireland would seem to most closely approximate its counterpart in England & Wales.

mediation/adjustment function, employing where necessary statutory powers in respect of *cy-près*, allow it to interpret the legal definition of 'charity' and 'charitable purpose' to better fit emerging patterns of social need.

The outcome of charity law reform in Singapore and New Zealand has been a new regulatory model which includes a Commissioner of Charities and a Charities Commission, respectively. In neither case does this compare with the role of the Charity Commission in England & Wales as they are not statutorily equipped to apply the mediation/adjustment function in a similar fashion and the central regulatory authority continues to rest with the Inland Revenue Authority of Singapore and the Inland Revenue Department respectively, thus ensuring that policing will remain the primary legal function relating to charities. In Ireland, following a protracted law reform process, the toothless Commissioners of Charitable Donations and Bequests is to be replaced by the Irish Regulatory Authority for Charities which will determine status and maintain a system of registration but will also carry statutory responsibility for applying the legal functions of policing and support. In this jurisdiction, the primacy of the policing role will again be preserved by allowing the Revenue Commissioners to retain their role as the central regulatory authority and by denying the Irish Regulatory Authority for Charities any specific equivalent to the Charity Commission's use of the mediation/adjustment function (though, see further, Chap. 15).

- *Fundraising and volunteering*

These vital aspects of charitable activity, traditionally treated by the law as detached from charity and subject to the general statutory provisions governing freedom of association etc., have historically attracted only an application of the policing function. When, in recent years they have been viewed as integral to charity and consolidated within the brief of the Charity Commission, as in jurisdictions such as England & Wales and Singapore, this has been reinforced by their association with the legal functions of support and protection.

Trustees and Corporate Boards

Across the common law world the charitable trust, traditionally the preferred legal structure for charity in England & Wales and Ireland but never to the same extent in Australia and the US, is now giving way to corporate forms. This is being accompanied by a corresponding switch in the emphasis of regulatory attention from the role of trustees to that of corporate boards as guardians of good governance. However, as many of the older established charities (which are often also the wealthier and more powerful) commenced and have chosen to remain as charitable trusts, the supervisory capacity of trustees will continue to be important.

It may at one time have been possible to confidently assert that "the independence of the sector is virtually enshrined in the fact that voluntary and charitable

organisations should be governed by independent, unpaid boards of trustees."[40] While this was never the case in those jurisdictions where trusts constituted a minority in the sector, it is now no longer the case anywhere. The traditional role of trustees in applying the protection function is dependant not just upon the prevalence of the trust as the preferred national structure for charities but also upon the degree to which national legislation has in recent years adjusted their traditional fiduciary and other obligations. In England & Wales, for example, the age old duty of a trustee to act gratuitously[41] has been undermined first by the Trustees Act 2000 and then by the Charities Act 2006. Trustees are now provided with a statutory entitlement to both payment for the provision of goods or a service to their charity over and above their normal trustee duties and, in certain circumstances, to be employed by that charity.[42] Moreover, the governance arrangements for charities are often not what they seem as the board can comprise, or sometimes consist entirely of, government appointees. The effectiveness of trustees as protectors of charities has diminished considerably in recent years in many common law jurisdictions.

Arguably, although oversight is now more in the hands of corporate boards than trustees, the capacity to safeguard charities has not improved. In Australia, for example, nonprofit board members traditionally provided their services free of charge, while a public company directorship was considered to be a gratuity[43] or the management role of a partner in a partnership. However, a recent survey conducted by Woodward and Marshall of companies limited by guarantee (overwhelmingly nonprofit organisations) indicated: a shift by nonprofit boards away from the practice of volunteerism[44] with approximately 8% of respondents remunerating their board members[45]; while 18% of surveyed boards had a mix of executive and non-executive directors, with only 5% comprised solely of executive members.[46]

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[40] Seddon, N., *op. cit*., p. 149.

[41] This duty probably dates from the decision in *Robinson v. Pett* (1734) 3 P Wms 249.

[42] See the Charity Commission, CC3 – *The Essential Trustee: What You Need to Know*, February 2007.

[43] See e.g., *Hutton v. West Cork Railway* (1833) 23 Ch D 654 at 666 *per* Cotton LJ.

[44] Woodward, S. and Marshall, S., *A Better Framework: Reforming Not-for-profit Regulation*, Centre for Corporate Law and Securities Regulation, The University of Melbourne, 2004, http://cclsr.law.unimelb.edu.au/activities/not-for-profit/. Although only 1665 of the 9,800 companies registered with Australian Securities and Investment Commission responded (approximately 17% response rate), the survey is to date the most significant survey on companies limited by guarantee: see Woodward, S., "Not-for-profit" motivation in a "for-profit" company law regime – national baseline data (2003) 21 C&SLJ 102, p. 109.

[45] Woodward and Marshall, n. 1, p. 110. Levels of remuneration ranged from $100 to $480,000 (presumably a total for all non-executive directors on a board).

[46] Woodward, n. 1, p. 116. An earlier study over the period of 1997–1998 on 118 Australian boards conducted by Peter Steane and Michael Christie found that on average 80% of all directors (total 1,405) were non-executive: Steane, P.D. and Christie, M., 'Nonprofit Boards in Australia: A Distinctive Governance Approach', *Corporate Governance* 9, 48, p. 54, 2001.

In the US, the preponderance of part-time board members and involvement of 'trophy directors' leads to situations where "the board is blind, except to the extent that the corporation's managers or independent gatekeepers advise it of impending problems".[47] The IRS, recognizing the issue of poor governance arrangements among tax exempt organizations, introduced Form 990 in June 2007 to elicit information regarding the exact nature of these arrangements but it has no duties in respect of standards of governance.

The Government/Charity Interface and Law Reform

In addition to the above jurisdictional disparity in the application of legal functions through the institutional infrastructure, differences in the relationship between government and charity have also arisen from local practice, from concerns in relation to international terrorism (see, further, Chap. 15) and as a consequence of charity law reform. Indeed, the common law world is at risk of becoming divided into those jurisdictions that accept the constraints of the *Pemsel* classification of charitable purposes, as developed by precedents under the 'spirit and intendment' rule, and those that have added a variety of new statutory definitions of such purposes to their common law legacy. The nature of the future relationship between government and charity will to a considerable extent be determined by whether or not the former has chosen to abide with or opt out of the traditional common law framework.

The Jurisdictions and the Government/Charity Interface in Public Service Provision

The permission given in the Preamble, for the common law to accommodate public service provision shared by both government and charity, has since been exploited in several jurisdictions. Charities, however, have always been required to demonstrate a sufficient, if uncertain, degree of independence from government. In principle, any organisation that allowed itself to become merely a conduit or agency for delivery of government services was no longer an independent entity and could be denied charitable status. This was not borne out in practice.

In Ireland and Singapore, for example, the government established semi-State bodies under the protective umbrella of charity as a core strand in its strategy to promote economic growth. In England & Wales the Charity Commission's ruling

[47] See Coffee, J.C., *Gatekeepers: The Professions and Corporate Governance*, 2007, p. 7; cited in Silk, T., 'Good Governance Practices for 503(c)(3) Organisations: Should the IRS Become Further Involved?', *The Exempt Organisation Tax Review*, 57: 2, August 2007, p. 183. Also, see the IRS draft document 'Good Governance Practices for 503(c)(3) Organisations', February 2007.

that the functions of central or local government can be discharged by a body established for exclusively charitable purposes has led to the transfer of leisure centres and other public service facilities to the charitable sector. This jurisdiction has also seen a reverse transfer with housing associations (exempt charities) being absorbed by government.

In Australia, the advice of the ATO that "the purposes of government in carrying out its functions are not charitable" as subsequently endorsed by the Charity Definition Inquiry Report[48] has given way to the judicial ruling in the *Central Bayside* case.[49] The court then determined that a nationwide organization of general medical practitioners, formed to deliver a government health care provision and wholly funded by government, was nonetheless a charity.

In the US, the view that lessening the burdens of government is a charitable purpose has long been a principle of charity law. It is embedded in the Treasury Regulations promulgated under section 501(c)(3).[50]

The Jurisdictions and the Independent Governance of Charities

In England & Wales the Charity Commission has emphasised that charity governance must, as a matter of practice, be independent from governmental authority. However, in that jurisdiction it has been estimated that there are now some 731 charities with a local authority as a trustee, while in 595 cases the local authority is the sole trustee.[51]

The Jurisdictions and Government Funding

Government funding of charities, a significant and growing sector trend in the jurisdictions studied, injects a further dimension to the complexities involved in differentiating public from private interests. The extent of funding to charities is such that in some circumstances the latter's service delivery is now little more than government provision by proxy. This places charity in the position of being seen as public benefit service provider and of being accountable for service deficiencies while government in fact exercises control through funding and by regulating

[48] See Sheppard, I., Fitzgerald, R., and Gonski, D., *Inquiry into the Definition of Charities and Related Organisations*, Recommendation 19, Canberra, 2001.

[49] [2005] VSCA 168/.

[50] See Tres. Reg. §1.501(c)(3)-d (1).

[51] Seddon, N., *op. cit*., p. 128, citing Smith, R. and Whittington, P., *Charity: The Spectre of Over-Regulation and State Dependency*, CPS, London, 2006, unpublished draft, p. 20, citing research by the Charity Commission.

standards. The warning of the Charity Commission that "charities must be independent of government and other funders"[52] is being obscured by such funding arrangements not only in England & Wales but also in many other common law jurisdictions.

In relation to some of Britain's leading charities, Seddon has noted that "Barnardo's now receives 78%, the Shaftesbury Society gets 93%, Rainier 82%, NCH 88%, Leonard Cheshire 88%, the National Family Parenting Institute 97% and the ironically named West Sussex Independent Living Association 99.65% of their income from statutory sources".[53] He further comments that:[54]

> In the mid-1980s, about 10% of overall charitable revenue came from government sources.[55] By 1991, government funding accounted for 27% of the sector's income,[56] and that figure is now at least 38%[57] … Jeremy Kendall's latest calculation for the sector's dependency on state places the proportion at 45%[58] … the state is now undeniably 'the largest contributor to philanthropic causes'.[59]

Moreover, following the National Lottery Act 1998 and the introduction of the New Opportunities Fund in 2006, the distributing bodies for lottery funds are now required to construct strategic plans in line with government policies, and have become "de facto delivery arms of government policy, funded through the lottery".[60]

In Australia the dividing line between government entities and entities preferenced by the federal taxation system as either Public Benevolent Institutions or charities is contested. Further complicating this tension is the strategy of state governments to create federal tax preferenced bodies to undertake state government responsibilities which allow them to get federal taxes for a cheaper service delivery. In Australia, the Inquiry Report agreed with the judiciary in *Metropolitan Fire Brigade Board v. The Commissioner of Taxation*[61] and *Mines Rescue Board of New South Wales v. Commissioner of Taxation*[62] (both state government formed bodies)

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[52] Charity Commission, 'Policy Statement on Charities and Public Service Delivery', June 2005.

[53] Seddon, N., *op. cit*., p. 4.

[54] *Ibid*., p. 28.

[55] *The Times*, December 17, 1984.

[56] NCVO, *Voluntary Sector Almanac 2004*.

[57] *UK Voluntary Sector Almanac 2006*.

[58] Kendall, J., *The Voluntary Sector: Comparative Perspectives in the UK*, Routledge, London, 2003, p. 25.

[59] Prochaska, F., *The Voluntary Impulse: Philanthropy in Modern Britain*, Faber & Faber, London, 1988, p. 4.

[60] Seddon, N., *op. cit*., p. 125, citing Lea and Lewis, *The Larceny of the Lottery Fund*, 2006, p. 2.

[61] (1990) 27 FCR 279.

[62] (Cth) (2000) 44 ATR 107 at p. 30. Also, see *Perpetual Trustee Co Ltd v. FC of T* [1931] 45 CLR 224 *per* Evatt J who described the recipients of charity as:

> 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.

that the test for determining whether an entity is a government body and therefore not tax deductible is that it be constituted, funded and controlled by government. Subsequently, however, in the above mentioned *Central Bayside* case, it found that just because a charity has the same goals as government and is wholly funded by it to deliver government services does not mean, without more, that it is not independent of government.

In the US also, government financial support for charities is significant. In 1996, the US government provided roughly 36% of all revenue for nonprofits; fees for services constituted another 54% of revenues, with private contributions responsible for only 10%. It has been noted that between 1977 and 1997, government funding for the sector grew by 195%, "proportionally more than any other source."[63]

In short, the trend for government to delegate its public service responsibilities and related funding to organizations it has set up as charities, or to increase its direct funding of charities so as to facilitate their delivery of public services, has increased in many common law jurisdictions. In some instances the proportion of funding from government is now such as to reduce the independence of the charity to the point where it has become little more than a government agency.

The Jurisdictions and Charitable Purposes

Although in some countries charity law reform is still underway, at present only in the UK jurisdictions has government introduced legislative provisions that will radically broaden the future interpretation of charitable purposes. Australia seemed prepared to do so but the government withdrew the necessary legislation after the sector would not support ancillary measures that had the potential to curb its independence and ability to advocate. Other jurisdictions have settled for a cautious extension to the existing four *Pemsel* heads coupled with a general recognition that in determining public benefit the 'activities test' should be applied. It remains possible, however, that others will in time follow the lead given by England & Wales and extend the definition of charitable purposes to include such matters of central importance to government as:

- The advancement of human rights, conflict resolution or reconciliation etc.
- The advancement of civil society
- Promoting the welfare of specific socially disadvantaged groups and indigenous people
- Promoting multicultural relationships, on a community, national and international basis

[63] See Salamon, L. (ed.), *The State of the Nonprofit America*, Brookings Institution Press, Washington, DC, 2002, p. 33.

This is a clear statement of matters deemed by government to be in the contemporary public interest and as such represents an updating of the Preamble social policy agenda.

The Jurisdictions and Charity Capacity to Challenge Government Policy

The constraints on political activity by charities are deeply rooted in the common law and present a real obstacle for charities that wish to campaign for change in laws or policy.[64] While some jurisdictions now adopt a more permissive approach, such as the US[65] where charities are not permitted to have political purposes but are permitted to be politically active but limits are placed upon the amount of funds and resources which can be so used, most others continue to deny charitable status to an organisation established for the purpose of challenging government policy, campaigning for a change in the law or even to advocate for the retention of current policy or law.[66] This constitutes a considerable weighting in favour of government in its relationship with charity, represents an archaic use of the policing function to suppress matters clearly in the public interest and contributes to a general muting of dissent from the charitable sector.

Towards an Answer: Clarifying the Distinction Between Charity, Other Non-profit Organisations and Government Bodies in Respect of Public Benefit Provision

The unique identity of charity and the integrity of charitable purposes, set within a common law legacy that has endured for four centuries and been shared fairly uniformly among the many nations that formerly constituted part of the British Empire, are increasingly in danger of being undermined by pressures from government and

[64] See the ruling in *McGovern v. A-G* [1982] Ch. 321 where the court ruled that it had no means of determining whether the outcome of policy change would be beneficial or otherwise. Also, see *Steel and Morris v. the United Kingdom* (application no. 68416/01) (2005) generally referred to as the 'McLibel Case'.

[65] However, *Better Business Bureau v. United States*, 326 U.S. 279 (1945) provides authority for the view that Reg. 1.501(c)(3)-1(c)(1), which states that an organization will not be regarded as operated 'exclusively' for IRC 501(c)(3) purposes if more than an insubstantial part of its activities is in furtherance of a non-charitable purpose, will be breached by the presence of any substantial engagement in non-charitable activity such as political advocacy.

[66] See *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue* (1999) 169 D.I.R. (4th) 34, SC where a minority group established to provide mutual support for immigrant women failed to gain charitable status because their purposes could be construed as permitting political rather than exclusively educational activities.

indeed from commerce. As, across the developed common law nations, much of the burden of public service provision is shunted from government to the voluntary or third sector, so charities are being drawn into closer association with government and in so doing are compromising their objects and independence. The institutional infrastructure of the regulatory framework and more recently definitional matters, have provided the mechanisms for government to adjust its partnership arrangements with charity. For some of the leading common law nations, this has been consolidated by charity law reform which presented an opportunity for governments to construct a more fundamental and strategic basis for partnership with charities and insert more control points for their activities. Ongoing but varying processes of adjustment to the government/charity relationship are causing problems of interpretation as institutions and concepts cease to bear the meaning that previously applied with some consistency and uniformity among the common law nations. The functional analysis approach to charity law provides some insight into the nature and extent of interpretational problems affecting the jurisdictions and perhaps points towards a solution.

It should also be noted, albeit in passing, that the integrity of charity is under threat as much from the predations of commerce as partnership with government. The transition from charity to a for-profit entity is not on anything like the same scale as that from charity to government function, but the entailed breach of the public benefit principle poses a more fundamental challenge to moral and legal integrity. In the US during the 1990s, there were a considerable number of instances when nonprofit organisations were taken over or bought out by commercial businesses or where they simply converted from nonprofit to for-profit status. This conversion trend was a growing and potentially very significant phenomenon, particularly in the field of health care[67] but the merger mania has slowed as the economics of health care have changed As the Empire Blue Cross Blue Shield case in the US has demonstrated (see, further, Chap. 9), the time is rapidly coming when the common law nations will need to adopt a uniform approach to issues of conversion from charity to for-profit. Where a charity, such as a hospital or nursing home, that has built up its expertise and efficiency over many years with the aid of tax exemptions, public donations and government grants wishes to transform itself into a for-profit, then some form of reparation will need to be made to the public purse on its conversion to a commercial entity.

Differentiation Between Roles of Charity and Government in Public Service Provision

The terms of the joint agenda for public service/utility provision by government and charity, as established in the Preamble and judicially developed within the

[67] See Lipman, H., 'Health-Conversion Funds Hold $16 Billion in Assets,' *Chronicle of Philanthropy*, May 4, 2000, p. 12 and Grantmakers in Health, *A Profile of New Health Foundations*, Washington, DC, 2003.

constraints of *Pemsel* and the 'spirit and intendment rule', have proven to be an insufficient basis for partnership in the 21st century. That, after all, was the main point of the charity law reviews. The judicial choice being, as recently stated in the Supreme Court of Canada, to "consider whether what is being proposed is an incremental change or one with such complex ramifications it should be left to Parliament".[68]

Now that England & Wales, the progenitor of the common law foundation for charity, has made the commitment to place the future development of charity on a statutory footing other jurisdictions will undoubtedly follow suit. The centuries old common law charity cloth is now to be statutorily cut to fit the particular requirements of each jurisdiction in turn and modified thereafter as each considers necessary. The transition from common law to legislation is not, however, unusual and far from spelling the end of charity law as a discrete coherent entity, it could provide the means for preserving that body of law, for restoring clarity and consistency and thereby removing some of the more troublesome problems of interpretation.

Governing Principles and Matters of Practice

The essential hallmark characteristics that have defined 'charity' in a common law context now need to be incorporated in national legislation as governing principles. In particular the rule that a charity be independent and therefore non-government, needs statutory endorsement not least because of the complications that otherwise arise for the tax paying citizen who chooses to donate to a charity with a specific charitable purpose only to see that charity then delivering public services that he or she has already paid for and in respect of which accountability is unclear. The regulatory framework now needs clear lines of transparency and accountability so that responsibilities of government and charity can be identified, differentiated and tracked. The level of obfuscation surrounding the public benefit remit of both parties, often deliberately cultivated by government and further complicated by private finance/commercial involvement, makes this separation exercise both increasingly difficult and urgent.

The governing principles would include standard modifications to the existing rules in relation to the 'public benefit' and to 'political activity' requiring that the former be applied to all charitable purposes including the advancement of religion and the latter be permitted, subject to the same test, except where this would promote party politics. The existing *Pemsel* categories of charitable purpose should be extended to include those now listed as above in the Charities Act 2006 and similarly incorporated in national legislation. Such a co-ordinated use of legislation would itself build in consistency, keep alive the existing body of precedents and

[68] *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*, 2007 SCC 42, p. 21.

permit charity law to continue unfolding in a shared, purposeful and fairly uniform manner across the common law world (see, further, Chap. 13).

Charities now need to be classified by type, rather than solely according to charitable purpose, and registered accordingly. So those that are also institutions of public character or public benefit institutions etc., or are otherwise the recipients of gift/donation schemes or lottery funding etc. should be clearly identifiable, as should those that engage largely in overseas aid or are in other ways quite specialist. Income steams provide an important means of differentiation. Charities that choose to pursue their goals by employing methods such as the following should be statutorily required to seek and obtain an appropriate license which would be entered on their registration details and flagged on their public logo. The allocation and monitoring of licenses should be vested in a body at arm's length from the tax collecting agency, such as a Charity Commission.

- *Commercial activity*

Many charities now develop a commercial arm and in some cases this can grow to dwarf their charitable activities. Provided that the commerce is in keeping with the charity's objects, advances its charitable purpose, allows for appropriate profit distribution and is not disproportionate in scale to its charitable activity then a standard license would be appropriate.

- *Fundraising*

Fundraising is the lifeblood of many charities and provides opportunities for individual altruism and community participation. Subject to the usual safeguards in respect of methods (professional fundraisers etc.), expenses and destination of proceeds, fundraising should again be simply licensed.

- *Public service provision*

Criteria, firmly establishing the independence of charities, need to be statutorily specified and their application policed to ensure that charities are not used as convenient vehicles for government. Not-for-profit organisations established by government, or that exist primarily to undertake government functions, or the activities of which consist largely of public service provision, should be set apart from charities and their right to seek public donations and avail of gift aid schemes etc. may need to be examined. The rules as to the nature and extent of government functions that nonprofits may undertake will need further exploration. This category may require to be treated quite differently in law and require more than a license.

- *Government funded*

Charities that choose to avail of government funds whether by way of direct grants, service or research contracts should be clearly differentiated from other charities and capped in relation to the proportion of annual income that they can avail of from that source without relinquishing their charitable status. Again, a specific license would seem appropriate.

- *Foundations*

Charities established by way of bequest or grant and which thereafter neither seek nor avail of funding from public donations or from government are on a distinctly different footing from all other charities in terms of tax issues. This category may need to be wholly subject to trust law with firm rules regarding governance arrangements particularly in relation to the independence and fiduciary duties of trustees.[69] Such charities, as wholly independent entities, would not require a license.

- *Lobbying*

As it is plainly in the public interest that charities articulate the issues facing the socially disadvantaged so the statutory removal of all common law obstacles to such lobbying is necessary. Those charities that choose to engage more in lobbying than in service provision should be required to seek a license.

Institutional Infrastructure

The range of government bodies that relate to charities needs to be tidied up, with legal functions streamlined and statutorily demarcated. Accepting that some jurisdictions will choose to retain their revenue driven approach to charity and not wish to adopt the regulatory model of England & Wales with a Charity Commission as the central agency, it should still be possible to achieve greater consistency and coordination in the distribution of functions between bodies such as the High Court, Attorney General etc. and to assign specific support responsibilities to a relatively independent government agency. Such an agency should be statutorily vested with the duty to review charities, mediate/adjust objects and use *cy-près* powers, to achieve the best fit between a charity's designated charitable purpose and presenting area of social need. This statutory duty should also enable that agency to develop a contemporary interpretation of charitable purpose, within the confines of its statutory definition, and to address newly emerging and/or jurisdiction specific areas of need.

The *locus standi* of charities is enhanced by specific representation in the political process and in the regulatory framework, particularly when that is institutionalised in the form of statutory duties vested in a Charity Commission or similar agency. Charities, their activities and the charitable sector, then constitute that agency's core responsibility and are not simply part of the brief of a tax or consumer affairs body or office of the Attorney General. Any statutory demarcation of responsibilities between government agencies will, however, need to take account

[69] Alternatives to trust law oversight are available in Canada and the United States, where private foundations are subject to stricter scrutiny by revenue agencies in accordance with tax rules that treat them differently (and more strictly) than normal charities.

of and seek to harmonise the existing differences between trust based and company based rules and principles governing charities and their activities.

Differentiation Between Charity and Other Nonprofits in Legal Status

The tax differential between charities and other nonprofits clearly needs to reflect a difference in terms of public benefit not just in the scale and professionalism of their respective activities. As large charities, small community voluntary organizations and a variety of social enterprises in varying shapes and sizes increasingly engage in service provision, lobbying and fundraising, forming partnerships when expedient with government or commercial bodies and set up subsidiary branches as necessary, all for the benefit of others, it becomes more difficult to pinpoint what exactly entitles the former but not necessarily the others to tax privileges and social cachet. Again, as the boundaries of charity become more porous to facilitate collaborative working arrangements with other bodies so its integrity is being diluted.

Governance

Charity law emerged from the law of trusts where the deeply embedded principles of Equity governed charity and its activities and set charity apart from other voluntary and indeed government bodies (see, further, Chap. 1). While all these principles should continue to have a bearing on how charities currently operate none have more significance for their survival in contemporary conditions than those that apply to governance and, in that context, those that apply to the duties of trustees are crucial. A key element differentiating charity from other nonprofits should be the obligation of trustees to assert the independence of their charity, ensure that in sharing the functions of government it does not merely become a government agency and to protect its fiduciary base. Such principles of governance applicable to trusts need to be enforced, harmonized with company law regulations and given uniform statutory effect throughout the common law nations.

Designated Legal Structures

There is at present no prescribed form for a charity. In England & Wales (unlike the US, Canada and Australia) structures for charity, like the law, have tended to strongly favour trusts and this has not proved conducive to promoting the growth of charities in the modern world. The trust/foundation is not an attractive structure for

social entrepreneurs and the cumbersome nature of the current dual registration and reporting requirements that burden those charities which are also companies limited by guarantee detracts from their efficiency. In England & Wales the Charitable Incorporated Organisation and the Charitable Designated Activity Company provide: a more appropriate alternative to the company limited by guarantee; allow members and managers to be insulated from the financial liabilities of the company; permits it to agree contracts, hold land titles, sue and be sued; and provides for simpler registration and reporting requirements than is now the case (see, further, Chap. 15). This type of statutorily designated legal structure serves to underpin the distinction between charities and other nonprofits.

Conclusion

There can be no assumption that the common law nations have had a fully shared charity law experience. There are jurisdictional differences in range and interpretation of charitable purposes, in other definitional matters (e.g. presumption regarding application of public benefit test), acceptance of judicial precedents and in regulatory infrastructure. These differences give rise to misinterpretations in any attempt to 'read across' meanings from one jurisdiction to another; there is indeed a danger of things being lost in translation.

However, the basic underpinnings of the government/charity interface are the same. The Preamble declared the terms of that relationship: setting out a government social policy agenda expressed in terms of matters to be construed as meeting the legal definition of 'charity'; incorporating a distinction between poverty and public service/utility; and embedding the dichotomy of public and private interests at the heart of charity law. *Pemsel* and subsequent case law precedents added further to the commonality of shared components: in particular establishing the parameter that charitable purpose and criticism of government were mutually exclusive. The recent charity law reform processes have to some extent simply extended the relationship on the terms as laid down in the Preamble: the common law heritage of definitional matters has been preserved; the institutional infrastructure remains largely in place, though the distribution of legal functions between them has, in some cases, been altered; and the negative parameters have been maintained. The fact that the outcome of the various processes has been confined, in the main, to placing definitional matters onto the statute book with some extension to charitable purposes, reinforces the point that the government/charity relationship has always been politically determined and that the Preamble agenda, as extended, continues to work to the advantage of government.

For charity, the price of partnership on Preamble terms has already been considerable and current trends indicate grounds for concern that government may make it a price that cannot be paid without further compromising its unique identity and undermining the integrity of charitable status. The charity law reviews were prompted by a government need to prepare the ground for charity to be more available

to share the burden of contemporary public benefit responsibilities. There is a danger that this has been so successful as to threaten the traditional role mutuality of government and charity by tilting the balance so far in favour of government that charity is at risk of becoming reduced to function more and more as an adjunct to government. Arguably, there now needs to be a redressing of that balance. The experience in the jurisdictions studied suggests that an important means of achieving this can be by strategic adjustments to the distribution of the legal functions among the regulatory agencies. The hallmark characteristics of charity – independence, non-governmental and exclusively charitable – need to be safeguarded by ensuring appropriate institutional representation at arm's length from the tax collecting agency and from other forms of direct government influence. Recognition that certain parts of the regulatory framework – notably the courts and office of the Attorney General – no longer fulfill their traditional roles needs to be accompanied by the transfer of their functions to other bodies with the statutory capacity to defend the interests of charity while remaining at arm's length from government control. This would bring the added advantage of introducing a greater degree of conformity to national regulatory frameworks for charity and thereby also reduce the present range of interpretational problems. However, the future of charity law in the common law nations is likely to be broadly in keeping with past experience, meaning that charity will continue to reflect its cultural context and in particular, as it is fundamentally politically determined, its partnership role with government will differ in accordance with the representative/participative model of democratic engagement adopted by that government.

Chapter 15
Framework Problems: Legal and Administrative Regimes

Introduction

This chapter considers the problems facing contemporary charities that emanate from the regulatory framework in the jurisdictions studied. The starting point for the chapter, as indeed it has been for the book, is the political frame of reference and its significance for charity. A beginning is therefore made with an appraisal of political influence as a factor in aligning charity law with social policy to create a facilitative environment for appropriate charitable activity. Attention is then given to the central role of the regulator in all charity law frameworks. It examines issues regarding the roles of the different regulators, giving particular attention to the distinction between revenue driven and other regulatory models. It considers the merits of having a lead agency within a regulatory framework and assesses the rival claims of possible contenders. As in practice the relevant regulating body is often determined by the type of legal form adopted by a charity, the chapter then turns to consider legal structures. This entails discussion of matters relating to the distinction between trust and company, the merits of new statutory models, the emergence of hybrid bodies to facilitate partnership arrangements and of implications arising from the growing gap between big and small charities.

The Political Dimension

Philanthropy exists within a political environment. The common law world of charity with its institutions, precedents and principles established over many centuries and essentially operating as a closed self-referral system, has had difficulties adjusting to the varying demands of contemporary national and international politics. The resulting compromises can be seen in the jurisdictional differences in charity law and the particular interplay of its functions that distinguish the countries surveyed in Part III.

The areas of commonality are significant. Modern developments in social justice, international human rights law, measures to combat global terrorism and international aid/trade have had an overall conforming effect in differentiating

K. O'Halloran et al., *Charity Law & Social Policy*,

between matters that are to be treated as rights or moral imperatives and those that may be left to philanthropy. In the latter category, the enduring consistency of certain broad social policy themes, which resonate with those first addressed in the Preamble, is evident in all common law countries. Evident also is the broad uniformity in the charity law response to a similar agenda of domestic and international pressures (e.g. multiculturalism and the terrorist threat respectively).

However, the areas of difference are important and those attributable to political influence are particularly revealing. Some are jurisdiction specific and structural, being a political response to an enduring national characteristic (e.g. Australia and the Indigenous people). Others are more a feature of national politics (e.g. the centralist conservative regime of Singapore or the democratic socialism of England & Wales). Some, like the G8 commitment to 'end poverty' are international, strategic and carry great potential for generating a new export of philanthropic resources, while others such as the raft of national and international anti-terrorism measures may curtail the flow of existing resources.

Arguably, the above array of jurisdictional characteristics indicate corresponding fundamental political differences in the relationships variously forged between government and third sector which set the context for national regulatory frameworks. In England & Wales, as elsewhere in the UK (and to a lesser extent in Ireland), the political approach of the Labour Party government has in a sense assimilated the principles of the sector and (through the Compacts, charity law reform process etc.), occupied its space (through the 'Third Way'[1] etc.) and become welded to it in a shared belief that such a partnership promotes participative democracy, is the best bet for securing civil society and will be necessary for the future planning and delivery of public benefit provision. This approach is probably at the opposite end of the spectrum from the position taken up by the government in Australia, which is not far removed from that of New Zealand and Singapore, where essentially the sector is viewed as a potentially subversive distraction from the representative democratic process which needs to be kept at a distance, monitored and carefully managed. In the US, on the other hand, with its deeply rooted democratic culture, the government has a strong sense of the political 'place' of the sector and has been feeling its way towards formally recognizing this but the complications of doing so in a federal system have so far defeated it. Canada is closest to the US on that spectrum but given the partnership arrangement with the sector that provided a basis for a joint review of the regulatory framework for nonprofits, coupled with the recent federal change of power, it is possible that the government will find a way to overcome the federal complications and succeed in forging a sustainable formal partnership with the sector. For all common law countries studied, and for many that were not, the regulatory framework reflects the established model of democratic politics and is driven or compromised by it.

Politics and philanthropy are thus inextricably entangled. It is this added veneer of national and international politics to the common law regulatory framework for

[1] See, for example, Giddens, A., *The Third Way and Its Critics*, Polity Press, Cambridge, 2000.

charity, and the resulting differential impact on the practice of philanthropy in the jurisdictions studied that is now of interest.

Social Policy and Regulating the Core Definitional Matters of Charity Law

From the shared baseline established by the Preamble (see, further, Chap. 2) the 53 nations of the common law world have built a platform of precedents that perpetuate the social policy themes then established. Inevitably, local circumstances, culture and politics have also ensured that to some extent each nation has used and developed this heritage differently. In recent years, the series of charity law reform processes have offered the nations concerned the opportunity to review this heritage and adjust their regulatory frameworks to facilitate the channeling of charitable resources in the direction of their respective government's social policy agenda. The extent to which legislation has been seen as a necessary corrective intervention to customize the common law heritage, and the type of statutory measures then introduced by some nations, are clearly politically determined (see, also, Chap. 13). It is, however, the jurisdiction from which the legacy originated that now itself offers the most convincing evidence of a continuing link between developments in charity law and government social policy.

National Differences in the Development of Charitable Purposes

The John Hopkins series of studies identified and applied many socio-economic indicators to measure and compare national differences in the role played by philanthropy in the common law world. The emphasis on particular charitable purposes and the range of such purposes can vary considerably from nation to nation, and within the same nation from time to time, in correlation with the prevailing political climate.

In Ireland, for example, for most of the period since independence, the synergy between Church and State provided fertile ground for a rapid growth in charitable activity that advanced religion but did not assist the propagation of secular voluntary organizations: religious bodies attracted public and government funds, while funding for other charitable purposes was in practice often channeled through the Catholic Church (e.g. advancement of education and relief of poverty being for the most part addressed by religious organizations) and then deployed in traditional and conservative methods. Singapore, again for almost the entire period since independence, adopted a similarly restrictive approach to the development of a pluralist voluntary sector. For reasons to do with an entrenched political party providing a very conservative and controlling government with an abiding fear of ethnic tensions fomenting social unrest, this jurisdiction has discouraged all forms

of independent organizations which again allowed the advancement of religion to become the primary charitable purpose with religious charities adopting a role of supplementing government public service provision. In New Zealand charity tended to be locality based due to the influence of Maori community lifestyles (Maori being the most significantly disadvantaged section of the population) combined with the thinly spread pockets of early European settlements, and channeled through a network of grassroots societies which in turn led to the development of a voluntary sector conscious of its independence but weakly led due a lack of national co-ordinating bodies. In comparison, the political climate in England & Wales has fostered the growth of a rich, varied and challenging voluntary sector closely allied to government in which charities, particularly under the fourth *Pemsel* head, have proliferated across a wide range of activities. This in part may be attributable to a generation of 'Third Way' politics which has seen elected representatives moving away on principle from the socialist commitment of previous generations to public service provision as an ideal and instead espousing values such as community involvement and civic responsibility while pursuing social goals through partnership arrangements with the community with private finance sources etc. In contrast to all the above, the US stands apart because of its consistent history of significant NPO activity, almost to the exclusion of the State at times in respect of matters such as education and health etc, and where religious issues are deeply rooted in American culture.

Social Policy, Legislation and Charitable Purposes

Some jurisdictions (England & Wales, Scotland, Northern Ireland, Ireland, New Zealand and Singapore) have either introduced or are preparing to introduce legislation that will radically alter the common law basis of charity law. Others (Australia, the US and Canada) considered doing so but so far have decided against it. The latter, unlike the former, presumably deciding that the same core social policy themes as initially articulated in the Preamble provide sufficient parameters for future charitable activity. Although recently in Canada, in relation to the prospect of sport and recreation being recognised as a charitable purpose in its own right (as opposed to this status being available only if the sport and recreation is ancillary to a bona fide charitable purpose such as advancement of education), there has been judicial acknowledgement of this tension.[2] As Justice Rothstein stated, such a prospect "would seem to be closer to wholesale reform than incremental change, and is best left to Parliament … substantial change in the definition of charity must come from the legislature rather than the courts."[3]

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[2] *A.Y.S.A. Amateur Youth Soccer Association v. Canada Revenue Agency* (2006), 267 D.L.R. (4th) 724 (F.C.A.).

[3] *Ibid*., pp. 28–29.

Placing the core definitional matters on a legislative footing, removes the interpretation and development of such matters from the ambit of judicial discretion, closes the door on reliance upon the common law process of incremental expansion through an unbroken line of analogous case law precedents but opens a door for further legislative amendment as and when this is deemed politically expedient. For charity, this itself amounts to politically imposed change reminiscent of the Preamble.

Almost all common law jurisdictions will, however, continue as before with charity law development remaining essentially a judicial process; though it is difficult to predict how that development will be influenced by future case law emanating from the new statutory regimes. At present, only England & Wales, the other UK jurisdictions and Ireland have committed to introducing legislative change to definitional matters. Charitable purposes, among the most important matters subject to such change and the most politically sensitive, have been excluded from statutory specification in New Zealand and Singapore but included in Ireland and the UK jurisdictions. In the latter jurisdictions, detailed analysis (see, further, Chap. 13) clearly reveals an alignment between type of new purpose and government social policy agenda. This is unsurprising and in the main the new purposes are either matters readily recognized as constituting instances of contemporary deprivation and social exclusion or are an uncontroversial statutory extension of accepted public benefit service provision. However, within the range of new statutorily specified purposes, there is a hint at the prospect of another dimension being opened up by government in its relationship with charity – a step beyond the line drawn in the Preamble.

Both nations have introduced the promotion of 'effectiveness' and 'efficiency', in different contexts, as inherently charitable. In s 2(l) of the Charities Act 2006, 'the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services'[4] while in s 3(1)(d)(iii) of the Charities Regulation Bill 2006 it is 'the advancement of citizenship, including the promotion of civic responsibility, volunteering, or the effectiveness or efficiency of charities', have now acquired charitable status. In both jurisdictions, particularly in England & Wales, there has been a shift from direct public service provision by government to regulating that provision by approved bodies.[5] In Ireland, the promotion of 'effectiveness' and 'efficiency' would seem to

[4] There is, of course, a well established a line of cases confirming that organizations which promote the efficiency of the armed forces are eligible for charitable status, for example: *In re Good* [1905] 2 Ch 60; *In re Gray* [1925] Ch 362; *Re Meyers* (1951) Ch 534; and *Downing v. Commissioner of Taxation* 71 ATC 4164; (1971) 125 CLR 185.

[5] This constitutes a step beyond the stand taken by the Charity Commission in *Application for Registration of Guidestar UK*, March 7, 2003, when it held that:

> there was a substantial benefit to the public in having an effective voluntary sector and that both tangible benefits (such as engaging and directing efforts of individuals that wish to help those in need) and intangible benefits (such as encouraging altruism in society) to the public would arise. The Commission was satisfied that the promotion of the voluntary sector was of benefit to the public and that that public benefit was established by this purpose.

licence the introduction of quangos, or government appointed agencies to set and control standards in the charitable sector. This potential use of charity to control charity constitutes a significant breach in the line between government and the sector.

Social Policy, Legislation and the Public Benefit Test

In both Ireland and England & Wales the public benefit test, along with other essential definitional elements of a 'charity' as understood within the common law (exclusively charitable, non-profit distributing and non-political), are now legislatively based and therefore placed beyond judicial reach. Some variations in the statutory incorporation of these key definitional matters are indicative of differences in political influence in the respective jurisdictions.

In Ireland, for example, while the subjective interpretation of what constitutes 'benefit' has been replaced by the more orthodox objective test, the established exemption of religious organizations from application of the public benefit test has been reasserted and with it the special relationship between the State and the Catholic Church which has since independence been a characteristic of national politics. This is accompanied by a failure to exclude government bodies from claiming that by virtue of their public benefit activity they are entitled to charitable status and by a provision debarring from inclusion in the register of charities any 'institution established for the purpose of attempting to change the law or government policy'. Such measures are clearly political: they state the terms on which the government intends to relate to the sector; the preferential differentiation (if not discrimination) it will make between religious organizations (with their member benefit orientation) and other charitable entities; and they cast some doubt on the government's partnership rhetoric. In England & Wales, equally political considerations prevail: the application of the test to all charitable purposes may well indicate the political intent of the current Labour party to address the anomaly of private, exclusive and expensive schools, hospitals and other health and social care facilities acquiring charitable status.

Social Policy and Regulating Tax Privileges

Control of a nation's purse strings has from feudal times provided its government with the resources necessary to implement policy. For contemporary governments of most developed nations this is now achieved though structural amendments and/or ongoing manipulation of the tax code. As the same mechanism offers government an important means for adjusting the fit between charity and social policy it is always vulnerable to the vicissitudes of politics.

Structuring the Tax Regime

The tax regime is the cutting edge of the relationship between government and charity. In those countries such as the US and Australia, where the relationship is dominated by a revenue driven approach, the political influence is primarily evident in the designation of the IRS and the ATO respectively as gatekeeper for charitable status with a brief to apply the tax regime in a uniform manner to all persons and entities. The reverse is equally true, initially only in the case of England & Wales, for those countries where the roles have been institutionally separated.

For so long as tax exemption for charities was set within common law definitional parameters, the social policy themes of the Preamble were preserved and government was obliged to legislate when it wished to extend exemption on charitable grounds. As Justice Iacobucci' commented in *Vancouver Society*, when considering an expansion of the definition of charity, the courts must consider whether what was being proposed was an incremental change or one with such complex ramifications that it should be left to Parliament.[6] This was the case in relation to recreation in many common law countries[7] and also, more recently, in relation to child care services on a non-profit basis in Australia.[8] Otherwise political influence was mainly apparent in the structuring of the tax code and is perhaps now most widely demonstrated in government use of VAT/GST.

In the US, unlike for example England & Wales, the line between mutual benefit and public benefit has never been as rigidly drawn but there is a basic structural distinction built into the tax code which defines a 'charitable organisation' as either a public charity or a private foundation.[9] The former category, which includes schools, hospitals, churches and any other charities that receive a third of their funding from a broad public group of donors or patrons, is treated preferentially for tax purposes. Political influence is apparent in subsequent adjustments to the tax code, extending the definition of public charities to include 'publicly supported' organizations and community foundations, which allows for an expanded contribution from this public service category.[10] Such influence can also be seen in respect of overseas aid: the Revenue Act of 1935 first restricted such donations by corporations and required that funds donated be used domestically[11]; this was extended to

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[6] See V*ancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10, *per* Iacobucci J, p. 21.

[7] See most recently, *A.Y.S.A. Amateur Youth Soccer Association v. Canada Revenue Agency, op cit*.

[8] The shift to a legislative platform, in the jurisdictions of the UK and Ireland, leaves open the possibility of a further extension or retraction in specified charitable purposes there, as and when deemed politically desirable.

[9] See s 501(c)(3) of the Internal Revenue Code. This distinction originated in the tax code and has since been legislatively adopted by some 48 states.

[10] See s 509 of the Internal Revenue Code.

[11] See Revenue Act of 1935, Pub. Law 74–407, §102 (r), 49 Stat.1014 (1935).

individuals in 1938,[12] and it remains the policy with respect to direct donations to overseas charities to this day. On the other hand, individuals, but not corporations,[13] are entitled to deduct contributions to any charities set up in the United States but working to provide poverty relief and humanitarian assistance outside the United States. Again, although tax laws initially permitted charities to engage in income-seeking activities, in 1950 Congress responded to pressure from commercial bodies by introducing a tax on unrelated business income (UBIT) to restrict unfair competition from charities.[14]

Something of the same structuring of the tax regime can be seen in the approach taken in Australia and Singapore where a distinction is drawn between charities and PBIs and charities and IPCs respectively. This has introduced a tiered approach to tax exemption on charitable grounds which in effect imposes a cap on tax expenditure. Most recently, in New Zealand a structural adjustment to the tax regime is likely to follow the government's recent discussion document *The Taxation of Maori Organisations*, published in April 2002, which should relax the public benefit test in respect of Maori organizations.

Manipulating the Tax Code

Manipulating the tax regime through regulations or annual budgets, usually to introduce a 'stealth' tax, has become common government practice among the developed nations as it offers a quick, informal, flexible and less accountable alternative to the legislative process. Once the primary legislation is in place, as for example with VAT, then governments may adjust thresholds or extend categories etc. as needed in response to political pressures. Such an approach is often adopted in relation to tax incentives to encourage donations from persons and companies which together with incentives for volunteering help to shape a climate conducive to the growth of philanthropy.

In the US, tax incentives for charitable giving have been part of the tax code since the 18th century, and have probably since then been susceptible to political manipulation.[15] Indeed, the US has "the world's most generous tax

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[12] See Revenue Act of 1938, Pub. Law 75–554, §23 (o), 52 Stat. 447 (1938).

[13] This restriction is strange given the significant role of corporations in relief activities generally (see Peter Dobkin Hall, *op. cit*., pp. 13–18) and is little understood as an historical matter. See Chang, J., Goldberg, J., and Schrag, N., 'Cross-Border Charitable Giving', available at http://www.law.nyu.edu/ncpl/libframe.html. It remains present in Section 170 (c) (2). However, most corporations get around the rule by setting up corporate foundations (incorporated separately) and thus making sure that they fit within the exact provisions of the section, which speaks only of corporate donations to foreign trusts, community chests, funds or foundations. See Rev. Rul. 69–80, 1969-1 C.B. 65.

[14] See ss 511–514 of the Internal Revenue Code.

[15] See Howard, C., *The Hidden Welfare State: Tax Expenditures and Social Policy in the United States*, Princeton University Press, Princeton, NJ, 1997. As cited by Wright, K., 'Generosity vs. Altruism: Philanthropy and Charity in the United States and United Kingdom', *Voluntas: International Journal of Voluntary and Nonprofit Organizations*, 12: 4, 2002, p. 410.

concessions"[16] for philanthropy and "no other nation grants subsidies at such a high level or across so many types of activities."[17] However, as has been pointed out "the key feature of US tax incentives for giving is that they directly benefit the donor,"[18] which is why at election time they attract so much political attention. According to Bob Reich "American tax policies regulating philanthropy promote inequality".[19]

By way of contrast, in Australia, Canada, New Zealand and England & Wales, donor incentive schemes have not been as available for political purposes as, to a large extent, they were displaced by government funding of charitable organizations. However, recently such schemes have been introduced in New Zealand and Singapore in a manner and with an effect that graphically illustrates the impact of political manipulation.

In New Zealand, in the context of the 2007 budget, the Minister responsible announced the removal of the cap on rebates for charitable donations from individuals and companies to 'donee organisations' which immediately made that jurisdiction a more attractive environment for philanthropic investment (see, further, Chap. 11). In Singapore, at much the same time and in the same context, the relevant Minister announced the removal of the rule requiring a charitable institution to spend within the jurisdiction, in any year of assessment, at least 80% of its received donations and income on charitable causes or lose its rights to tax exemption (see, further, Chap. 10). Again, this was a politically motivated adjustment of the tax code calculated to make the jurisdiction an attractive option for foreign philanthropists.

In Australia, to some extent, the formulation of Deductible Gift Recipient which enables taxpayers to claim a deduction for certain gifts made to specified types of nonprofit organisations (Deductible Gift Recipients) is a not dissimilar device. In the UK jurisdictions, the 'Getting Britain Giving' campaign is a donor incentive scheme but it is the National Lottery that provides government with various opportunities for channeling tax revenues towards its favoured forms of public service.

Social Policy and the Regulator

Insulating the regulator from political influence is itself a political decision. It is revealing that none of the jurisdictions studied were prepared to take that step.

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[16] See Clotfelter, C., 'Tax-Induced Distortions in the Voluntary Sector', *Case Western Law Review*, 39 (1988/1989): 663–694.

[17] See Weisbrod, B., 'The Pitfalls of Profits', *Stanford Social Innovation Review* (Winter 2004).

[18] *Ibid*.

[19] See Reich, B., 'A Failure of Philanthropy: American Charity Shortchanges the Poor, and Public Policy is Partly to Blame', *Stanford Social Innovation Review*, Winter 2005, p. 9.

Jurisdictional Variance in Regulator's Exposure to Political Influence

In the jurisdictions studied, the main regulator was invariably a government body placed within a government department. This had corresponding social policy implications. Only in the UK jurisdictions are the regulators free from direct Ministerial control.

The Charity Commission in England & Wales stands apart from other national regulatory bodies in many respects but it would be a mistake to view the Commission as totally politically neutral. It may not be under the control of a Minister or government department[20] but it remains a government body, the principal staff of which are government appointees and the Commission must report annually to Parliament on the discharge of its functions, the extent to which it believes its objectives have been met, and the management of its affairs. It also liaises with the Office of the Third Sector, created in May 2006 and located in the Cabinet Office at the heart of government, which has a statutory duty to support Ministers in their functions in relation to the Charity Commission. This leaves the Commission strategically compromised and exposed to a level of political influence. The risk of being tarnished by succumbing to pressing government social policy concerns has been exacerbated by the requirement that when making *cy-près* schemes it have regard to the 'social and economic circumstances prevailing at the time of the proposed alteration of the original purposes'[21] and 'the need for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstances'.[22] It has been said that:[23]

> By identifying social and economic impact as an objective of the Commission the legislature appears to be providing for a "beefed up" Charity Commission to be an instrument of policy … The objective of 'social and economic impact' as a golden met-wand, whether of public character or of the appropriateness of new *cy-près* scheme objects, imports vague factors falling within the fields of government policy.

The Role of the Regulators

The regulatory regime – that is, the institutional infrastructure, the distribution of agency responsibilities and in particular the operation of the tax code – is crucially important. The role of the regulators in giving effect to legal functions, particularly

[20] Section 1A(4) of the 2006 Act, amending s 1 of the 1993 Act, states that "in the exercise of its functions the Commission shall not be subject to the direction or control of any Minister of the Crown or other government department". Note that in Scotland the Office of Scottish Charity Regulator (OSCR) is similar to the Charity Commission in that it is an independent quasi-judicial entity. In Northern Ireland, indications are that a Commission modelled on that of England & Wales is to be established while in Ireland a not dissimilar institutional arrangement seems likely.

[21] The Charities Act 2006, s 15(3)(c).

[22] The Charities Act 2006, s 18(2)(c).

[23] See Picarda, H., recorded response to Charity Commission public consultation exercise in respect of the Charities Bill.

policing, as they relate to charity, is concerned with differentiating philanthropy from other activities and positively discriminating in favour of those structures and activities that most usefully address social need. It is largely set within statutory parameters and therefore politically determined. The institutional common law legacy is important, as are the discretionary powers available to administrative agencies, while other factors such as differences in the relative scale of various types of philanthropic activity and in the size of their organizations, also play a part. Mostly, however, the regulatory framework reflects the prevailing politics. In the jurisdictions studied, the alignment between charity and social policy, the relative capacity and flexibility of different regimes to foster and develop charities, their openness to new forms of social entrepreneurship and their willingness to use tax incentives to guide and reinforce philanthropic intervention can be traced to differences in their respective models of democratic politics.

Gatekeeper

The latitude available to regulators in the jurisdictions studied permitted some more than others to create a sympathetic environment for charities conducive to their growth and innovatory practice. This suggests that much may be achieved by strategically altering the regulatory framework, and not just by manipulating the tax regime. However, in all jurisdictions there was also evidence of discretional capacity giving way to new security measures imposed by governments, in response to the perceived threat posed by international terrorism.

Gatekeeper and Anti-terrorism

There is considerable irony in the fact that charity law reform processes, initiated by government to liberate philanthropy from some of the more constricting aspects of its common law legacy and lay the foundations for a new era of partnership with charity, should conclude in circumstances where the threat of international terrorism is prompting government to introduce tough legislative provisions designed to tighten its surveillance and control of the sector. This will inevitably inhibit charities and result in a degree of mutual suspicion and estrangement between government and charity.

The recent shift in government focus, from expanding the range of charitable purposes to bringing charities and other nonprofits within the reach of regulatory bodies so as to be better able to locate them, supervise their activities and monitor the flow of funds, has been noticeable in all the jurisdictions studied. As highlighted in the Kennedy report[24] in respect of England & Wales, government has

[24] See Kennedy, H., *Report of the Advisory Group on Campaigning and the Voluntary Sector*, London, 2007.

introduced new control measures not just in the form of anti-terrorism legislation but including a range of other powers such as 'stop and search', restrictions on broadcasting, advertising and public demonstrations.[25] The consequence of imposing such a legislative blanket of restrictions in this jurisdiction, as in others, is that the public benefit work of charity is being impeded and mutual trust between charity and government, essential for partnership, is at risk of being eroded.

National constraints are further compounded by international initiatives as governments acknowledge the global presence of many charities, some of which have built up operational networks in precisely the same underdeveloped countries identified as associated with international terrorism, and coordinate multi-national agreements to intercept their activities. So, for example, the Financial Action Task Force (FATF), an inter-governmental body established to combat money laundering and the financing of terrorism, has led the way in negotiating such agreements because:[26]

> … terrorists and terrorist organizations exploit the NPO sector to raise and move funds, provide logistical support, encourage terrorist recruitment or otherwise support terrorist organizations and operations. This misuse not only facilitates terrorist activity but also undermines donor confidence and jeopardizes the very integrity of NPOs. Therefore, protecting the NPO sector from terrorist abuse is both a critical component of the global fight against terrorism and a necessary step to preserve the integrity of NPOs.

The willingness of governments to increase regulatory control over charities and other nonprofits 'for their own good' does not augur well for future partnership arrangements and gatekeeper agencies will almost certainly be placed under increasing pressure to exercise tighter surveillance.

Gatekeeper to Charitable Status

The IRS and the ATO, in the US and Australia respectively, typify the problem facing those governments in common law countries which set out to cultivate a partnership with the voluntary sector whether for the purpose of fostering civil society or, more mundanely, for sharing the responsibility and cost of public service provision to offset the retraction of government services. These tax collecting agencies are over burdened with their core statutorily set duty to maximize State revenue, protect the tax base and to do so by uniformly applying the government's tax code across all taxable entities. Their gatekeeper role is the traditional policing function, performed defensively, permitting little flexibility and lacking sophistication. If an entity can tick the prescribed boxes, of charitable purpose and associated definitional

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[25] *Ibid*., citing in particular the Protection from Harassment Act 1997, Terrorism Act 2000, the Communications Act 2003 and the Serious Organised Crime and Police Act 2005.

[26] FATF:GAFI – *Interpretative Note to Special Recommendation VIII Non-Profit Organisations*. See further at www.fatf-gafi.org.

matters as benchmarked by case precedents, to acquire charitable status, then tax exemption is automatically awarded. The agency has little room for manoeuvre.

In Canada, the political realities underpinning the gatekeeper role as vested in the tax collecting agency were clearly demonstrated in the recent decision of the Supreme Court in the A.Y.S.A. case[27] Counsel for the government then submitted that 21% of all non-profit organizations in the country were sports and recreation organizations and that acceding to the appellant's argument, by granting charitable status to an amateur sporting association, would have a significant impact on the income tax system. Justice Rothstein agreed with the government.[28]

In Singapore, New Zealand and Ireland, the gatekeeper role of this agency has ostensibly been statutorily adjusted with the responsibility for awarding charitable status surgically removed and transplanted into the newly established and very similar Commissioner of Charities, Charities Commission and the Irish Regulatory Authority for Charities respectively. These agencies have statutorily ascribed support functions in addition to the transferred policing component. However, as the new regulatory authority has no more discretion to interpret charitable purpose and definitional matters than the tax collecting agency had, is not vested with the necessary inherent powers of the High court that would enable it to do so, and as its decisions remain subject to the right of the tax collecting agency to determine tax exemption privileges, it is unlikely that the statutory adjustment will cause the outcome for charities in these jurisdictions to differ greatly.

In England & Wales the twin gatekeeper duties have long been statutorily separated, a policy subsequently reinforced by vesting in the Charity Commission the powers necessary to give it real capability relative to the Inland Revenue. In effect the Commission has now displaced the Revenue as gatekeeper to both charitable status and tax exemption privileges. In addition, the statutory extension of charitable purposes coupled with the considerable discretionary power entailed in the 'public benefit test' now applicable to all purposes,[29] greatly increases the flexibility available to the Commission and enables it to assertively pursue the support and mediation/adjustment functions alongside policing and protection. The announcement that the Commission intends to require all 190,000 registered charities to report annually on how their activities satisfy this test, indicates just how potent a regulatory tool the public benefit principle has become in this jurisdiction. While the usual misgivings regarding entrusting the legal functions of policing and

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[27] *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*, 2007 SCC 42.

[28] *Ibid*., pp. 28–29.

[29] The Charities Act 2006 removed the public benefit presumption, preferentially favouring many classes of activity for centuries, and introduced a level playing field to be regulated by the Charity Commission through the impartial and objective application of the public benefit test which, for the first time, will require many private schools and health care facilities to provide proof that they satisfy both arms of this test. Note that when applying the test, the Commission is proposing that four key principles be satisfied: there must be an identifiable benefit; benefit must be to the public or a section of the public; people on low incomes must be able to benefit; and any private benefit must be incidental (see, further, at http://www.charitycommission.gov.uk/news/pbnewsindex.asp.).

support to the same body remain, there is much greater likelihood of the Commission holding the two in balance than is the case in any of the other above mentioned jurisdictions, particularly the US and Australia where policing must dominate. This ensures that the outcome for charities in England & Wales will greatly differ from those jurisdictions where the tax collecting agency holds the upper hand.

Applying the Tax Code

Settling the terms of the tax code is a political matter, administering it falls to the relevant tax collecting agency. Once the charitable status issue has been determined, the margins for any discretionary action by that agency are usually tightly drawn. Such scope as exists for interpreting the application of the tax code to charities varies across the jurisdictions studied (see, further, below).

Ireland and Singapore, being small countries with big governments that are centralist and conservative in nature, leave their tax collecting agencies with little room for independent action (though are now showing signs of being prepared to do so). In the UK there are tensions between Westminster and the devolved governments of Scotland, Wales and Northern Ireland and further tensions between central government and local councils as the different levels of jurisdiction try and shuffle costs and responsibilities between each other. This happens also in the federated jurisdictions that were studied: a federal government that gives tax exemptions to charity may protest if state governments with responsibility for health shift service delivery to charities which do not pay tax to federal government from state public servants who do.

In Australia and the US, with their federated states and less controlling central governments, there is in theory greater possibility for a discerning application of taxes that would favour charitable and other nonprofit organizations established for public benefit purposes. However, the prevailing ethos as much as the pressure of other priorities would seem responsible for creating a regime that is not conducive to positively assisting charities by providing the expert guidance needed to ensure that they avail of all possible tax breaks. Arguably, in the absence of a counterbalancing agency equivalent to the Charity Commission, a great deal could still be done by the ATO and IRS to promote charities if those agencies changed from an emphasis on the traditional policing function and instead developed an approach that allowed for a commitment of resources necessary to support charities by providing such guidance. Again, while legislative change is a matter for government, the ancillary rules and regulations are more often a departmental responsibility and could offer opportunities for those agencies to build in preferential advice and support for charities. This would, however, require a change of mindset at the ATO and IRS.

Cy-près

Charities, like all organizations, need the ability to respond quickly and flexibly to changing circumstances in the contemporary environment. The history of charity law, however, is one rich in cases dealing with inept, inert, moribund and defunct charities. In all jurisdictions studied there were problems associated with redundant charities: those that had collapsed due to lack of resources or poor management; those established to address problems that had ceased or faded in significance, or had become the responsibility of government; or those that simply, for whatever reason, had become inactive. The regulatory role of the gatekeeper, in addition to determining eligibility to acquire charitable status, can also carry responsibilities in respect of redundant charities that need to exit the system.

In the common law world, the traditional means of changing the objects of a viable charity or transferring the assets of a defunct one has been by a *cy-près* scheme. Currently, its usefulness depends very much on accessibility in which there is now considerable jurisdictional variance. Only in England & Wales and Ireland is a power to make such schemes entrusted to a non-judicial regulator with discretion to do so up to a high financial threshold.[30] In the US, the experience of hospital conversions from charitable to for profit status indicates that recourse to legislation rather than to *cy-près* is emerging as the preferred means of dealing with disposal of charitable assets.

Housekeeper

Charity regulators cannot hope to control the fundamental factors that shape the sector. There has always, for example, been great disparity in wealth and longevity with some charities and their assets of land and buildings having survived for centuries while other small neighbourhood self-help groups survive for a few months and run at a financial loss. There are considerable differences also in influence with colleges such as Eton and universities such as Oxford and Cambridge educating those who subsequently shape the policy governing relationships between the government and the sector. Then again, for as long as philanthropy has been practiced it has done so with great variation in relative contribution to public benefit as is evident in the proliferation of wealthy charities for animal welfare etc.[31] However, there are significant

[30] See: for England & Wales, sections 13 and 14 of the Charities Act 1993 as further simplified by the 2006 Act; for Ireland, s 16 of the Social Welfare (Miscellaneous Provisions) Act 2002 lifts the previous ceiling of £250,000 to give the Commissioners of Charitable Donations and Bequests unlimited jurisdiction.

[31] See Charity Commission, *Analysis of the law underpinning Charities and Public Benefit* (March 2007). Also, see *Re Hummeltenberg* [1923] 1 Ch 237, 242 and *National Anti-Vivisection Society v. IRC* [1948] Ch 31, 46 *per* Lord Wright and "trusts to support dancing poodles."

jurisdictional differences in the extent to which regulators engage with the sector and take a proactive role in seeking to influence charitable activity.

Spread of Philanthropic Activity

The spread of charities, in terms of numbers and size, across the spectrum of charitable purposes is very uneven. In all jurisdictions the distribution is determined largely by the whim of philanthropists and the flow of government funds, the latter being particularly potent as government grants and contracts can determine survival. Again, some causes seem to generate more charities than others.

The multiples of charities competing for public donations, government funds and media attention in areas such as cancer research, the welfare of children and the elderly is a matter of concern to regulators in most countries. Other factors such as the longevity and accumulated assets of some charities, donor incentive tax privileges and the media attention given to the victims of war or natural disaster also generate particular clusters of charitable activity and resources. This uneven spread, with little correlation to strategic social policy concerns, is a constant source of frustration to cash strapped governments struggling to find the resources necessary to shore up public services.

In Ireland, the wealth accumulated by religious organizations over many generations of donor contributions towards the saying of masses for the dead, the upkeep of graves and churches and for the benefit of closed religious orders etc. is considerable. The fact that this is available for distribution in accordance with the preferences of a religiously divided nation may be thought likely to undermine government social policy to build and sustain a pluralist non-discriminatory civil society. In England & Wales, as in other jurisdictions, the wealth amassed by charities for the welfare of animals outweighs the corresponding resources available for the welfare of children[32] which detracts from government strategy to harness charitable resources for public service provision. In Singapore, the regulators are ever watchful that societies and associations are not granted charitable status if they have purposes, such as promoting ancestor worship, that are likely to exacerbate religious and ethnic tensions.

The regulators are generally powerless to influence philanthropic spread. Any such intervention is usually viewed, if desirable, as a matter for politicians rather than regulators (see, below). Only in England & Wales is the regulator equipped with sufficient discretionary power to both negotiate with newly registering entities about possible overlap with existing charities and to review all those registered and at least remove that are defunct. It remains to be seen whether the Charity

[32] For example: the RSPCA, founded in 1824, reported in 2006, income of £110.7 million, assets of £81.1 million and investments of £118 million; the NSPCC, founded in 1884, reported in 2006, total income of £116 million, assets of £54.9 million, and investment income of £2.8 million.

Commission, newly endowed under the 2006 Act with a statutory public benefit test, will find itself able to use this power to rationalise those clusters of overlapping charities already registered.

Effectiveness of Charitable Activity

Debate regarding the effectiveness of charity and charities has existed for as long as the concept itself. Subject to the responsibilities of trustees and the requirements of good governance, there is no legal duty for a charity to be effective and many are not. For individual charities, once charitable status has been conferred then in the absence of fraud or criminal negligence they are free to mismanage their organisation and its assets. Such regulatory scrutiny as exists is most usually restricted to a paper exercise to check that declared purpose and objects coincide, sometimes accompanied by an 'activities test' and, where statutorily required, a rudimentary scan of annual income and expenditure accounts. Exposure to the 'contract culture' and grant funding arrangements have brought the charities concerned into the view of government bodies which have had an incidental regulatory effect on management standards. For the most part, however, there is a very low level of State intervention in the affairs of charities.

In Australia the inverse correlation between philanthropic intervention and the health and well-being of the Indigenous people has been well documented. The extent of poverty among the Inuit and other first nation people in Canada is also testimony to the failure of charitable activity which, too often focused on removing children to alternative care, fatally compromised the cultural integrity of vulnerable ethnic groups. Perhaps particularly in this context, where the wellbeing of indigenous tribes has been subject to such sustained intervention, philanthropy has earned the criticism most frequently levelled at it that far from being an effective means of promoting the recipient's independence it can instead fatally drain their initiative, motivation and self-respect and induce compliant dependency.

In England & Wales, some academic work has been undertaken to introduce and test the analytical methods necessary to assess the effectiveness of charities and their activities.[33] The amount of data collected by and available on the website of the Charity Commission undoubtedly itself assists such analysis but it is the fact that the Commission has a statutory duty to promote effectiveness that distinguishes this jurisdiction.[34] According to its website, the Commission equips charities to

[33] See, for example: Kendall, J., 'Revisiting the Loose and Baggy Monster', *Charity Finance*, November 2003, pp. 30–32; Kendall, J. and Knapp, M.R.J., 'Measuring the Performance of Voluntary Organizations', *Public Management* 2: 1, 2000, pp. 105–132.

[34] See the duties of the Commission as stated in Charities Act 1993: "promoting the effective use of charitable resources by encouraging the development of better methods of administration, by giving charity trustees information or advice on any matter affecting the charity and by investigating and checking abuses" (s 1(3)); and the requirement that the Commission promotes and makes effective the work of any charity by assisting it to meet the needs designed by its trusts (s 1(4)).

work better by: the registration processes (and by recognising new charitable purposes); the advice and guidance formally provided to 24,000 charities each year, in addition to the 250,000 calls to its Contact Centre; by several hundred visits to charities each year to review their activities, constitutions and administration, identifying good and bad practice; and by making legal schemes or orders modernising the constitutions of existing charities. It states "our aim is to provide the best possible regulation of these charities in order to increase charities' efficiency and effectiveness and public confidence and trust in them".[35] In no other jurisdiction is there an agency with comparable duties and resources dedicated to improving the effectiveness of charities.

Size of Charities

It is clear from the jurisdictions studied that there is a problem relating to the division between large and small charities – they share the common characteristic of a spectrum of charities heavily weighted at either end. The fact that they all need to cope with the very small micro enterprise and the very large complex, churches and national federations, with not that much in between, raises certain issues for the role of the regulators.

- *Impact on sector*

In all jurisdictions, a few large charities now exercise a great deal more leverage in terms of influencing government policy and in shaping practice in the sector than ever before. This is exacerbated where government policy is to cultivate partnership arrangements as invariably such arrangements are made with the larger charities (see, also, Chap. 14). Government funding also tends to flow towards the more well established and non-controversial charities which in turn provide consultants to government bodies. The larger institutional and international charities are well networked, they have the capacity and familiarity with infrastructure and officials to negotiate with government. The voice of the small independent charity is thus less likely to be heard – on local minority issues, in dissent on policy matters, on behalf of the most marginalised and in relation to their own sector interests – which is all the more important if the bigger influential charities are 'in the pocket' of government.

The separation of big from small is a widening chasm in all jurisdictions. Given that there are far more small than big charities and that small is much more likely to mean engagement with local communities, user involvement and carry the added value of generating social capital, it is not without consequences for the growth of participative grassroots democracy if the small more independent charities are overshadowed by bigger and more compromised entities. There is a sense in which the

[35] See, for example, the Charity Commission, CC60 *The Hallmarks of an Effective Charity*.

largest and most independent section of the charitable sector is becoming disenfranchised and perhaps unfairly discriminated against as consortiums of big charities, often with vested interests to protect, speak to government from their perspective on matters they construe as important to the sector. This polarization into big and small, together with its associated problems, is likely to become more emphatic as government colonization of the sector increases in conjunction with government retraction in public service provision. So far, in none of the jurisdictions studied have the regulators (invariably government bodies) shown any willingness to put in place mechanisms for reaching behind the big charities to hear the voice of the small entities and make room for their contribution on matters of policy and sectoral representation.

- *Legal structure*

Size also matters in that the legal vehicle needed to carry the purposes, resources and direct the activities of a very large complex charity such as a university, religious organisation or national/international consortium differs from that required by a local group running a small grassroots organisation. The restrictions of the traditional 'one size fits all' approach led to the recent statutory experimentation with new legal structures as detailed above but otherwise the regulators in the jurisdictions studied have not shown much enthusiasm for dealing with the effects of size on the functioning of charities. These problems are mostly evident in the disproportionate time and cost of administration involved for a small as opposed to a large charity in complying with standard requirements relating to governance, registration, record keeping and reporting arrangements etc. When further complicated by the dual registration and reporting requirements that result from the trust/company dichotomy, as mentioned above, this can prove exceptionally onerous for small charities.

In New Zealand, Australia and the US all charities big and small are required to abide by fairly standard reporting requirements; in New Zealand the accounting standards are uniformly applied with no tailoring of requirements in accordance with type or size of charity. In Singapore, the government has accepted the recommendation of the Inter-Ministry Committee that a tiered approach be adopted which will impose more stringent rules on larger charities/IPCs and less on smaller such entities with higher levels of disclosure and standards of compliance required from the larger IPCs. In England & Wales, the previously long established if crude tiered approach which allowed the 100,000 or so very large and very small charities to be exempted or excepted from registration requirements has been revised in the 2006 Act. Now any charity with an annual gross income exceeding £100,000 and not subject to another regulator is required to register with the Charity Commission and comply with the Commission's standard regulatory role. It is intended that this monetary threshold will be lowered in stages until all charities with an annual income of more than £5,000 will be required to register. Where a charity has an annual gross income of less than £5,000 it will be allowed to register on a voluntary basis. The reporting requirements as detailed in SORP 2 are tailored to differentiate between large and small charities.

A Lead Regulatory Body

The above range of jurisdictional experience gives rise to certain questions – is a standard regulatory model likely to be best for all charities regardless of size or type? Does continued regulation by type (trust or incorporated entity) make much sense? Should a range of proportionate supervisory mechanisms be developed that would differentiate between small grassroots organisations and very large and complex entities and allow a more flexible regulatory approach in accordance with the needs and resources of contemporary charities? Is a lead regulatory body necessary?

Common Law Institutional Legacy

As discussed earlier (see, for example, Chap. 14), modern charities in the jurisdictions studied continue to operate within a regulating environment encumbered with residual vestiges of their common law infrastructure. Partly this is unhelpful because over time the institutions concerned have gradually lost their traditional functions. In the case of the Attorney General, the slippage in functionality is more complicated and serious because that office held not just the powers of the inherent jurisdiction but it was also custodian of the principles of the Court of Equity and entrusted guardian of the integrity of charitable purposes. The traditional authority and responsibility of that office has in reality become dissipated, if not entirely lost, but the semblance of continuity is maintained by retaining the now neutered role of the Attorney General within the contemporary regulatory framework. Partly, also, the legacy is unhelpful because it transfers into the modern regulatory environment the historical machinery of government arrangements from a time when courting partnership arrangements with the sector was not a government priority. Retaining the Attorney General as a figurehead protector of charities may indicate a government unwillingness to let go of its traditional collective control of such entities.

Regulatory Leadership

Jurisdictional differences in regulatory framework indicate that the most successful are those headed by an independent regulator, equipped with real statutory powers, sufficient resources and with a specific brief for charities. Such a body must have responsibility to determine charitable status and related tax exemption privileges, coordinate the roles of all other relevant regulators and have the capacity to monitor and intervene as appropriate in the affairs of charities and to assist the development of the sector.

Most usually, in the jurisdictions studied, the regulator was the tax collecting agency and as such was directly accountable to the Minister for Finance; to some

extent, the modern law of charity is in part a story of the regulator's migration from that traditional position of direct political control by fiscally driven imperatives to a more neutral setting. While in the US and Australia the traditional model continues, it has been adjusted to some degree in Ireland, New Zealand and Singapore, but only in the UK jurisdictions has that journey been nearly completed. There, as a consequence of consistent political deliberation since at least the time of the Brougham Inquiry,[36] the lead agency is the Charity Commission and all other regulators are statutorily required to fall in behind its leadership.

This is unlike the position in the US, Australia and Canada where the IRS, the ATO and Revenue Canada, respectively, are lead regulators by political default. These agencies have difficulties in coping with the pressures of their core business, they have no particular brief for charities, no interest in diluting the revenue base by fostering the development of charitable purposes and have little capacity to coordinate the roles of other state based regulatory agencies.[37] In New Zealand, Ireland and Singapore, the lead regulatory body has been decoupled from the tax collecting agency in a political initiative that is ostensibly a step towards the UK model, but the failure to equip the new regulator with comparable statutory powers leaves its functionality perhaps fatally compromised.

Where, as in the UK jurisdictions, there is a strong and relatively independent lead body, equipped with the traditional powers and responsibilities of the Attorney General, then the regulatory framework can accommodate the variety of legal structures that are needed to house modern charities. So long as there is a consistent regulatory body of principles applied to all entities that acquire charitable status, with one regulator leading the others, then the regulatory framework will have coherence and form an effective bridge between government and sector.

Legal Structures

Methods of ensuring good governance, transparency and accountability are now matters of as much concern to charity as to big business. This concern has generated debate on the relative merits of different organizational models in terms of their capacity to embed such standards and to perform and be assessed in accordance with them. Should legal structure vary with organizational activity? Is it best

[36] The Brougham Inquiry 1819–1837. See, further, McGregor-Lowndes, M., 'Diversions of Charitable Assets: Crimes and Punishments in Australia', paper given at the *Reforming the Charitable Contribution Deduction 16th Annual Conference*, National Centre on Philanthropy and the Law, 2004.

[37] In the US, for example, efforts by the IRS to coordinate with state agencies, particularly with the National Association of State Charity Officials, have not prospered; see, further, statement by Everson, M., former IRS Commissioner, to the Senate Finance Committee, June 22, 2004 (IR-2005-81).

if models appropriate for charity are clearly differentiated from those of other non-profit entities? Should these, perhaps, be different again from the forms adopted by commercial bodies? In respect of government bodies, does the fact that the bar for such standards needs to be set so high mean that a distinctive organizational structure is required? This debate will continue. At present the position remains that the regulatory means for monitoring standards in charities in the 21st century is largely predetermined by legal structures designed for organizations of an earlier era.

In the jurisdictions studied, the legal structure for charitable activity has been heavily influenced by the common law legacy (see, further, Chap. 1) which brought with it a regulatory emphasis on charitable purpose. The extent to which the trust rather than the company, with its corresponding emphasis on formal governance arrangements and reporting requirements, prevailed as the preferred structure differed considerably. The issues as to the continued appropriateness of charities being variously constituted as unincorporated associations, companies or as charitable trusts/foundations, and the complications involved in transferring from one to another, have arisen in many countries. Some of these have opted to introduce new statutory models, specifically designated for charitable activity, which are intended to displace all others, accommodate social entrepreneurship and assist partnership arrangements with government and commercial bodies.

Regulating with an Emphasis on Charitable Purpose

This, the traditional approach as developed and still largely relied upon in England & Wales, is rooted in the law of trusts and has its primary focus on protecting the integrity of charitable purposes with less attention being placed on legal structure.

Trusts

The Courts of Equity had taken the view that the 'gift' at the heart of the gift relationship could be best secured by a combination of trust principles, the fiduciary duties and moral obligations of the trustees, reinforced by the *parens patriae* jurisdiction of the Attorney General and ultimately by the powers of the High court. In particular, the protection of a charity in trust form was seen as assured by being placed in the hands of a board of independent and unpaid trustees. With the presumption that trust law would always be available to secure the donor's gift, regulatory attention shifted instead to the purpose for which the donee used the gift. Centuries of case law illustrate the vigilance with which the courts, particularly in England & Wales, sought to clarify and protect the integrity of charitable purposes and distinguish charitable from non-charitable activity. In that jurisdiction charitable trusts have always constituted the largest number of charities on the register. There, as in Ireland, Canada and New Zealand, but to a lesser extent in the US and Australia,

the primary regulatory focus has always been placed on protecting charitable purposes and policing charitable status as the ancillary regulatory assumption was that the trust form provided sufficient safeguards in itself to secure the donor's gift.

Regulatory Methods

In all common law jurisdictions, but to a lesser extent in some than in others (currently while it is the second most popular form for charities in the US, it accounts for only 4% in Singapore), the trust continues, as it has in the past, to operate as a legal structure for charities. Prevalence of the trust form, particularly in the UK and Irish jurisdictions if not so much in Australia and Canada, has been accompanied by a corresponding jurisdictional focus on protecting the integrity of charitable purpose and policing entitlement to charitable status as the principal regulatory objectives. Jurisdictional adherence to the common law legacy being proportionately reflected in the importance regulators attach to trusts rather than incorporated entities, to matters relating to the definition of 'charity' and to precedents that set the boundaries for circumstances in which the use or misuse of a gift would breach the legal definition of a charitable purpose.

However, where the trust form prevailed, so did the attendant problems: ensuring limited liability for trustees while also equipping the charity to enter into contractual relations with third parties; and ensuring modern management models are available and the reciprocal rights and duties of directors and staff are catered for. Reliance upon the responsibilities of trustees has not proven to be a sufficient basis for ensuring that standards of good governance, transparency and accountability are maintained in such charities. For example, only with the establishment of the Charity Commissioners in 1853 did trust based charities in England & Wales submit to a regulatory regime and not until the introduction of the Charities (Statement of Account) Regulations 1960[38] were they required to keep proper books of accounts, submit financial reports listing income and expenditure and maintain records.

In an exception to the general rule, the Charity Commission in England & Wales has been able to bring to bear on all charities, that are not statutorily exempted or excepted and however structured (as government agency, religious organization, endowed foundation, as well as the more traditional trust, incorporated and unincorporated association, other bodies and eleemosynary corporations), a regulatory regime that calibrates its reporting requirements in accordance with the size of the charity concerned, is flexible in its use of *cy-près* to transfer assets and change purposes and is able to offer support (see, further, below). This may be contrasted with the many other common law countries, including some the subject of this study, in which charities taking the legal form of a trust or unincorporated association were subject only to a regulatory body, typically the tax collecting agency, that regulated the sector as a

[38] SI 1960 No. 2425.

whole, regardless of legal structure and type of activity, with attention to charitable purposes only insofar as they served to set the threshold for tax exemption on grounds of charitable status and with no interest in their further development.

Regulating with an Emphasis on Legal Structure

The US, Canada and Australia never fully shared the commitment in England & Wales to trusts as the preferred legal structure for charities. In the former jurisdictions incorporation was viewed as a more secure basis for charitable activity and an early reliance upon the charitable corporation became a distinctive feature in the development of their charity law. In the US, corporations for charitable purposes flourished to become the dominant legal form[39] and now the most common legal vehicle for charitable activities in this jurisdiction is the nonprofit corporation as is the case in Canada, Singapore and Australia.

Companies

The registration of a charity as a company triggered a regulatory focus which treated charities the same as any other registered organization. Charitable purposes were of no interest to a company regulator concerned solely to ensure compliance with company law provisions relating to matters such as governance, accounting, record keeping and reporting requirements. Neither were they of much interest to the tax collecting regulator, except as a threshold to tax exemption: in the absence of issues regarding a possible breach of charitable purpose, individual companies were left to either ignore anachronistic objects or to adjust them in alignment with their current activities without too much technical difficulty. In the absence of any equivalent to the Charity Commission, the possibility of a more strategic re-working of charitable purpose or of intervention to protect its integrity, in all jurisdictions other than England & Wales, was left to such random litigation as occasionally reached the courts or to the restrictive interpretations of tax regulators.

Endowed Foundations

This type of charitable organisation is a grant-making institution that does not itself conduct direct charitable activity, is typically established by a single individual or

[39] See Fishman, J.J., 'The Development of Nonprofit Corporation Law and an Agenda for Reform', *Emory Law Journal*, 34, 1985, pp. 619–683, p. 631.

family and receives more than two thirds of its support from its founders or from investment income earned by an endowment. Although essentially a private trust, the endowed foundation has always attracted particular regulatory attention because of its potential to accumulate considerable asset reserves, the resulting removal of any need to solicit the goodwill and funds of government or the general public and its capacity to thereby acquire a great deal of independence. The lessons of the Reformation, when the Church amassed land and wealth which it sought to retain in perpetuity at the expense of State tax revenues, have reverberated down the centuries. In all jurisdictions, charities which accrue wealth through donor endowment are viewed as susceptible to donor control and are thus invariably subject to specific statutory controls as regards governance, accounting and reporting arrangements while also forced to comply with mandatory requirements for a high level of annual income dispersal. This legal structure is most usually associated with the US where it and a public charity are the two forms of 'charitable organisation' recognized by the IRS under section 501(c)(3) of the Internal Revenue Code.

There are a number of variations on this theme including foundations based in local communities or on particular religious groupings or distinguished by their funding source such as livery companies, appeal trusts or public subscription trusts etc. One variant is the corporate foundation, also known as a company-sponsored foundation, which is a private foundation that receives its primary funding from a profit-making business. The foundation is a separate, legal charitable organisation even though it often maintains close ties with the founding company, and it must abide by the same rules and regulations as other private foundations.[40]

Community Foundations

This type of charitable trust, used to support local community causes, was first established in the USA in 1914,[41] emerged in the UK in the 1980s, has since become widespread in over 35 countries and has now become the fastest-growing sector of philanthropy in Canada.[42] As Anheier and Leat explain "community foundations

[40] There are over 50,000 foundations in the U.S. with $448 billion in assets in 1999 (somewhat less now). When the federal government launched its War on Poverty foundations' assets were then valued at less than $30 billion. The Bill and Melinda Gates Foundation started in 1999 with $21 billion is now the biggest US foundation. John Walters, publisher of *Philanthropy*, estimates that foundation assets alone may easily grow to between $4 trillion and $5.9 trillion by 2035, 'Come the Revolution', *Philanthropy*, July–August 1999, pp. 25–26.

[41] The community foundation has been a prominent feature on the charity landscape in the US since the forming of the Cleveland trust company in 1914.

[42] See Wayne, S., *A Profile of Planned Giving and Endowments Within the Canadian International NGO Community*, Canadian Council for International Co-operation, 1999. This form of charity recorded 83.2% growth in assets between 1994 and 1997. http://www.ccic.ca/e/docs/002_od_profile_of_planned_giving_and_endowments.pdf

are rooted in, and emphasise, building local communities; they encourage and provide vehicles for corporate giving; they are governed locally; they encourage citizen-donor involvement and 'democratise' giving by enabling smaller donors to create what are, in effect, their own mini-foundations (e.g. donor-advised funds) within an established infrastructure; and they seek to work with rather than apart from local government and businesses."[43] This institution is generally recognised as a public charity and is therefore not subject to the more stringent rules that apply to private foundations. Typically, a community foundation provides grants and other services to assist other charitable organisations in meeting local needs, and also offers services to help donors establish endowed funds for specific charitable purposes. They may be incorporated.

Cooperatives

Co-ops are enterprises, owned by and constituted for the mutual benefit of their members and democratically organized, which are operated in accordance with the seven international co-operative principles and encourage their members to take an active part in the governance of the organisation. They offer a means of ensuring local community control and of leveraging loans at low interest rates which, in Australia, has made housing co-ops an attractive option as a means of trying to empower consumers (Aboriginals) with respect to their housing needs. They may be of different types: worker co-ops (owned by the workers), retail or consumer co-ops (owned by the customers), credit unions and such other types as farming and housing co-operatives. Some allow profits to be distributed to members, others are set up on a not-for-profit basis where the profit is put back into the business. They can be established as a company limited by shares, but most usually take the form of either a company limited by guarantee or more simply as a bona fide co-operative society. Co-ops often have an Industrial and Provident Society legal format and are registerable as charitable bodies on the Friendly Societies register.

Although co-ops have had a varied history of success they nonetheless maintain a considerable profile in the nonprofit sector of the jurisdictions studied. Against a common background of rising house prices, it is perhaps unsurprising that housing associations and housing co-ops have experienced something of a renaissance. In Australia, New Zealand, Canada and in the Irish and UK jurisdictions, housing co-ops have grown in importance as the traditional stock of social housing declined. However, in a climate of decreasing government grants and a general credit squeeze, it is likely that any advantages they offer will be eroded as they are forced to turn to the private finance markets for loans, and rent levels are driven up to 'market rent' level to meet interest repayments.

[43] *Op. cit*., p. 149.

Religious Corporations

As a general rule, religious organisations in all common law jurisdictions are largely exempted from normal regulatory processes unless a regulatory body (usually the tax collecting agency) has notice of irregularities. In the US, religious corporations have a long history and their exemption from taxes has been held not to violate the Constitution.[44] As has been pointed out "the largest piece of America's charitable pie is going to the sustenance of religious groups – for their facilities, their operating costs, and their clergy salaries"[45] and yet they are exempted from the public benefit test as are their activities and gifts to them. This is the same as in Ireland where the exemption has been underpinned by statutory provision. In England & Wales (and elsewhere in the UK) religious organizations have traditionally been exempted[46] from the normal regulatory requirements imposed by the Charity Commission[47] while in Canada religious charities are exempted from the public reporting requirement regarding financial information.

Two-Tiered Definitional Systems

In some jurisdictions, notably Australia and Singapore, where the trust failed to become the main legal structure for charities, the focus on charitable purposes has been further compromised. For tax purposes, a sub-set of 'charity' (PBI in Australia and IPC in Singapore) has been identified as a category entitled to receive tax-deductible donations from the public. This requires an organisation to first satisfy the definitional requirements of a 'charity' then to satisfy additional requirements if it is to be designated entitled to receive such donations. Essentially, however, the central regulatory focus is on legal structure rather than charitable purpose.

Dual Regulatory Systems

Jurisdictions with a regulatory emphasis on an organisation's charitable purpose – whether as reviewed, adjusted and developed by the Charity Commission in England & Wales or as negatively monitored by the ATO in Australia and the IRS in the

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[44] See, for example, *Walz v. Tax Commission of the City of New York*, 397 US 664 (1970).

[45] See Brown, *Giving USA 2005*, the Annual Report on Philanthropy for the Year 2004, cited by Reich, B., *op. cit*., p. 8. It is estimated that 60% of annual donations in this jurisdiction go to fund religious organisations (excluding their service provision).

[46] See the Charities Act 1993, Schedule 2.

[47] This will change when new provisions introduced by the Charities Act 2006 take effect.

US – also invariably have a statutory regulatory system for supervising all incorporated organisations. Parallel reporting requirements have thus been unavoidable for the many charities structured as companies. Unquestionably, the tension between corporate form and trust principles does not assist philanthropic functionality.

Regulating and the Introduction of New Statutory and Hybrid Legal Structures

Instead of the forced choice between trust and incorporation, neither of which quite had the capacity to equally address both the protection of charitable purpose and the requirements of company law, or more bluntly to marry social mission with business methods, some jurisdictions have chosen to create specially designated legal structures by legislation, usually accompanied by incentives to encourage their use, with the intention that these should in time displace the need for the present bifurcated regulatory approach to charity. Recently there has been some experimentation with new and varied hybrid structures which may suggest a different way forward.

The New Statutory Models

For the nations concerned, the spate of charity law reform processes have provided ample opportunity to consider the legal structure issue and, as might be expected, the decisions taken in regard to it have differed considerably. Those jurisdictions with a heavy reliance upon the traditional trust and unincorporated association have found it expedient to redress the balance by introducing new incorporated structures while Australia, New Zealand and Singapore all found it unnecessary to do likewise.

- *England & Wales*

In this jurisdiction the government has for some time been experimenting with public/private financial arrangements to improve social infrastructure, "tackle poverty and social exclusion and improve the quality of life".[48] Since launching 'PFI: Meeting the Investment Challenge',[49] public finance initiatives have delivered over

[48] See HM Treasury, *PFI: Strengthening Long-term Partnerships*, London, March 2006, p. 3.

[49] See HM Treasury, *PFI: Meeting the Investment Challenge*, London, July 2003. Also see, LIFT, a scheme whereby public, private and community sectors have formed a joint venture to build and maintain primary health care centres over a 25 year period provides an example of such a legal arrangement. The joint venture companies provide multiple facilities in a geographic area and parties may include GPs, chemists, dentists and other allied health professionals as well as local authorities, primary health care trusts (hospitals) and the Department of Health and Treasury. The private sector has a 60% holding, local stakeholders and the government departments have a 20% holding each and a shared governance structure. The LIFT owns and manages the premises using rentals, government start up finance and commercial debt to finance its operations. The government has also established a separate corporation to provide technical support and capacity building to LIFTs known as Partnerships UK.

500 operational projects, including:[50] 185 new or refurbished health facilities; 230 new and refurbished schools; 43 new transport projects; nine waste and water projects; and 180 other projects in sectors including defence, prisons, leisure, culture and housing. PFI consistently makes up 10–15% of public sector investment. There are currently around 200 projects, the largest proportion of which are in health, with a capital value of £26 billion in the procurement pipeline to 2010. Moreover, the government has also recently been experimenting with shedding statutory responsibility for public provision by transferring council services to charities.[51]

Against that background, the government recently introduced the community interest company (CIC), a limited-liability company designed to use its profits and assets to achieve social missions, with the explanation that while it viewed them as suitable for assisting in the delivery of social services at the local authority level it did not envisage that they should be used to deliver centrally directed public services such as health and education. A CIC is intended to be a tailor-made vehicle for social entrepreneurs and it has several distinguishing features: it must pass a "community interest test" that ensures that it operates in the public interest; it must file an annual report detailing payments to directors, dividends paid on shares, interest paid on loans, and the ways it has fostered involvement of stakeholders in the company's activities; it also must operate under an "asset lock," which prohibits it from distributing its assets or profits to its members except in cases where shareholders have an equity stake in the company. In those cases, returns to shareholders must be modest and are capped so that most of the profits are distributed to the broader community. Charities cannot qualify as CICs, but they can invest in them or own them. Unlike charities, CICs enjoy no special tax breaks. By summer 2007, some 500 Community Interest Companies had been registered.

In addition, the government has used the Charities Act 2006 to introduce the Charitable Incorporated Organisation (CIO) which is the first legal structure in this jurisdiction created specifically to meet the needs of charities and available exclusively to charities. As with a company, it will have the benefits of incorporation, which are the creation of a 'legal personality' for the charity and limited liability for trustees. However, CIOs will need neither separate registration with Companies House nor regulation under company law. A CIO will be a corporate body with a constitution, and will be registered with, and regulated by, the Charity Commission. This new legal structure will enable charities to obtain the benefits of incorporation, while allowing the regulator to protect the integrity of

[50] *Op. cit*., 2006, p. 16.

[51] See the Commission's 2004 decision in relation to the Trafford Community Leisure Centre and Wigan Leisure and Culture Trust. Previously, charities had been able to deliver discretionary responsibilities – museums, parks, community centres and the like – for councils, but this ruling meant statutory responsibilities – management of cemeteries, libraries and so on – could also be transferred.

charitable purpose and police charitable status, without having to undergo dual registration and regulation.[52]

- *Ireland*

Developments in this jurisdiction seem set to follow those in England & Wales. Part VII of the Charities Regulation Bill 2006 promises to update and codify previous legislative provisions to ascribe a uniform role, duty of care, range of responsibilities and duties to all trustees/officers/directors of charities regardless of the legal structure. The proposed legislation also provides for the introduction of the Charitable Designated Activity Company (CDAC), a new legal structure created specifically and exclusively for charities and to which existing charities could opt to convert.[53] The CDAC will be allowed to lock its profits into the company, for not-for-profit purposes, and is intended for groups such as non-charitable community interest groups, social enterprises and/or trading subsidiaries of charities.

In addition, the Law Reform Commission has proposed the introduction of the Charitable Incorporated Organisation (CIO) which would be the first legal entity in Ireland specifically designed for charities. It would offer directors/trustees the benefits of limited liability offered by existing company law (e.g. protection against costs of winding up an organisation), but be less cumbersome and trustees can be organisations, not just individuals as under company law.

For charities in both jurisdictions these new limited liability corporate structures will provide: a more appropriate alternative to the company limited by guarantee; for members and managers to be insulated from the financial liabilities of the company; for it to agree contracts, hold land titles, sue and be sued; and for simpler registration and reporting requirements than is now the case. It is envisaged that new charities and many existing ones will opt for such incorporated structures because of the shortcomings of the trust/foundation as an attractive structure for entrepreneurs and the cumbersome nature of the current dual registration and reporting requirements that burden charities which are also companies limited by guarantee. As in both jurisdictions the principal regulator will then be neither the tax collecting agency nor the company registrar but the regulator with a concern for charitable purpose, this should facilitate the marrying of trust principles to company rules within a new legal structure flexible enough to attract innovative entrepreneurs and to address emerging areas of social need. Such limited liability corporate structures may be sufficient to allow philanthropy to bridge the for profit/charity dichotomy and form partnerships or joint ventures between commercial, nonprofit and charitable entities.

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[52] See, further, NCVS Information Sheet at http://www.cvsnewcastle.org.uk/publications/infosheets/cio.pdf.

[53] See also the Law Reform Commission, *Consultation Paper on New Legal Structures for Charities*, Dublin, 2005.

The New Hybrid Models

Finally, in what is perhaps a further stage of evolution from what has been termed the 'third sector',[54] Billitteri has drawn attention to:[55]

> … an emerging 'Fourth Sector' of social enterprise organizations that combine charitable missions, corporate methods, and social and environmental consciousness in ways that transcend traditional business and philanthropy. This new generation of hybrid organizations is taking root in a fertile space between the corporate world, which is constrained by its duty to generate profits for shareholders, and the nonprofit world, which often lacks the market efficiencies of commercial enterprise.

He goes on to define such "hybrid" organizations as those which:

> typically work within the capitalist system, earning income and operating in a businesslike manner, but their goals are not purely financial and their duty is far broader than serving just the interests of shareholders. They strive not only to succeed financially but also to do good, using a blend of traditional corporate methods and progressive social approaches such as sharing governing power with employees and community members and hewing to rigorous outcome standards. Some groups are tax-exempt while others are for-profit organizations… they may seek to develop a unique charitable "brand" … their financing might come from a blend of traditional business sources, such as bank loans and stock offerings, and philanthropic sources, such as foundation investments.

Which leads him to posit the questions – Are wholly new legal forms and tax structures needed to accommodate the next generation of social enterprise organizations? – Is the growth of social enterprise being hindered by the limitations of traditional corporate structures and non-profit tax laws?

Various contenders have surfaced as possible new legal structures for the 'fourth sector':

- *Social enterprise*

These are businesses with primarily social objectives the surpluses of which are principally reinvested for that purpose in the business or in the community, rather than being driven by the need to maximise profit for shareholders and owners. In England & Wales there are now a variety of groups formed under various legal structures, including some that are registered charities, operating with a social or environmental mission. It has been estimated that the present total of some 50,000 social enterprises generate approximately £18 billion in annual turnover and

[54] A term probably first introduced in Etzioni, A., 'The Third Sector and Domestic Missions', *Public Administration Review*, 33, 1973, pp. 314–323.

[55] Billitteri, T., 'Mixing Mission and Business: Does Social Enterprise Need a New Legal Approach?', *Highlights from an Aspen Institute Roundtable*, January 2007. See, further, the Aspen Institute Google Groups listserv called Hybrid Legal Forms and Tax Structures (HLFTS) established to help people who run or support hybrid organizations share their knowledge and introduce new ideas.

employ over 775,000 people.[56] Almost a quarter (23%) are in London, but they operate in every region of the UK and represent around 1% of the UK's (employing) businesses. In 2003 they formed the Social Enterprise Coalition, an organization comprising some 8,000 social enterprises, which range from housing associations and credit unions to registered charities, a coffee company and a newspaper published by homeless people. This coalition promotes a unified voice for social enterprise companies, lobbies government in favor of policies that support them, and identifies best practices among those engaged in social enterprise work.

- *L3C*

Low-profit limited liability companies (l×3 companies) are seen as offering an attractive investment opportunity for foundations, as well as individuals and government agencies, through the purchase of an equity position or other means, such as loans. Such investments could provide capital for socially beneficial activities such as keeping a small-town factory in business or building low-cost housing. Modest dividends would accrue to its investors, who, in the case of foundations, could then use that money to make more program-related investments or traditional grants. If an L3C stopped pursuing its charitable mission, a foundation investor would have to divest its stake.

Whether social enterprise will prove capable of stimulating the birth of new and sustainable legal structures for philanthropy in the way that the joint stock companies did in the 19th century remains to be seen, but it is worth noting that the charitable trust has never been wholly displaced in any common law jurisdiction, and thrives in many. Its survival as a key legal structure through 400 years of developments in commerce and philanthropy indicates a likelihood of its continuing to do so and should therefore prompt at least as much reflection on the need to improve its effectiveness as on the merits of introducing other structures.

Arguably, the question of whether or not new legal forms and tax structures should be devised has arisen at all times when the world of commerce experienced a transition to a new platform: a spin-off in the transformation of established commerce by more modern business methods has often been this type of reflection on the possible implications for the nonprofit sector.[57] Currently, in the wake of venture capitalism and the exploitations of hedge-funds, with governments experimenting in public/private finance initiatives and successful businessmen like Bill Gates applying their skills and profits to public benefit purposes, the world of philanthropy

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[56] See Department of Trade and Industry, *The Small Business Service: Social Enterprise Survey Across the UK*, July 11, 2007. Almost two thirds of those surveyed (64%) stated that they had charitable status. Of those that were not registered with the Charity Commission, 5% were exempt or had exempted status, and 5% were in the process of registering.

[57] In the mid-19th century, for example, introduction of joint stock companies acted as a significant catalyst for generating growth in trade and manufacturing in England & Wales leading in turn to the regeneration of philanthropy as new successful business methods were applied to traditional models of charity. See, further, Deakin, N., *In Search of Civil Society*, Palgrave, London, 2001.

is again being challenged by the relevance of methods that have proven their worth in the world of commerce.

Conclusion

The regulatory agencies, together with a body of mainly common law definitions and precedents, constitute a framework within which a distinct set of legal functions (protection, policing, mediation/adjustment and support) relate to charity. How those functions are applied and balanced and which agencies are assigned to give effect to them, are politically determined.

In the jurisdictions studied, there was a clear differentiation between those where the tax collecting agency, necessarily giving priority to the policing function, maintained its traditional role as the designated lead regulatory body and others where, in a break with tradition, the lead role had been transferred to a newly created body statutorily empowered to give much more emphasis to the mediation/adjustment and support functions. In the former group, the lead regulatory agency treated charities and other nonprofits simply as potential taxable entities among many others, with no allowances made for their particular legal standing. In the latter, a charity specific focus was applied that positively discriminated in their favour by offering at least support services. In both groups, the protection function as traditionally vested in the Attorney General had largely lapsed. The situation was further complicated by a cross cutting differentiation between jurisdictions that adhered to the trust as the main legal structure for charities and those that had in preference adopted the corporate form; a distinction accompanied by a regulatory focus on trust principles and the definition of charitable purpose, as rooted in the *parens patriae* powers, on the one hand and by a focus on company law provisions as administered by the Registrar of Companies on the other. The study revealed that these divisions were now becoming blurred as governments experiment with public/private finance arrangements, various forms of social enterprises and community foundations spread across jurisdictions and as a new generation of entrepreneurs introduce customized hybrid models.

The recent law reform processes have not produced any radical change to established institutional regulatory frameworks: no ‘silver bullet’ has emerged as the key for simplifying the regulatory machinery in all jurisdictions. The approach developed in England & Wales, where the Charity Commission, as lead regulator with a charity specific brief, applies its statutory powers to all registered charities regardless of legal structure in a manner that strikes the functional balance appropriate to the circumstances of each charity, has not been generally followed. In part this may be due to expense: the Charity Commission is an expensive regulatory body. More probably, political context has played an important role. Such a Commission provides, among other things, a tangible bridge between government and charity: serving as government monitoring agency to assess how charity is giving effect to its social policy agenda; a forum for charity to seek a broader

interpretation of charitable purpose or access to the flexibility of *cy-près* powers; and a means for both parties to work through any practice issues that carry implications for their partnership. It is likely that such a body is a product of, rather than strategy for achieving, a government/charity partnership, which in turn is dependant upon whether the political culture is ready to make room for a more participative form of democracy to sit alongside established representative institutions. The UK and Irish jurisdictions, unsurprisingly, have proven to be the only ones ready to accommodate such a lead regulatory body, leaving Singapore and New Zealand settling for an institution that approximates a Charity Commission in name only. Other jurisdictions, reflecting their more conservative political cultures, have opted to maintain the traditional, tax driven, undifferentiated approach to regulating charity with the tax collecting agency carrying primary responsibility and with continuing unresolved complications regarding the mismatch between type of legal structure, governing principles and type of regulatory body.

Political context can also affect the regulatory framework more bluntly by prompting government to ratchet up the policing function, discard protection and be very selective in its use of the support and mediation/adjustment functions. There is every possibility of any remedial intervention in the regulatory framework being overtaken by events as governments now move to control the movement of funds and curb dissent in the sector generally. Governments in the jurisdictions studied and elsewhere are looking with increasing suspicion upon the sector as possibly harbouring, albeit unwittingly, the enemy within and therefore perhaps meriting surveillance and policing rather than partnership; again, there are unmistakable resonances with the Preamble political context. Unlike the position 400 years ago, however, the political context now sits alongside an international framework of fundamental human rights and other binding provisions that set out legal parameters for acceptable levels of government intervention in the sector: rights of association, expression and to non-discriminatory treatment operate to curb excessive government interference (unless it opts to formally derogate); and require governments to respect the individual and collective rights of indigenous peoples to their own culture etc.

Whether philanthropy in the developed nations that formed the case studies for this book is able to fulfill the potential envisaged for it in the new charity legislation will depend on the future balance struck between participative and representative models of democratic engagement. This in turn will be conditioned by government response to the threat of international terrorism, without breaching or derogating from its international obligations, and the degree to which it views the sector as a help or hindrance in dealing with that threat.

Conclusion

'Charity' in a common law context is best viewed as a political construct: charitable purposes are in fact political purposes; public benefit is essentially politically determined; and charity is subject to political control. This book has drawn a distinction between charity as an altruistic expression of the 'gift relationship' and charity as it is known to the common law. It has argued that in the latter sense, charity is amenable to analysis on the basis of its legally established purposes and as regards the mechanics of its application. These aspects of charity are politically determined.

The functions of the law relating to charity and the core set of associated social policy themes, both clearly evident in the Preamble, have held fast over the past 400 years. The interplay between the two constitutes a running narrative of the government's relationship to the sector and as such reveals a dynamic that lies at the heart of democratic society. The fact that the emphasis now given to each function within the regulatory framework varies somewhat from country to country is interesting. Also interesting is the fact that some jurisdictions are now choosing to legislatively extend the Preamble social policy parameters by adding to the legal list of purposes that charity may address. Perhaps, in the long run, the more interesting development may prove to be the current emergence and spread of hybrid organizations and forms of social entrepreneurship. In retrospect, this might come to be viewed as the most significant indicator of a fundamental shift in the four centuries of status quo, presaging the arrival of what turns out to be a new era in charity law.

This book suggests that such changes mirror those occurring not just in the relationship between government and charity but between nonprofits, the State and the market. It further suggests that the comparative analysis of jurisdictions undertaken in respect of charity law speaks to the quality of that relationship. The changes now occurring in the law relating to charity are, therefore, of some importance for the future health of democratic society.

Faced with the challenge of charity law reform, governments in the jurisdictions studied have been unavoidably faced also with the challenge of revealing the terms on which they propose to engage with the sector. The countries that underwent this reform process and those that did not, the manner in which the process was conducted and its outcomes, all say a great deal about that relationship and therefore about the state of democracy in the countries concerned. The news is mixed and some of it quite troubling.

K. O'Halloran et al., *Charity Law & Social Policy*,

This closing section of the book draws from the evidence available in the jurisdictions studied to suggest that charity law provides a strong indicator of the health of a democratic polity. The jurisdictional differences in that law and the nature of current changes reflect political differences that may have an important bearing on the future development of democracy and its institutions.

Social Policy, the Preamble and Current Change

The social policy agenda as first formulated by government in the Preamble, and the role to be played by charity in addressing it, has endured and spread throughout the common law nations. This clear political statement – essentially a blueprint of the terms on which government and the sector should relate and of their common public benefit concerns – has now come up for re-evaluation in the context of recent charity law reform processes. The reasons for reform are also clearly political – the relationship between government and sector, as far as public benefit service provision is concerned, is undergoing fundamental change. Coincidentally, perhaps, the period of charity law reform has overlapped with much academic theorizing as to how to achieve and sustain 'civil society'. The tendency for academics to run the two together has, arguably, done a disservice to both and distracted attention from emerging global political realities that are now steadily closing down opportunities for either to fulfill their full potential.

Social Policy and the Preamble

In social policy terms, the Preamble is a government statement of: matters constituting the public benefit (charitable purposes); the terms on which government proposes to engage with charity in addressing such matters (tax privileges, regulatory framework to prevent abuse etc.); and, at least by implication, the mechanics of the law to be used in the operational management of the government/charity relationship (legal functions of protection, policing, mediation/adjustment and support). Of these it is the charitable purposes that can be identified as the core business of charity, its raison d'etre as far as government is concerned, and the primary trigger for the latter instigating charity law reform processes.

Preamble, the Public Benefit and Partnership

The items listed in the Preamble public benefit agenda, as forming the basis of a government/charity partnership, continue to be matters of contemporary concern in all jurisdictions studied. The provision of health and social care services, training for employment,

public utility provision and the physical maintenance of social infrastructure, are still very much the business of charities. Now as then, education, housing, the general alleviation of those in impoverished circumstances and the protection of citizens are also legally defined as contributing to the public benefit and therefore charitable. The social control role of charities, their capacity to generate social capital, and the part played by religious organisations as providers of charity, have also been retained. Subsequently tidied up by *Pemsel* and broadened by precedent, the Preamble agenda still constitutes the principal heads of charitable purposes in all common law nations and has simply been statutorily extended in a few (see, further, Chaps. 2 and 13).

The premise, content and boundaries of the Welfare State established in the UK in 1948 were crumbling rapidly by the end of that century. This book linked that process to a reawakening of the same political dynamics that had triggered the Preamble: government had reached a position where it had to place increased responsibility for public benefit service provision onto the shoulders of charity. The core Preamble charitable purposes, forming a template for transferring public benefit services from charity to government in 1948, would now become the basis for gradually reversing that transfer.

Although the dismantling of the Welfare State began under the authoritarian direction of a conservative Thatcherite government, it has been continued by a Labour government which adopted a wholly different approach. Instead of simply declaring the extent to which public service provision would be shed by government, it chose the tactic of fostering a partnership with the sector which was then merged into its 'third way' political philosophy. In that context, over the lifetime of the Labour government and underpinned by compacts, charity law reform evolved. The Charities Act 2006, however, was only a small part of the outcome: the cultivation of partnership led to a virtual assimilation of the interests of the sector by government. In other jurisdictions the partnership relationship also proved pivotal and determined the various outcomes of charity law reform processes.

New Charitable Purposes: The Extended Preamble Agenda

As the Preamble list eventually proved to be insufficient if not inappropriate, a number of governments were prompted to embark upon charity law reform as an opportunity to extend the range of charitable purposes. This book noted that the minority of governments that chose to statutorily extend that range did so with a remarkable degree of unanimity, agreeing purposes that clearly fitted with the social policy agenda of contemporary government in the same way that the Preamble purposes had done. This only occurred, however, in those jurisdictions where the democratic polity comprised a blend of representative and participative channels and where the foundations for partnership between government and the sector were well established.

The Irish and UK jurisdictions, of all those studied, had the most well established and formally constituted partnership arrangements. It is suggested that this is linked to their fairly shared Welfare State experience and to the similar outcomes of their

charity law reform processes. Just as the Welfare State in England & Wales had clearly demarcated between the business of government and charity as regards responsibility for public benefit services, so the neighbouring jurisdictions shared that perception and in recent years have accepted the need to begin a reversal of roles. The basis and parameters of partnership in those jurisdictions had been set by the Preamble, institutionalized by the Welfare State, were mutually accepted and thus available for re-negotiation in the context of charity law reform. This was proportionately less true for other jurisdictions, the further they were from that experience.

The Public/Private Divide

The government/charity partnership forged in England & Wales, as cemented by the Charities Act 2006, amounts to a fusion of both sets of interests under the umbrella of 'public benefit', to be applied through the now extended Preamble agenda embodied in that statute. This book has drawn attention to the difficulties that arise from such a mixing together of the responsibilities of government and others; it has attributed this to a deliberate political strategy of the present government as it pursues its 'third way' doctrine. In that jurisdiction, the resulting politically contrived partnership has undercut the *locus standi* of charities and indeed that of the sector. The statutory assertion that 'public benefit' as understood in relation to 13 charitable purposes (to be implemented by the Charity Commission, developed by case law and further extended by amendment) is no longer to be regarded as government business gives rise to concerns in relation to accountability; concerns aggravated by the policy of contracting out the delivery of services statutorily assigned to government.[1]

In other jurisdictions, most particularly the US, where the public/private divide is firmer, perhaps because the 'public' dimension to service provision is less pronounced, the separate interests of government and nonprofits are more readily recognized. This permits clear lines of negotiation and accountability.

Charity Law and Civil Society

There can be no standard recipe for creating a 'civil society'. Although globalisation is increasingly impacting upon the capacity to remain autonomous and distinctive,

[1] See, for example, *YL v. Birmingham CC* [2007] UKHL 27, 3 WLR 112, which concerned an appeal from an 84 year old Alzheimer's sufferer in relation to a decision to remove her, contrary to her wishes, from a private care home where she had been placed by the local authority pursuant to its statutory duty to provide her with care under s 21 of the National Assistance Act 1948. The House rejected the appeal on the grounds that the home was not a public body and was not exercising 'functions of a public nature' within the meaning of s 6(3)(b) of the Human Rights Act 1988.

the case studies revealed the differentiating effect of cultural heritage and contemporary socio-economic circumstances. Of necessity, the jurisdictions studied had different social policy priorities requiring correspondingly different sets of laws and institutions. No particular set of charitable purposes and no particular functional balance in the law regulating charity would produce for all such countries an optimal version of democracy: a healthy democratic society will always keep its institutions of justice and government at arm's length and strike the balance in legal functions that best suits its particular set of social needs.

A sense of perspective, therefore, is needed with regard to charity law. Its credentials as a determinant of the democratic tenor of a society are slight: the laws relating to justice, rights and civil liberties clearly exercise greater leverage; imposing a prescriptive formula cannot fit the complex variations in cultural and socio-economic circumstances; while any aspirations charity law may have to become a determinant of civil society will always be conditional upon prevailing national and international politics.

Post-civil Society

Arguably, civil society has not survived 9/11 and its aftermath. As time moves on, the failure to absorb and respond to the significance of that event becomes more evident and embedded and more likely to compromise any future prospect of bringing the 'civil society' ideal to fruition. Individually and collectively, the jurisdictions studied provided worrying evidence of unwillingness to reflect and to tackle the causes of alienation. Instead the 'bunker' approach is leading to defensive and offensive government action that shows every sign of objectifying and further marginalizing the alienated and exacerbating their sense of grievance. The relevance of civil society rhetoric is fading as anti-terrorism legislation proliferates at the expense of civil liberties. Such legislation is largely unworkable, will do little to obstruct terrorism and is not much more than a symbolic gesture of defiance; an excuse for a lack of political will to build the complex and systemic solutions now needed to cope with the consequences of political failure. What it might achieve, however, is to place a roadblock in the path of those charities that are still prepared to go where governments cannot and man the bridges that in the long run will be necessary to resolve the injustices affecting the alienated, or those that perceive themselves to be so. Instead of being allowed to be part of the solution, charities working internationally and with immigrant populations are becoming ensnared in the red tape of symbolic government action and run a real risk of being treated as part of the problem – the weak link in governments' global war against terrorism – at the very time when their unique role as western ambassadors of goodwill is most needed.

In the post 9/11 world, the most expensive weaponry ever developed is now being deployed by some Christian common law nations against Islamic 'insurgents' in the most impoverished parts of the planet. The same nations stand by while poverty and AIDS destroy families and communities in sub-Saharan Africa.

Again, it is largely a failure of political will in the same nations that has permitted and continues to permit global warming, with its catastrophic consequences for the planet. It would indeed be naïve to presume that adjustments to charity law would be enough to endow the nations comprising the 'axis of virtue' with civil society status; there are issues here of scale and relative values.

Legal Functions, the Preamble and Current Change

The functions of the law as it relates to charity, this book suggests, form the contours of the Preamble footprint – an enduring political statement of the mechanics underpinning the relationship between government and the sector – and reveal the social policy of government as clearly now at the beginning of the 21st century as at the beginning of the 17th. Recognising the current differential in weighting given to legal functions provides insight to the role played by politics and clarifies the choices to be made by government and by charity in forging any future partnership.

Policing

The traditional revenue driven model probably no longer prevails in its original pure form in any jurisdiction. All governments have learnt that by adjusting the regulatory framework, particularly by manipulating the tax regime, it is possible to offset the more blunt effects of the policing function and build in some nuances that provide sufficient measures of support to appease the charitable sector and encourage donors. Nonetheless, it is evident that the priority given to policing remains a good deal more emphatic in some jurisdictions than others in accordance with political context.

Singapore and Australia

Until very recently, of all the jurisdictions studied, Singapore could have been confidently placed at the more extreme end of the spectrum of those with an essentially revenue driven approach to charity regulation while Australia would have been viewed as a likely candidate for shedding that approach and moving towards a more liberal regime. Both have now emerged from their charity law reform processes to take up quite different positions for reasons that are clearly determined by and calculated to further their respective government's social policy strategy.

Singapore, ruled by the same political party since its independence, has achieved considerable economic growth and social stability largely as a result of the priority given to the policing function in relation to all aspects of governance, including regulating charity. Government has used the recent opportunity of charity law

reform to ostensibly relax the policing function in favour of support in order to attract to philanthropy the entrepreneurial skills and the funding that have proven so beneficial to its economy. The changes implemented have been mainly in respect of the regulatory institutions together with adjustments to the tax regime, without any accompanying legislative initiative to alter the underpinning common law foundations. So far change has been accomplished without regard for any views from the sector and it remains to be seen, in the event of the reform programme moving on as promised, whether the government will be obliged to take the same route as adopted by all other countries and proceed towards legislative reform in consultation with the sector. The indications are that the policing function will be relaxed only to the extent deemed necessary to provide the conditions for entrepreneurial leadership to generate in philanthropy the growth it has achieved in the economy. The clinical transfer of a business model, accompanied by the customary Singaporean tight regulatory controls, is unlikely to involve government in any meaningful discussions with the sector. Far from attempting to forge any partnership arrangement, the government is more likely to continue regarding the sector with suspicion and maintain its established social policy strategy of promoting economic growth and consolidating social stability by means of direct supervisory control of all organizations. Government controlled application of a business model to philanthropy may produce some success in terms of attracting and generating more funding streams which can be used by foundations to ease social hardship but will not, and is not intended to, provide a platform for partnership with the sector. Such a partnership would be counter to the Singaporean interpretation of democracy which, leaving no room for participative and little for representative forms of engagement, mostly closely resembles direct rule. Charity law reform in Singapore is therefore in keeping with its particular culture. Although necessitating some shift in emphasis from the policing to the support function, it is most unlikely to do so to the extent of involving the government in a closer relationship with the sector. This would entail a broadening of Singaporean social policy and interpretation of democracy beyond the parameters already firmly established by government.

Australia, after 11 years of conservative government which has seen the country move ever closer to the US in terms of economic, health, welfare and foreign policy, embarked on its charity law reform process amid much political rhetoric about partnership. However, the government exited from that process having abandoned both the reforms previewed in the Charity Definition Inquiry Report and any pretence of willingness to sustain a partnership with the sector. Its approach to domestic matters (e.g. custodial treatment of 'asylum seekers', retraction of health services and welfare benefits and failure to deal with racial tensions and the problems of its Indigenous people) and to international issues (e.g. commitment to war in Iraq and to restricted civil liberties in furtherance of anti-terrorist measures) distanced it from the sector. The strict reliance upon representative politics as its preferred medium of engagement with communities also narrowed the common ground between government and sector. The price of partnership, in terms of engaging openly in a shared agenda and addressing matters of agreed public benefit, proved too much for the government. Instead it fell back to a more traditional and directive role with the

sector, discontinued any plans it may have had to significantly extend the definition of charitable purposes and to introduce a Charity Commission type body, and resumed its reliance on the policing function as exercised by the ATO to lead the regulatory framework for charities. Unlike its Singaporean counterpart, the Australian government would seem to have adopted a somewhat negative and defensive posture towards the sector (in Singapore, the government is undoubtedly motivated to improve the efficiency and effectiveness of philanthropy and attract overseas funds to manage and perhaps direct to high end health and university research) but the outcome is not so different: in both jurisdictions the democratic culture is such that government is able to reject any prospect of partnership, maintain a capacity to unilaterally determine matters constituting the public benefit and ensure that the tax driven approach to regulating charity remains dominant. This is not unlike the government/charity relationship that prevailed at the time of the Preamble.

Other Jurisdictions

In the other jurisdictions studied the policing function does not dominate the regulatory framework for charity to the same extent as in Singapore and Australia. Often, however, it is the lead function and in all, except currently England & Wales and perhaps Scotland, it remains the most influential.

Blend of Policing/Protection and Support

If the policing function, as typified in the traditional revenue driven approach to regulating charity and exemplified by Singapore and Australia, is at one end of a continuum which has mediation/adjustment as represented by the Charity Commission of England & Wales at the other, then jurisdictions such as the US, Canada and New Zealand (also, at present, Ireland and Northern Ireland), lie between the two, clumped fairly closely together but nearer to the Singaporean end. This group has in common the fact that they retain allegiance to the traditional approach but, while the policing function remains prominent, the other functions have grown to become relatively strong. Some of these jurisdictions have demonstrated a preparedness to move further along the continuum.

US and Canada

Undoubtedly there are difficulties in introducing charity law reform in federated jurisdictions. For that reason, perhaps, the IRS and CRA have shown some

willingness to offer support in the form of advice and guidance to charities, in conjunction with applying the policing function, as compensation for the absence of federal led reform and prevailing disinterest at state/province level. These jurisdictions seem to generate a considerable volume of case law which strengthens the protection function, permits a degree of development in charitable purposes and a flexible use of *cy-près*. The fact that they never wholly subscribed to the trust as the preferred legal structure for charity is also relevant as they were then more open to working with other corporate forms and to relying on more appropriate regulatory bodies than the Attorney General etc. This occurs in a basically inclusive political context that rests upon the institutions of representative democracy but has traditionally reached out to afford participative opportunities for those in marginal communities or in a position to make a specialist contribution.

In practice the US and Canada, though fully committed to the traditional revenue driven regulatory approach to charities, have evolved practices that would seem to provide an effective counterbalance to that approach. In particular, the US has used its Tax Code to evolve a clearly calibrated system in which tax privileges and regulatory requirements are proportionately matched to an organisation's public benefit quotient. Section 501(c)(3) of the IRC provides a straight, objective codification of nonprofits running from 'charity' as known to the common law through all forms of philanthropic and social enterprises. Charities as legal entities, are much more separate, distinct and independent of government in the US than in the UK, they are subject to the tax code in the same way as other nonprofits (though preferenced by donor incentive schemes) and are left to compete or otherwise in the open market. The lack of a 'Welfare State' ethic has meant that there is no public services imprint on charitable purposes, no presumption that charity and government share a core agenda and therefore there is less need for the two parties to negotiate partnership arrangements. The public/private divide is not as evident: charities have less cause to worry about being muzzled or colonized by a government intent on cloning substitute service delivery conduits, as in the UK and Australia; and charities are left to fight their own corner in an open market much the same as any other entity. For the same reason, the impetus for charity law reform – focused on definitional matters and designed to engineer greater congruity between the purposes of charity and the contemporary social policy agenda of government – has not been as pressing in the US as in the UK. To some extent, the same can be said of Canada, where the CRA is slowly evolving into an agency that provides more support for the sector. The law reform process initiated by the government involved the sector in close consultations. While the outcomes may not have been as significant as the sector had hoped, the major development has been the determination of CRA to be more transparent. What is missing in both the US and Canada, however, is a statutorily empowered federal agency, independent of government, that can represent the interests of nonprofits to government and vice versa, protect the integrity and autonomy of charities, develop the legal interpretation of charitable purposes to fit contemporary social need and coordinate the involvement of all other agencies.

Other Jurisdictions

New Zealand has taken the step of finalizing its charity law reform process and the outcome, in terms of adjustments to the institutional framework and developing charitable purposes, advanced its regulatory framework a stage further than the process achieved in Australia. However, the failure to empower the new Charities Commission and to introduce any new charitable purposes has left charity law in New Zealand on a par with corresponding developments in Singapore. The fact that both of the latter jurisdictions have put in place Commissions to counterbalance the revenue driven orientation, suggests that they are prepared to begin the journey towards a new regulatory framework with stronger protection and support functions.

Ireland and Northern Ireland, on the other hand, have yet to finalise their reform processes. The present approach in both is not untypical of other essentially revenue driven models with priority given to the policing function as applied by the Revenue Commissioners. This function is prevented from being wholly dominant by the presence within their institutional regulatory frameworks of a statutory body – the Commission for Charitable Donations and Bequests and the Charities Unit respectively (the latter derived from the former which in turn is a surviving colonial legacy that unlike its original parent body the Charity Commission failed to fulfill its potential). These bodies, although positioned alongside the tax collecting agencies have, for reasons of a lack of empowerment, had only minimal effect on the latter's exercise of the policing function.

In Northern Ireland, the lack of empowerment may in part be due to resistance from the political establishment. Some members of the now functioning Assembly, the parliamentary institution for that jurisdiction, have rejected outright any suggestion that the sector might have a direct input into framing policy: representative politics, it has been claimed, has no need for participative channels; the Civic Forum was established as a consultative mechanism on social, economic and cultural issues not as a policy making body. In Ireland, the position is quite different as there the culture of social partnership has been well established since the late 1990s[2]: the Community and Voluntary Pillar of the social partnership[3] has played an important role alongside government in forums that have shaped policy and cemented relationships between the representative and participative political strands. Both jurisdictions, however, would seem poised to introduce new legislation that will alter the existing blend of functions and send them further down the road towards the model now long established in England & Wales.

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[2] The social partnership process, which began in 1987 and found a place in the Programme for Economic and Social Progress in 1990, was formalized in October 1996 when the Taoiseach (Prime Minister) invited a number of organisations to form a group for the purposes of joining in formal talks on a new Social Partnership programme (*Partnership 2000*).

[3] Consisting of representatives from Age Action Ireland, Carers Association, Children's Rights Alliance, Congress Centres for the Unemployed, CORI Justice Commission, Disability Federation of Ireland, Irish Council for Social Housing, Irish National Organisation for the Unemployed, Irish Rural Link, Irish Senior Citizens Parliament, National Association of Building Co-operatives, National Youth Council of Ireland, Protestant Aid, Society of St Vincent de Paul and The Wheel.

Mediation/Adjustment

The priority given to mediation/adjustment rather than to the policing function signifies government recognition that there are greater benefits to be gained by developing the capacity of charity, and demonstrating an interest in doing so, than by continuing the traditional emphasis on regulating to detect and prevent abuse. This can probably only ever grow from within a mature democratic society which has managed to nurture and sustain a culture of partnership, with proven reciprocity in terms of sharing responsibility and accountability, between its representative and participative strands. Apart from a clear acknowledgement of common interests, it requires diligence, restraint and a high degree of mutual respect if a genuinely even-handed partnership is to be brokered and maintained. In theory, government and charity are the ideal partners for addressing issues of public benefit provision on a social policy agenda.

England & Wales

The mediation/adjustment function has long been embodied in the role of the Charity Commission of England & Wales and is now to be legislatively transplanted to the jurisdictions of Northern Ireland and Scotland and replicated in Ireland. In no other jurisdiction is there a body vested with commensurate powers and the duty to proactively develop charitable purposes, the capacity of charities and that of the sector. Unquestionably, placing the emphasis on mediation/adjustment and on an empowered Charity Commission has enabled this jurisdiction to achieve much for the sector and set an example that is the envy of others. This book has noted the advantages of building a regulatory system around such a Commission rather than leaving it to be revenue driven.

However, health warnings need to be attached to a model that has a Charity Commission type entity as the lead regulatory body in a political environment which is wholly amenable to close relations between government and sector. The current political context in England & Wales, with its fusion of government and sector interests in both the 'third way' approach and in the statutorily extended Preamble agenda, is such that any regulatory body with mediation/adjustment as its primary legal function runs the risk of being drawn into facilitating political objectives. It is possible that the Charity Commission can no longer be relied upon to draw a clear principled line between the two sets of interests. Instead of exercising vigilance and assertiveness in protecting the independence of charities from government interference, the Commission is in danger of accepting the prevailing political ethos and viewing the 'public benefit' as providing common ground for both. It would seem to be working towards a presumption that public benefit service provision, even if statutorily assigned to a government body, may be undertaken by charity if so authorized by government. It is not impossible that the Commission could succumb to political culture and to government influence in the same way as lead regulatory bodies in revenue driven regimes, such as the ATO in Australia: the protection

function, on which the integrity and autonomy of charity depends, being equally overridden. This tendency may be increased in the future by influence exercised from the Office of the Third Sector, created in May 2006 and located at the centre of government in the Cabinet Office under the Minister for the Third Sector, which has a statutory duty to support Ministers in their functions in relation to the Charity Commission. It remains to be seen whether the controls exercised through the Compacts and perhaps also through the courts, particularly the ECHR, will enable a clearer recognition of, and willingness to enforce, a public/private divide and with it the independence of the Commission.[4] Only when that is demonstrated will there be confidence that the independence of charities from government interference can be truly safeguarded in this jurisdiction and that the mediation/adjustment, as the primary legal function of a Commission, offers a useful model for other jurisdictions.

Other Jurisdictions

In jurisdictions where conservative politics prevail, for example in Singapore (also, Australia or Canada should either ever acquire a Commission led regulatory regime), it is perhaps worth noting that the corollary to the above analysis is probably also true, with the synergy producing quite different outcomes. The mediation/adjustment function could then equally lend itself to furthering government intent to the detriment of the sector. As a bridgehead between government and sector, a Commission type body is strategically placed and will exercise considerable leverage, which is why it must be insulated from political influence.

The mediation/adjustment function, entrusted to a lead regulatory body similar to the Charity Commission, now has legal precedence in Scotland as will shortly also be the case in Northern Ireland and Ireland. While it is too early to comment on how the statutory powers vested in such bodies enable these jurisdictions to give effect to that function, it will be particularly interesting to see how it plays out in Ireland in the context of that nation's well developed social partnership model.

Charity Law: The Future

In the early years of the 21st century, as in the early years of the 17th, government is seeking to use charity law as a platform for laying down its terms of reference for engaging with the sector. This time, however, the parties at the table are not simply government and charity (then, largely the Church) but if a deal is to be struck

[4] Note that the Charity Commission, though not under direct Ministerial control, is not wholly independent of government as all Commissioner posts are by government appointment and the Commission must report annually to Parliament.

it must be made between nonprofits, the State and the market. The eventual outcome, of what may prove to be a lengthy process of negotiation, will be every bit as important for the body politic as the Preamble once was.

Political Context

A correlation between the priority given to legal functions and the political climate of the government/charity relationship, in each of the jurisdictions studied, is as unmistakable as it is unsurprising. The issue is whether the resulting jurisdictional differences in the law regulating charity signifies anything other than appropriate differences due to political context – is there anything else going on, other factors that need to be taken into account, when considering how charity law may unfold in the future? This book suggests that there is. It suggests that there are quite fundamental readjustments occurring in the body politic of our developed democratic nations which are evident to a varying degree in the jurisdictions studied, as indicated above, and have some way to go before they are worked out. The current reform processes are at best an inadequate attempt to grapple with the effects of changes that are largely outside the charity law frame of reference.

Legal Functions and Political Climate

It is clear that those jurisdictions where the law and institutional framework give effect to a certain basic configuration of legal functions, have a healthier blend of representative and participative strands of democracy that those that do not. Whether as cause or effect, such a setting also seems to coincide with strong government/charity partnerships. Balance is crucial.

Where there is continued reliance upon the traditional revenue driven model there is also an absence of a sense of true partnership in the government/charity relationship. This tends to coincide with a centralized and directive style of governing that sees no legitimacy in participative channels and relies fairly exclusively upon ministerial control exercised through government bodies. At the other extreme, where the emphasis is very much on the mediation/adjustment function, then partnership and participative channels seem to flourish but the realities of political power are also evident and the consequent exposure of charity to assimilation by government, as a conduit for delivering the latter's public benefit service programme but at the price of foregoing independence, then becomes a real danger. At some point on the continuum between these two extremes, the political climate may be such that it allows for the structured engagement of participative and representative strands and it then becomes possible to build a robust partnership model which separates and keeps separate the interests of government and charity, permitting transparent negotiations and reciprocal accountability on an agreed public

benefit agenda. In that context, a flexible calibration of legal functions with mediation/adjustment to the fore but not dominant, should in theory be achievable. None of the jurisdictions studied had quite reached that point.

Judicial Context

The Preamble was launched in a legal context that differs in many important respects from that in which the present reforms take place and where they will have to make such headway as they can. The courts of the nations concerned have nothing like the capacity nor the opportunities they had in England in the years following the Preamble to give effect to legislative intent, challenge practice developments and protect the interests of charities. Without any equivalent to that degree of judicial authority and vigilance, it is very difficult to envisage the present reforms and the accompanying political strategy having the impact and durability of its Elizabethan predecessor, but relatively easy to envisage charities being left exposed to political interference from the range of administrative and quasi-judicial bodies that now occupy the space left by the courts.

The Courts and Protecting the Interests of Charities

Unlike 400 years ago, there will be no *Pemsel* waiting in the wings to bring classification, order and coherence to the law and practice that emerges from this latest government intervention into the affairs of charities. The present marginality of the courts can only increase as the determination of charitable status becomes prescriptive in accordance with specified statutory purposes rather than judicially interpreted as indicated by precedent and the 'spirit and intendment' rule. Then there is the accompanying problem of the fragmenting of the common law fabric and the diminution if not loss of the power of precedent as nations opt out and place their law on a statutory footing. In addition, the office of Attorney General cannot be relied upon to bring issues to court, while other regulatory bodies may choose not to unless it is in their interests and, in current conditions, private parties (donors, beneficiaries etc.) are unlikely to acquire the necessary *locus standi* to do so. Indeed, a large proportion of legal determinations are now made by administrative bodies which, particularly in revenue driven regulatory regimes, lack the impartiality to protect the interests of charities and are susceptible to political pressure.

The resulting problems are likely to be felt most acutely in the area of public benefit service provision by charities. Given the political intent driving legislative reform and the pace at which government is colonizing the sector, the question arises – do the regulatory regimes of the nations concerned provide adequate mechanisms to protect the independence of charities from government and, if not, is this intentional?

The Courts and Human Rights

Human rights, equality and the broad spectrum of social justice legislation, together with other national and international legal provisions now provide a very different legal context for new statutory laws relating to charity than that which awaited the Preamble. The body of case law assembled by the ECHR around matters such as the fundamental human rights to freedom of association, expression, assembly etc. (see, further, Chap. 3) place real parameters on operational aspects of charity law. There is also evidence that this court is gradually exploring the public/private divide in relation to bodies that act in an agency capacity on behalf of government; certainly, the fact that it may be given reason to do so, is causing government bodies and the judiciary in the Irish and UK jurisdictions to proceed cautiously when it comes to measuring the assigning of public responsibilities to charities against the provisions of their respective human rights legislation. This approach may, in due course, extend also to charities and political purposes. It is probable that the contextual difference in human rights regimes will in the near future open up significant legal differences between the European jurisdictions and others such as the US, Australia and Singapore (where the prospect of human rights proceedings induces far less defensiveness) as regards the public/private divide in the provision of statutory services and in other respects.

The divisive effect of human rights stands in interesting contrast to the solidarity and unanimity of legislative response to terrorism among the jurisdictions studied. Similar rafts of legislation have been introduced to provide the means for surveillance and tracking the funds of organizations, for detaining people without trial and for otherwise restricting civil liberties. Where such measures risk breaching human rights provisions, then some governments, such as in England & Wales, have openly indicated a willingness to derogate from their responsibilities as Convention signatories.

The Funding Context

As at the time of the Preamble, governments are now at a funding watershed for public benefit provision and are looking to charities to bear more of the cost. Appropriately, it is England & Wales that is heading up the list of those now rewriting the terms of the government/charity partnership devised to expand the charity share of responsibility. In that jurisdiction, more than any other, the demarcation of responsibility has been clearest due to the Welfare State experience, which has allowed the steady retraction of services to be readily acknowledged thereby facilitating a measured strategic response. The leadership role undertaken there may not, however, be adopted by other jurisdictions and is unlikely in itself to provide as satisfactory and endurable an answer to the funding dilemma as the Preamble once did.

A New Approach: Social Entrepreneurship etc.

Despite the climate of charity law reform, or perhaps because of it, there are some signs of an increasing weariness with the whole charity law package; a sense that maybe there are inherent constraints in that approach that no amount of tinkering with purposes, structures and regulatory framework will ever quite overcome; that it is simply too dated and outmoded to cope with contemporary social need with its complex dynamics and global, interrelated dimensions; and that it perhaps unfairly delivers tax privileges, market advantage and a social cachet to some public benefit organizations in preference to others. The MBA School mantra of corporate planning tools, the focused passion of an entrepreneur, the righteousness of an advocate for global justice and the new wealth of dot.com young wealthy make for a heady mix of self confident bravado which challenges all before it. Consequently, social enterprises in various shapes and sizes have appeared in the US and UK jurisdictions and are spreading rapidly. Their sophistication and flexibility make the traditional vehicles for charity seem redundant. The statutory introduction of Community Interest Companies (CIC) and the Charitable Incorporated Organisations (CIO) may have come too late to stem the tide.

In a number of the jurisdictions studied, but particularly in England & Wales and the US, there is evidence that those tired of charity law structures and restraints and attracted by market solutions are experimenting with new legal structures between market and State. The structures they are developing and test driving challenge some of the previous givens of the non-distribution constraint, specified purposes and even of voluntary action. This approach acknowledges the legitimacy of private profit, and provides for a return to those who invest either as a social return or a capped financial return on their monetary investment.

Such social entrepreneurs want to move to outcomes rather than purposes. So, for example, getting unemployment down by whatever means would be their objective, rather than being restricted to the purpose of relieving unemployment. Again, their commitment would be to 'make poverty history' rather than to relieving victims of its effects. They court the involvement of venture capital, large commercial companies and wealthy philanthropists in preference to appealing to the general public for donations This approach is not one that relies upon volunteer participation, nor would be prepared to tolerate making room for it, unless economically justified: the building of social capital, encouragement of civic responsibility and de Tocqueville's concern for the moral tie, would be sidestepped as belonging to a different agenda. Instead of maneuvering around issues of the compatibility of charitable purpose and political activity, this approach may often involve or require structural reform to the very heart of the political and economic system.

The new social entrepreneurs would also, perhaps, challenge the central role of 'public benefit' in charity law as this becomes: a more elastic concept with global dimensions; politically exploited to accommodate the responsibilities of government bodies; and largely applied by regulatory bodies that are revenue driven or otherwise politically controlled. Instead of allowing this concept scope to become a Trojan horse, available to serve the purposes of the government of the day, they

would perhaps seek to strip it of political taint and place it firmly under judicial control, if that were possible.

New Legal Structures: Hybrid Bodies[5] etc.

The range and scale of public benefit activity now occurring outside the box of an orthodox government/charity partnership is quite staggering. This is particularly the case in the UK jurisdictions where government experimentation with public/private finance initiatives has brought the finances, skills, competitiveness, and profit motive of the business world to bear on areas of utility and service provision that were once the heartland of charity. Schools, hospitals, roads, bridges and prisons – all Preamble stalwarts – are now much more likely to be provided by consortia in which big business plays a leading role and charity little if any. In the US, community organisations have an established track record of providing public utilities such as schools, health centres and residential care facilities while recent research output at the Aspen Institute has recorded the emergence of a wide range of newly minted hybrid bodies developed to attract venture capital and further extend philanthropic capacity.

Charity law, as presently constituted, is unable to capture the range and permutations of legal structures now emerging to bridge the interests of nonprofits, government and commerce.

At this point it is difficult to grasp the significance of the above developments. It is more than possible that the 400 year old charity law machine will grind on, with some adjustments and jurisdictional variation. The lurch towards social entrepreneurship, new legal structures and hybrid bodies may turn out to be just another instance of charity being accidentally caught up in the slipstream of passing market trends such as occurred in the late 19th century. The market rhetoric, management driven changes, and bean counting orientation that has come to dominate the nonprofit sector in recent years – producing, for example, 'the new public management' agenda in government administration – could just be temporarily masking the fact that the regulatory framework and the functions of the law relating to charity continue much as before. It's all just a passing fad.

On the other hand, given the pace and spread of changes now impacting on charity, it could be that conditions are such that it is heading into 'the perfect storm'. It may be that the democratic polity is being fundamentally reworked and, as this common law construct is politically determined, charity and the law governing it will not avoid being wholly transformed.

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[5] Note that, in the UK, the term 'hybrid bodies' is used in s 6 of the Human Rights Act 1998 in reference to the large number of private bodies that have come to exercise public functions previously exercised by public authorities. It distinguishes between acts of a pure public authority which are governed by the terms of the Human Rights Act, and acts of a hybrid body which are bound by the Human Rights Act only when it is performing functions of a public nature.

Appendix

A Template of Legal Functions

Protection

(i) Protecting the value and purpose of the donor's gift
(ii) Protecting the perpetual nature of a charity
(iii) Protecting the integrity of the status of 'charity' (e.g. its independence in partnership arrangements with government) and its 'core business' i.e. dealing with poverty
(iv) Provision of legal forums with capacity to provide effective remedies for charities i.e. the High Court, the AG, of principles favouring the interests of charities in decision-making, of case precedents and legislative measures illustrating the weight given to protecting charities
(v) Protecting the status and limiting the liability of those charged with responsibility for charities e.g. trustees
(vi) Protecting the distinction between charity and other non-profit models (mutual benefit associations, co-operatives, friendly societies etc.)
(vii) Protecting the traditional legal structure for charity i.e. trust
(viii) Protecting its tax-exempt entitlements

Policing

(i) Existence of a register – voluntary/statutory – and criteria for registration
(ii) Existence of statutory provisions for regulating charities (or self-regulation by sector), of a specific government agency charged with responsibility for monitoring/supervising the activities of charities and of principles and case precedents illustrating the priority given to policing
(iii) Primacy of tax determining function (i.e. charitable status and tax exemption eligibility determined solely by Revenue agency) relative to the remit of any other agency
(iv) Narrow spectrum of activities qualifying for charitable status and of taxes/rates/donation incentives qualifying for exemption

(v) Rigorous application of 'public benefit' test and 'spirit and intendment' and 'exclusively charitable' rules
(vi) Limited range of agencies and powers available to police charities
(vii) Restrictions on extra-charitable activity (e.g. trading, political activity, contract culture, profit distribution etc.)
(viii) Extent of imposed anti-terrorism measures (tracking funds, surveillance etc.)
(ix) Existence of appropriate powers for regulating modern fundraising
(x) Ensuring proper standards of transparency and accountability
(xi) Ensuring HR compliance

Mediation and Adjustment

(i) Capacity and willingness of relevant agencies to re-interpret principles (e.g. the 'public benefit' test and the 'spirit and intendment' rule), charitable purposes and precedents in the light of changing social need (e.g. broadening the definition of 'poverty') to achieve strategic change
(ii) Existence of an agency or spread of forums for mediation and arbitration (e.g. Charity Commission) in addition to those available to adjudicate
(iii) Existence of a range of appropriate legal structures providing flexibility for charitable purposes
(iv) Evidence of agency capacity and willingness to develop new methods of charitable intervention (e.g. community development)
(v) Existence of principles, case precedents and legislative measures illustrating the weight given to allowing charities to exercise flexibility and discretion
(vi) Mechanisms for giving effect to donor's intent when objects cannot be achieved (e.g. saving gifts using *cy-près* and other schemes)
(vii) Adjusting the fit between charity law and such other legislation as tax, rates, company law etc.

Support

(i) Existence of a supportive statutory framework providing a designated agency and effective statutory powers enabling relevant philanthropy/altruism and an absence of provisions inhibiting effective philanthropic intervention
(ii) Existence of supportive case law precedents and principles (e.g. the 'benignant construction' rule)
(iii) Enduring rationale for partnership with government underpinned and safeguarded by modern formal arrangements
(iv) Existence of a supportive network of umbrella NGOs
(v) Measures facilitating use of volunteers and promoting good citizenship

(vi) Existence of National Lottery and other modern methods of generating charitable funds
(vii) Measures that assist the administration, provide operational advice, encourage the efficiency of charities and permit the development of innovative methods of charitable intervention
(viii) Measures facilitating proper governance, information distribution etc.
(ix) Measures that facilitate access to and use of *cy-près*
(x) Measures that build and sustain public confidence in charities
(xi) Provision of a range of generous tax concessions for charities and donors
(xii) Provision of a range of appropriate legal structures (unincorporated associations, trusts, companies)

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