

SUBMISSION TO THE TREASURY, *A DEFINITION OF CHARITY* (CONSULTATION PAPER, OCTOBER 2011)

BY THE NOT-FOR-PROFIT PROJECT, UNIVERSITY OF MELBOURNE LAW SCHOOL

4 APRIL 2013

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INTRODUCTION

The University of Melbourne Law School's Not-for-Profit Project is a three-year research project funded by the Australian Research Council which began in 2010. This project is the first comprehensive Australian analysis of the legal definition, taxation, and regulation of not-for-profit organisations. Further information on the project and its members is attached to this submission as Appendix A.

We welcome this opportunity to contribute to the Treasury's work, especially as a key aspect of our project has been the issue of the definition of charity. We have done a considerable amount of work on this topic, which we refer to here, and which is attached for your reference:

- Joyce Chia et al., *Defining Charity: A Literature Review* (2011).
- Joyce Chia, Matthew Harding and Ann O'Connell, 'Navigating the Politics of Charity: Reflections on *Aid/Watch v Commissioner of Taxation*' (2011) 2 *Melbourne University Law Review* (forthcoming).
- Ann O'Connell, 'Defining Charity—Where to from Here?', Speech presented at the Australian Charity Law Association Conference, Melbourne, 23 September 2011.
- Matthew Harding, 'Finding the Limits of *Aid/Watch*' (2011) 3(3s) *Cosmopolitan Civil Societies Journal* 34.
- Matthew Harding, 'Distinguishing Government from Charity in Australian Law' (2009) 31 *Sydney Law Review* 559.
- Matthew Harding, 'Trusts for Religious Purposes and the Question of Public Benefit' (2008) 71 *Modern Law Review* 159.

With the exception of the forthcoming journal articles, this research is also available at our website, <http://tax.law.unimelb.edu.au/notforprofit>. The website also has a resources page which hosts many of the relevant documents discussed below.

This submission draws upon this research, which has included consideration of the equivalent reform processes in comparable jurisdictions as well as the various documents relevant to the Australian context. These are discussed in detail in the literature review. The submissions also draws extensively on the discussion of the common law of charity in leading textbooks, including Professor Gino Dal Pont's *The Law of Charity* (2nd ed, 2010) ('Dal Pont') and Hubert Picarda, *The Law and Practice Relating to Charities* (4th ed, 2010) ('Picarda'), as well as the recently released ruling by the Australian Taxation Office ('ATO'), *Income tax and fringe benefits tax: charities* (2011) ('TR 2011/4').

We begin this submission by welcoming the Government's reform in this area, and agreeing with the Government's approach of basing the new statutory definition on the general principles of the *Inquiry into the Definition of Charities and Related Organisations* ('Sheppard Inquiry') as reflected in the Exposure Draft of the Charities Bill 2003 ('Charities

Bill 2003'). We acknowledge that the Government has decided not to re-open for public discussion the wider debate concerning the definition of charity, and our submission proceeds on this basis.

Although we are in general agreement with the Government's approach and agree with many of the recommendations of the Sheppard Inquiry, we consider that there is still a real need to improve upon the Charities Bill 2003 in significant respects. In particular, we consider that there should be an expansion of the list of charitable purposes and that some statutory guidance should be provided in respect of the public benefit test. We also recommend the omission of references to disqualifying activities and purposes, and updating the Bill to reflect the principles of the High Court's decision in *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 ('*Aid/Watch*') and *Central Bayside General Practice Association Limited v Commissioner of State Revenue* [2006] HCA 43 ('*Central Bayside*').

Given the significance of this reform and our particular expertise in this area, we have examined the issues in some detail in this submission. We have begun with our general approach to the reform. We then discuss in detail the key issues of charitable purpose and public benefit. We consider purposes and activities, particular types of bodies, and other issues raised in the Consultation Paper. As this does not follow the order of the Consultation Paper, we have provided for ease of reference below a summary of our responses to the questions in the Consultation Paper, as well as a list of the Recommendations we have made throughout our submission as Appendix B.

SUMMARY OF RESPONSES TO CONSULTATION PAPER

1. *Are there any issues with amending the 2003 definition to replace the 'dominant purpose' requirement with the requirement that a charity have an exclusively charitable purpose?*

We recommend that the requirement be changed so that a charity must have 'charitable purposes only'. To avoid doubt, however, it should be specified that this does not preclude the existence of other purposes that further, are in aid of, or are ancillary or incidental to these charitable purposes.

2. *Does the decision by the New South Wales Administrative Tribunal provide sufficient clarification on the circumstances when a peak body can be a charity or is further clarification required?*

It is preferable to clarify the charitable status of peak bodies within the statutory definition. The tribunal decision is helpful, but remains the decision of a tribunal only in one State. We recommend that, as in the United Kingdom and Ireland, there should be express reference to the charitable purpose of advancing volunteering, the voluntary sector, and the effectiveness and efficiency of charities.

3. *Are any changes required to the Charities Bill 2003 to clarify the meaning of 'public' or 'sufficient section of the general community'?*

As there is significant complexity in the common law regarding this element of the public benefit test, there should be some clarification through the statutory definition. We recommend that the test be re-stated in the legislation in the following manner:

In determining whether there is a benefit for the public or a sufficient section for the public, regard should be had to:

- 1) the existence of wider benefits to the general community;
- 2) the nature of any limitations on the class to be benefited, including in particular:
 - a. the extent to which the class of potential beneficiaries is open in nature;
 - b. the extent to which such limitations are related to the nature of the charitable purpose; and
 - c. the practical need for such limitations.
4. *Are changes to the Charities Bill 2003 necessary to ensure beneficiaries with family ties (such as native title holders) can receive benefits from charities?*

It is desirable to clarify that the 'section of the public' test does not, by itself, disqualify trusts and organisations that benefit people connected by blood ties, as is done in the *Charities Act 2005* (NZ). We also recommend specific legislative provision for the charitable status of prescribed bodies corporate under the *Native Title Act 1993* (Cth).

5. *Could the term 'for the public benefit' be further clarified, for example, by including additional principles outlined in ruling TR 2011/D2 or as contained in the Scottish, Ireland and Northern Ireland definitions or in the guidance material of the Charities Commission of England and Wales?*

There is considerable benefit in clarifying further the public benefit test, as this has been a source of complexity and confusion in the common law. In addition to clarifying the relevant factors with regard to when the benefit is for the public or a 'sufficient section of the public' (see Question 3), we consider it is helpful if the legislation states that:

- The benefit(s) may be tangible or intangible, direct or indirect;
- The benefit(s) are to be assessed in the light of contemporary needs and circumstances;
- The benefit(s) may be assessed against potential detriment(s), where appropriate; and
- The inquiry is not into the merits of the methods or opinions of the organisation.

6. *Would the approach taken by England and Wales of relying on the common law and providing guidance on the meaning of public benefit, be preferable on the grounds it provides greater flexibility?*

As noted above, some clarification of key principles in the public benefit test is preferable. However, such clarification in the statutory definition will not remove the need for the regulator to provide more detailed guidance on the application of such a test to particular circumstances.

7. *What are the issues with requiring an existing charity or an entity seeking approval as a charity to demonstrate they are for the public benefit?*

This is perhaps the most difficult and contested issue, as the competing arguments are finely balanced. The principle that all charities should be required to prove public benefit affirmatively furthers objectives of transparency and accountability, and could promote public trust and confidence.

However, we also express reservations about the desirability of removing the presumptions of public benefit. We note that the legal status of the ‘presumptions’ is often overstated. We consider that the presumptions perform some useful functions, including minimising the evidential (and compliance) burden, and assisting in determinations where public benefit is intangible, diffuse, or which involve conflicts of beliefs and values.

We are also concerned about the removal of the presumptions from a practical and a political perspective. As a practical matter, the determination of public benefit is likely to be resource-intensive, both on the part of charities and on the part of the regulator. We are not convinced that this is the best use of the limited resources of the regulator (or of charities). From a political perspective, we note that the removal of the presumptions is likely to be interpreted as an expression of scepticism towards certain parts of the sector, which may undermine support for this reform and harm relations between government and the sector.

It is, of course, always possible to disprove public benefit. The Australian Charities and Not-for-Profits Commission (ACNC) should have sufficient powers to enable it to require further information from charities where it considers there is a risk that the public benefit test is not met. Further, charities whose purposes do not fall within recognised categories of charities must still prove public benefit, as is currently done.

8. *What role should the ACNC have in providing assistance to charities in demonstrating this test, and also in ensuring charities demonstrate their continued meeting of this test?*

As noted above, the ACNC should be required to provide guidance on the public benefit test in a manner similar to that of Charity Commissions overseas. As the charities will report (presumably annually) to the ACNC, the ACNC is also best placed to identify whether

charities are continuing to meet this requirement, and should have appropriate powers to request further information where it considers there is a risk it is not meeting such a requirement.

9. *What are the issues for entities established for the advancement of religion or education if the presumption of benefit is overturned?*

This is dealt with in the answer to Question 7.

10. *Are there any issues with the requirement that the activities of a charity be in furtherance or in aid of its charitable purpose?*

No 'activities' test should be included in the statutory definition. The inclusion of such a test muddles fundamental concepts of charity law and will induce suspicion (and engender confusion) in the charitable sector. However, if such an activities test is included, it should accurately reflect the current common law principles.

11. *Should the role of activities in determining an entity's status as a charity be further clarified in the definition?*

We see no reason to include any reference to activities in the statutory definition. This is not done in comparable legislation and, as discussed above (see Question 10), is likely to confuse the law or, at least, the intended audience of the law.

12. *Are there any issues with the suggested changes to the Charities Bill 2003 as outlined above to allow charities to engage in political activities?*

The proposed modification is too limited and does not correctly reflect the principles in *Aid/Watch*. We recommend instead that the entire clause be removed. The issue of whether certain types of political purposes are charitable should instead be left to the general tests of charitable purpose and public benefit. To the extent that charitable engagement in politics raises policy concerns, these should be dealt with in the legal regime that regulates those concerns (for example, in electoral or counter-terrorism legislation) rather than in charity law.

13. *Are there any issues with prohibiting charities from advocating a political party, or supporting or opposing a candidate for political office?*

As noted above (see Question 12), this prohibition does not reflect the principles of the decision in *Aid/Watch*. Further, the prohibition does not reflect sound policy. There are many good reasons for including charities in Australian political discourse, including their representation of the marginalised and their awareness of relevant policy issues and the consequences of implementation.

14. *Is any further clarification required in the definition on the types of legal entity which can be used to operate a charity?*

There is value in clarifying the impact of partnerships, joint ventures, and shared service arrangements on the charitable status of organisations. As a matter of policy, arrangements that encourage collaboration between charities are to be encouraged. Further, arrangements between charities and commercial or government entities that are designed to facilitate charitable purposes, including through additional financing, should be encouraged.

The reference to ‘partnership’ in the Charities Bill 2003 may inhibit such collaboration because of the breadth of the term ‘partnership’ in tax law. We therefore recommend that it is not specified as a disqualifying entity. We also recommend empowering the ACNC with discretion to consider groups of related organisations together in an application for charitable status, to cater for complex groups of organisations.

15. *In the light of the Central Bayside decision is the existing definition of ‘government body’ in the Charities Bill 2003 adequate?*

The distinction between charity and government may be better regarded as a contextual distinction. It may not be necessary therefore to include the distinction at all (in line with some comparable definitions overseas). Alternatively, if the distinction is to be included, it should be restricted to ‘government bodies’ only, or government bodies and a specified level of control, analogous to the threshold of ‘control’ in the *Corporations Act 2001* (Cth).

16. *Is the list of charitable purposes in the Charities Bill 2003 and the Extension of Charitable Purposes Act 2004 an appropriate list of charitable purposes?*

The list of charitable purposes in the Charities Bill 2003 and the *Extension of Charitable Purposes Act 2004* (Cth) represent a good basis for a list of charitable purposes. However, a major benefit of this reform would be to include other charitable purposes, especially those included in comparable legislation overseas (see Question 17).

We recommend, however, that the format of the Recommendation in the Sheppard Inquiry be followed, so that there is specific reference to particular disputed or novel issues within the major heads of charity. This will improve the accessibility of the definition. In particular, we recommend elevating to their own heads the advancement of civil or human rights; the advancement of reconciliation, conflict resolution, harmonious community relations, and equality or diversity; and the advancement of animal welfare. We also recommend express reference to some other charitable purposes identified in the Explanatory Material accompanying the Charities Bill 2003 (Cth).

17. *If not, what other charitable purposes have strong public recognition as charitable which would improve clarity if listed?*

We recommend including charitable purposes that are included in the legislation of the United Kingdom and Ireland, including: the advancement of citizenship and community development; the advancement of sport and the provision of recreational facilities; and the advancement of conflict resolution. We also recommend considering including a category of promoting access to information and advice.

We also recommend drawing inspiration from overseas legislation by expanding, clarifying and/or modernising some of the listed purposes. These suggestions include: adding the 'saving of lives' to the advancement of health; extending the advancement of culture to include specific reference to the arts, heritage, philosophy and the sciences; extending the advancement of religion to include analogous philosophical beliefs; modernising the head in relation to animal welfare; and providing specific reference to urban and rural regeneration, the promotion of volunteering, the voluntary sector and the effectiveness and efficiency of charities, and the advancement of industry or commerce.

18. *What changes are required to the Charities Bill 2003 and other Commonwealth, State and Territory laws to achieve a harmonised definition of charity?*

The provision of recreational facilities for social welfare (and, in Tasmania, sport) would facilitate a harmonised definition, as this is already deemed to be charitable in several jurisdictions.

A modern statutory definition of charity would assist in the process of rationalising the complexity of legislative references to charities, particularly in the context of State or Territory tax concessions which are unduly complex. However, different policy contexts may justify broader or narrower definitions of charity, particularly in the context of regulatory regimes and trusts legislation. This may be achieved by the use of particular conditions for different types of concessions.

19. *What are the current problems and limitations with ADRFs?*

We agree that there are limitations in relation to ADRFs, including in their fundraising, time of establishment, capacity for distribution, and the complexity of accessing tax concessions. However, we do not see this as part of the process of the definition of charity and consider that it requires separate consultation.

20. *Are there any other transitional issues with enacting a statutory definition of charity?*

We agree that the statutory definition should be, if anything, broader than the common law and therefore that there should be minimal transitional issues involved. We agree that existing endorsements by the ATO should be 'carried over' to the ACNC, as this will enable the ACNC to operate more efficiently. Rather than a general educational campaign, which may be counterproductive, we consider it is appropriate for peak bodies, voluntary sector service organisations and the like to promote the new definition throughout the sector, linked to appropriate guidance by the ACNC on the impact of the new definition.

We recommend, however, that if the ‘poor relations’ cases are to be no longer charitable, that a specific provision deem existing testamentary trusts in such cases to be charitable.

OUR APPROACH TO REFORM GENERALLY

A key goal of our Project is to consider reform issues in a principled way. The following principles have guided us in our consideration of the issues in the Consultation Paper.

There are four good reasons for legislation where there is existing common law on the subject. First, legislation increases the **accessibility** of the law to a general, non-legal audience. This reason justifies the restatement of some principles of common law in legislation.

Second, legislation can **clarify** complex issues of law or where there is either no law or the common law is confused or in flux. This is a very useful function of legislation in the present context, as there are several areas in which the common law definition of charity is unduly complex or where no decision has been made directly on the subject.

Third, legislation can **modernise** the law. The common law’s consideration of charity stretches over hundreds of years, and particular decisions clearly reflect a very different social context in different eras. This function is especially useful here as charities are often in the vanguard of identifying and addressing social issues, including controversial or minority viewpoints.

Fourth, legislation can **correct** principles of common law where the underlying policy is mistaken, archaic, or otherwise questionable. While, in general, the common law principles of charity are often sound, there are aspects of the definition which are at least problematic at the level of policy.

In responding to this Consultation Paper, therefore, we have identified which objectives will be furthered by any changes we recommend. We emphasise, however, that this reform is more than just an opportunity to state the principles of common law—it is a chance also to modernise it and to correct mistakes of the common law.

Another guiding principle of our Project is that legal reforms relating to charity should have, at its heart, a coherent contemporary vision of the not-for-profit sector. Such a vision would recognise that the sector does not merely supply social services or services and/or goods that are not supplied by government or the market. Rather, the sector plays a fundamental role in promoting the flourishing of individuals and communities in diverse ways and in diverse dimensions.

The characteristics of diversity, individual autonomy and voluntary association are, in our view, key virtues of this sector, and these should be facilitated and respected by the State. We agree, therefore, with the fundamental principle of the common law of charity that it

should not be for the judges to enquire into the quality, effectiveness or efficiency of the methods of achieving charitable purposes, beyond certain minimal constraints.

We also note that a statutory definition of charity for all Commonwealth purposes will not be determinative of access to particular concessions. For example, Commonwealth tax legislation uses a number of different terms to describe bodies that are eligible for various concessions such as “public benevolent institution”. It will, therefore, be necessary to consider that legislation to determine how the statutory definition will be used to determine eligibility. Although not raised in this consultation, we believe that the tax legislation dealing with the NFP sector is itself in need of simplification.

CHARITABLE PURPOSES (QUESTIONS 16 & 17)

Recommendation 1

The statutory list of charitable purposes should include:

- (a) the advancement of health or the saving of lives, including:
 - (ii) prevention or relief of sickness, disease or human suffering;
- (b) the advancement of education;
- (c) the advancement of social or community welfare, including:
 - (i) the prevention or relief of poverty;
 - (ii) the care, support or relief of those in need by reason of youth, age, ill-health, disability, financial hardship, disaster, geographical location, or other disadvantage, including by the provision of accommodation;
 - (iii) the integration of, or participation by, the disadvantaged;
 - (iv) the care or support of members or former members of the armed forces or the civil defence forces and their families; and
 - (v) the provision of child care services;
- (d) the advancement of religion or analogous philosophical beliefs;
- (e) the advancement of arts, culture, heritage, the sciences or philosophy, including:
 - (i) the cultures or customs of Indigenous peoples or ethnic or language groups;
- (f) the advancement of the natural environment;
- (g) the advancement of citizenship or community development, including:
 - (i) urban or rural regeneration;

- (ii) volunteering, the voluntary sector, or the effectiveness and efficiency of charities;
- (h) the advancement of sport or the provision of facilities for recreation and leisure;
- (i) the advancement of civil or human rights;
- (j) the advancement of reconciliation, conflict resolution, harmonious community relations, or equality or diversity, including:
 - (i) assistance or support for immigrants and refugees;
- (k) the advancement of animal welfare;
- (l) the advancement of industry or commerce;
- (m) the advancement of public access to advice and information; and
- (n) other purposes beneficial to the community.

Recommendation 2

The common law requirement that a purpose should be ‘within the spirit and intendment’ of the preamble to the Elizabethan Statute of Charitable Uses 1601 should be ousted by statute.

Recommendation 3

There should be no definition of religion in the statutory definition.

APPROACH TO REFORM OF CHARITABLE PURPOSES

One of the strongest arguments for a statutory definition is to expand the traditional classification of charitable purposes from the four *Pemsel* heads to reflect both case law and contemporary conceptions of charity. In this respect, we disagree in principle with the statement at [130] of the Consultation Paper that the list should be limited only to “those purposes that have strong recognition in the existing common law”. The Paper expects that future extensions, instead, will “fall to Parliament for consideration on a case-by-case basis”.

In our view, merely codifying existing charitable purposes would be a missed opportunity. As noted above, one of the purposes of this reform should be to facilitate a healthy civil society, including by updating and modernising archaic parts of the law. Further, the development of charity law is necessarily incremental. The development of charity law has also been impeded by the reluctance of charities to engage in expensive litigation, and the relative dearth of cases in England and Wales because of the influence of the Charity Commission. In our view, it would be a mistake to omit certain types of charitable purposes simply because they have not yet been litigated. For similar reasons, it would also be a

mistake to leave future extensions to the courts. Finally, it is also mistaken to hope that Parliament will consider, on a case by case basis, future extensions of the law. So far, the Commonwealth Parliament has only managed to extend the definition of charitable purpose marginally, in the *Extension of Charitable Purposes Act 2004* (Cth). Parliamentary time is increasingly precious and charities will rarely have sufficient political power to force ad hoc extensions on to the legislative agenda. We consider that additions that are widely recognised by the community as charitable can and should be included in any list of charitable purposes, and indeed that this would be a major benefit of this reform.

This is especially so because we have the benefit of the legislative definitions passed recently by the various jurisdictions of the United Kingdom and Ireland, which have usefully included clauses both clarifying issues in dispute and extending the scope of particular heads of charitable purpose. It makes no sense for us to ignore the extensions usefully made by those with whom we have shared the heritage of charity law.

Finally, we also note that most of these purposes are already covered by specific tax exemptions in Commonwealth law, and thus have already been recognised as of sufficient 'public benefit' by Parliament to warrant equivalent benefits. This recognition also minimises the transitional costs of adding new charitable purposes. We also consider that their addition may help in the longer-term project of rationalising the tax concessions available for not-for-profits, by bringing within the term 'charity' most of the purposes that are recognised as warranting tax relief.

APPROACH TO DEFINING CHARITABLE PURPOSES

We agree that the statutory list of charitable purposes in the Charities Bill 2003, when read in the light of the specific instances mentioned in the accompanying Explanatory Material, should form the basis of the proposed legislation. We agree, in particular, with the broad notion of 'advancement' adopted in the Bill to include prevention as well as relief. The *Extension of Charitable Purposes Act 2004* (Cth) should also be consolidated into this statutory definition. Of course, the listing of a charitable purpose of itself does not mean a particular organisation advancing that purpose will necessarily satisfy the definition of charity.

As discussed above, we consider that the list should also include purposes that have been recognised in the jurisdictions of the United Kingdom and Ireland in their definitions. We have also considered the other categories of tax exemption and tax deductibility in Commonwealth legislation, as well as legislation in South Africa¹ and Europe.²

¹ *Income Tax Act 1962* (South Africa) Sch 9.

² See generally David Moore, Katerina Hadzi-Miceva and Nilda Bullain, 'A Comparative Overview of Public Benefit Status in Europe' (2008) 11 *International Journal of Not-for-Profit Law* <http://www.icnl.org/knowledge/ijnl/vol11iss1/special_1.htm>.

Further, there are advantages in elevating particular purposes to their own head, or referring expressly to instances of charitable purposes. There are also advantages in extending or redrafting the language of the definition in line with the definitions adopted elsewhere. Finally, we also consider some minor issues of drafting.

NEW PURPOSES

We recommend that, in addition to the purposes covered by the Charities Bill 2003 (Cth) and its accompanying Explanatory Material ('EM'), that the list be enlarged to include the following purposes:

- Advancement of citizenship or community development as a separate head, together with promotion of civic responsibility;
- Advancement of sport or provision of recreational facilities;
- Advancement of conflict resolution; and
- Promotion of access to information and advice.

The first three of these purposes have been recognised in the equivalent legislation in the United Kingdom and Ireland. For the purposes of comparison, we have provided as Appendix C a table that compares the lists of purposes in the various jurisdictions of the United Kingdom and Ireland with that of the Charities Bill 2003 and its EM.

Citizenship or community development

In recent years, the flourishing of studies on civil society and third sector organisations has recognised the role of charities in inculcating civic values such as participation,³ and its contribution to social capital.⁴ The inclusion of this head recognises these valuable contributions.

The term 'citizenship', in this context, connotes the political conception of citizenship, namely the promotion of civic values such as (for example) public participation and governance, rather than the legal conception of citizenship. Examples that might fall under this head include organisations that promote digital democracy, or which train community activists. Greater public participation in the political process, and more 'active' citizenship, is clearly of public benefit.

³ For an excellent overview, see Elisabeth S Clemens, 'The Constitution of Citizens: Political Theories of Nonprofit Organizations' in Walter W Powell and Richard Steinberg (eds), *The Nonprofit Sector: A Research Handbook* (Yale University Press, 2nd ed, 2006) 207.

⁴ See, eg, Mark Lyons, 'Non-Profit Organisations, Social Capital and Social Policy in Australia' in Ian Winter (ed), *Social Capital and Public Policy in Australia* (Australian Institute of Family Studies, 2000) 165; J Butcher, 'Government, the Third Sector and the Rise of Social Capital' (2006) 12 *Third Sector Review* 69; Dag Wollebæk and Per Selle, 'Social Capital' in Rupert Taylor (ed), *Third Sector Research* (Springer, 2010) 219.

‘The promotion of community development’ was included by the Sheppard Inquiry as an instance of a charitable purpose under the head of the advancement of social and community welfare. The EM included as an instance of a charitable purpose ‘community capacity-building’. Further, ‘community development’ is already recognised by the common law in a piecemeal fashion. For example, the provision of public works and utilities, the relief of poverty and distress, and the promotion of industry and commerce partly reflect aspects of this head. ‘Community service organisations’ have also been granted exemption from income tax.⁵ However, the elevation of this purpose and its integration with citizenship will enhance conceptual clarity, and recognise and even foster the civic and community dimension of much charitable activity.

Sport and recreational facilities

The recognition of sport has been a vexed issue within the common law, with sporting purposes *per se* not currently considered to be charitable.⁶ However, sporting purposes with a nexus to other charitable purposes, such as education, may be charitable.⁷ Most recently, the Administrative Appeals Tribunal has acknowledged that the promotion of health through sport may be a charitable purpose.⁸

The common law exclusion of sport has been widely criticised.⁹ The principal argument in favour of its inclusion is succinctly stated:

The inclusion of sport as a charitable object recognises the change in society which now considers sport to be integral to a healthy lifestyle and the prevention of illness.¹⁰

Dal Pont observes that other benefits include mental benefits and social benefits to the community. Further, he adds, it is odd to exclude sport given the value Australians have

⁵ *Income Tax Assessment Act 1997* (Cth) s 50.10. This was intended to include civic clubs such as Rotary International, and has been interpreted to include a not-for-profit corporation providing face-to-face banking services in a rural town lacking such services: *Wentworth District Capital Ltd v Commissioner of Taxation* [2010] FCA 862.

⁶ *Re Nottage* [1985] 2 Ch 649.

⁷ G E Dal Pont and S Petrow, *Law of Charity* (LexisNexis Butterworths, 2010) [12.8].

⁸ *Bicycle Victoria Inc and Commissioner of Taxation* [2011] AATA 444. See also *Northern NSW Football Ltd v Chief Commissioner of State Revenue* [2009] NSWADT 113.

⁹ Ontario Law Reform Commission, *Report on the Law of Charities* (1996), vol 1, 224; P Smith, ‘Charity and a Question of Sport’ (1998) 5 *Charity Law and Practice Review* 135; James Willis, ‘Charitable Trusts and Sport’ [2000] *New Zealand Law Journal* 69; Cabinet Office Strategy Unit (UK), *Private Action, Public Benefit: Sport and Charitable Status* (September 2002); David Brown, ‘The Charities Act 2005 and the Definition of Charitable Purposes’ (2005) 21 *New Zealand Universities Law Review* 589, 617; M. McInnes, ‘Charity and Sport: A Canadian Perspective’ (2008) 124 *202*; Richard Pidgeon, ‘Amateur Sport and the Charities Act’ [2009] *New Zealand Law Journal* 65.

¹⁰ Alison MacLennan and Francesca Quint, *Blackstone’s Guide to the Charities Act 2006* (Oxford University Press, 2007) [2.09].

generally placed upon the “both public participation in sport and ... the uplifting in the national morale of sporting triumphs”.¹¹

Logically, it is difficult to justify the exclusion of sport when sport conducted by an educational institution, or restricted to a locality, may be charitable.¹² It is also difficult to justify its exclusion on the basis that it provides pleasure, since (as Picarda points out) this is also true of arts and culture.¹³

The recognition by the various jurisdictions of the UK of the charitable status of sport, and in other jurisdictions as well,¹⁴ indicates that the traditional common law position is out of date. We also note that sport has already been recognised as beneficial to the community for the purposes of income tax exemption,¹⁵ an inclusion that was justified as far back as 1952.¹⁶ Finally, the perception of the ‘public benefit’ of sport is amply testified to by the fact that sports and recreation has one of the largest volunteer rates in Australia.¹⁷

In addition, several Australian States have also passed legislation deeming recreational facilities for social welfare to be of public benefit,¹⁸ following England in this respect.¹⁹ Most of these Acts require that the facilities are provided in the interests of social welfare. This is defined as meaning “with the object of improving the conditions of life”, either for those who need such facilities by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances; or where the facilities are available to members of the public at large, or male and female members.

However, s 4(1) of the *Variation of Trusts Act 1994* (Tas) simply provides:

A gift of property to provide opportunities or facilities for sport, recreation or other activities associated with leisure is taken to be, and to have always been, a gift for charitable purposes.

¹¹ Dal Pont and Petrow, *Law of Charity*, above n 7, [12.5].

¹² Smith, ‘Charity and a Question of Sport’, above n 9.

¹³ Hubert Picarda, *The Law and Practice Relating to Charities* (Bloomsbury Professional, 4th ed, 2010) 178.

¹⁴ For example, amateur sport is also recognised as a public benefit activity in South Africa: *Income Tax Act 1962* (South Africa), Sch 9, Pt 1, it 9. See also *Hutchinson Baseball Enterprises Inc v Commissioner of Internal Revenue* 696 F 2d 757 (Court of Appeals (10th Circuit), 1982); *Re Laidlaw Foundation* (1984) 13 DLR 491. It is also recognised in European countries, including France and Germany: see Council on Foundations, *Country Information* United States International Grantmaking <<http://www.usig.org/countryinfo.asp>>.

¹⁵ *Income Tax Assessment Act 1997* (Cth), s 50.45.

¹⁶ Commonwealth Committee on Taxation, *Report on Exemption of Income of Certain Bodies and Funds* (Reference No. 25) (Parliamentary Paper, No 136, 12 August 1952), [13]–[16].

¹⁷ Australian Bureau of Statistics, *Voluntary Work, Australia, 2006* (No Cat 4441.0, 20 July 2007) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/productsbyCatalogue/124E5675AD3AED8CCA256A71000019C5?OpenDocument>>.

¹⁸ *Trustee Act 1936* (SA) s 69C; *Charitable Trusts Act 1962* (WA) s 5(1); *Trusts Act 1973* (Qld) s 103(2); *Variation of Trusts Act 1994* (Tas) s 4(1).

¹⁹ *Recreational Charities Act 1958* (UK).

In addition to the principled arguments set out above, the inclusion of sport will therefore also facilitate harmonisation across States and Territories.

We note that the English provision refers to ‘amateur’ sport and the Scottish provision to ‘participation in sport’. However, we prefer the broader term ‘sport’, which reflects the more expansive scope of the current income tax exemption in Australia as well as the Tasmanian legislation, and which avoids the difficulties of determining the line between ‘amateur’ and ‘professional’ sports.

Conflict resolution

While this head is new, it seems obvious that the promotion of the resolution of conflicts would be for the public benefit. It is clearly in line with the objects of promoting human rights and racial harmony which were recognised in the Charities Bill 2003 and its EM, and with the promotion of reconciliation, mutual respect and tolerance which was recognised by the Sheppard Inquiry and also in the EM.²⁰ Previously, trusts for peace and international friendship have been in conflict with the political purposes doctrine, which the High Court in *Aid/Watch* has clearly removed (as discussed below).

We consider that this is one of the ‘mistakes’ of the common law that a statutory definition should correct. There is no good policy reason to exclude from charitable status the promotion of peace, which is clearly an object that is of great public benefit. Similarly, it is hard to argue that friendships with other States are not generally of public benefit.

Access to advice or information

There are a range of purposes that have been recognised as charitable in statutes and in the common law that relate to the promotion of access to advice or information. These include:

- The provision of legal services for the disadvantaged (which falls within the category of care, support and relief for the disadvantaged);²¹
- The promotion of access to media and a free press;²²
- The protection and promotion of consumer rights and the improvement of control and quality with regard to products or services;²³
- Research into, and dissemination of, information useful to the community;²⁴ and

²⁰ Ian Fitzhardinge Sheppard, Robert Fitzgerald and David Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001) <<http://www.cdi.gov.au/html/report.htm>>, 190–191.

²¹ *Income Tax Act 1962* (South Africa), Sch 9, Pt 1, it 1m). The Charity Commission of England and Wales has registered a community law centre as charitable: Picarda, *The Law and Practice Relating to Charities*, above n 13, 210.

²² *Income Tax Act 1962* (South Africa), Sch 9, Pt 1, 1q).

²³ *Income Tax Act 1962* (South Africa) Sch 9, Pt 1, 8b). This is also recognised in Europe: Moore, Hadzi-Miceva, and Bullain, ‘A Comparative Overview of Public Benefit Status in Europe’, above n 2.

²⁴ Picarda, *The Law and Practice Relating to Charities*, above n 13, 221–222.

- The provision of public amenities such as libraries, reading rooms and centres providing access to the Internet.²⁵

Very recently, the Charity Commission recognised the charitable status of the Wikimedia Foundation, which promotes open access to content, under the residual ‘other purposes beneficial to the community’.²⁶

Access to information may be conceptualised as charitable under existing heads in a number of ways. Access to advice or information that assists in dealing with disadvantage (for example, legal advice for the poor or health advice for the ill, access to the Internet for the economically disadvantaged) may be conceptualised as advancing social or community welfare in addressing the needs of the disadvantaged. Access to information may also be conceptualised as advancement of education, as Wikimedia argued originally (unsuccessfully). Access to government information may be conceptualised as part of the advancement of citizenship. Provision of access to digital technology may be conceptualised as provision of recreational facilities for the social welfare. Access to information is also a crucial component of the advancement of the arts, culture, heritage, sciences and philosophy.

Further, it is clear that access to information is a human right, as expressed in Article 19 of the *International Covenant on Civil and Political Rights* which includes as part of the right to freedom of opinion and expression a right to “seek, receive and impart information and ideas through any media and regardless of frontiers”. Access to government information, in particular, has been held to be a fundamental human right by human rights courts and is constitutionally guaranteed in 60 countries.²⁷ The advancement of access to information may therefore be conceptualised as part of advancing civil or human rights.

In the context of our information age, it is likely that access to information will have increasing practical significance. Digital access to information, the promotion of open-access content, open government and digital democracy initiatives, and the emerging not-for-profit media sector²⁸ are examples of emerging charitable purposes in this arena. There is

²⁵ *Vancouver Regional Freenet Association v Minister of National Revenue* [1996] 3 CTC 102. See also the decision of the Charity Commission of England and Wales on Community Server, <<http://www.charitycommission.gov.uk/Library/start/commservdecision.pdf>>.

²⁶ Wikimedia Foundation, *UK Charity Registration a Milestone in the Recognition of the Wikimedia Movement* (7 November 2011) <<http://blog.wikimedia.org/2011/11/07/uk-charity-registration-a-milestone-in-the-recognition-of-the-wikimedia-movement/>>. See also *Charity Commission Application - Wikimedia UK* Wikimedia Foundation <http://uk.wikimedia.org/wiki/Charity_Commission_application>.

²⁷ *Constitutional Protections of the Right to Information* Rights2org <<http://www.right2info.org/constitutional-protections-of-the-right-to>>.

²⁸ *News to You Canada v Minister of National Revenue* [2011] FCA 192; Steve Coll, *Nonprofit Newspapers* (2009) *The New Yorker*; Thomas Ferraro, ‘US bill seeks to rescue faltering newspapers’ *Reuters*, 24 March 2009.

therefore a good case for addressing this emerging issue directly in the statutory definition. This is particularly so because there has been some complexity in analysing its relevance to existing heads. For example, in *Vancouver Regional Freenet* the provision of a community centre to facilitate access to the Internet was characterised as analogous to the provision of highways in the Elizabethan statute, whereas the Charity Commission of England and Wales characterised it as a combination of the provision of public amenities, the provision of recreational facilities for the social welfare, and advancing education. The complexity of the process is well illustrated by the case of Wikimedia Foundation. It apparently encountered difficulty because the provision of a public resource is not an expressly listed charitable purpose, and it originally argued that it advanced education before a change in legal strategy which resulted in its successful argument by analogy to 19th-century cases dealing with reading rooms.²⁹

A better reading of these instances, we suggest, is that they reflect the broader benefit of access to information. Conceptually, access to information provides at least three types of 'public benefit'. First, it serves an instrumental function in that it is a precondition to the enjoyment of other rights or the fulfilment of charitable purposes (such as the relief of disadvantage). Second, access to information is an essential element in a flourishing democracy and society because of the importance of the free exchange of ideas and communication. Third, access to information ultimately promotes the full flourishing of individuals because of the human need for expression, communication and social interchange. As the Court stated in *Vancouver Regional Freenet*:

Information is the currency of modern life. This has been properly called the information age. The free exchange of information amongst members of society has long been recognized as a public good. It is indeed essential to the maintenance of democracy, and modern experience demonstrates more and more frequently that it, more than any force of arms, has the power to destroy authoritarianism. The recognition of freedom of speech as a core value in society is but one aspect of the importance of freedom of information.

It is important, in our view, to recognise that access to information has a benefit beyond the instrumental benefit of furthering other charitable purposes or enabling the enjoyment of human rights. It also has a broader public benefit in the sense that the free exchange of information is an indispensable requirement of a healthy democracy and society. There is also, in our view, a good case to be made for the non-instrumental value of access to information itself, as its status as a human right indicates.

To embrace these three aspects of public benefit, we have suggested that the list of charitable purposes include the advancement of access to advice or information. We

²⁹ Kaye Wiggins, *Why Wikipedia Is Charitable* (29 November 2011) Third Sector Online <http://www.thirdsector.co.uk/bulletin/third_sector_governance_bulletin/article/1106308/why-wikipedia-charitable/>.

emphasise here that the purpose must be to advance *access*, not simply to provide information. The provision of news, for example, that is already widely available would not promote access to information. Nor would the mere provision of news on the basis that it sought to be objective or unbiased.³⁰ The requirement of public benefit must still be fulfilled, so that the promotion of access to information to serve private interests would not be charitable, and access to the information must be 'beneficial' in some way. Further, the requirement that it be 'not for profit' would exclude the commercial provision of services. Finally, there may be other factors that would negate the 'public benefit' (for example, the promotion of access to classified information is likely to cause harm outweighing the public benefit in access).

While this broader formulation is preferred, there are other more conservative options that would embrace most of the recognised instances of charitable purposes, and probably cover the first two types of public benefit that we have identified. For example, it would be possible to include in the definition of 'advancement' express reference to the promotion of access of information relevant to a listed charitable purpose. This would cover, for example, the provision of free legal advice to the poor or otherwise disadvantaged, or the promotion of access to health information. Another possibility would be to specify as a charitable purpose the advancement of particular classes of information (such as legal or governmental) information.

ELEVATION OF, AND EXPRESS REFERENCE TO, CHARITABLE PURPOSES

Certain charitable purposes mentioned in the EM warrant either their own head or express reference in the definition as an instance of charitable purpose. This would improve the accessibility and clarity of the statutory definition. It would also be of expressive value in communicating the social significance of those purposes.

The following charitable purposes warrant their own paragraph in the definition of charitable purposes:

- The advancement of civil or human rights;³¹
- The advancement of reconciliation, conflict resolution, harmonious community relations, or equality or diversity; and
- The advancement of animal welfare.

We also consider that the format of the original Recommendation in the Sheppard Inquiry, which identified as sub-clauses particular points either in dispute in the common law or

³⁰ *News to You Canada v Minister of National Revenue* [2011] FCA 192 .

³¹ We prefer here the broader phrasing of the EM to the confined reference to human rights in the legislation of the United Kingdom.

otherwise obscure, is preferable to the shorter version in the Charities Bill 2003. This would increase accessibility and clarity.

We have therefore included in our Recommendation the specific points mentioned by the Sheppard Inquiry, as well as including the following instances specified in the legislation of the UK and Ireland or in the EM:

- the care, support or relief of those in need by reason of youth, age, ill-health, disability, financial hardship, or other disadvantage, including through the provision of accommodation (UK);
- the relief of those in need by reason of disaster (EM);
- the care or support of members or former members of the armed forces or the civil defence forces and their families (EM);
- the integration of, or participation by, the disadvantaged (Ireland);
- the cultures or customs of Indigenous peoples or ethnic or language groups (EM); and
- assistance or support for immigrants and refugees (EM).

We have incorporated the relief of need by reason of disaster within the general provision dealing with the care, support or relief of disadvantage. In addition, we have made specific reference to 'geographical location' to include charities that work to address the disadvantages faced by rural or remote communities in Australia.

MINOR EXTENSIONS

In addition, we recommend redrafting existing purposes along the lines of the UK legislation to:

- Include the saving of lives in the head of advancement of health;
- Expand the head of advancement of culture to include specific reference to the arts, heritage, philosophy and sciences;
- Extend the advancement of religion to include also the advancement of analogous philosophical beliefs;
- Rephrase the 'prevention and relief of animal suffering' to the 'advancement of animal welfare';
- Include in the head of advancement of citizenship or community development the specific instances of urban and rural regeneration, and the promotion of volunteering, the voluntary sector or the effectiveness and efficiency of charities; and
- Include specific reference to the advancement of industry or commerce.

The saving of lives

This inclusion merely clarifies the existing law. The protection of human life has been upheld as being within the fourth *Pemsel* head. Gifts for providing lifeboats, for the Royal National Lifeboat Institution and the Royal Humane Society for Saving Life, have been upheld, together with volunteer fire brigades.³² The uncontroversial status of this extension is underlined by the recent passage of Commonwealth legislation extending gift deductibility status to volunteer fire brigades.³³

Although arguably this might fall within the head of the ‘advancement of health’, this is not necessarily a natural understanding of the phrase ‘advancing health’. It is therefore desirable to include it in the statutory definition.

Arts, culture, heritage and sciences

All of these purposes have been recognised as charitable, and were referred to in the EM. Although the phrase ‘advancement of culture’ is intended to encompass these elements, we consider that the phrasing in the UK statutes is clearer and more accessible. The addition of ‘sciences’ also expands the notion of ‘culture’ to include aspects that might otherwise have fallen within ‘education’.

Philosophical beliefs

The legislation in Scotland expressly includes the “advancement of any philosophical belief” as analogous to the advancement of religion.³⁴ The South African legislation similarly includes the promotion and/or practice of a belief, and the promotion of, or engaging in, philosophical activities.³⁵

The common law has accepted some ethical or philosophical beliefs as charitable.³⁶ The promotion of particular philosophical beliefs (such as the discussion of particular strains of liberal philosophy) would generally fall under other heads of charity, especially the advancement of education.

However, the common law has had some difficulty with some broader philosophical viewpoints and its potential overlap with ‘religion’. For example, in *Bowman v Secular Society* it was suggested that humanism would not be a charitable object.³⁷ Such belief systems clearly do not constitute ‘religions’. However, there is a strong argument for modernising our conception of charity to encompass philosophical belief systems analogous

³² Picarda, *The Law and Practice Relating to Charities*, above n 13, Ch 12.

³³ *Tax Laws Amendment (2010 Measures No. 4) Act 2010* (Cth) Sch 7.

³⁴ *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10 s 7(3)(f).

³⁵ *Income Tax Act 1962* (South Africa), Sch 9, Pt 1, it 5b), c).

³⁶ See especially *Re South Place Ethical Society, Barralet v Attorney-General* [1980] 1 WLR 1565. Picarda suggests that the promotion of moral or spiritual welfare or improvement may be a separate type of charitable purpose: Picarda, *The Law and Practice Relating to Charities*, above n 13, 220–221.

³⁷ *Bowman v Secular Society Ltd* [1917] AC 406.

to that of religion in our modern, liberal, and largely secular society. This reflects a broader principle of liberal neutrality towards religions and will counter claims that charity law assumes that “any religion is likely to be better than none”,³⁸ an assumption that is not necessarily accepted by many in society. The public benefit in engaging with philosophy is, in our view, properly analogous to the public benefit in religion and its exclusion reflects an archaic historical context. It will also reduce pressure on the need for judges or the regulator to declare particular controversial beliefs to be a ‘religion’, with its symbolic implication of state sanction. For this reason, we recommend that the advancement of religion be extended to encompass analogous philosophical beliefs.

As a consequence, we have also recommended the addition of philosophy to the head of ‘the advancement of arts, culture, heritage and the sciences’. This is to clarify that it is a charitable purpose to promote other, non-analogous, philosophical beliefs.

Animal welfare

The purpose of protecting animals has been held to be charitable. There are, however, complexities in the case law in interpreting how the protection of animals ‘benefits’ the public, which reflect outdated perceptions of the value of animal life.³⁹

The EM to the Charities Bill 2003 included the ‘prevention and relief of animal suffering’ as an instance of a charitable purpose. However, we prefer the more expansive term of ‘animal welfare’ used in the UK legislation to reflect the modern holistic approach to animal welfare. For example, this would more clearly encompass situations where the purposes were targeted at redressing the destruction of an animal’s habitat, although there was not particular ‘suffering’.

Urban or rural regeneration

The Charity Commission of England and Wales recognised the promotion of urban and rural regeneration as a charitable purpose in 1999. Such organisations may conduct a variety of activities, such as providing: assistance to the poor and unemployed, assistance or advice to new or existing businesses to improve unemployment, recreational facilities, and public amenities.⁴⁰

This purpose overlaps with and combines other charitable purposes recognised by the common law, such as relief of poverty, the provision of public works and utilities, the promotion of commerce, and the purpose of benefiting a locality or neighbourhood. However, the addition of this express purpose will clarify the charitable status of

³⁸ Picarda, *The Law and Practice Relating to Charities*, above n 13, 100–101.

³⁹ Dal Pont and Petrow, *Law of Charity*, above n 7, [11.34]–[11.41].

⁴⁰ Charity Commission of England and Wales, *Promotion of Urban and Rural Regeneration* (RR, No 2, March 1999) <<http://www.charitycommission.gov.uk/publications/rr2.aspx>>.

organisations that combine such purposes, and allow greater flexibility in the way such organisations structure their activities.

Volunteering, the voluntary sector, and effectiveness and efficiency of charities

At present, the charitable status of such bodies requires clarification (as discussed below). Therefore, express reference to this charitable purpose will recognise and encourage the valuable role of volunteering organisations, peak bodies and infrastructure organisations in the modern charitable sector. South Africa also makes similar provision.⁴¹

Industry or commerce

Under the common law, the promotion of industry or commerce, including in particular fields such as agriculture, can be a charitable purpose, although such organisations may fail where their objects are directed to providing private benefits.⁴² The promotion of particular industries is also specifically prescribed as exempt from income tax.⁴³

As this is quite a distinct purpose from the others on the list, we consider that it is appropriate that this purpose be specifically mentioned. Of course, any such organisation must also satisfy the general public benefit test.

THE *EXTENSION OF CHARITABLE PURPOSES ACT 2004* (Cth)

The *Extension of Charitable Purposes Act 2004* (Cth) deems the following to be a charitable purpose: the provision of non-profit child care services (s 4), and allocations to income-tax exempt entities providing rentals under the National Rental Affordability Scheme (s 4A).

These purposes should be folded into the general statutory definition of charity. We consider that both would fall within the existing instances of charitable purposes, but these could be specified as an instance or example to avoid doubt.

The Act also provides for self-help groups and closed or contemplative religious orders, which are discussed below in relation to public benefit.

RESIDUAL CHARITABLE PURPOSES

We agree that a residual category of ‘any other purposes beneficial to the community’ should be retained for the purposes of flexibility. History has shown time and again that

⁴¹ *Income Tax Act 1962* (South Africa), Sch 9, Pt 1, it 11a). This includes as a public benefit activity: “the provision of support services to, or promotion of the common interests of public benefit organisations contemplated in section 30 or institutions, boards or bodies contemplated in section 10(1)(cA)(i), which conduct one or more public benefit activities contemplated in this part.”

⁴² Picarda, *The Law and Practice Relating to Charities*, above n 13, 218–220; Dal Pont and Petrow, *Law of Charity*, above n 7, [11.46]–[11.47].

⁴³ *Income Tax Assessment Act 1997* (Cth), s 50.40. This section refers to the development of aviation, tourism, and the following Australian resources: agricultural, horticultural, industrial, manufacturing, pastoral, viticultural, aquacultural and fishing resources, and information and communication technology.

charitable purposes emerge and are recognised in particular historical and social contexts which are difficult to predict.

We prefer that such a category be left open-ended, as in the Charities Bill 2003. The requirement that such a purpose be ‘within the spirit and intendment’ of the Elizabethan Statute of Charitable Uses should be expressly ousted.

We note that s 2 of the *Charities Act 2006* (UK) attempts to restrict this category to those either already recognised as charitable within common law, or analogous to, or within the spirit of, the statutory list of charitable purposes or those already recognised by the common law. (Similar provision is made in Scotland and Northern Ireland, but not in Ireland). In our view, this is unnecessarily restrictive and fails to recognise the variety and diversity of new charitable purposes. It also reflects a suspicion of judicial values and decision-making which we do not believe is justified.

DEFINITION OF RELIGION

Clause 12 of the Charities Bill 2003 attempts to codify the principles of the High Court’s decision as to the definition of ‘religion’ in the *Church of Scientology* case.⁴⁴ This reflected the recommendation of the Sheppard Inquiry, although the Inquiry identified only characteristics enunciated by Mason ACJ and Brennan J in that case. The additional indicia in the Charities Bill 2003 reflect statements by other judges in that case.

We draw attention to the discussion in our literature review of the controversies over the difficulties of defining religion.⁴⁵ As discussed there, the issue is one of constructing a definition that enables an objective determination despite the inherent subjectivity of faith, and which encompasses the diversity of religious practices and beliefs without being so broad as to be meaningless. It is also difficult to define religion in a way that excludes cults.

In our view, while the principles enunciated by the High Court in the *Church of Scientology* case provide an appropriate basis for deciding the question, we would prefer that these principles are not included in the statutory definition as this may unduly restrict the flexibility of the common law principles.

DRAFTING POINTS

Our recommendation reflects the format of the Sheppard Inquiry’s list to the more concise version in the Charities Bill 2003, as discussed above. Where additional heads or instances of charitable purposes have been included, we have adopted the language used in the comparable legislation overseas or in the EM. The adoption of language used in overseas

⁴⁴ *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120.

⁴⁵ Joyce Chia et al., *Defining Charity: A Literature Review* (Not-for-Profit Project, Melbourne Law School, 23 February 2011) <<http://tax.law.unimelb.edu.au/download.cfm?DownloadFile=560AEA8E-5056-B405-51449B7990F9ABEF>>, 47–50.

legislation will provide Australian courts (and charities) with the benefit from the guidance of decisions from those jurisdictions, and ensure that differences in language are not misinterpreted as intending differences in scope.

We also note that the disjunctive 'or' should be used instead of the 'and' preferred in some aspects of the recommendation in the Sheppard Inquiry (such as 'prevention and relief'), to ensure that the definition is not misinterpreted as requiring both aspects of prevention and relief.

PUBLIC BENEFIT (QUESTIONS 3–9)

Recommendation 4

The statutory definition should state, in relation to the 'public benefit' test, that regard should be had to the following principles.

In relation to whether there is 'benefit':

- (a) the benefit(s) may be tangible or intangible, direct or indirect, present or future;
- (b) the benefit(s) should be assessed in the light of contemporary needs and circumstances;
- (c) the benefit(s) may, where appropriate, be assessed against potential detriment(s); and
- (d) the inquiry is not into the merits of the methods or opinions of the organisation.

In relation to whether the benefit is for the 'public' or a 'sufficient section of the public':

- (a) the existence of wider benefits to the general community;
- (b) the nature of any limitations on the class to be benefited, and in particular:
 - (i) the extent to which the class of potential beneficiaries is open in nature;
 - (ii) whether such limitations are reasonably related to the nature of the charitable purpose; and
 - (iii) the practical need for such limitations.

Recommendation 5

The Australian Charities and Not-for-Profits Commission should be required to provide further guidance on the test of public benefit.

Recommendation 6

There should be no exception for the relief of poverty in relation to the public benefit test for 'poor relations'.

Recommendation 7

There should be no legislative reference to the requirement that a sufficient section of the public should be more than 'numerically negligible'.

Recommendation 8

The standard legislative definition of 'not-for-profit' should be incorporated as a requirement of charitable status. In addition, the definition should require that, where a benefit is conferred on a person other than in his or her capacity as a member of the public or a section of the public, any such benefit is reasonable in all of the circumstances, and is ancillary to or otherwise furthers the public benefit.

Recommendation 9

If the presumptions of public benefit are retained, they should apply equally to all the listed instances of charitable purposes, excepting the residual category of 'other purposes beneficial to the community'.

Recommendation 10

The definition of public benefit should provide that the purpose of a trust, society, or institution is a charitable purpose if it 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. The definition should further specify that prescribed corporate bodies under the *Native Title Act 1993* (Cth) are charitable.

Recommendation 11

To avoid doubt, reference should be made either in the legislation or in the Explanatory Memorandum to clarify that self-help groups and closed or contemplative religious orders may meet the public benefit test. There should not, however, be a requirement of intercessory prayer for closed or contemplative religious orders to be of public benefit.

APPROACH TO PUBLIC BENEFIT

As discussed in our literature review, the meaning of 'public benefit' has been controversial for many years.⁴⁶ As the Ontario Law Reform Commission observed, there is "considerable confusion ... over the meaning and significance of [the public benefit] test".⁴⁷

⁴⁶ Ibid 28–30.

⁴⁷ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 9, vol 1, 176.

In our view, therefore, there is considerable merit to clarifying the ‘public benefit’ test in a statutory definition, especially given its practical significance. In our view, the recent decision of the Upper Tribunal in England and Wales regarding ‘public benefit’ illustrates the complexity that surrounds the issue and the desirability of further statutory guidance.⁴⁸

However, it would be impossible to exhaustively define the concept. We agree, therefore, that much of the detail must necessarily be left to the ACNC, which should (as in the UK) provide guidance on this issue. We are, however, concerned about the current definition in the Charities Bill 2003. The first two limbs to the definition import new tests and concepts which do not reflect the current common law. We address this in detail below.

We recommend instead that some guiding principles be inserted to clarify the definition of ‘public benefit’. In relation to ‘benefit’, we draw these principles directly from the common law. In relation to ‘public’, we provide a clarifying conceptual framework that is broadly consistent with the approach taken by the common law, the Australian Taxation Office, and the Charity Commission of England and Wales. In relation to the prohibition against ‘private benefit’, we recommend the adoption of a provision similar to that in the legislation in Northern Ireland.

We express significant reservations about the desirability of removing the presumptions of public benefit in respect of the first three heads. The policy concerns about the presumptions are, to some extent, overstated. The presumptions perform some useful functions, the most important of which is ensuring the appropriate balance between judicial (and regulatory) scrutiny and the autonomy of charities. Further, the abolition of the presumptions is likely to divert considerable resources of the ACNC away from its core functions, and is likely to be politically counterproductive.

Finally, we address the practical role of the ACNC and charities in the implementation of the public benefit test.

DIFFICULTIES WITH THE PROPOSED TEST

The definition of public benefit in the Charities Bill 2003, with its three-part test of ‘aimed at achieving a universal or common good’, ‘has practical utility’, and ‘is directed to the benefit of the general community or to a sufficient section of the general community’, derives ultimately from the 1996 report on charities by the Ontario Law Reform Commission (‘OLRC’).⁴⁹

This report is of considerable intellectual interest and its analysis of the definitional issues is illuminating and original. However, this analysis departs from an orthodox understanding of

⁴⁸ *The Independent Schools Council v The Charity Commission* [2011] UKUT 421.

⁴⁹ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 9, vol 1, Chs 6 and 7; see Sheppard, Fitzgerald, and Gonski, *Sheppard Inquiry*, above n 20, 116–117.

the common law definition in its attempt to construct a ‘real’ definition of charity. Importantly, also, the report’s analysis is used merely to clarify and provide analytical guidance to the common law. The report itself recommends against a statutory definition, or if one is adopted, recommends only a codification of the *Pemsel* test or a “modestly improved” version of it.⁵⁰ It also expressly recommends against statutory reform of the ‘public benefit’ test.⁵¹

In particular, while the third element of the test is conventional,⁵² the first and second elements are not conventional parts of the common law definition of public benefit. Rather, the orthodox analysis is that while the term ‘public benefit’ must be understood as a whole, it comprises two constituent elements, namely the concept of ‘public’ and the concept of ‘benefit’.⁵³

The first two limbs therefore introduce novel concepts into charity law which are likely to cause difficulties. In relation to the idea of a ‘universal or common good’, we note that the OLRC here drew upon the idea of ‘basic human goods’ developed by the natural law philosopher John Finnis. These basic human goods are “our ultimate purposes; they are the ones that give all their right-thinking actions their point, making them intelligible to ourselves and others”.⁵⁴ Finnis includes the following as ‘basic human goods’: life,⁵⁵ knowledge, play,⁵⁶ aesthetic experience, friendship, religion and practical reasonableness.⁵⁷ The OLRC considered work should also be included on the list.⁵⁸

The OLRC then uses the term “common or universal goods” to capture these basic human goods. However, the term “common or universal goods” is novel to charity law and, so too, are Finnis’ concepts of basic human goods. We are concerned that this may lead to unintended consequences. In particular, Finnis’ expansive concept of ‘basic human goods’ may be misinterpreted as requiring that the ‘benefit’ of public benefit must be “common or universal” in a more lay sense of those terms. Another concern is that the philosophical

⁵⁰ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 9, vol 1, 164–166.

⁵¹ Ibid vol 1, 176.

⁵² Dal Pont and Petrow, *Law of Charity*, above n 7, [3.5].

⁵³ See, eg, Ibid [3.2]; *Income Tax and Fringe Benefits Tax: Charities* (Taxation Ruling, No TR 2011/4, 12 October 2011), [129].

⁵⁴ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 9, vol 1, 148.

⁵⁵ This is defined as ‘every aspect of vitality which puts a human being in good shape for self-determination’: John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980) 86. The OLRC saw hospitals, medical schools, famine relief, soup kitchens, and road safety laws as participating in this good: Ontario Law Reform Commission, *Report on the Law of Charities*, above n 9, vol 1, 148.

⁵⁶ This is defined as “performances which have no point beyond the performance itself, enjoyed for its own sake”: Finnis, *Natural Law and Natural Rights*, above n 55, 87.

⁵⁷ This is defined as the good of being able to “bring one’s own intelligence to bear effectively ... on the problems of choosing one’s action and life-style and shaping one’s character”: Ibid 88.

⁵⁸ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 9, vol 1, 146.

origin of the theory of ‘basic human goods’ is natural law theory, a school of philosophy that is not easily reconciled with the aims of a liberal state like Australia.

We express greater concern about the introduction of the second limb of ‘practical utility’. The OLRC defines this as requiring that the project “actually contribute to the improvement of the world”.⁵⁹ But the OLRC also acknowledges that there is “only limited explicit recognition in the case law and commentary of the practical utility of the project [as] a formally relevant consideration”.⁶⁰

In our view, a test of ‘practical utility’ adds nothing to a wider test of ‘public benefit’ unless it is interpreted in a way that we regard as problematic. To the extent that there is any discussion of ‘practical utility’ in the cases considered by the OLRC in its report, it is used only to exclude gifts that are considered entirely useless.⁶¹ Such gifts would be struck down anyway under a broader ‘public benefit’ test.

Our real concern is not that a ‘practical utility’ test would be moribund. Our real concern is that courts (and the regulator) would breathe life into such a test by interpreting it in problematic ways. For example, it may be interpreted as requiring some tangible benefit or welfare return on a utilitarian calculus. While such benefits or assessments have some role, they do not exhaust the public benefit test. For example, in *Aid/Watch*, the High Court found that the public benefit test was satisfied by a purpose that generated an intangible benefit, understood as a benefit in light of non-utilitarian thinking about the value of free speech in a liberal democracy. The public benefit test should be broad enough to reflect the diverse ways in which charitable purposes may be understood to make contributions to the good: some of those ways are captured by the notion of ‘practical utility’, but others are not. To insist on a test of ‘practical utility’ within the public benefit test is to risk taking a too narrow approach.

We therefore recommend that the statutory definition revert to the orthodox ‘public benefit’ test, which focuses on two limbs: ‘public’ and ‘benefit’.

BENEFIT

We address first the issue of benefit, as it is more straightforward. Although the *Charities Act 2006* (UK) is silent on the public benefit test, the definitions in Scotland and Northern Ireland do provide some further guidance on the notion of ‘benefit’, namely:

⁵⁹ Ibid vol 1, 182.

⁶⁰ Ibid vol 1, 182.

⁶¹ The OLRC cited, for example, a case in which a testator had left his “atrociously bad” artworks to the National Museum, and the judges there considered there was “virtual certainty on [the] balance of probabilities that no member of the public will ever extract one iota of education from the disposition”: *Re Pinion*; *Westminster Bank v Pinion* [1965] Ch 422.

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.⁶²

This provision addresses only one of the principles in the common law regarding benefit, namely the balancing of benefit and detriment. In our view, this gives undue prominence to the concept of detriment and does not meet the objectives of accessibility and clarification. We therefore recommend that this should be complemented in the statutory definition with some of the other key principles concerning the nature of ‘benefit’.

In relation to ‘benefit’, we suggest that the following principles drawn from the common law could usefully be stated in the definition:

- The benefit(s) may be tangible or intangible, direct or indirect, present or future;
- The benefit(s) should be assessed in the light of contemporary needs and circumstances;
- The benefit(s) may, where appropriate, be assessed against potential detriment; and
- The inquiry is not into the merits of the methods or opinions of the organisation.⁶³

These principles communicate the appropriate scope and approach to the understanding of ‘benefit’. The first principle directs attention to the breadth of the term, especially in relation to intangible and non-instrumental benefits. We have included reference to ‘future’ benefits to encompass benefits to future generations, an issue that has particular relevance for environmental charities.

The second principle is reflected in the common law, but deserves specific mention as a method of facilitating the modernisation of the law of charity. Charitable purposes emerge in specific historical and political contexts, and over time issues that were not considered charitable may become charitable. Further, the ‘benefit’ in particular activities may need to be re-assessed over time. For example, the common law has had difficulty in the past in characterising the intrinsic value of animal welfare and environmental protection, in a way that no longer accords with contemporary conceptions.

The third principle enables consideration of harm. The common law test, in our view, is less stringent than that specified in Scotland or Northern Ireland. As Dal Pont explains, the

⁶² *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 8(2); *Charities Act (Northern Ireland) 2008* (NI) s 3(3).

⁶³ Dal Pont and Petrow, *Law of Charity*, above n 7, [3.37]–[3.45].

balancing test must involve “all elements of benefit and harm, tangible or intangible, direct or indirect”, and where there is evidence of public benefit, “judges justifiably require clear evidence of harm or detriment”.⁶⁴ We therefore recommend that this principle should be restated to enable, rather than require, judges to consider potential detriment where appropriate.

The final principle directs attention to the underlying principle, discussed above, of respecting the autonomy and diversity of the sector in defining and achieving its purposes.

PUBLIC

The issues relating to the ‘public’ element are somewhat more difficult. There is no real problem if the benefit is to the general public, such as in the case of the conservation of the environment.

However, it is worth clarifying that a wider, often intangible or indirect, benefit to the public may co-exist with tangible or direct benefits to a smaller section of the public, as is reflected in the first paragraph of our recommendation defining ‘public’. As the Charity Commission of England and Wales note,

in the case of a professional body or learned society, membership may be restricted to members of a particular profession or to people who have certain academic qualifications. Where people are able to benefit from learned articles published by the society for example, or from the application of the knowledge gained by the professional from being a member of the professional body, the restriction on membership does not affect public benefit since membership is not the only, or main, means by which people generally can benefit.⁶⁵

The real difficulty concerns how to distinguish a ‘section of the public’ from a private group of individuals. The leading test in the common law in this regard is the *Compton-Oppenheim* test.⁶⁶ The first part of this test is that

if the quality that distinguishes the possible class of beneficiaries from other members of the community depends on a link by blood, contract, family, association membership or employment, that class does not constitute the public or an appreciably important class of the community to fulfil the element of public benefit.⁶⁷

⁶⁴ Ibid [3.43]–[3.44].

⁶⁵ The Charity Commission for England and Wales, *Charities and Public Benefit* (January 2008) <http://www.charity-commission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/public_benefit.aspx>, F8. See also Dal Pont and Petrow, *Law of Charity*, above n 7, [3.16].

⁶⁶ Named after the cases *Re Compton* (1945) 1 Ch 123; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

⁶⁷ Dal Pont and Petrow, *Law of Charity*, above n 7, [3.8].

The judges also stated that the size of the beneficiary class should not be “numerically negligible”.⁶⁸ This was the genesis of clause 7(2) of the Charities Bill 2003 (Cth). As Dal Pont explains, this leading test defines ‘public’ by what it is not, by focusing on whether the connecting link between the beneficiaries is “essentially impersonal or essentially personal”.⁶⁹

The test has been much criticised, principally on the ground of its artificiality, as the trust in that case could have been simply defined differently to capture the same beneficiaries.⁷⁰ The OLRC also thought it was “seriously misleading” because, if taken literally, it would exclude gifts in favour of any class identified by a relationship with any named person.⁷¹ However, Dal Pont notes that “no viable alternative” has been developed by the case law.⁷²

As long ago as 1945, one scholar considered it necessary to clarify the concept of ‘public’ by statute.⁷³ We agree that this aspect of the law is unduly complicated and that statutory guidance could usefully clarify the law.

Having reviewed the common law, proposed redefinitions, and the legislative definitions overseas, we consider that the following three principles provides a sounder conceptual framework for determining whether there is benefit to a ‘sufficient section of the public’. These accord with the thrust of the common law and encompass the scenarios addressed by *Taxation Ruling TR 2011/4* and the guidance of the Charity Commission of England and Wales. We emphasise that the principles are guides rather than hard-and-fast rules, so it will remain a “matter of fact and degree” as to whether the purpose is for the public benefit.⁷⁴ Nevertheless, the principles direct attention to the relevant factors that should guide the decision.

In our view, the focus of the enquiry should be on the nature of limitations on the class to be benefited. Three principles in particular should be borne in mind: 1) the extent to which the class of potential beneficiaries is open in nature; 2) whether such limitations are reasonably related to the nature of the charitable purpose; and 3) the practical need for such limitations.

The first principle reflects, in our view, the broader underlying policy motivating the *Compton-Oppenheim* test. It also encompasses the principle that membership of exclusive clubs can often lack ‘public’ benefit, and helps explain concerns about ‘exclusive’ religions.

⁶⁸ *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 306.

⁶⁹ Dal Pont and Petrow, *Law of Charity*, above n 7, [3.8].

⁷⁰ *Ibid* [3.11].

⁷¹ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 9, 179.

⁷² Dal Pont and Petrow, *Law of Charity*, above n 7, [3.12].

⁷³ John Brunyate, ‘The Legal Definition of Charity’ (1945) 61 *Law Quarterly Review* 268.

⁷⁴ *Taxation Ruling TR 2011/4*, above n 53, [139].

This aspect has been the focus of much of the case law, and is also the focus of the relevant provision in South Africa, which requires that the public benefit activity:

is for the benefit of, or is widely accessible to, the general public at large, including any sector thereof (other than small and *exclusive* groups)⁷⁵ (emphasis added).

The second principle, which is set out clearly in the Charity Commission's guidance and is implicit in the common law,⁷⁶ reflects the fact that the particular benefit (for example, advancing women's health, or women in the legal profession)⁷⁷ may dictate or justify limitations on the class to be benefited. In addition, we believe that the second principle explains why Indigenous, ethnic and cultural minorities are legitimate 'sections of the public' notwithstanding the lack of 'openness' of the group.

The final principle reflects the fact that limits on access may be required as a practical matter. This caters for the examples, cited in the recently released TR 2011/4, of "enrolment procedures of schools, referral policies of medical clinics, and borrowing rules of libraries".⁷⁸ It should also cater for situations where there are restrictions on access to facilities, where limitations are related to resource management, and to some extent for cases where fees are charged for services.

We note that the legislation in Scotland and Northern Ireland and Ireland expressly refer to the factor of fees in their definitions.⁷⁹ Section 3(7) of the *Charities Act 2009* (Ireland) also provides:

In determining whether a gift is of public benefit or not, account shall be taken of—

(a) any limitation imposed by the donor of the gift on the class of persons who may benefit from the gift and whether or not such limitation is justified and reasonable, having regard to the nature of the purpose of the gift, and

(b) the amount of any charge payable for any service provided in furtherance of the purpose for which the gift is given and whether it is likely to limit the number of persons or classes of person who will benefit from the gift.

The issue of fee-charging is unduly prominent in these statutory definitions. In our view, the question of fees is more accurately analysed as relevant to the openness of the class and the practical need for financial resources. We note that its appearance in the UK legislation results from a particular political context to deal with independent schools in the UK, and

⁷⁵ *Income Tax Act 1962* (South Africa), s 30(1)(c).

⁷⁶ The Charity Commission for England and Wales, *Charities and Public Benefit*, above n 65, F5, F6.

⁷⁷ *Victorian Women Lawyers' Association Inc v Commissioner of Taxation* [2008] FCA 983.

⁷⁸ *Taxation Ruling TR 2011/4*, above n 53, [143].

⁷⁹ *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 8(2); *Charities Act (Northern Ireland) 2008* (NI), s 3(3).

carries with it an attitude of suspicion towards such schools which is not helpful. We also note that on the question of fees there is a strong argument that the Charity Commission of England and Wales has departed from the common law.⁸⁰

We also do not prefer the Irish language of s 3(7)(a) dealing with limitations on classes (which deals with charitable gifts only). In our view, this provision is too vague to serve the purpose of clarification. It also imports language of ‘justification’ and ‘reasonableness’ which is not present in the common law and which misdirects attention from the critical question of whether the benefit is for a ‘sufficient’ section. Arguably, this language also encourages an inappropriate degree of judicial (and regulatory) scrutiny.

We also recommend the abolition of the common law exception from the public benefit test for the relief of poverty, which has resulted in an “anomalous” recognition of ‘poor relations’ or ‘poor employees’ cases.⁸¹ In this regard, we agree with the “tide of commentators ... against maintaining that exception”,⁸² and the Sheppard Inquiry.⁸³ The poor relations cases are anomalous and reflect a particular class structure and history that are not relevant to modern Australia. However, as discussed below, existing testamentary trusts established on this basis should be deemed to retain their charitable status.

We also consider that there is no need to refer to the “numerically negligible” test because, as the OLRC has suggested, the size of the class is not formally relevant. Rather, the small size may evidence the lack of openness of the class.⁸⁴

PROHIBITION OF PRIVATE BENEFIT

Another aspect of the ‘public’ benefit test is that it is used to exclude cases in which there is private profit or benefit. As Dal Pont explains, the distinction is between the intended beneficiaries and others who profit or benefit from the charity’s operations.⁸⁵ However, this rule does not exclude cases in which a personal benefit is incidental to the purposes of the gift or the association; does not preclude charitable organisations from making a profit; does not preclude charitable organisations from paying for its operating costs; and does not prevent charities from charging fees for its services.⁸⁶

To some extent, the issue of private benefit is covered by the requirement that a charity be ‘not for profit’, which is the subject of a separate consultation regarding the ‘in Australia’ requirements. We have already made a submission in regard to that definition in which we

⁸⁰ Mary Synge, ‘Poverty: An Essential Element in Charity After All?’ (2011) 70 *The Cambridge Law Journal* 649.

⁸¹ See Dal Pont and Petrow, *Law of Charity*, above n 7, [3.9].

⁸² Ibid [8.26].

⁸³ Sheppard, Fitzgerald, and Gonski, *Sheppard Inquiry*, above n 20, Rec 10.

⁸⁴ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 9, vol 1, 179–181.

⁸⁵ Dal Pont and Petrow, *Law of Charity*, above n 7, [3.23].

⁸⁶ Ibid [3.29]–[3.34].

recommended that the standard legislative definition of ‘not for profit’ continue to apply.⁸⁷ The standard definition defines a not-for-profit as:

a body that is not carried on for the purposes of profit or gain to its individual members and is, by the terms of the body’s constituent document, prohibited from making any distribution, whether in money, property or otherwise, to its members.⁸⁸

To enhance accessibility and clarity, the definition of not-for-profit should be included directly in the statutory definition of charity, rather than as a cross-reference.

To the extent that the standard legislative definition does not address the issue of private benefit, we consider that s 3(3)(b) of the *Charities Act 2009* (NI) is a good model, which provides that a gift shall not be of public benefit unless:

in a case where it confers a benefit on a person other than in his or her capacity as a member of the public or a section of the public, any such benefit is reasonable in all of the circumstances, and is ancillary to, and necessary, for the furtherance of the public benefit.

In our view, this covers the situations discussed above and is sufficiently flexible to cover the situation where (for example) a trustee is being paid excess remuneration and therefore infringes the proscription against private benefit. We consider, however, that the definition should not include the term ‘necessary’ for the furtherance of the public benefit. For example, charging fees may increase the operational efficiency of a charity without strictly being ‘necessary’ for furthering the public benefit.

PRESUMPTIONS FOR PUBLIC BENEFIT (QUESTIONS 7–9)

This is one of the more difficult aspects of statutory reform of the definition. We acknowledge that the competing arguments here are finely balanced, and that there is room for disagreement on the underlying issues of policy.

We agree that it is a fundamental principle that all organisations must benefit the public in order to attain charitable status. In principle, the requirement that all charities should be required to prove affirmatively public benefit furthers objectives of transparency and accountability. This demonstration of public benefit could ultimately promote public trust and confidence in the sector. As well, the abolition of the presumptions will ensure equality across the various heads of charity.⁸⁹

⁸⁷ Not-for-Profit Project, *Restating in Australia Conditions* (Submission to Treasury, 18 August 2011) <<http://tax.law.unimelb.edu.au/download.cfm?DownloadFile=8EAAADCC-5056-B405-51115658032B73B7>>.

⁸⁸ See, eg, *Electronic Transactions Act 1999* (Cth) s 3. The same definition is used in the mirror legislation of the States and Territories.

⁸⁹ Picarda, however, argues that “[c]harities are not equal animals and the need to have a ‘level playing field’ among disparate charities appears to have ideological origins”: Picarda, *The Law and Practice Relating to Charities*, above n 13, 38.

However, we also note that the presumptions serve useful functions which may be overshadowed by the rhetoric regarding their removal. It is necessary to put the legal effect of the presumptions in context.

First, all charities are still required to fulfil the requirement of public benefit. All the presumptions do is shift the evidential onus of establishing public benefit. The presumptions are merely tools designed to minimise the requirements of evidence and/or to provide for situations where there is no evidence. In this respect, they are helpful to courts in situations where the benefits are intangible, diffuse or yet to be realised, as will be the case with new charities.

Arguably, these presumptions are also helpful to courts in enabling them to determine public benefit in a context where there are likely to be political controversies rooted in diverse views of the good. In such cases, by relying on presumptions courts (and regulators) may more successfully operate in applying charity law without inflaming political sensitivities.

Second, the legal force of the presumptions may be overstated. Dal Pont suggests that they “may lack the full force of a legal presumption”.⁹⁰ The case law certainly suggests that judges have not been slow to consider competing evidence.

Indeed, some commentators go further in casting doubt on the presumptions. Picarda calls the presumptions “mythical”.⁹¹ A recent article in the *Cambridge Law Journal* argued that it was “misleading to suggest that public benefit, as understood in charity law, was ever presumed” and argued that the UK legislation did not in fact change the legal position as to public benefit.⁹² Similarly, Picarda notes that there is continuing controversy “as to whether, or to what extent, the public benefit element developed by the courts has been changed”, especially given the “elliptical and non-specificatory” nature of the language in the Act.⁹³

Third, the drive to oust the presumptions in the UK arose largely from a push from the National Council of Voluntary Organisations, principally in the context of independent schools, and also in its desire to emphasise ‘public benefit’ as the key to the definition of charity.⁹⁴ The desire to oust the presumptions was primarily a matter of symbolic and

⁹⁰ Dal Pont and Petrow, *Law of Charity*, above n 7, [3.38].

⁹¹ Picarda, *The Law and Practice Relating to Charities*, above n 13, 39B. In argument in the High Court in *Aid/Watch*, Heydon J also noted the “very fragile support” for the argument that the presumptions applied to the first three heads: *Commissioner of Taxation v Aid/Watch Incorporated* [2010] HCA Trans 154.

⁹² Synge, ‘Poverty’, above n 80, 649–650.

⁹³ Picarda, *The Law and Practice Relating to Charities*, above n 13, 39A.

⁹⁴ See especially Commission on the Future of the Voluntary Sector, *Meeting the Challenge of Change: Voluntary Action in the 21st Century* (National Council for Voluntary Organisations, 1996); National Council for Voluntary Organisations, *For the Public Benefit? A Consultation Document on Charity Law Reform* (2001). These are discussed in Chia et al., *Defining Charity: A Literature Review*, above n 45, 21–22.

political significance. Picarda describes how the Home Office and the Charity Commission “reached a hasty compromise” prior to the enactment of the *Charities Act 2006* (UK) in the form of a Concordat which included the principle that “an organisation which wholly excluded poor people from any benefits direct or indirect would not be established and operate for the public benefit”.⁹⁵ In our view, this process does not necessarily reflect “international best practice” (as stated at [80] in the Consultation Paper), but rather a particular political outcome. It also is directed to the ‘public’ aspect of the test, rather than the general benefit of education.

The other controversy regarding the public benefit test is that of religion. Historically, advancing religion was seen as obviously of benefit. This has, of course, changed with increasing secularism and pluralism of religions, and there are those who object to particular religions (or their status as religions) and atheists who object to religion in general. Nevertheless, we agree with the OLRC that “whether in fact God exists or not, the question of God’s existence is crucially important for everyone”.⁹⁶ Spirituality, in all its manifestations, is an important dimension of the human experience, although not everyone may choose to explore that dimension. In our view, there is clearly benefit in enabling individuals to explore that spirituality in the form of religions.

Indeed, an analogy may be drawn between the proper treatment of the advancement of religion and the treatment of political purposes in the recent *Aid/Watch* case: just as free political speech is of value to a liberal society and political purposes satisfy the public benefit test on that basis, so too is freedom of religion of value to such a society and religious purposes should be regarded as being for the public benefit on that basis.

Ultimately, the main argument for removing the so-called presumptions is the expressive effect of doing so. We note, however, that an incidental expressive effect of removing the presumptions is a scepticism towards parts of the charitable sector which may undermine support for the reform and harm relations between the government and the sector.

On a more practical note, we are also concerned that removing the presumptions may create an unnecessary compliance burden on the regulator as well as the charities. Recently, for example, the Charity Commission of England and Wales issued a 21-page decision on the ‘public benefit’ of Druidry.⁹⁷ The Druid Network reported it had taken over 5 years to gain recognition.⁹⁸ There is no doubt that this case imposed a significant burden not only on the Network but on the Commission itself. The recent litigation between the Independent Schools Council and the Charity Commission regarding the guidance on public

⁹⁵ Picarda, *The Law and Practice Relating to Charities*, above n 13, 38–39.

⁹⁶ Dal Pont and Petrow, *Law of Charity*, above n 7, 148.

⁹⁷ ‘The Druid Network’ (2011) 13 *Ecclesiastical Law Journal* 127.

⁹⁸ AFP, ‘Druidry Recognised as Religion in UK’, *ABC News*, 2 October 2010 <<http://www.abc.net.au/news/stories/2010/10/02/3028033.htm>>.

benefit is another recent example of the time and energy devoted to this issue.⁹⁹ Despite this energy, the issue of public benefit relating to independent schools is still unclear, and indeed the matter is still unsettled, with the parties returning for a further hearing before the Tribunal on 22 November 2011.¹⁰⁰ It is clear that the Charity Commission has directed extensive resources into producing guidance, conducting public benefit assessments and surveying the public and charities on the public benefit requirement.

There is a real question whether undue emphasis on the public benefit test is the best use of the new regulator's resources. We note that the Charity Commission of England and Wales in 2009-2010 spent £32.7m and had 466 staff.¹⁰¹ In comparison, the ACNC's budget is \$53.6 million over four years, and much of that will necessarily be devoted to start-up costs.

We note that the Consultation Paper states at [85] that the removal of the presumption did not cause significant issues in England and Wales. However, we are not sure that this is entirely accurate. There has been considerable concern about the Charity Commission's interpretation of the public benefit test, which has inspired academic criticism,¹⁰² also litigation and certainly scepticism from parts of the sector. Further, we note that the Charity Commission had assessed public benefit as a matter of practice at registration before the presumptions were ousted.

We also note that other jurisdictions have chosen differently. Ireland, for example, has expressly retained a presumption for the public benefit of religion, and requires in addition that a contrary determination can only be made with the consent of the Attorney-General.¹⁰³ Further, it has been reported recently that the Northern Ireland executive is considering applying the presumption specifically to religion and possibly educational purposes to meet concerns from the sector.¹⁰⁴

Although we acknowledge, therefore, the arguments in favour of removing the presumptions (to the extent that they exist), we are not convinced that there is a compelling

⁹⁹ *The Independent Schools Council v The Charity Commission* [2011] UKUT 421.

¹⁰⁰ *Fee-charging Schools Public Benefit Case Returns to Upper Tribunal* (1 December 2011) Third Sector Online <http://www.thirdsector.co.uk/bulletin/third_sector_governance_bulletin/article/1107421/fee-charging-schools-public-benefit-case-returns-upper-tribunal/>.

¹⁰¹ Charity Commission of England and Wales, *Annual Report* (2010 2009) <http://www.charitycommission.gov.uk/Library/about_us/Charity_Commission_Annual_Report_09_10.pdf>, 14–15.

¹⁰² See, eg, Peter W Edge and Joan M Loughrey, 'Religious Charities and the Juridification of the Charity Commission' (2001) 21 *Legal Studies* 36; Picarda, *The Law and Practice Relating to Charities*, above n 13, 39A–39F; Synge, 'Poverty', above n 80.

¹⁰³ *Charities Act 2009* (Ireland) s 3(4), (5). This in fact represented a relaxation, as previously gifts for religion were conclusively presumed to be for the public benefit: *Charities Act 1961* (Ireland) s 45.

¹⁰⁴ David Ainsworth, *Public Benefit Quandary in Northern Ireland* (1 November 2011) Third Sector Online <<http://www.thirdsector.co.uk/Resources/Governance/Article/1101287/Public-benefit-quandary-Northern-Ireland>>.

case for their removal. It may, instead, be preferable to clarify the strength of the presumptions. For example, it could be stated that, a court (and the regulator) may assume that a listed charitable purpose is also for the public benefit unless there is evidence to the contrary.

If these presumptions are retained, we consider that logically the presumptions should apply equally to all the charitable purposes in the statutory list, excepting the residual head of 'other purposes beneficial to the community'.

ADMINISTERING THE PUBLIC BENEFIT TEST (QUESTION 8)

As noted above, there will remain a need for further, more detailed, guidance on the application of the public benefit test. This should be a function of the ACNC, as it is overseas.

As discussed above, we are not convinced that the ACNC should emphasise enforcement of the 'public benefit' test to the same extent as appears to have occurred in England and Wales. However, the ACNC should have sufficient powers to require further information if it considers that the public benefit test may not be met, which it will be best placed to do as presumably such charities will report to the ACNC.

INDIGENOUS ORGANISATIONS (QUESTION 4)

As discussed above, the 'section of the public' should include class limitations that are reasonably related to charitable purposes, including Indigenous, ethnic and cultural minorities. This would distinguish between trusts and associations which, for example, aim to relieve societal disadvantage of marginalised groups, and trusts and associations that unfairly discriminate against particular races or groups. This is preferable to the distinction suggested elsewhere of distinguishing between them on the basis of motivation.¹⁰⁵

While most Australian courts have upheld trusts and associations dealing with Indigenous communities,¹⁰⁶ it is sensible for the statutory definition to put the matter beyond dispute. This is especially the case if the exception for the relief of poverty in relation to the public benefit is removed, as recommended above.¹⁰⁷

¹⁰⁵ Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Charity Law and Voluntary Organisations* (1976), [42]–[43]; Ontario Law Reform Commission, *Report on the Law of Charities*, above n 9, 217.

¹⁰⁶ See generally Fiona Martin, 'Is the Aim of Preserving and Enhancing Indigenous Culture a Charitable Purpose?' (2007) 6 *Indigenous Law Bulletin* 11; Fiona Martin, 'The Legal Concept of Charity in the Context of Australian Taxation Law: The Public Benefit and Commercial Activity, Important Issues for Indigenous Charities' (2010) 25 *Australian Tax Forum* 275.

¹⁰⁷ See especially Fiona Martin, 'Prescribed Bodies Corporate Under the Native Title Act 1993 (Cth): Can They Be Exempt from Income Tax as Charitable Trusts?' (2007) 30 *University of New South Wales Law Journal* 713, 725–726.

This can be done by providing that the ‘section of the public’ test does not automatically exclude trusts and organisations that benefit people connected by blood ties, in equivalent terms to section 5(2) of the *Charities Act 2005* (NZ):

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[.]

Such an organisation is still required to prove, however, benefit to a sufficient section of the public in the ordinary way.

Further, again along the lines of the legislation in New Zealand,¹⁰⁸ the statutory definition should clarify that prescribed bodies corporate under the *Native Title Act 1993* (Cth) should be regarded as charitable. Currently, such prescribed bodies corporate must be constituted by groups of native title holders who will commonly be linked by blood, which may be interpreted as infringing the *Compton-Oppenheim* test. This is an issue of some practical import and would further Indigenous community development.¹⁰⁹

SELF-HELP GROUPS AND CLOSED OR CONTEMPLATIVE RELIGIOUS ORDERS

Section 5 of the *Extension of Charitable Purposes Act 2004* (Cth) deems “open and non-discriminatory self-help groups” to be for the public benefit. It also deems that closed or contemplative religious orders that regularly undertake prayerful intervention at the request of the public satisfy the public benefit test.

In relation to self-help groups, this legislation clarifies when self-help groups are sufficiently open to the ‘public’ to be charitable. Section 5(2) of the *Extension of Charitable Purposes Act 2004* (Cth) specifies that the group is for the public benefit if it: is established to assist individuals affected by a particular disadvantage or discrimination, or a need arising from a disadvantage or discrimination that is not met; is made up of, or controlled by, individuals affected by the disadvantage or discrimination; all of its membership criteria relate to its purpose; and its membership is open to any individual who satisfies the criteria.

In our view, all of these elements are present in the overall guidance on the public benefit test proposed above. If anything, the present test may be too restrictive. For example, on its face it would appear to exclude the possibility of requiring, as a condition of membership, pragmatic matters such as a minimal membership fee or restrictions based on locality. We do not therefore consider it necessary to replicate this provision in the general statutory definition, but to avoid doubt it is helpful to include a clarifying provision or example.

¹⁰⁸ The legislation specifically refers to the charitable status of marae: *Charities Act 2005* 2005 (NZ) s 5(2)(b).

¹⁰⁹ Martin, ‘Prescribed Bodies Corporate Under the Native Title Act 1993 (Cth): Can They Be Exempt from Income Tax as Charitable Trusts?’, above n 107.

In relation to closed or contemplative religious groups, we agree with the comments by Gobbo J in *Crowther v Brophy* [1992] 2 VR 97 about the appropriateness of the test requiring intercessory prayer as a requirement of public benefit, which derives from the English case of *Gilmour v Coats*.¹¹⁰ In that case, his Honour stated:

It is at least open to doubt whether *Gilmour v Coats* represents the law in Australia where there has been a number of decisions recognising that the contemplative life may convey sufficient elements of public benefit to make assistance for the pursuit of such life charitable within the traditional description of charity [footnotes omitted]. Lord Simonds in *Gilmour v Coats*, at 446, spoke of the court requiring proof that the particular purpose satisfies the test of benefit to the community and said that the gift to the contemplative order was a purpose manifestly not susceptible of such proof. With great respect to that distinguished judge, it may be that the test of the success of intercessory prayer is an inappropriate test and that the enhancement in the life, both religious and otherwise, of those who found comfort and peace of mind in their resort to intercessory prayer was a more appropriate consideration to adopt.¹¹¹

We agree with the critiques, discussed at pages 51–52 of our literature review, of the decision in *Gilmour v Coats* as failing to recognise the core benefit of religion in terms of spirituality, and of inappropriately favouring some types of religion.¹¹² We therefore consider that, while it may be appropriate to clarify that closed or contemplative religious orders may satisfy the public benefit test, this should not depend upon the undertaking of intercessory prayer.

PURPOSES AND ACTIVITIES (QUESTIONS 1, 10–13)

DOMINANT PURPOSE (QUESTION 1)

Recommendation 12

The definition should state that a charity must have a purpose or purposes that are charitable only. To avoid doubt, however, it should be specified that this does not preclude the existence of other purposes that further, are in aid of, or are ancillary or incidental to these charitable purposes.

Both the terms ‘exclusive’ and ‘dominant’ are potentially misleading in this context. The term ‘exclusively charitable’ is apt to convey to the layperson a higher threshold than the common law actually requires. As Dal Pont explains in detail in Chapter 13 of his textbook, *The Law of Charity* (2010), the judicial interpretation of the phrase ‘exclusively charitable’ “is

¹¹⁰ *Gilmour v Coats* [1949] AC 426.

¹¹¹ *Crowther v Brophy* [1992] 2 VR 97, 100.

¹¹² See also Dal Pont and Petrow, *Law of Charity*, above n 7, [10.47].

not as unyielding as may appear on its face”.¹¹³ In particular, non-charitable purposes that are merely incidental and ancillary do not violate the ‘exclusively charitable’ requirement.

It is for this reason that alternative language, such as ‘main’, ‘dominant’, ‘chief’, and ‘primary’ has been used by judges in describing the test. No substantive difference is intended by this change in language, contrary to what is suggested at [94] of the Consultation Paper. The term ‘dominant’ appears to have been adopted by the Sheppard Inquiry merely as a more accessible term.

However, the term ‘dominant’ as commonly used in tax law may itself convey the misleading impression that only a majority of the purposes need be charitable. It is for this reason that *Taxation Ruling TR 2011/4* uses the language of ‘sole’ purpose, although this is misleading for the same reasons as the term ‘exclusive’ (and may also convey the impression that only one purpose is allowed, although there may be multiple charitable purposes).

For these reasons, we prefer the language used in the legislation of the United Kingdom or Ireland that a charity must be established for charitable purposes ‘only’.¹¹⁴ However, to ensure clarity, we recommend that the statutory provision should clarify that this does not preclude a charity from having purposes that further, are in aid of, or are ancillary or incidental to the charitable purposes.¹¹⁵

ACTIVITIES GENERALLY (QUESTIONS 10 & 11)

Recommendation 13

The statutory definition should not refer to the activities of a charity. However, if such an activities test is included, it should accurately reflect the current common law principles.

The Consultation Paper inaccurately states in [93] that under the common law both activities and purposes of an institution are considered in determining charitable status. The true position is, as Dal Pont states, that “the purposes of an association ... determine its charitable status”, and indeed that “an activity, taken in the abstract, can rarely be deemed charitable or non-charitable”.¹¹⁶

As Dal Pont then explains, activities are relevant in three main circumstances: 1) where there is doubt that the main object is really the main purpose of the association or a stated subsidiary object may be the main purpose; 2) where the rules do not indicate with clarity

¹¹³ Ibid [13.1].

¹¹⁴ *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 7(1)(a); *Charities Act 2006* (UK) c 50 s 1(1)(a); *Charities Act (Northern Ireland) 2008* (NI), s 1(1)(a); *Charities Act 2009* (Ireland), s 2, “charitable organisation.”

¹¹⁵ Sheppard, Fitzgerald, and Gonski, *Sheppard Inquiry*, above n 20, Recommendation 3.

¹¹⁶ Dal Pont and Petrow, *Law of Charity*, above n 7, [13.19].

the main object(s); and 3) if an association lacks a written constitution or rules or these are informal and incomplete.¹¹⁷

This is not merely a legal quibble, because as Cullity forcefully points out, the “distinction between ends and means is fundamental in the law of charity.”¹¹⁸ As stated above, we also consider it a basic principle that it is not generally for the courts (or regulators) to assess the quality or merits of the means by which a charity should further its objects. Practically, too, in the case of the regulator, its function will often be to register charities at their inception, when they have not carried out any activities.

Proposed section 4 of the Exposure Draft of the Charities Bill 2003 defined a charity as one which (among other things) “does not engage in activities that do not further, or are not in aid of, its dominant purpose”. On face value, this phrase is somewhat inscrutable. It appears to have originated in Recommendation 5 of the Sheppard Inquiry, namely that “the activities of a charity must further, or be in aid of, its charitable purpose or purposes.”¹¹⁹

In coming to that recommendation, the Sheppard Inquiry relied partly on the statement by the ATO in its then Ruling that “[f]inding an institution’s sole or dominant purpose involves an objective weighing of all its features. They include its constitutive or governing documents, its activities, policies and plans, administration, financial history and control, and any legislation ...”¹²⁰ It did so even though it acknowledged the ATO’s ruling did not follow the ‘orthodox’ approach outlined in the textbooks.

The Sheppard Inquiry came to that conclusion also in part because the “ATO’s approach seems to have an element of practicality and thus common sense about it”, and because it could not see why a “short investigation of the nature of the activities of an organisation may not be beneficial”.¹²¹ The Inquiry’s recommendation came even though submissions to the Inquiry “argued overwhelmingly that an organisation’s purpose should be the prime determinant of its charitable status.”¹²²

We note that the current *Taxation Ruling TR 2011/4* more accurately reflects the law. It states:

¹¹⁷ Ibid [13.19].

¹¹⁸ M C Cullity, ‘The Myth of Charitable Activities’ (1990) 10 *Estates, Trusts & Pensions Journal* 7.

¹¹⁹ Sheppard, Fitzgerald, and Gonski, *Sheppard Inquiry*, above n 20, 109.

¹²⁰ Ibid 102, citing TR 1999/D21, paras 24 and 105–106.

¹²¹ Ibid 109.

¹²² Ibid 104.

[Where] the objects or objectives in the constituent documents of an institution indicate it has a sole* purpose which is charitable, but its activities and other relevant factors indicate the substance and reality is to the contrary, the institution will not be charitable. ...

Where the constituent documents of an institution indicate it has been established solely for a charitable purpose, it can be charitable even if its activities are not intrinsically charitable. In these circumstances, the enquiry centres on whether it can be said that the activities are carried on in furtherance of the institution's charitable purpose.¹²³

We see no reason to unsettle this principle of law. If there is concern about activities that reveal a non-charitable purpose, the current law already enables activities to be taken into account, as discussed above. We also expect that the regulator will require publication of reports that will include activities, and to that extent the promotion of public trust and confidence will be strengthened. We see therefore no reason to include an 'activities' test in the legislation. The inclusion of such a test not only muddles fundamental concepts of charity law but is likely to induce confusion in the sector. However, if such a test is included, it should accurately reflect the current common law principles.

Finally, we also note that the example given of Ireland 'strengthening' the definition of charity (at [98]) is misleading. The Irish requirement that an organisation can 'promote a charitable purpose only' simply reflects the statutory language used to express the 'exclusivity' test, discussed above. The requirement that a charity must apply all its property (both real and personal) in furtherance of a charitable purpose simply reflects the current 'non-profit' requirement that prohibits distribution of private profit.

POLITICAL PURPOSES (QUESTIONS 12 & 13)

Recommendation 14

The statutory definition should not include clause 8 of the Exposure Draft of the Charities Bill 2003 (Cth), or any other express reference to political purposes or activities. In any event, there should be no reference whatsoever prohibiting 'political' or other causes.

The Consultation Paper recommends removing paragraph (c) of clause 8 of the Charities Bill 2003, which provided that the purposes of attempting to the change the law or government policy was a 'disqualifying purpose'. We would prefer that the entire clause be omitted from the statutory definition.

* This term is cross-referenced to the definition of 'sole purpose' in *Taxation Ruling TR 2011/4*. This terminology is explained above.

¹²³ *Taxation Ruling TR 2011/4*, above n 53, [32]–[33].

The High Court in *Aid/Watch* clearly affirmed that there is no rule against political purposes in Australian law.¹²⁴ Clause 8 is intended to reflect this rule, and should therefore be removed as inconsistent with the decision in *Aid/Watch*.

Removal of the entire clause does not, however, mean that a purpose of advocating a political party or cause, or supporting a candidate for political office, will be necessarily charitable. Indeed (with the possible exception of the ‘political cause’) these are unlikely to be charitable because of a lack of public benefit. However, they are not separately ‘disqualified’.

As a matter of policy, we consider that it is legitimate for charitable organisations to identify, for example, political parties or candidates that support their policies, and to (for example) have politicians speak at their functions on debates that affect their organisation. Charities should be able to engage in and enrich Australian political discourse, and such engagement will enrich our democracy. Indeed, charities are often best placed to speak for the marginalised and to reflect on the consequences of government policies. We have recently explored these issues in detail in our forthcoming article.¹²⁵ We discuss there, in particular, the tension between the constitutional and fundamental principles of freedom of expression and representative democracy (among others) and the rule against political purposes.

We note the suggestion at [113] of the Consultation Paper that charities engaging in political activities could breach electoral law. These concerns, if valid, should be regulated by electoral law, not charity law. That is the more appropriate context for considering such policy concerns.

We also note the suggestion in [114] of the Consultation paper that ‘cause’ be amended to ‘political cause’. As indicated above, this could be read widely to embrace many social issues which happen to be controversial, such as climate change. This element should not be included in any version of the statutory definition.

ILLEGAL PURPOSES AND ACTIVITIES

Recommendation 15

The statutory definition should not refer to illegal activities or purposes.

¹²⁴ *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42, [48].

¹²⁵ Joyce Chia, Matthew Harding and Ann O’Connell, ‘Navigating the Politics of Charity: Reflections on *Aid/Watch v Commissioner of Taxation*’ (2011) 35 *Melbourne University Law Review* (forthcoming). This is attached to the submission.

Charity engaging in conduct constituting serious offence

Although the Consultation Paper does not specifically ask a question about illegal activities or purposes, it does discuss at [115]-[117] the possibility of removing from the core definition the requirement that a charity not engage in conduct constituting a serious offence (s 4(e)).

We agree that this provision is seriously misguided and should be removed, for several reasons. First, as noted by the Consultation Paper, there is confusion between the purposes and activities of a charity. While there is some case law suggesting that illegal purposes will not be charitable (as discussed below), there is no rule currently that if a charity engages in illegal activities it necessarily loses its status as a charity. As the ATO's Ruling states:

The issue turns on purpose. The mere fact that an institution or its employee has breached a law would not, in itself, show that the institution has a non-charitable purpose. Instances of illegality in relation to occupational health and safety, employee entitlements and regulatory requirements would be unlikely to point towards a non-charitable purpose. Toward the other extreme would be a planned and coordinated campaign of violence.¹²⁶

However, engagement in illegal activities may evidence a non-charitable purpose, or be evidence of harm that may outweigh any public benefit.

Second, if an activity is illegal, then the appropriate punishment for that activity is through the law governing the offence itself, and not through charity law. If, for example, charity trustees have defrauded the charity or others, then the appropriate reaction is to remove the charity trustees and punish them, rather than disqualifying the charity itself from charitable status. In such a situation, the charity—its donors, stakeholders, and beneficiaries—may be innocent victims of such fraud. In this case, it would be more appropriate for the ACNC to have powers to sanction such conduct, including the sanction of deregistration.

Third, in the modern world, there are a plethora of offences which vary greatly in seriousness. Such a provision is, however, 'black and white', recognising no shades of seriousness, and therefore disqualification from charitable status may well be a disproportionate response to a particular offence.

Illegal activity as a disqualifying activity

We disagree, however, with the suggestion in the Consultation Paper that this requirement might be shifted to a clause regarding 'disqualifying activity'.¹²⁷ This is in line with our view,

¹²⁶ *Taxation Ruling TR 2011/4*, above n 53, [270].

¹²⁷ In this regard, we note that this appears to derive from the Sheppard Inquiry's recommendation that some types of activities should be disqualifying, including activities that are "illegal, contrary to public policy, or that promote a political party or a candidate for political office": Sheppard, Fitzgerald, and Gonski, *Sheppard*

expressed above, that there should be no reference to activities in the statutory definition. In substance, this will have the same adverse effects as above: namely, it will introduce a new requirement into charity law that muddles the distinction between purposes and activities; it fails to recognise that illegality should be dealt with through the provisions specific to the offence; and it is a black and white rule that will likely trigger a disproportionate response.

Instead, we consider that the statutory definition should not include any references to illegal activities. Instead, illegal activities can continue to be considered as relevant to the existence of a charitable purpose and public benefit.

Illegal purpose as a disqualifying purpose

While the Consultation Paper does not raise this particular issue, we are concerned about the existing provision in the Charities Bill that provides that the purpose of engaging in unlawful activities is a disqualifying purpose (s 8(1)). Although the drafting of this appears narrower than the common law rule against illegal purposes, we still express concerns about reflecting this rule in the statutory definition.

Our concerns about this are twofold. First, the scope and existence of this rule in the common law is far from clear. The cases cited for this position at [269]-[270] of *Taxation Ruling TR 2011/4* do not, in our view, support such a blanket rule.¹²⁸ Nor do the cases cited by Picarda.¹²⁹ The only clear expression of this rule is in a very short passage in *Re Collier (deceased)* [1998] 1 NZLR 81, which was free of authority. In our view, the better analysis is (as Dal Pont analyses it) that illegal purposes are better understood as offending the rule against public policy.¹³⁰

Second, there is a policy issue about the breadth and appropriateness of such a rule. As noted above, there are many shades of illegality in the contemporary world, not of all which necessarily offend against public policy. Further, there are at least some cases in which the

Inquiry, above n 20, 109, Rec 5. There is surprisingly little discussion of these rules within the report itself, however.

¹²⁸ *Re Pinion; Westminster Bank v Pinion* [1965] Ch 85, 105; *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382. The former merely refers to an argument by counsel that a school for pickpockets would fail because of the rule against public policy or morality. In the latter, it was expressly held that the trust had not in law performed any illegal activities. Its reference to illegal activities (rather than purposes) appears to refer to the principle, stated above, that illegal activities may be evidence of a non-charitable purpose.

¹²⁹ Picarda, *The Law and Practice Relating to Charities*, above n 13, 451. The author cites here only two 19th-century cases which expose the underlying policy issues discussed above. In one, a bequest to make seats for poor people to beg (when begging was a criminal offence) was not charitable; in the other, a bequest to release imprisoned debtors was held not to be charitable. The other cases in this passage refer to the rule against public policy.

¹³⁰ Dal Pont and Petrow, *Law of Charity*, above n 7, [3.46].

rule might infringe against legitimate causes of law reform. A historical example is that of advocacy for the abolition of slavery. A contemporary example is that of abortion, which remains illegal in parts of Australia.¹³¹ An organisation that, for example, promotes women's health and reproductive rights, including providing advice on abortions, may well infringe this rule. The rule therefore is potentially in conflict with the decision of the High Court in *Aid/Watch* which recognised the need for the public to debate important issues, including those involving changes to the law, as an essential part of representative democracy.

The same concern applies even more strongly, however, to the rule against public policy. The scope of 'public policy' is potentially broad, although so far courts have wisely been reticent to invalidate gifts on this ground. There is certainly potential that advocacy of controversial viewpoints may be considered to contravene such a rule, and that this rule could be used to stifle a healthy and diverse civil society.

We consider that it is more appropriate to consider questions of illegality as raising questions about public policy that are best considered in the overall context of the public benefit test. This enables a more contextual assessment of the strength and value of the public policy involved, directed to the ultimate question of whether it benefits the public. We do not consider, however, that is necessary to include specific reference to such issues in the statutory definition.

PARTICULAR TYPES OF BODIES (QUESTION 2, 14–15)

GOVERNMENT BODIES (QUESTION 15)

Recommendation 16

Clause 4(1)(f) of the Exposure Draft of the Charities Bill 2003 (Cth) should be omitted. However, if some reference to government bodies is desired, the reference should be to 'government bodies' only, or should be confined by including a specific legislative test of 'control'.

The distinction between charitable and government purposes is an area that lacks clarity in the common law. As Dal Pont states, "[a]ny clear charity-government divide is no longer", particularly with the outsourcing of government functions to charities, especially in the form of detailed tenders. This contextual shift, together with the removal of the doctrine against political purposes, means "there is in modern law far less compulsion to distinguish charitable from governmental purposes".¹³² Although the distinction was not "obliterate[d]"

¹³¹ See generally Victorian Law Reform Commission, *Law of Abortion: Final Report* (March 2008) <http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Completed+Projects/Abortion/LAWREFORM+-+Law+of+Abortion_+Final+Report>, Ch 2.

¹³² Dal Pont and Petrow, *Law of Charity*, above n 7, [2.21].

by the High Court in *Central Bayside*, the ruling “suggests a porosity in the relevant concepts”.¹³³

One of our Chief Investigators, Matthew Harding, has written a detailed article on distinguishing government from charity, which is attached.¹³⁴ This article argues that the feature that best distinguishes charity from government in the case law is a concept of ‘voluntarism’, namely the pursuit of the public good individually and autonomously, as distinct from administration, in which the public good is pursued collectively by the community as a whole through deliberative and democratic processes of the State.¹³⁵ A charity may be established by statute, receive most of their funding from government, align their objectives with those of government, and seek to achieve outcomes specified by government contracts, and yet ultimately retain its autonomy in the sense that the trustees or directors are free to choose not to follow government objectives or policies.

The correct policy position, in our view, is to recognise that there are, and will continue to be, shifts in the relationship between government and charity over time. Historically, the modern State has taken over many of the functions first performed by charities, which has increased the overlap between government and charitable purposes. Further, there has been a shift towards a contracting relationship between government and the sector which has been driven, in large part, by government. In our view, therefore, the distinction between government and charity is best regarded not as an analytical distinction but rather as a contextual distinction shaped by shifting attitudes and conceptions of the role of State and society. Therefore, the distinction between government and charity should, if drawn at all in the statute, be drawn loosely and in favour of charitable status.

There are several possible options for dealing with this attenuated distinction. One option is not to refer to the distinction at all in the statute. This is the position taken by most of the legislative definitions in the United Kingdom and Ireland. In practice, it is difficult to think of a not-for-profit organisation that exhibits such a high level of ‘governmental’ features as to fail the test in *Central Bayside*. Indeed, if the government desired control to that degree, it should openly establish a government body. We note also that tax exemptions commonly cover government bodies and public lands in any event,¹³⁶ so as a practical matter this distinction is less important.

A second option is a minimalist version which would exclude only ‘a government body’ from the definition of the charity. In the facts of a particular case, it could be argued that the level of identification between a particular organisation and the government was so close that it

¹³³ Ibid [2.22].

¹³⁴ Matthew Harding, ‘Distinguishing Government from Charity in Australian Law’ (2009) 31 *Sydney Law Review* 559.

¹³⁵ Ibid 572.

¹³⁶ See, eg, *Income Tax Assessment Act 1997* (Cth), s 50.25.

was, in fact, a ‘government body’ for practical purposes. This would seem to accord with the reasoning in *Central Bayside*, which required a much higher degree of control over management and funding before the body could be seen to be ‘governmental’ rather than ‘charitable’. Alternatively, a legislative definition of ‘government entity’, such as that in s 41 of *A New Tax System (Australian Business Number) Act 1999* (Cth) could be used, although we would prefer that the definition be expressly stated rather than through a legislative cross-reference. We note, however, that this definition should make express reference to local government.

Alternatively, one could be more precise about what might constitute effective ‘control’ by the government. An obvious legislative precedent would be the concept of ‘controlled entities’ in the *Corporations Act 2001* (Cth). Section 50AA of that Act deems an entity to ‘control’ a second entity if the “first entity has the capacity to determine the outcome of decisions about the second entity’s financial or operating policies”.¹³⁷ This is a matter determined on the facts and examines the level of control in practice. This would seem to correspond with the High Court’s view that *Central Bayside* had retained control over its management and funding allocation to a sufficient extent that distinguished it from a government body.

A further example is provided by the Scottish legislation, which excludes a charity where “its constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities”.¹³⁸ In New Zealand, the *Income Tax Act 2007* (Cth) uses the concept of ‘council-controlled organisations’ as a way of distinguishing organisations controlled by local government for the purposes of access to tax exemptions.¹³⁹ These more stringent definitions are analogous to the threshold required to be a ‘subsidiary’ under Div 6 of Pt 1.2 of the *Corporations Act 2001* (Cth). A similar definition is provided in relation to the payroll tax exemption for non-profit organisation in s 48(4) of the *Payroll Tax Act 2007* (NSW), which excludes educational companies controlled by an educational institution.¹⁴⁰ These are other possible legislative precedents.

PEAK BODIES (QUESTION 2)

In our view, it is desirable to clarify the charitable status of peak bodies in the proposed definition. First, as already discussed, the purpose of a statutory definition is to provide greater clarity and accessibility. There seems no good reason to leave this particular issue

¹³⁷ *Corporations Act 2001* (Cth).

¹³⁸ *Corporations Act 2001* (Cth) s 7(4).

¹³⁹ This is defined in s 6(1) of the *Local Government Act 2002* (NZ) in terms of a majority of voting rights or power to appoint directors and managers.

¹⁴⁰ An ‘educational institution’ is defined as one providing education beyond secondary level.

buried in the common law, inaccessible to the layperson.¹⁴¹ Second, although the decision of the Administrative Tribunal is useful, it is not conclusive. It is a decision of a tribunal, not a superior or a federal court. Third, the decision is inevitably fact-specific.

As discussed above, the purposes of peak bodies and also infrastructure organisations should be expressly recognised as a charitable purpose, namely in its promotion of volunteering, the voluntary sector or the effectiveness or efficiency of charities.¹⁴² Recommendation 1 therefore includes our response to this question.

COLLABORATIVE ARRANGEMENTS (QUESTION 14)

Recommendation 17

The legislation should not refer to disqualifying types of entities.

Recommendation 18

The legislation should empower the ACNC with a discretion to treat some entities as forming part of a related charity or as a single charity.

We consider that clause 4(1)(f), which excludes from the scope of the term ‘entity’ particular entities including individuals, partnerships, and superannuation funds, is unnecessary and confusing, and should be removed. There is no reference in the 2003 Bill to “institutions”, a term which does feature in the income tax legislation. This term has acquired a particular meaning in tax law. *Taxation Ruling TR 2011/4* summarises the position as follows:

An institution is an establishment, organisation or association, instituted for the promotion of an 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. However it involves more than mere incorporation. A structure with a small and exclusive membership that is controlled and operated by family members and friends and undertakes limited activities is not an institution.

This imposes a limitation on newly formed bodies. It may be desirable to address this in the definition of charity or to ensure the references in the tax legislation are changed to entity.

The Sheppard Inquiry’s purpose in including the tax definition of “entity” in s 960-100 of *Income Tax Assessment Act 1997* (Cth) was to provide a “clear and flexible” term that

¹⁴¹ We note that although the decision in *Social Ventures Limited v Chief Commissioner of State Revenue* [2008] NSWADT 331 is available on the website of the Tribunal, it is not reported in any law reports, is not available in Austlii, and is not indexed by either major law publisher.

¹⁴² *Charities Act 2006* (UK) c 50 c 50, s 2(3)(c)(ii); *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 7(3)(b)(ii); *Charities Act (Northern Ireland) 2008* (NI), s 2(3)(c)(ii).

covered the range of possible legal types of entity which could be charitable.¹⁴³ They considered that some of these entities, however, could not be charities, including individuals, partnerships and superannuation funds. They were concerned about problems of accountability if individuals could be charities, and considered that superannuation funds were entities formed for the benefit of members. They did not separately address the question of partnerships.

This express exclusion appears to be superfluous in the cases of individuals and superannuation funds. It is not clear how individuals could also satisfy the definition of ‘not-for-profit’ or otherwise be ‘established for charitable purposes only’. Similarly, superannuation funds are clearly not established for charitable purposes only.

In relation to partnerships, we note that the term is defined in s 995-1 of the *Income Tax Assessment Act 1997* (Cth) more broadly than it is in State and Territory partnership legislation,¹⁴⁴ which would require that partnerships be formed “with a view of profit”.¹⁴⁵ The term ‘entity’, however, expressly excludes “non-entity joint ventures”.¹⁴⁶ We observe some concern was expressed by stakeholders in the Board of Taxation Inquiry that the exclusion of partnerships might impede collaboration between not-for-profits.¹⁴⁷ The view of the Inquiry was that the term ‘partnership’ was used by the sector more loosely to cover a range of collaborative arrangements and that the Bill or EM should clarify that its strict legal meaning was intended, in which case the concept was only relevant to a for-profit entity.¹⁴⁸

In principle, policy should encourage and facilitate collaboration between not-for-profits. In our view, the specific exclusion of partnerships is confusing and serves no policy purpose, so should be removed. We note that none of the other jurisdictions specifically refer to types of entities, but rather speak generally of ‘institutions’ or ‘bodies’.

We also refer to our view, expressed above, that one category of charitable purpose should include the promotion of volunteering, the voluntary sector, and the effectiveness and

¹⁴³ Sheppard, Fitzgerald, and Gonski, *Sheppard Inquiry*, above n 20, 95–96.

¹⁴⁴ The definition refers to “an association of persons (other than a company or a limited partnership) carrying on business as partners or in receipt of ordinary income or statutory income jointly”, or a limited partnership.

¹⁴⁵ See, eg, *Partnership Act 1892* s 1(1).

¹⁴⁶ This is further defined as a contractual arrangement (a) under which 2 or more parties undertake an economic activity that is subject to the joint control of the parties; and (b) that is entered into to obtain individual benefits for the parties, in the form of a share of the output of the arrangement rather than joint or collective profits for all the parties: *Income Tax Assessment Act 1997* (Cth), s 995.1. This was inserted by Sch 7 of the *Indirect Tax Legislation Amendment Act 2000* (Cth).

¹⁴⁷ The Board of Taxation, *Consultation on the Definition of a Charity* (December 2003) <http://www.taxboard.gov.au/content/content.aspx?doc=reviews_and_consultations/definition_of_a_charity/default.htm&pageid=007>, [4.10]–[4.11].

¹⁴⁸ *Ibid* [4.28].

efficiency of charities. This would address arrangements in which charities pool or share services.

In relation to complex groups of related entities, which are a particular feature of religious institutions, we note that special provision has been made in relation to GST to such entities and sub-entities. However, rather than applying this complicated regime to the statutory definition, we prefer the simple solution provided in the legislation of Northern Ireland:

(4) The Commission may direct that for all or any of the purposes of this Act an institution established for any special purposes of or in connection with a charity (being charitable purposes) shall be treated as forming part of that charity or as forming a distinct charity.

(5) The Commission may direct that for all or any of the purposes of this Act two or more charities having the same charity trustees shall be treated as a single charity.¹⁴⁹

In our view, this provision gives the Commission sufficient scope to consider all the circumstances that may be appropriate in relation to complex groups of entities.

OTHER ISSUES (QUESTIONS 18–20)

STATE AND TERRITORY DEFINITIONS (QUESTION 18)

Recreational and sporting purposes

As discussed earlier, the extension of the definition to include the advancement of sport and the provision of recreation facilities will facilitate harmonisation.

Charitable trusts legislation

The Consultation Paper raises the issue of trusts legislation in States and Territories that extend recognition of charitable trusts (at [144]) in cases where specific trusts are deemed charitable, and to ‘save’ mixed purposes trusts (commonly known as ‘savings’ legislation).

Different policy issues are raised when charitable status is considered as a requirement for the validity of trusts. As Lord Cross argued in 1956, the scope of charitable status ought to be more generous in this context, given the limited range of legal privileges.¹⁵⁰ Others have suggested that all public purposes, and not only charitable ones, should be validated.¹⁵¹ We agree that there is a significant contextual difference between ‘saving’ a gift that falls short of charitable status because of the technicalities of the interpretation of charity, and

¹⁴⁹ *Charities Act (Northern Ireland) 2008* (NI), s 1(4), (5).

¹⁵⁰ Geoffrey Cross, ‘Some Recent Developments in the Law of Charity’ (1956) 72 *Law Quarterly Review* 187.

¹⁵¹ N P Gravells, ‘Public Purpose Trusts’ (1977) 40 *Modern Law Review* 397; Susan Bright, ‘Charity and Trusts for the Public Benefit—Time for a Rethink?’ [1989] *Conveyancer* 28; G Dal Pont, ‘Why Define Charity? Is the Search for Meaning Worth the Effort?’ (2002) 8 *Third Sector Review* 5; Nuzhat Malik, ‘Defining “Charity” and “Charitable Purposes” in the United Kingdom’ (2008) 11 *International Journal of Not-for-Profit Law* <http://www.icnl.org/knowledge/ijnl/vol11iss1/special_2.htm>.

charitable status for the purpose of access to tax concessions. We therefore do not consider that this legislation necessarily raises a problem for harmonisation.

We also note that other legislation specifically deem certain trusts to be charitable. This ensures the validity of the trust, as well as the application of relevant State or Territory legislation governing trusts (including, for example, curial powers and accountability requirements). Again, this raises different policy considerations from charitable status for the purposes of tax concessions, which need to be considered in the process of harmonisation.

Other issues

There are many other legislative references to the term ‘charity’ and its cognates. These principally arise in the following contexts:

- privileges or preferences, including:
 - tax concessions;
 - exemptions from anti-discrimination legislation;
 - exemption for gambling or lotteries;
 - exemptions from volunteers’ or other liability; and
 - facilitative provisions enabling participation by charities in particular schemes such as adoption and housing; and
- regulatory provisions, including:
 - fundraising legislation;
 - facilitative legislation;
 - inclusion or exclusion of particular regulatory regimes.

Ultimately, the appropriate scope of the term ‘charity’ depends upon the context. For example, it is usual (although by no means universal) to see in regulatory provisions a broad definition that would encompass (for example) “benevolent, philanthropic or patriotic purposes”, since the purpose is to regulate the general activity being undertaken.

For practical purposes, the harmonisation project should focus on the issue of privileges and preferences, of which perhaps the most significant is that of tax concessions. The scope of such concessions and the relative importance of the definition of charity varies widely, both between and within jurisdictions. Of all the jurisdictions, Victorian tax concessions depend most on the general law definition. In some other jurisdictions, particularly NSW and Queensland, the scope is more closely defined (sometimes more restrictively, sometimes more generously, and sometimes being narrower in some respects and wider in others). Finally, a range of concessions are extended broadly to encompass other “benevolent, philanthropic or patriotic”, or even “similar public” purposes. Importantly, this last category includes the now-harmonised exemptions for payroll tax.

Therefore, the definition of ‘charity’ is less critical in State or Territory tax concessions, for the most part, than in Commonwealth tax legislation. However, a modern statutory definition of charity at a Commonwealth level may provide a good starting point in assisting States and Territories to rationalise the scope of their exemptions, which are often unnecessarily complex and inconsistent.

AUSTRALIAN DISASTER RELIEF FUNDS (QUESTION 19)

We agree with the concerns expressed in the Consultation Paper at [145]-[151] about the need to provide greater flexibility within the regime governing Australian Disaster Relief Funds. We agree, in particular, that there should be flexibility in:

- establishing such funds prior to disasters, in order to facilitate timely delivery of services;
- allowing funds to expend funds in relation to other disasters; and
- increasing the scope of allowable activities; and
- applying and distributed donated funds.

The details of these issues concern matters of policy that are best addressed by the sector, and are not clearly relevant to the statutory definition of charity. We suggest that, while there is a need to review these issues, there ought to be a separate consultation on this issue.

TRANSITIONAL ISSUES (QUESTION 20)

Recommendation 19

Existing testamentary trusts for poor relatives should be deemed charitable by the legislation.

Our view is that the statutory definition of charity should, in almost all respects, be broader than that of existing charities. It should therefore cause minimal transitional difficulties.

We observe that, in light of this minimal impact, the suggestion of a general education campaign may be counterproductive, as charities may mistakenly think they are adversely affected. We would expect, of course, that existing sector organisations will communicate the news to affected organisations together with appropriate links to training or guidance on the matter.

However, one particular issue that may cause difficulty is the removal of the ‘poor relations’ cases from charitable status. This may adversely affect existing testamentary trusts, which are difficult to change, as the Board of Taxation Inquiry discussed.¹⁵² That Inquiry considered that grandfathering existing charitable bodies would be “too wide” an

¹⁵² The Board of Taxation, *Consultation*, above n 148, [4.30]–[4.31].

exemption that might defeat the purpose of the bill. However, we consider it is unfair to prejudice existing trusts which were charitable at the time of creation. We recommend including a provision deeming existing testamentary trusts for cases for poor relatives to be charitable. Such a provision is not, in our view, unduly wide.

CONCLUSION

We hope the above discussion is useful. We should emphasise that, despite the comprehensive and detailed nature of our submission, we are in general agreement with this particular reform. However, the recommendations we have made will help to ensure that this important reform fully achieves the goals of accessibility, clarification, modernisation and correction.

Please feel free to contact us if you wish to discuss any matters further, or would like access to any of the material to which we have referred. Our contact details are listed in Appendix A. We look forward to engaging further with Treasury on the agenda of not-for-profit reform.

APPENDIX A: NOT-FOR-PROFIT PROJECT, MELBOURNE LAW SCHOOL

A group of academics from the University of Melbourne Law School is undertaking the first comprehensive and comparative investigation of the definition, regulation, and taxation of the not-for-profit sector in Australia (the Not-for-Profit Project). The Australian Research Council is funding this project for three years, beginning in 2010. The project aims to identify and analyse opportunities to strengthen the sector and make proposals that seek to maximise the sector's capacity to contribute to the important work of social inclusion and to the economic life of the nation. In particular, the project aims to generate new proposals for the definition, regulation and taxation of the not-for-profit sector that reflect a proper understanding of the distinctions between the sector, government, and business.

The project investigators of the Not-for-Profit Project are:

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Ann is Co-Director of Taxation Studies and teaches taxation and securities regulation at the Law School. She is also Special Counsel at Allens, Arthur Robinson, a member of the Advisory Panel to the Board of Taxation and an external member of the Australian Taxation Office's Public Rulings Panel.

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Miranda is Co-Director of Taxation Studies and teaches tax law and policy at the Law School. She is an International Fellow of the Centre of Business Taxation at Oxford University and is on the Tax Committee of the Law Council of Australia. She has previously worked at New York University School of Law, US and as a solicitor and in the Australian Taxation Office.

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Matthew is an Associate Professor at the University of Melbourne. He holds a BCL and PhD from Oxford University. His published work deals with issues in moral philosophy, fiduciary law, equitable property, land title registration, and the law of charity. Matthew has also worked as a solicitor for Arthur Robinson & Hedderwicks (now Allens, Arthur Robinson).

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Joyce is the Research Fellow on the Not-for-Profit Project. She holds a PhD from University College, London. She has worked at the Australian Law Reform Commission, the Federal Court of Australia, and the Victorian Court of Appeal.

More information on the project can be found on the website of the [Melbourne Law School Tax Group Not-for-Profit Project](#).

APPENDIX B: CONSOLIDATED LIST OF RECOMMENDATIONS

Recommendation 1: List of charitable purposes

The statutory list of charitable purposes should include:

- (a) the advancement of health or the saving of lives, including:
 - (ii) prevention or relief of sickness, disease or human suffering;
- (b) the advancement of education;
- (c) the advancement of social or community welfare, including:
 - (i) the prevention or relief of poverty;
 - (ii) the care, support or relief of those in need by reason of youth, age, ill-health, disability, financial hardship, disaster, geographical location or other disadvantage, including by the provision of accommodation;
 - (iii) the integration of, or participation by, the disadvantaged;
 - (iv) the care or support of members or former members of the armed forces or the civil defence forces and their families; and
 - (v) the provision of child care services;
- (d) the advancement of religion or analogous philosophical beliefs;
- (e) the advancement of arts, culture, heritage, the sciences or philosophy, including:
 - (i) the cultures or customs of Indigenous peoples or ethnic or language groups;
- (f) the advancement of the natural environment;
- (g) the advancement of citizenship or community development, including:
 - (i) urban or rural regeneration;
 - (ii) volunteering, the voluntary sector, or the effectiveness and efficiency of charities;
- (h) the advancement of sport or the provision of facilities for recreation and leisure;
- (i) the advancement of civil or human rights;
- (j) the advancement of reconciliation, conflict resolution, harmonious community relations, or equality or diversity, including:
 - (i) assistance or support for immigrants and refugees;
- (k) the advancement of animal welfare;

- (l) the advancement of industry or commerce;
- (m) the advancement of access to advice or information; and
- (n) other purposes beneficial to the community.

Recommendation 2: Ousting of the preamble of Statute of Elizabeth

The common law requirement that a purpose should be 'within the spirit and intendment' of the preamble to the Elizabethan Statute of Charitable Uses 1601 should be ousted by statute.

Recommendation 3: Definition of religion

There should be no definition of religion in the statutory definition.

Recommendation 4: Public benefit test

The statutory definition should state, in relation to the 'public benefit' test, that regard should be had to the following principles.

In relation to whether there is 'benefit':

- (a) the benefit(s) may be tangible or intangible, direct or indirect, present or future;
- (b) the benefit(s) should be assessed in the light of contemporary needs and circumstances;
- (c) the benefit(s) may, where appropriate, be assessed against potential detriment(s); and
- (d) the inquiry is not into the merits of the methods or opinions of the organisation.

In relation to whether the benefit is for the 'public' or a 'sufficient section of the public':

- (a) the existence of wider benefits to the general community;
- (b) the nature of any limitations on the class to be benefited, and in particular:
 - (i) the extent to which the class of potential beneficiaries is open in nature;
 - (ii) whether such limitations are reasonably related to the nature of the charitable purpose; and
 - (iii) the practical need for such limitations.

Recommendation 5: Guidance on public benefit test

The Australian Charities and Not-for-Profits Commission should be required to provide further guidance on the test of public benefit.

Recommendation 6: Removal of exception for relief of poverty

There should be no exception for the relief of poverty in relation to the public benefit test for 'poor relations'.

Recommendation 7: Removal of reference to numerically negligible class

There should be no legislative reference to the requirement that a sufficient section of the public should be more than 'numerically negligible'.

Recommendation 8: Prohibition of private benefit

The standard legislative definition of 'not-for-profit' should be incorporated as a requirement of charitable status. In addition, the definition should require that, where a benefit is conferred on a person other than in his or her capacity as a member of the public or a section of the public, any such benefit is reasonable in all of the circumstances, and is ancillary to or otherwise furthers the public benefit.

Recommendation 9: Application of presumptions

If the presumptions of public benefit are retained, they should apply equally to all the listed instances of charitable purposes, excepting the residual category of 'other purposes beneficial to the community'.

Recommendation 10: Indigenous organisations

The definition of public benefit should provide that the purpose of a trust, society, or institution is a charitable purpose if it 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. The definition should further specify that prescribed corporate bodies under the *Native Title Act 1993* (Cth) are charitable.

Recommendation 11: Self-help groups and closed or contemplative religious orders

To avoid doubt, reference should be made either in the legislation or in the Explanatory Memorandum to clarify that self-help groups and closed or contemplative religious orders may meet the public benefit test. There should not, however, be a requirement of intercessory prayer for closed or contemplative religious orders to be of public benefit.

Recommendation 12: Charitable purposes only

The definition should state that a charity must have a purpose or purposes that are charitable only. To avoid doubt, however, it should be specified that this does not preclude the existence of other purposes that further, are in aid of, or are ancillary or incidental to these charitable purposes.

Recommendation 13: Activities

The statutory definition should not refer to the activities of a charity. However, if such an activities test is included, it should accurately reflect the current common law principles.

Recommendation 14: Political purposes or activities

The statutory definition should not include clause 8 of the Exposure Draft of the Charities Bill 2003 (Cth), or any other express reference to political purposes or activities. In any event, there should be no reference whatsoever prohibiting 'political' or other causes.

Recommendation 15: Illegal purposes or activities

The statutory definition should not refer to illegal activities or purposes.

Recommendation 16: Government bodies

Clause 4(1)(f) of the Exposure Draft of the Charities Bill 2003 (Cth) should be omitted. However, if some reference to government bodies is desired, the reference should be to 'government bodies' only, or should be confined by including a specific legislative test of 'control'.

Recommendation 17: Partnerships or other entities

The legislation should not refer to disqualifying types of entities.

Recommendation 18: Complex groups of entities

The legislation should empower the ACNC with a discretion to treat some entities as forming part of a related charity or as a single charity.

Recommendation 19: Transitional provisions

Existing testamentary trusts for poor relatives should be deemed charitable by the legislation.

APPENDIX C: COMPARISON OF DEFINITIONS OF CHARITABLE PURPOSE

The table below identifies in the first column the charitable purpose in England and Wales, followed by any modifications made in the jurisdictions of Scotland, Northern Ireland or Ireland, and finally the equivalent provision in the Australian Charities Bill 2003 and its EM.

This format has been adopted because the later lists are very largely based on the listing the *Charities Act 2006* (UK). The first legislative reference is to the *Charities Act 2006* (UK) and also to the *Charities Act (Northern Ireland) 2008* (NI). This is because the legislation is virtually identical, including the numbering. Differences between these lists are highlighted in bold.

England and Wales	Modifications	Australian equivalent
Prevention or relief of poverty		Included under para 10(1)(c): EM 1.67
Advancement of education		Para 10(1)(d)
		Identified as including formal and informal education, research, educational support and facilities: EM 1.63
Advancement of religion		Para 10(1)(d)
Defined as including belief in more than one god or no god	In Ireland, presumption of public benefit preserved and strengthened as determination otherwise requires consent of Attorney-General; but special provisions for cults	Regard to be had to indicia stated in <i>Church of New Faith</i> (see further below)
Advancement of health or the saving of lives	Ireland does not include 'saving of lives'	Para 10(1)(a), does not include 'saving of lives'
Defined as including prevention or relief of sickness, disease or human suffering		Identified in EM 1.60
		Specifically identifies also public health services and health and medical research
Advancement of citizenship or community development	Ireland omits 'citizenship'	No equivalent in relation to citizenship; but identified as including community capacity building: EM 1.66
Defined as including rural or urban regeneration		
Defined as including promotion of civic responsibility ,	Ireland omits 'the voluntary sector', and refers to	No equivalent

volunteering, the voluntary sector or the effectiveness or efficiency of charities	'property of charitable organisations'	
Advancement of the arts, culture, heritage or science/s		Advancement of culture: para 10(1)(e)
		Identified as including the arts: EM 1.77
		Identified as including establishment and maintenance of public museums, libraries, art galleries, and moveable cultural heritage
		Identified as including culture and customs of Indigenous people and language/ethnic groups : EM 1.77
		Identified as including national monuments and heritage: EM 1.77
Advancement of amateur sport	Ireland omits this purpose: Scotland refers to participation in sport	No equivalent
Defined as "sports or games which promote health by involving physical or mental skill or exertion"	Scotland defines it as a game involving "physical skill or exertion"	
Provision of recreational facilities for disadvantaged or public at large ¹⁵³	Not included in Ireland	No equivalent; but equivalent legislation in States/Territories
Defined as not including registered sports clubs, which cannot be charities	Not included in Scotland;	
Advancement of human rights	Ireland omits this purpose	Identified as including promotion and protection of civil and human rights: EM 1.84
Advancement of conflict resolution	Northern Ireland includes 'peace'	No equivalent
Advancement of reconciliation		Identified in EM 1.84

¹⁵³ This charitable purpose requires that the recreational facilities be primarily intended to improve the life conditions of either: those in need by reason of their youth, age, infirmity or disability, poverty, or social and economic circumstances; or the public at large, or to male, or female, members of the public at large. This is an amendment of the *Recreational Charities Act 1958* (UK).

Promotion of religious or racial harmony or equality and diversity	Northern Ireland includes 'harmonious community relations' and 'good community relations'; Ireland omits 'equality and diversity' but includes 'harmonious community relations'	Identified as including social cohesion, inclusion and diversity: EM 1.66, and mutual respect and tolerance: EM 1.84
		Identified as including assistance and support for Indigenous, refugees, and immigrants: EM 1.67
		Identified as including public safety: EM 1.84
Advancement of environmental protection or improvement	Ireland substitutes 'environmental sustainability' for 'improvement'	Advancement of natural environment: s 10(1)(f) (which includes improvement)
Relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage	Scotland omits 'youth', but implicit in 'age'	Identified as including prevention and relief of 'distress or disadvantage': see EM 1.67
Defined as including relief given by the provision of accommodation or care	Not included in Ireland	Identified in EM 1.67
	Ireland also includes integration and participation of disadvantaged	Community development identified as to enhance social and economic participation : EM 1.67
		Specifically identifies also care, support and protection of children and young people; and child care services : para 11(a), (b)
		Identified also as including family support services : EM 1.67
		Identified also as including assistance and support for prisoners and their families, and those disadvantaged in the labour market : EM 1.67
		Identified also as relief of distress caused by natural disasters: EM 1.67
Advancement of animal welfare	Ireland uses 'prevention and relief of animal suffering'	Prevention or relief of animal suffering: EM 1.84
Promotion of the efficiency of the armed	Not replicated elsewhere	Identified as including assistance to armed

forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services		and civil defence forces, and their families: EM 1.67
	Scotland provides for the advancement of any philosophical belief, whether or not involving a god , as part of 'other purposes	

DEFINING CHARITY – WHERE TO FROM HERE?

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Australian Charity Law Association Conference
23 September 2011

As part of the 2011 Budget, the Assistant Treasurer announced that the government proposed to introduce a statutory definition of 'charity' applicable from 1 July 2013. At the same time he announced the establishment of the Australian Charities and Not-for-Profit Commission and what was described as "better targeting of NFP tax concessions" which has come to be known as the "unrelated business income" proposal. Both of these other announcements have progressed significantly – in May a Consultation Paper on the unrelated business income proposal was released and in July Susan Pascoe was appointed as Chair of the Implementation Taskforce for the Australian Charities and Not-for-Profits Commission in the expectation that she will be the first Commissioner. Treasury is working on the definitional issue but has not yet released any consultation documents. It is therefore timely to consider what the Assistant Treasurer had to say about the definition of charity and to think about what the definition might look like.

There are three matters that are deserving of attention:

1. The Assistant Treasurer said that the definition would be applicable across all Commonwealth agencies. It will not however apply to the States. The Minister does note that the Federal government would continue negotiations with the states and territories on national regulation of the charitable sector but whether the States will accept that position is far from certain. It may be that we will still have different meanings of charity for different jurisdictions. There may also be uncertainty in relation to trust law where presumably the state law will continue to apply. This may not be a huge practical issue and indeed the states may accept that a common definition is appropriate but it is as well to note that there may be situations in which the statutory definition will not apply.
2. Further details of the proposal are in Budget Paper No 2 where it is said that the ACNC would have sole responsibility for determining charitable, public benevolent institution and other not-for-profit status for all commonwealth purposes. However, the Commissioner of Taxation will retain responsibility for administering the tax concessions for the NFP sector. I think this raises two questions: first, will it be enough to be a charity approved by the ACNC to access all concessions? Presumably not, because even the statement refers to public benevolent institutions

suggesting that there may be categories of charities with different entitlements to concessions. This may mean that we need other definitions and hopefully the notion of PBI will be replaced with a more up to date term. A second question relates to conditions for tax concessions, such as the proposed 'in Australia' requirement. Who will determine whether the conditions are satisfied? Presumably the ATO but what will happen if the conditions overlap eg if the tax concession requires the entity to be a NFP and this has already been determined by the ACNC? What does seem clear is that the tax concessions will need to be redrafted and that decisions will need to be made about eligibility that may have little to do with charitable status. Hopefully, many of the complex categories will be removed and the concessions will be considerably simplified but this has not been mentioned to date. I would just mention the interaction of the UK charities definition and the tax law definition. Under UK tax law, a charity is a body of persons or trust that is established for charitable purposes (as defined in the *Charities Act 2006*) and meets 3 conditions:

- a jurisdiction condition;
- a registration condition; and
- a management (ie a manager is a fit and proper person) condition.

Those 3 conditions are determined by the revenue authority. This seems sensible, although it may be more appropriate that the fit and proper person test is left to ACNC.

3. The third matter relates to the definition itself. The Minister said that the definition will be based on the *2001 Report of the Inquiry into the Definition of Charities and Related Organisations* (CDI), taking into account recent judicial decisions such as *Aid/Watch*. It is therefore timely to go back to what was recommended and also to consider the ED of the *Charities Bill 2003* which was drafted to give effect to those recommendations.

Recommendations of the CDI

The CDI made 27 recommendations. I will consider them under 6 heads:

(i) the not-for-profit requirement. The CDI recommended that this term should replace the term 'non-profit' and should form part of the definition of charity. The 2003 ED included this in the 'core definition' and also included a definition of a NFP entity as an entity that did not operate or provide benefits to particular persons, including owners or members of the entity. This definition recently appeared in the ED of legislation to amend the tax provisions to include the 'in Australia' requirement. However, the reference to particular persons was replaced by the reference to particular entities and concerns were raised about whether this would mean that a NFP could not name another body to take over its assets in the event of winding up. Even if the definition refers to person, this may still be an issue.

(ii) entity requirement. The CDI recommended that the term 'entity' be adopted to describe charities and that the definition of entity include: a body corporate; a corporation sole; any association or body of persons whether incorporated or not and a trust. Furthermore, they said it should exclude: a political party; a partnership; a superannuation fund and government or a government body. This was achieved in the 2003 ED, rather clumsily, by referring to the definition of entity in the ITAA 1997 and then excluding certain entities under s 4(1)(f) ie individuals, a partnership, a political party, a superannuation fund or a government body. This followed on from a discussion about whether all charities should be structured in a particular way, eg as companies limited by guarantee. It was concluded that there should not be a requirement as to any particular structure. There was some concern about the reference to partnerships as some charities regarded themselves as entering into partnerships and were worried if this would be disqualifying. Another area of concern was the reference to a government body and whether it would be enough for the government to have some sort of control over the entity. Cases like *Central Bayside* demonstrate how difficult this can be.

The current tax law distinguishes between charitable institutions and charitable funds. According to the ATO a number of factors need to be taken into account to determine if an entity was an institution "including activities, size, permanence and recognition" (TR 2011/D2, para 154). The ATO also has this to say about the notion of an institution:

"An institution is an establishment, organisation 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. However it involves more than mere incorporation, and does not include a structure controlled and operated by family members and friends."

Thus a body that is just established would presumably not be an institution. However, the definition of entity would include newly formed bodies whether they are incorporated or not.

Presumably the term entity is broad enough to cover both bodies and funds ie trusts, but this is not entirely clear as it is not usual to speak of a fund as an entity. It is worth noting though that the UK tax law defines a charity as 'a body of persons or a trust established for charitable purposes' with charitable purposes determined under the *Charities Act 2006*, whereas the *Charities Act* itself defines charity as an institution established for charitable purposes.

(iii) the charitable purpose requirement. The CDI recommended that charitable purposes should include 6 heads plus a 7th general head. The 2003 ED included those heads as follows:

(a) the advancement of health;

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

And advancement was defined as including protection, maintenance, support, research and improvement.

Two things struck me about this list when I read it again. First, it is broader than the *Pemsel* categories so that some of the things which may have been recognised under the 4th *Pemsel* head are now categories in their own right: health, community welfare and natural environment. I also noted that there was no express reference to relief of poverty – perhaps the category from *Pemsel* that most closely aligns with the ordinary meaning of charity. In fact the CDI recommended that many of the categories should be defined in a way that included certain things. For example, advancement of health was said to include ‘the prevention and relief of sickness, disease or of human suffering’ and the advancement of social and community welfare was said to include 5 subcategories, one of which was ‘the prevention and relief of poverty, distress or disadvantage or individuals or families’ and another was ‘the care and support children and young people’. These subcategories did not make it into the 2003 ED. The purpose requirement is obviously of crucial importance to the sector and perhaps given that it is now 10 years since the CDI it might be useful to think again about the categories. By way of contrast, the UK Charities Act 2006 contains 13 categories with the first 3 the same as *Pemsel* but including health, amateur sport, human rights and animal welfare. The catch all category is framed in terms of purposes analogous to or within the spirit of the specified categories or previously recognised as charitable.

The CDI recommended that the dominant purpose of the entity should be charitable and that any other purpose should be ancillary or incidental. This was included in the 2003 ED and reflects the current position. Again by way of contrast the UK Act specifies that a charitable institution is one that is formed for charitable purposes only. I don’t think much turns on the different formulations.

The CDI also recommended that the activities of a charity must further, or be in aid of, its charitable purpose or purposes. This was included in the 2003 ED (s 4(1)(c)). There is also some discussion in the CDI Report about whether it is appropriate to consider the activities of the entity to determine purpose but no real conclusion was reached on this point.

(iv) the public benefit requirement. The CDI recommended that the public benefit test as currently applied under the common law continue to be applied. This was said to mean that the purpose must be:

- aimed at achieving a universal or common good;
- have practical utility; and
- be directed to the benefit of the general community or a sufficient section of the general community.

The public benefit test is a common law requirement but has been presumed to be satisfied in the case of the first three heads of charity. The CDI recommendation, although it refers to the existing common law position, appears to require that the public benefit be demonstrated rather than presumed in certain cases. They do say that the test would not be satisfied where there is a relationship between the beneficiaries and the donor (such as a family or employment relationship) and that this extends to the relief of poverty ie the so-called 'poor relations' and 'poor employees' cases. However they did recommend that there be two exceptions to this rule, namely for:

- open and non-discriminatory self-help groups; and
- closed or contemplative religious orders that undertake prayerful intervention.

Although the proposed Charities Act did not eventuate, these exceptions to the public benefit requirement were enacted in the *Extension of Charitable Purpose Act 2004* (s 5). That Act also provides that the provision of child care services on a non-profit basis is a charitable purpose (s 4).

In the UK the inclusion of a statutory requirement of public benefit has had a significant impact. The main areas where there is likely to be an issue are in relation to religion and education. So for example, it may be that private schools will need to provide more than just a few scholarships to students suffering financial disadvantage. It may also be necessary for religions to make the case that they provide some public benefit. In this regard it is interesting to note that in Ireland the legislation deems religions to satisfy the public benefit test which means that the law in Ireland differs from that in England and Wales.

The CDI also recommended that the public benefit test be strengthened by including a requirement that the dominant purpose must be altruistic which they described as unselfish concern for the welfare of others. This was considered by the Board of Review which concluded that the requirement was unnecessary and could reduce the clarity of the public benefit test

(v) illegal purposes and activities. CDI Rec 4 was that an entity should be denied charitable status if it had purposes that were illegal, contrary to public policy, or promoted a political party or a candidate for political office. Rec 5 said that activities must not be illegal, contrary to public policy, or promote a political party or a candidate for political office. There are three things referred to here: illegality; contrary to public policy and what we might call advocacy (come back to this). The 2003 ED included a provision (s 8(1) that provides that the purpose of engaging in activities that are unlawful is a disqualifying purpose. This is consistent with the common law and unexceptional. However, s 4 (1)(e) provided

that the entity must not engage in conduct that would constitute a serious offence (defined as an offence that may be dealt with as an indictable offence ie generally requires a judge and jury rather than a magistrate). The Board of Tax report noted that this was harsh and potentially unworkable as even a single instance could operate to deprive the entity of charitable status. The recommended that the paragraph (s 4(1)(e)) be removed which would mean that the only reference was to unlawful purposes. The ED did not refer to purposes or activities that were contrary to public policy.

(vi) other disqualifying purposes. The other disqualifying purpose is in s 8(2) ie the purpose of advocating a political party or cause; supporting a candidate for political office or attempting to change the law or government policy, if those purposes either alone or together were more than ancillary or incidental to the other purposes of the entity. The Board of Tax received 267 written submissions and most of them were concerned with this provision. Of course, now we have the High Court decision in Aid/Watch and the Minister has made it clear that the definition will take into account judicial decisions since the CDI Report. What is not clear is whether any type of political activity will be a disqualifying purpose. Certainly advocating for change of the law or government policy is now permitted under Aid/Watch but it doesn't say anything about support for political parties or political causes. The definition of entity in the 2003 ED excluded a political party but perhaps even that is on the table in the post Aid/Watch world.

Looking back at the CDI Report and the 2003 ED demonstrates how much has changed in 10 years. But it also reminds us that the translation of the common law principles into legislative form is fraught with difficulties. The legislators will be aiming to give effect to what the law is – no change in policy has been announced, but the community will need to analyse the legislative definition to see that it does represent the existing position and does not create more problems than it solves.

HEINONLINE

Citation: 31 Sydney L. Rev. 559 2009

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Distinguishing Government from Charity in Australian Law

MATTHEW HARDING*

Abstract

Government and charity are in the same business, which is to enable the pursuit of, or even directly to pursue, the common good. This article aims to identify an analytic distinction between government and charity notwithstanding that, being in the same business, they are functionally similar. More precisely, the article aims to identify the analytic distinction between government and charity that accords most satisfactorily with Australian law. To that end, the article discusses three concepts that courts in Australia and in England have invoked when seeking to draw a distinction between government and charity: purposes; control; and voluntarism. In Parts Two and Three of the article it is argued that the concepts of purposes and control are of limited assistance when drawing a distinction between government and charity. In Part Four of the article it is argued that, in light of the case law, the best view of what distinguishes government from charity in Australian law points to the fact that government is characterised by administration whereas charity is characterised by voluntarism. This conclusion, while not consistent with all of the decided cases, is consistent with the substantial majority of them.

1. Introduction

Philosophers will tell you that the business of government is — or at least ought to be — to enable the pursuit of, or even directly to pursue, the common good.¹ Any lawyer will tell you that ‘the pursuit of the common good’ sounds like a description of the business of charity according to modern Australian law, ‘charity’ in our law consisting of an oddly circumscribed group of purposes that, if carried out, will benefit the public.² Put broadly, then, government and charity — at least charity in

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1 For an account of how government might enable the pursuit of the good, see, generally, John Rawls, *A Theory of Justice* (first published 1971, revised ed, 1999); for an account of how government might directly pursue the good, see also Joseph Raz, *The Morality of Freedom* (1986).

2 These purposes are oddly circumscribed because they must fall within the ‘spirit and intentment’ of the preamble to the *Statute of Charitable Uses 1601* (43 Eliz 1 c 4); *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304, 305. As to what purposes fall within the spirit and intentment of the preamble, see *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 583 (Lord Macnaghten).

the legal sense — are in the same business. My aim in this article is to identify an analytic distinction between government and charity, notwithstanding that, being in the same business, they are functionally similar. More precisely, my aim is to identify the analytic distinction between government and charity that accords most satisfactorily with Australian law. I therefore seek to draw the distinction out of decided cases, and it follows that I have little to say about ideal or non-legal distinctions between government and charity.³

Drawing a distinction between government and charity has, over the past 30 or so years, become both increasingly difficult and increasingly important, owing to profound changes in the relationship between the charity sector and the State.⁴ One change has taken the form of a growing reliance by parts of the charity sector on government funding, accompanied by an increasing use of agreements under which funding depends on certain outcomes being achieved, and a corresponding decrease in direct grants from government.⁵ This change has led to greater dependence on government, along with greater government control. It has made the task of distinguishing government from charity more difficult, because it has led to government and charity becoming more closely intertwined than ever before. Another change has been brought about by the well-documented withdrawal of the State, in Western countries at least, from the direct provision of welfare to the community. This has placed additional burdens on the charity sector, burdens which, in some cases, charities are able to bear only because of the tax advantages that they enjoy on account of their charitable status.⁶ This governmental retreat from welfare makes the task of accurately capturing the distinction between government and charity particularly important. To the extent that the burden of

3 It also follows that when I refer to 'charity', I mean charity in the legal sense unless I specify otherwise. For a characteristically brilliant account of charity in the non-legal sense, see John Gardner, 'The Virtue of Charity and Its Foils' in Charles Mitchell and Susan R Moody (eds), *Foundations of Charity* (2000) 1.

4 The sector in question is sometimes referred to as the 'not-for-profit sector', the 'third sector' (see Senate Standing Committee on Economics, Commonwealth, *Disclosure Regimes for Charities and Not-for-Profit Organisations* (2008), ch 2) or the 'voluntary sector'. I prefer 'charity sector' simply because my focus in this article is on organisations that are — putting to one side the question whether they are too governmental — charitable in the legal sense. However, as I hope will become clear by the end of the article, there are advantages to be gained by using the word 'voluntary' when describing the charity sector. For an exploration of the distinctions between the charity sector and the voluntary sector more generally, see Jonathan Garton, 'The Legal Definition of Charity and the Regulation of Civil Society' (2005) 16 *King's College Law Journal* 29.

5 For a discussion of these trends, see Jean Warburton and Debra Morris, 'Charities and the Contract Culture' [1991] *The Conveyancer* 419; Jane Lewis, 'Reviewing the Relationship between the Voluntary Sector and the State in Britain in the 1990s' (1999) 10 *Voluntas* 255; Michael Chesterman, 'Foundations of Charity Law in the New Welfare State' in Charles Mitchell and Susan R Moody (eds), *Foundations of Charity* (2000) 249; Peter Luxton, *The Law of Charities* (2001), [1.18]-[1.19], [1.28]-[1.29]; Commonwealth, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001) ('The Sheppard Report'), chs 6 and 7; The Charity Commission for England and Wales, *Stand and Deliver: The Future of Charities Providing Public Services* (February 2007) ('CC 2007'); Alison Dunn, 'Demanding Service or Servicing Demand? Charities, Regulation and the Policy Process' (2008) 71 *Modern Law Review* 247.

6 See Ann O'Connell, 'The Tax Position of Charities in Australia: Why Does It Have to Be So Complicated?' (2008) 37 *Australian Tax Review* 17.

welfare rests on charities, and to the extent that charities are able to carry that burden only because of their tax advantages, the pursuit of the common good in the form of welfare depends on charities not losing tax advantages. It is therefore critical that an unduly narrow view of charity is not taken by taxing authorities and courts.⁷ In particular, it is critical that charities not lose their tax advantages because, for the wrong reasons, they are viewed as too governmental.⁸

My article discusses three concepts that courts in Australia and in England have invoked when seeking to draw a distinction between government and charity: purposes, control and voluntarism. I concentrate on English case law as well as Australian case law because of the great influence that the decisions of English courts have traditionally had on the law of charity in Australia.⁹ For this reason, I assume that decisions of English courts on the distinction between government and charity will be applied in Australia, unless Australian case law clearly indicates otherwise. In Parts 2 and 3 of the article, I argue, with reference to the case law, that the concepts of purposes and control are of limited assistance when distinguishing government from charity in Australian law. In Part Four of the article, I argue, again with reference to the case law, that the best explanation of cases in which a distinction has been drawn between government and charity points to the concept of voluntarism. My conclusion, in brief, is that what distinguishes government from charity in Australian law is that government is characterised by administration whereas charity is characterised by voluntarism. I acknowledge that this conclusion is not consistent with all of the decided cases but, in an area of law as notoriously incoherent as the law of charity, I argue that it is sufficient that the conclusion is consistent with the substantial majority of the decided cases.

2. *Purposes*

In large part, whether or not a gift, trust or organisation is charitable in Australian law depends on the character of its purposes.¹⁰ The question of purposes therefore appears to be a good starting point for thinking about the distinction between government and charity. Might it be said that, according to Australian law, charitable gifts, trusts and organisations have *charitable* purposes, while gifts to government, trusts the trustee of which is some part of government, and governmental organisations have *governmental* purposes? Something along these lines may be drawn out of the report on the law of charity submitted to the Commonwealth Government by the Sheppard Committee in 2001:

Government bodies have not been considered charitable entities because they are considered to have a single overarching purpose, to carry out the functions or responsibilities of government, and thus do not have the requisite dominant charitable purpose.¹¹

⁷ *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350 (Hammond J).

⁸ *Central Bayside General Practice Association Limited v Commissioner of State Revenue* (2006) 228 CLR 168, 213–4 (Kirby J) (*'Central Bayside (HCA)'*).

⁹ I also refer from time to time to decisions of the courts of New Zealand, including the Privy Council as the (former) court of highest appeal in that jurisdiction.

¹⁰ For an overview of the cases establishing this proposition, see Gino Dal Pont, *Charity Law in Australia and New Zealand* (2000), 8–13.

Similarly, the Charity Commission for England and Wales has formed the view that if an organisation with ostensibly charitable purposes nonetheless has an 'unstated purpose that is concerned with giving effect to the wishes and policies of a governmental authority', it will be governmental rather than charitable as a result.¹²

Before considering the merits of drawing a distinction between government and charity based on 'purposes', it is important to understand precisely what 'purposes' means. Here, two distinctions must be drawn. The first distinction is between that which has motivated someone to make a gift, settle a trust or establish an organisation, and the express or implied objectives of a gift, trust or organisation once made, settled or established. It is well-established that motives are irrelevant when considering the purposes of a gift, trust or organisation, and that only objectives will be taken into account.¹³ It follows that if, for example, an organisation has been established for objectives that are undeniably charitable, the fact that those who have established the organisation have done so in order to relieve a welfare burden that government would otherwise have had to bear ought be of no significance when determining whether the purposes of that organisation are charitable.¹⁴

The second distinction is between the objectives of an organisation and that organisation's activities. In circumstances where an organisation established for objectives that are clearly charitable has, in its activities, deviated radically from those objectives, a court might be prepared to take those deviant activities into account when considering whether or not the organisation's purposes are truly charitable.¹⁵ However, in the absence of such exceptional circumstances, an organisation's activities, just like the motives behind its establishment, are irrelevant when considering its purposes. In the ordinary case, those purposes are to be determined according to the objectives of the organisation in question, which will usually be found in its constituent document.¹⁶ Consequently, if, for example, an organisation is established by statute for objectives that are clearly governmental, it ought to be of no significance when considering its charitable

11 The Sheppard Report, above n 5, 233.

12 The Charity Commission for England and Wales, RR7 – *The Independence of Charities from the State* (February 2001) ('RR7'), [6].

13 *Church of the New Faith v Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120, 141–2 (Mason ACJ and Brennan J), 170 (Wilson and Deane JJ); *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157, 168.

14 RR7, above n 12, [3].

15 *Public Trustee v Attorney-General of New South Wales* (1997) 42 NSWLR 600, 617 (Santow J). The Charity Commission for England and Wales is more willing than the Australian courts to consider an organisation's activities when determining its charitable status: see Charles Mitchell, 'Reviewing the Register' in Charles Mitchell and Susan R Moody (eds), *Foundations of Charity* (2000) 184.

16 *Public Trustee v Attorney-General of New South Wales* (1997) 42 NSWLR 600, 615–7 (Santow J); RR7, above n 12, [5]; *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue* [2003] VSC 285, [30]–[31] (Nettle J) ('*Central Bayside (VSC)*'). An organisation's activities may be relevant when considering questions broader than whether its purposes are charitable, such as whether the organisation is a 'charitable institution' within the meaning of the *Income Tax Assessment Act 1997* (Cth): see, generally, *Victorian Women Lawyers' Association v Commissioner of Taxation* (2008) 170 FCR 318 (French J); *Commissioner of Taxation of the Commonwealth v Word Investments Ltd* (2008) 236 CLR 204.

status that the organisation in question has, as a matter of fact, engaged in activities in which charities typically engage.¹⁷ The organisation in question will be denied charitable status notwithstanding that its activities coincide with the activities of charitable organisations.

When thinking about the distinction between government and charity in terms of the purposes of a gift, trust or organisation, the focus should be on the express or implied objectives of the gift, trust or organisation in question. In this regard, it is clear enough that a trust or an organisation which has the express objective of carrying out government policy, whether established by government or not, is settled or established for a governmental purpose and is not charitable.¹⁸ It is also clear that a gift to a government department for its general purposes is not charitable,¹⁹ except, as I point out below, to the extent that it can be regarded as a gift for the relief of taxes. However, gifts, trusts and organisations for which charitable status is sought are not typically made, settled or established for an expressly governmental objective; in more typical cases, gifts, trusts and organisations are made, settled or established for objectives that are not expressly governmental but which are susceptible nonetheless to being interpreted as governmental. Drawing a distinction in such cases between government and charity based on purposes is difficult. Importantly, however, it is not impossible. For example, the Charity Commission for England and Wales appears to have overcome the difficulty by taking the view that in some cases an organisation with ostensibly charitable objectives might nonetheless have an unstated governmental purpose.²⁰ This technique — even if there is some artifice to it — enables a distinction to be drawn between government and charity in cases where an organisation's stated objectives reveal its purposes only in part.

With the right interpretive tools, it therefore appears to be possible to draw an analytic distinction between government and charity when considering the purposes of a gift, trust or organisation for which charitable status is sought. However, when trying to distinguish generally between government and charity based on purposes and in accordance with decided cases, one encounters a problem. The history of the law of charity shows that the purposes of government have sometimes been regarded as charitable. Arguably, the treatment of governmental purposes as charitable may be found in at least three types of case. First, there have been cases in which a gift has been made or a trust settled for the purpose of relieving taxes. Secondly, there have been cases of a gift to government for the purpose of reducing the national debt. Finally, there have been cases of a gift, again to government, for the purpose of benefiting a specified geographical area. I will consider each type of case in turn.

17 RR7, above n 12, [5].

18 With respect to trusts declared by government in pursuit of government policy, the position is clear: *Kinloch v Secretary of State for India in Council* (1882) 7 App Cas 619; *Tito v Waddell (No 2)* [1977] Ch 106 (Sir Robert Megarry VC); *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145.

19 *In re Cain (dec'd)* [1950] VLR 382, 387 (Dean J).

20 CC 2007, above n 5.

The relief of taxes is as well-established a charitable purpose as any, being mentioned expressly in the preamble to the *Statute of Charitable Uses 1601*.²¹ This early recognition of the relief of taxes as a charitable purpose has been echoed since. In *Attorney-General v Bushby*, Sir John Romilly MR characterised as ‘charity property’ a trust of land established in 1494 for the purpose of the ‘discharge of the tax of the commonalty of Grantham to King Henry the Seventh and his successors for ever’.²² In Australia, in *Monds v Stackhouse*, Latham CJ of the High Court affirmed the principle that a gift in aid of rates or taxes is charitable.²³ And recently, the Charity Commissioners for England and Wales accepted that it is a ‘good charitable purpose’ to relieve the community from taxes, so long as the public benefit test is met.²⁴ The relief of taxes is not typically a governmental purpose.²⁵ Nonetheless, it is arguable that there is a clear connection between the relief of taxes and the purposes of government: if taxes are *raised* for governmental purposes, then it follows that a gift or trust for governmental purposes is indirectly a gift or trust for the relief of taxes. If this argument holds, a gift or trust for governmental purposes is always (indirectly) charitable.²⁶ This reasoning is not explicit in the case law as it has developed. However, it may be implicit and, to the extent that it is, the cases on relief of taxes support the proposition, not only that governmental purposes may be charitable, but also that they are necessarily charitable.

It might be thought that this interpretation of the ‘relief of taxes’ cases is far-fetched, attributing to courts a view about governmental purposes in cases where such purposes were not directly under consideration. It might also be thought that the interpretation is at odds with dicta of Dean J of the Supreme Court of Victoria in *In re Cain (dec’d)*, to the effect that a gift to a government department for its general purposes cannot be charitable.²⁷ The same objections may not, however, be raised with respect to cases of gifts to government for the purpose of reducing the national debt. In *Thellusson v Woodford*, a Chancery bench appears to have upheld as charitable, without any misgivings, a gift to the Crown ‘to the use of the sinking fund’.²⁸ In *Newland v Attorney-General*, a gift to ‘His Majesty’s government in exoneration of the national debt’ was dealt with by Lord Eldon LC as a charitable gift.²⁹ Given that the discharge of the national debt is undoubtedly a governmental purpose, these two cases must be taken to support the proposition that at least one of the purposes of government is charitable.

21 The reference is to the ‘aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes’: *Statute of Charitable Uses 1601* (43 Eliz 1 c 4).

22 (1857) 24 Beav 299, 301; 53 ER 373.

23 (1948) 77 CLR 232, 241.

24 Decision of the Charity Commissioners of England and Wales in *Applications for Registration of (i) Trafford Community Leisure Trust and (ii) Wigan Leisure and Cultural Trust* (21 April 2004), [6.1.5].

25 The relief of taxes might be a governmental purpose where the policy of the government in question is to reduce taxes.

26 David Brown, ‘Charity, the Crown and the Treaty’ [2003] *New Zealand Law Journal* 65, 70. Compare David Brown, ‘The Charities Act 2005 and the Definition of Charitable Purposes’ (2005) 21 *New Zealand Universities Law Review* 598, 629.

27 [1950] VLR 382, 387.

28 (1799) 4 Ves Jr 227, 233–5; 31 ER 117. During the 18th century, the ‘sinking fund’ was used in England to reduce national debt.

29 (1809) 3 Mer 684, 684; 36 ER 262.

Finally, there are the cases of a gift to government for the purpose of benefiting a specified geographical area. Early cases may be found in which a testamentary gift ‘to the Parish of Great Creaton’ in Northamptonshire; a similar gift for the purpose of ‘the improvement of the city of Bath’; and a trust for a variety of purposes connected with the beautification of the town of Great Bolton (now part of Greater Manchester), were upheld as charitable.³⁰ In none of those early cases was the donee or trustee in any sense part of government. However, on the basis of the early cases, a series of later cases established the principle that a gift to government for the benefit of the inhabitants of a specified geographical area, even an area as large as a whole country, was a charitable gift.³¹ The *ne plus ultra* of this series is thought to be the decision of the English Court of Appeal in *In re Smith*, in which a testamentary gift ‘unto my country England’ was upheld as charitable, the Court ordering that the fund be paid to a person nominated by the Crown under the Sign Manual.³² It has been suggested that *In re Smith* was wrongly decided and that the purposes contemplated by the testator in that case were not (wholly) charitable.³³ However, the more widely accepted view is that the gift in *In re Smith* was for purposes that, by implication, were charitable, even if anomalously so.³⁴

Whether *In re Smith* was correctly decided or anomalous, the case, along with all the other cases which establish the charitable nature of a gift to government for the benefit of a locality (including the nation as a whole), points to an important fact. In seeking to apply a gift for the benefit of a specified geographical area, government may — indeed, is likely to — apply that gift to governmental purposes, simply because government typically acts by pursuing governmental purposes.³⁵ Such a gift is nonetheless charitable. To take an example, imagine that the Commonwealth government receives a gift for ‘my country, Australia’. With the court’s approval, the Commonwealth might allocate the gift to particular

30 *West v Knight* (1669) 1 Ch Cas 134; 22 ER 729; *Howse v Chapman* (1799) 3 Ves Jr 542, 551; 31 ER 278 (Lord Loughborough LC); *Attorney-General v Heelis* (1824) 2 Sim & St 67 (Sir John Leach VC), 77. *Attorney-General v Heelis* (1824) 2 Sim & St 67-77; 57 ER 270 (Sir John Leach VC).

31 *Mitford v Reynolds* [1835–42] All ER Rep 331, 335–6 (a gift to ‘the government of Bengal’ for ‘public works at and in the city of Dacca’) (Lord Lyndhurst LC); *Nightingale v Goulbourn* (1848) 2 Ph 594, 595–6 (a gift to ‘the Queen’s Chancellor of the Exchequer’ for ‘the benefit and advantage of my beloved country Great Britain’) (Lord Cottenham LC); *Goodman v Mayor of Saltash* (1882) 7 App Cas 633, 642 (Lord Selborne LC); *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 584 (Lord Macnaghten); *Robinson v Stuart* (1891) 12 LR (NSW) Eq 47, 50–1 (Owen CJ in Eq); *In re Tetley* [1923] 1 Ch 258 262, 275 (‘patriotic purposes’) (Russell J); *Monds v Stackhouse* (1948) 77 CLR 232, 246 (Dixon J); possibly also *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566, 582.

32 [1932] 1 Ch 153 (CA), 168–9 (Lord Hanworth MR), 171–3 (Lawrence LJ), 174–6 (Romer LJ).

33 Michael Albury, ‘Trusts for the Benefit of the Inhabitants of a Locality’ (1940) 56 *Law Quarterly Review* 49.

34 *Williams’ Trustees v Inland Revenue Commissioners* [1947] AC 447, 459–60 (Lord Simonds); *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195, 213; *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157, 171 (Lord Millett); Brown, ‘Charity, the Crown and the Treaty’, above n 26, 68.

35 Note, however, that government need not *always* act by pursuing governmental purposes: see below 13–15.

national infrastructure projects that have already been embarked on and funded by the revenue in accordance with announced government policies. In this example, there can be no doubt that carrying out the infrastructure projects in accordance with government policies is a governmental purpose, but the charitable status of the gift that is allocated to the infrastructure projects shows that carrying out the projects is not just a governmental purpose. It is instead a purpose with a dual character: it is both governmental *and* charitable.³⁶

In summary, then, although it is difficult to draw a distinction between governmental and charitable purposes in cases where a gift, trust or organisation is made, settled or established for purposes that are not expressly governmental, it is not impossible, particularly if a court is prepared to find that a gift, trust or organisation has an unstated governmental purpose. However, it is not possible to argue for a general distinction between government and charity based on purposes in Australian law because in some cases — cases entailing gifts and trusts for the relief of taxes, gifts to government for the purpose of reducing the national debt, and gifts to government for the purpose of benefiting a specified geographical area — purposes that are undeniably governmental have been found to be charitable as well.

3. *Control*

It has been said that in Australian law the test for distinguishing a governmental from a charitable organisation is one of control.³⁷ According to this test, the question to be asked when considering whether an organisation is governmental or charitable is whether or not government is able to, and does, control the organisation in question.³⁸ In answering this question, which is a question of fact, relevant considerations might include the extent to which government is able to dictate the objectives and activities of the organisation; the extent to which the organisation is monitored by and accountable to government; and the extent of government involvement in the decision-making structures of the organisation.³⁹ Given that in recent years government and charitable organisations that deliver welfare to the community have become more closely intertwined than ever before (for instance, through agreements under which government funding depends on the achievement by charitable organisations of certain outcomes), the question of control might be thought critical when considering the distinction between government and charity. However, although there is support for a control test in the case law, that support is not strong. Moreover, there are cases in which government

36 In *Central Bayside (HCA)* (2006) 228 CLR 168, 224, Callinan J stated that in Australia, some undoubtedly charitable purposes may only be carried out by or under the direction of government. His Honour referred to the building of roads, which is charitable because it is analogous to the 'repair ... of highways' expressly mentioned in the preamble to the *Statute of Charitable Uses 1601*. It follows that those purposes are inescapably both governmental and charitable.

37 The Sheppard Report, above n 5, 234, 239.

38 Ibid, 239.

39 *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue* [2005] VSCA 168, [10] (Chernov JA) ('*Central Bayside (VCA)*').

control appears to have made no difference when drawing a distinction between government and charity.

Before turning to the cases supporting a control test, I wish to set aside one distraction, which is the idea that the extent to which an organisation is governmental is closely related to the extent to which government funds that organisation. In the *Central Bayside* case, Nettle J of the Supreme Court of Victoria was of the opinion that the fact of government funding is significant when determining whether an organisation is governmental or charitable.⁴⁰ However, this view was rejected in both the Victorian Court of Appeal and the High Court.⁴¹ Moreover, in at least one other recent Australian decision, the fact of government funding was found to be irrelevant to the question of charitable status.⁴² There is even authority suggesting that the fact of government funding supports a finding that an organisation has purposes that will benefit the public and is charitable as a result.⁴³ Therefore, although in practice organisations may feel constrained with respect to their purposes and activities because they rely on government funding,⁴⁴ it must be concluded that the fact of government funding is not relevant when considering whether such organisations are charitable in Australian law. It might be thought that an exception ought to be made in cases where an organisation is funded pursuant to an outcomes-oriented funding agreement. In such cases, an argument might be made that government controls the organisation in question in part because the ongoing provision of funding is dependent on the government being satisfied that certain outcomes have been achieved. However, in the *Central Bayside* case, members of the Victorian Court of Appeal and the High Court appeared to view outcomes-oriented funding agreements as no impediment to charitable status.⁴⁵ Moreover, as I will argue shortly, even the fact of government control of an organisation, particularly an organisation not created by statute, is a weak basis for concluding that that organisation is too governmental and therefore not charitable.

I turn now to the cases supporting a control test for distinguishing a governmental from a charitable organisation. In England, the leading decision setting out a control test is that of the Court of Appeal in *Construction Industry Training Board v Attorney-General*.⁴⁶ There, the question arose whether a

40 *Central Bayside (VSC)* [2003] VSC 285, [25].

41 *Central Bayside (VCA)* [2005] VSCA 168, [11], [49]–[54], [56] (Chernov JA); *Central Bayside (HCA)* (2006) 228 CLR 168, 185 (Gleeson CJ, Heydon and Crennan JJ), 212–4 (Kirby J).

42 *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 115 NTR 25. See also *Robinson v Stuart* (1891) 12 LR (NSW) Eq 47 (Owen CJ in Eq); The Sheppard Report, above n 5, 239.

43 *Attorney-General v M'Carthy* (1886) 12 VLR 535; *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* (2005) 142 FCR 371 (Heerey J).

44 In CC 2007, [1.8], the Charity Commission for England and Wales reported survey findings in which nearly half of charities surveyed disagreed with the following statement: 'our charitable activities are determined by our mission rather than by funding opportunities.'

45 *Central Bayside (VCA)* [2005] VSCA 168 [53] (Chernov JA); *Central Bayside (HCA)* (2006) 228 CLR 168, 185 (Gleeson CJ, Heydon and Crennan JJ).

46 [1973] 1 Ch 173 (CA).

statutory entity whose purposes were undoubtedly charitable was nonetheless too governmental because it was under the control of the executive. A majority of the Court found that the entity in question was not under the control of the executive and therefore remained subject to the charity jurisdiction of the High Court of Justice.⁴⁷ By contrast, Russell LJ thought that the charity jurisdiction of the High Court had been ousted by the statute establishing the entity, which placed almost all control over that entity in the hands of the relevant government Minister.⁴⁸ In Australia, the Court of Appeal of the Supreme Court of the Northern Territory adopted a control test in *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation*, concluding that the entity in that case was not controlled by government.⁴⁹ And in the recent *Central Bayside* litigation, the question of control loomed large. In the Supreme Court of Victoria, Nettle J stated his opinion that ‘the level of government involvement in a body ... may be relevant to the body’s status as a charity’.⁵⁰ In the Victorian Court of Appeal, similar thoughts were expressed by Chernov JA,⁵¹ and Byrne AJA said that the important question is whether an entity is a ‘mere creature or agent’ of government.⁵² Finally, in the High Court of Australia, Gleeson CJ, Heydon and Crennan JJ dealt with the case on the assumption that a body established for charitable purposes cannot be truly charitable if controlled by government.⁵³

Also supporting a control test is a group of cases dealing with the question whether an organisation is, for tax purposes, a ‘public benevolent institution’ under Australian law.⁵⁴ The law relating to public benevolent institutions overlaps with the law relating to charities. However, ‘public benevolent institution’ is not synonymous with ‘charity’ in Australian law: put broadly, a public benevolent institution must have an eleemosynary character, whereas it is not necessary for an organisation seeking charitable status to be eleemosynary.⁵⁵ Despite the differences between the law relating to public benevolent institutions and the law relating to charities, it is arguable that an analogy can and ought to be drawn between cases dealing with public benevolent institutions and cases dealing with charities on the question of government control.⁵⁶ Those who would draw such an analogy may point out that, in the public benevolent institution cases, organisations have been denied status as public benevolent institutions, and denied

47 Ibid 188 (Buckley LJ), 188–9 (Plowman J).

48 Ibid 184. Note that in *Central Bayside (HCA)* (2006) 228 CLR 168, 228, Callinan J was of the view that governmental control does not oust the charity jurisdiction of the court where the objectives of an organisation are charitable.

49 (1997) 115 NTR 25.

50 *Central Bayside (VSC)* [2003] VSC 285, [25].

51 *Central Bayside (VCA)* [2005] VSCA 168, [6].

52 Ibid [56].

53 *Central Bayside (HCA)* (2006) 228 CLR 168, 181.

54 *Metropolitan Fire Brigades Board v Commissioner of Taxation* (1990) 27 FCR 279; *Mines Rescue Board (NSW) v Commissioner of Taxation* (2000) 101 FCR 91; *Ambulance Service of New South Wales v Deputy Commissioner of Taxation* (2003) 130 FCR 477.

55 On the nature and tax treatment of public benevolent institutions, see generally Dal Pont, above n10, 37–41; Chesterman, above n 5, 258–61; O’Connell, above n 6.

56 *Central Bayside (VCA)* [2005] VSCA 168, [6] (Chernov JA).

access to tax advantages as a result, because they were subject to too much government control. *Mines Rescue Board (NSW) v Commissioner of Taxation* is typical of these cases. There, the Full Court of the Federal Court of Australia found the Mines Rescue Board (NSW) to be controlled by government to such an extent that it was not a public benevolent institution.⁵⁷ This finding was based on a variety of factors, including that the Board was established as a statutory body; that the relevant government Minister could instruct the directors of the Board; and that the Minister could remove those directors if she or he chose to do so.⁵⁸

It cannot be doubted that there is some support in the case law for a control test when distinguishing government from charity, but that support is not strong. To begin with, the High Court of Australia refused to endorse such a test unqualifiedly in the *Central Bayside* case. Although Gleeson CJ, Heydon and Crennan JJ were prepared to assume that a control test applied for the purposes of the case before them, they also left open the question whether an organisation established for charitable purposes might retain charitable status notwithstanding the fact of government control.⁵⁹ In the same case, Kirby J pointed out that even bodies established by statute and ‘part of government’ have been found to be charitable,⁶⁰ and Callinan J suggested that a gift might be charitable despite the fact that it is a gift to a ‘polity or creature’ of government.⁶¹ These dicta, taken together, represent the views of the full bench of the High Court of Australia in the leading case on the distinction between government and charity in Australian law. As such, they considerably weaken the support there is in Australian law for a control test.

The doubt cast by the High Court of Australia in the *Central Bayside* case on the appropriateness of a control test when distinguishing between government and charity is not without foundation in the case law. As I noted above, Kirby J pointed out in the *Central Bayside* case that even organisations established by statute have been found to be charitable. The most celebrated such case, to which Kirby J referred,⁶² is that of the British Museum, established by statute in 1753 and found in 1826 to be a charitable organisation in *The Trustees of the British Museum v White*.⁶³ The case of the British Museum also supports Callinan J’s reference in the *Central Bayside* case to gifts being charitable even though they are to a ‘polity or creature’ of government, a reference that finds further support in a series of cases concerning hospitals that were decided in the 1950s. In *In re Morgan’s Will Trusts* and *In re Frere (dec’d)*, testamentary gifts were made to British hospitals which, between the time of the making of the respective wills and the time of the testators’ deaths, had been nationalised under the *National Health Service Act 1946*.⁶⁴ In neither case did the fact that government had assumed control of the hospitals in

57 (2000) 101 FCR 91.

58 Ibid 101.

59 *Central Bayside (HCA)* (2006) 228 CLR 168, 187 (Gleeson CJ, Heydon and Crennan JJ).

60 Ibid 211 (Kirby J).

61 Ibid 226 (Callinan J).

62 Ibid 211 (Kirby J).

63 *Trustees of the British Museum v White* (1826) 2 Sim & St 594; 57 ER 473 (Sir John Leach VC). The British Museum was established under the *British Museum Act 1753* (26 Geo 2 c 22).

question affect in any way the charitable character of the gifts. Further, in *Re Sutherland, deceased*, the Full Court of the Supreme Court of Queensland ruled that a charitable trust for 'public hospitals in Queensland' could be carried out by making distributions to hospitals under government control.⁶⁵

In addition to casting doubt on the appropriateness of a control test when distinguishing government and charity in Australian law, the High Court in the *Central Bayside* case considered that the 'public benevolent institution' cases were of little use when thinking about the distinction between government and charity. Their Honours pointed out that the 'public benevolent institution' cases all involved organisations created by statute, and refused to draw an analogy between those cases and cases involving organisations not created by statute.⁶⁶ This refusal was significant, for a reason that I will return to below. For now, it will suffice to point out that, if no analogy may be drawn between the 'public benevolent institution' cases and cases involving non-statutory organisations, the 'public benevolent institution' cases do not support the application of a control test in cases of the latter type.

At the beginning of this Part, I noted the view of the Sheppard Committee that the test for distinguishing a governmental from a charitable organisation in Australian law is one of control. It must be concluded that this view is largely unsupported by the case law. Although there is some support for a control test, particularly in the judgments of Nettle J of the Supreme Court of Victoria and members of the Victorian Court of Appeal in the *Central Bayside* case, that support is weakened by the scepticism exhibited towards a control test by the High Court of Australia in its later decision in that case. In addition, the 'public benevolent institution' cases, in which a control test appears to have been applied by Australian courts, were found by the High Court in the *Central Bayside* case to be of precedential value only in cases of organisations established by statute. Finally, a control test is unable to account for those cases where a testamentary gift to a charitable organisation has retained its charitable character notwithstanding that control of the organisation might have been assumed by government.

4. *Voluntarism*

Based on the foregoing, in this final Part, I assume that what distinguishes government from charity in Australian law is not the character of the purposes for which a gift, trust or organisation is made, settled or established, nor the fact of government control of an organisation. Instead, I argue that the distinction between government and charity in Australian law is best understood with reference to the concept of voluntarism. That is not to say that courts have explicitly invoked the

64 9 & 10 Geo 6 c 81. See *In re Morgan's Will Trusts* [1950] Ch 637 (Roxburgh J); *In re Frere (dec'd)* [1951] Ch 27 (Wynn-Parry J).

65 *Re Sutherland, deceased* [1954] St R Qd 99.

66 *Central Bayside (HCA)* (2006) 228 CLR 168, 186 (Gleeson CJ, Heydon and Crennan JJ), 195 (Kirby J), 228–9 (Callinan J).

concept of voluntarism when drawing a distinction between government and charity; rather, the concept of voluntarism best explains what courts have been doing in cases where a distinction between government and charity has been drawn. In brief, my argument is that what courts have considered charitable is characterised by voluntarism, whereas what courts have considered governmental is not. In addition, although there is an old Chancery case that at first glance appears to be inconsistent with treating voluntarism as the basis for the distinction between government and charity in Australian law, that case, once properly understood, is no threat to a voluntarism analysis.

In order to see how this argument works, it is important to have a clear sense both of what voluntarism is, and of what it is not. First, what it is not. It is not altruism. In the *Central Bayside* case, Kirby J spoke of the ‘spark of altruism and benevolence’ that is ‘essential’ to charity.⁶⁷ Similarly, in its report to the Commonwealth Government on the law of charity in Australia, the Sheppard Committee regarded altruism as an important dimension of charity, recommending that the public benefit test for charitable purposes in Australian law be reformed to demand more explicitly that purposes, in order to be charitable, be altruistic.⁶⁸ Altruism — which I, like the Sheppard Committee, take to mean a regard for others as a principle of action⁶⁹ — often coincides with charity. Indeed, altruism is doubtless a significant motive for charity. However, it is a conceptual error to suppose that altruism is what defines charity, and to that extent it is wrong to imagine that altruism is capable of distinguishing that which is charitable from that which is governmental. To illustrate the point, imagine the case of a religious person who settles all her wealth on trust for the purpose of feeding the poor, not because of her regard for the plight of the poor, but rather because she believes that her religious duty is to give everything she has to the poor.⁷⁰ Her actions are not altruistic, yet it cannot be doubted that her trust is one for a charitable purpose, as the relief of poverty is one of the accepted heads of charity according to the celebrated judgment of Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v Pemsel*.⁷¹

Nor is voluntarism volunteerism, in the sense of the use of volunteer labour. Much of the work of the charity sector is performed by volunteers as opposed to paid staff, and much of the work of government is performed by paid staff as opposed to volunteers. However, although charitable organisations typically rely on volunteers whereas government does not, volunteerism is not what distinguishes charity from government. The work of a charitable organisation might be performed by paid employees, and this ought not to affect that organisation’s charitable status in any way. Indeed, many large charitable organisations maintain paid permanent staff and engage professional advisers for

⁶⁷ Ibid 210 (Kirby J). See also *Central Bayside (VCA)* [2005] VSCA 168, [4] (Chernov JA).

⁶⁸ The Sheppard Report, above n 5, 124–5.

⁶⁹ Ibid 124. See also Thomas Nagel, *The Possibility of Altruism* (paperback edn, 1978) 3.

⁷⁰ Such a duty may even be a duty of charity (in the non-legal sense): Gardner, above n 3, 8.

⁷¹ *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 583 (Lord Macnaghten).

fees, and this ‘professionalisation’ of the charity sector has been remarked on in recent years.⁷² In its report, the Sheppard Committee stated that, given the variability in the use of volunteers across the charity sector, it would be inappropriate to introduce into the law any necessary connection between charity and volunteerism.⁷³ Not only did that statement indicate that volunteerism ought not to be the test of charity, but it implied, correctly, that volunteerism is not the test of charity as the law currently stands.

It has been argued that voluntarism is accompanied by self-giving,⁷⁴ and that it is connected with the social value of fraternity.⁷⁵ In addition, individual virtues, such as generosity,⁷⁶ commitment,⁷⁷ empathy,⁷⁸ and public-spiritedness,⁷⁹ are often manifested where voluntarism is present. However, the gist of voluntarism is choice. At the beginning of this article, I noted that government and charity are in the same business, which is fostering the common good. The common good might be pursued or enabled in a variety of ways,⁸⁰ but, for present purposes, only two are relevant. First, the common good might be pursued individually by persons making autonomous choices; and, second, it might be pursued collectively by the community as a whole via the deliberative and democratic processes of the State.⁸¹ The first way of pursuing the common good — the individually and autonomously chosen way — is appropriately described as voluntarism and, when it takes the form of the making of a gift, the settlement of a trust, or the establishment of an organisation for purposes that are charitable in the legal sense, it amounts to charity in Australian law. The second way of pursuing the common good — the collectively and democratically determined way — is not appropriately described as voluntarism. It is better described as administration, and it typically takes the form of the distribution and application of the revenue by entities created by statute or which derive their authority from the Crown. This second way of pursuing the common good does not amount to charity in Australian law.

The concept of voluntarism, thus understood, helps to explain many of the cases in which courts have been called on to draw a distinction between government and charity. For example, it provides an account of why courts have upheld gifts to government for charitable purposes like the relief of taxes, the discharge of the

72 Jonathan Garton, ‘Charities and the State’ (2000) 14 *Trust Law International* 93, 96–7.

73 The Sheppard Report, above n 5, 125. Unfortunately, the Sheppard Committee used the language of ‘voluntarism’ to make this point, thereby obscuring its meaning.

74 Susan R Moody, ‘Self-Giving in “Charity”: The Role of Law’ in Charles Mitchell and Susan R Moody (eds), *Foundations of Charity* (2000) 79.

75 Rob Atkinson, ‘Problems with Presbyterians: Prolegomena to a Theory of Voluntary Associations and the Liberal State’ in Charles Mitchell and Susan R Moody (eds), *Foundations of Charity* (2000) 125.

76 Mitchell, above n 15, 204.

77 Lewis, above n 5.

78 Mitchell, above n 15, 204.

79 Gardner, above n 3, 15–9.

80 See generally Mark Freedland, ‘Charity Law and the Public/Private Distinction’ in Charles Mitchell and Susan R Moody (eds), *Foundations of Charity* (2000) 111.

81 These different ways of pursuing the common good might also correspond to the non-legal meanings of charity and justice respectively: see Gardner, above n 3, 35.

national debt, or the benefit of a specified geographical area, even where those purposes are also governmental.⁸² What gives such gifts their charitable status is their voluntary character as gifts, which is not diminished by the fact that government is their donee. By contrast, in cases of gifts to government for general governmental purposes, courts appear to have taken the view that a testator, by making such a gift, has made an individual and autonomous choice but that the choice has been for administration with respect to the subject matter of the gift. To the extent that the choice has been for administration, the testator has effectively cancelled whatever charitable character the gift might otherwise have had.⁸³

Two cases illustrate this point. First, there is the decision of the High Court of Australia in *Diocesan Trustees of the Church of England in Western Australia v Solicitor General*.⁸⁴ In that case, testamentary gifts had been made to the trustees of 'lunatic asylums' and 'poor houses' in Western Australia. At the time, Western Australia had only one 'lunatic asylum' and two 'poor houses', and all three were governmental institutions. In ordering a scheme for distribution, the High Court was of the view that the gifts should be applied to purposes that would not ordinarily be funded out of the revenue.⁸⁵ As Barton J put it, 'care will be taken [when settling the scheme] that the moneys will be used for the benefit of the inmates, and not for the ease of the Government in its expenditure.'⁸⁶ And O'Connor J added that:

there are many ways in which private charity sympathetically and wisely administered may render the daily lives of both classes of inmates brighter and happier than they can be under the ordinary routine of Government administration.⁸⁷

These statements imply a distinction between those purposes that could be achieved only by the voluntarism of the testator and those purposes that could be achieved by government administration. The High Court was prepared to regard the gifts as charitable only to the extent that they would be applied to purposes of the former type.

The second case that illustrates the significance of voluntarism to the distinction between government and charity in cases entailing gifts to government is *In re Cain (dec'd)*.⁸⁸ A testator made a gift to 'the Children's Welfare Department' of the State of Victoria. Along with pointing out that the case before him was not analogous to those cases where gifts had been made to government for the purpose of benefiting a particular geographical area, Dean J of the Supreme

⁸² See above 8–13.

⁸³ Courts need not have taken this view; they might, instead, have understood a choice for administration to be nonetheless voluntary and therefore charitable. See below n 108, and accompanying text.

⁸⁴ *Diocesan Trustees of the Church of England in Western Australia v Solicitor General* (1909) 9 CLR 757.

⁸⁵ *Ibid* 763, 765–6 (Griffith CJ), 768 (Barton J), 772 (O'Connor J).

⁸⁶ *Ibid* 768 (Barton J).

⁸⁷ *Ibid* 772 (O'Connor J).

⁸⁸ [1950] VLR 382.

Court of Victoria stated that a gift to a government department for its general purposes could not be charitable.⁸⁹ Putting aside the possibility that a gift to a government department for its general purposes might be a charitable gift for the relief of taxes, this statement was consistent with the idea that a testator might cancel the charitable character of her own gift by choosing administration with respect to the subject matter of the gift. However, of most interest in *In re Cain* (*dec'd*) is what Dean J said next:

If the Department is able and willing to undertake for the benefit of children under its care some activities over and above its normal duties and is prepared to apply the present gift to that end, then, if such a course is fairly within what the testator intended, the gift would be charitable.⁹⁰

His Honour ruled that this course of action was within the testator's intention and ordered the preparation of a scheme of distribution for the approval of the court.⁹¹ Dean J was prepared to regard a gift to government as charitable insofar as the voluntary character of the gift remained distinct and paramount: in other words, to the extent that the gift could be carried out without treating the testator's choice as a choice for administration with respect to the subject matter of the gift.

The concept of voluntarism also helps to explain cases in which the question of government control has arisen. As I pointed out above, in the *Central Bayside* case, the High Court of Australia refused to endorse a control test unqualifiedly.⁹² This suggests that their decision might be better explained according to a concept other than control. The judgments of the High Court in the *Central Bayside* case indicate that what influenced the Court's decision to recognise the appellant, an organisation that pursued a variety of purposes relating to general medical practice in suburban Melbourne, as charitable, was the presence of voluntarism. For example, Gleeson CJ, Heydon and Crennan JJ stated that:

The history of general practice divisions [of which the appellant was one] suggests that *medical practitioners originally began to cooperate for charitable purposes of their own volition*. The Commonwealth Government perceived that those purposes, which it shared, could be more effectively carried out by government-influenced reorganisation of, and government funding for, the activities of local private medical practitioners, than by enlisting the aid of more remotely located public servants.⁹³

According to Kirby J:

At all times, as a "body", *the appellant was a private corporation, constituted independently of government*. It was only tied to ... governmental purposes so long as those purposes coincided with benefits to the public, the patients and the members, as perceived and accepted by the constituent body of the appellant.⁹⁴

⁸⁹ Ibid 386–7.

⁹⁰ Ibid 387.

⁹¹ Ibid 388.

⁹² See above 10.

⁹³ *Central Bayside (HCA)* (2006) 228 CLR 168, 184–5 (Gleeson CJ, Heydon and Crennan JJ) (emphasis added).

⁹⁴ Ibid 214 (Kirby J) (emphasis added).

Each of these statements implied a distinction between that which is chosen voluntarily (charity) and that which is determined administratively (government). However, it was Callinan J who stated the point most clearly:

*The appellant in this case was entirely voluntarily established. It is not, and has never been, part of a government department. It does not owe its existence to a statute. It is quite separate from government.*⁹⁵

Another aspect of the *Central Bayside* case which the concept of voluntarism helps to explain, is the refusal of the High Court to draw an analogy between that case and the ‘public benevolent institution’ cases. Earlier, I noted that the Court refused to draw such an analogy because the entities before the courts in the ‘public benevolent institution’ cases were all established by statute whereas the appellant in the *Central Bayside* case was not so established.⁹⁶ I also suggested that this was significant, and the reason for its significance should now be clear. An entity that is established by statute lacks a voluntary character; being established by the collective and democratic processes of the State, it is a creature of administration. As a result, it cannot be charitable. So the fact that the appellant in the *Central Bayside* case was not established by statute was only superficially the reason why the High Court refrained from drawing an analogy between the situation of the appellant and the situations of the entities in the public benevolent institution cases. The real, underlying, reason was that the appellant was established by voluntarism whereas the entities in the public benevolent institution cases were not.⁹⁷

It might be thought that a voluntarism analysis of the distinction between government and charity in Australian law runs into an obstacle in the form of the old Chancery case of *Attorney-General v Brown*.⁹⁸ Under an Act of Parliament enacted during the reign of George III, commissioners were appointed to oversee the paving, lighting and cleaning of the town of Brighton, as well as the repair of ‘groyns’ which functioned to keep the sea from encroaching on the town. The commissioners were authorised under the Act of Parliament to impose a levy on coal that was landed at Brighton, the purpose of the levy being to fund the purposes for which the commissioners were appointed. Various complaints were brought against the commissioners by the Attorney-General. The Lord Chancellor, Lord Eldon, had to decide whether the Attorney-General had standing to bring these complaints before him. The Attorney-General argued that the commissioners had

⁹⁵ Ibid 229 (Callinan J) (emphasis added).

⁹⁶ See above 10–11.

⁹⁷ Indeed, this conclusion appears to be reinforced by dicta from Allsop J of the Federal Court of Australia in his first instance decision in *Ambulance Service of New South Wales v Deputy Commissioner of Taxation* [2002] FCA 1023. Having found (at [151]–[152]) that the Ambulance Service of New South Wales was too governmental to be a public benevolent institution, his Honour noted (at [155]) that the Service relied in small measure on voluntarism in the form of gifts from members of the public. In the following paragraph (at [156]) his Honour stated, ‘I have not found the resolution of the question at all easy.’ It would appear that his Honour’s disquiet was attributable in part to this small measure of voluntarism.

⁹⁸ (1818) 1 Swans 265; [1814–23] All ER Rep 382.

been appointed to carry out charitable purposes, and that the jurisdiction of Chancery was enlivened as a consequence. The commissioners argued that the system set up by the legislature in no way involved charity. The report of the case summarised their argument as follows:

Here is no gift; no transfer of a fund; it is a mere compulsory levy, authorized by the legislature; a local tax. What analogy exists between such an exercise of sovereign power, and the act of an individual proprietor devoting a portion of his property to public purposes?⁹⁹

In other words, the argument of the commissioners was that the town improvement scheme took the form of administration, not voluntarism.

Lord Eldon was of the view that he had jurisdiction in the case. He pointed to previous instances in which the raising of levies by Act of Parliament for public purposes was characterised as charity; in particular he pointed to examples of levies being imposed on commodities landed at ports the repair of which the levies were raised to facilitate.¹⁰⁰ And he quoted the following from *Duke's Exposition of the Statute of Elizabeth*:

Money given by a private donor for repairing a church or chapel is a charitable use; and if this is the law, there is no reason why money given by the public, if it is applied to a charitable purpose, should not be equally within the statute of Elizabeth.¹⁰¹

Attorney-General v Brown therefore appears to stand for the proposition that the core case of administration by government — raising taxes by statute to fund public purposes — might be charitable. If Lord Eldon's analysis stands, it challenges the view that what distinguishes government from charity in Australian law is voluntarism.

However, that analysis does not stand. In *Attorney-General v Heelis*, another town improvement case decided only a few years after *Attorney-General v Brown*, Sir John Leach VC appeared to endorse Lord Eldon's earlier decision.¹⁰² However, a close reading of the decision of the Vice-Chancellor reveals that he drew a significant distinction that was not drawn by Lord Eldon: a distinction between a gift of the legislature or of the Crown for the purpose of improving a town, and the imposition of a tax or a levy by the legislature for that purpose. Only the former was charitable, according to Sir John Leach.¹⁰³ It must be said that it is difficult, in a modern democratic State, to conceive of the legislature, or even the Crown, making a gift in the voluntary fashion contemplated by the Vice-Chancellor. But this ought not to detract from the fact that the distinction drawn by Sir John Leach in *Attorney-General v Heelis* was a distinction between

⁹⁹ Ibid 279.

¹⁰⁰ Ibid 308.

¹⁰¹ Ibid 297.

¹⁰² (1824) 2 Sim & St 67; 57 ER 270.

¹⁰³ Ibid 76–8.

voluntarism and administration. To that extent, *Attorney-General v Heelis* dilutes whatever challenge *Attorney-General v Brown* presents to a voluntarism analysis. Furthermore, in two cases decided in the 1820s, *Attorney-General v Mayor of Dublin* and *Attorney-General v The Mayor and Corporation of Carlisle*, the Court of Chancery pointed out that there had never been any need in *Attorney-General v Brown* to demonstrate the existence of charity to invoke the jurisdiction of Chancery, because Chancery had jurisdiction over the case anyway.¹⁰⁴ In light of these decisions, it is strongly arguable that *Attorney-General v Brown* has negligible or even no value as a precedent when it comes to distinguishing between government and charity, particularly as Lord Eldon himself was one of the judges in *Attorney-General v Mayor of Dublin*.

Once *Attorney-General v Brown* is properly understood, there is no obstacle to concluding that the best view of what distinguishes government from charity in Australian law points to the concept of voluntarism. This conclusion should not be taken to imply that a voluntarism analysis is consistent with all of the decided cases. For example, in *Construction Industry Training Board v Attorney-General*, a majority of the English Court of Appeal found an organisation that had been established by statute and was therefore a creature of administration to be charitable.¹⁰⁵ In the *Central Bayside* case, Kirby J stated that even bodies established by statute could be charitable.¹⁰⁶ And in *In re Cain (dec'd)*, Dean J of the Supreme Court of Victoria took the view that a gift to a government department for its general purposes could not be charitable, presumably even if all of those purposes, considered in isolation, were of charitable character.¹⁰⁷ It is arguable, in light of a voluntarism analysis, that these approaches to the distinction between government and charity were founded on error; indeed, in the *Central Bayside* case, members of the High Court of Australia raised just that possibility with respect to *In re Cain (dec'd)*.¹⁰⁸ However, rather than making that argument, I am content to point to the fact that a voluntarism analysis is consistent with the substantial majority of the decided cases, including the decision of the High Court in the leading *Central Bayside* case. In *Oppenheim v Tobacco Securities Trust Co Ltd*, Lord Simonds, who understood the law of charity better than almost anyone before or since, stated that '[n]o-one who has been versed ... in this difficult and very artificial branch of the law can be unaware of its illogicalities.'¹⁰⁹ With that in mind, consistency with most of the decided cases might be the best that any analysis of a topic in the law of charity can hope for.

104 *Attorney-General v Mayor of Dublin* (1827) 1 Bligh NS 312, 346–8 (Lord Redesdale), 357–9 (Lord Eldon LC); 4 ER 88; *Attorney-General v The Mayor and Corporation of Carlisle* (1828) 2 Sim 437, 449–50; 57 ER 848.

105 [1973] 1 Ch 173 (CA), 188 (Buckley LJ), 188–9 (Plowman J).

106 *Central Bayside (HCA)* (2006) 228 CLR 168, 211 (Kirby J).

107 *In re Cain (dec'd)* [1950] VLR 382, 386–7 (Dean J).

108 *Central Bayside (HCA)* (2006) 228 CLR 168, 181 n 37 (Gleeson CJ, Heydon and Crennan JJ).

109 [1951] AC 297, 307.

5. *Conclusion*

As I have sought to demonstrate in this article, drawing a meaningful distinction between government and charity in Australian law depends on the concept of voluntarism. However, while drawing that distinction is important, it is not uniquely so. Another distinction that demands attention is that between charity and commerce; a moment's attention reveals that this latter distinction does not depend on voluntarism, as charity and commerce are both characterised by individual and autonomous choice. What the distinction between charity and commerce does depend on remains an open question in Australian law, even in light of the High Court of Australia's recent consideration of the matter in *Commissioner of Taxation of the Commonwealth v Word Investments Ltd.*¹¹⁰ The *Word Investments* case teaches us that identifying charity as a species of voluntarism only partly explains what makes charity distinct in our law from other modes of social interaction. However, as I hope to have shown in this article, pointing to voluntarism as that which makes charity distinct from government is an important component of any complete explanation of the nature of charity in Australian law, whatever else that explanation contains.

¹¹⁰ (2008) 236 CLR 204.

Finding the Limits of *Aid/Watch*

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Abstract

Commissioner of Taxation v Aid/Watch Incorporated is the latest of a series of recent cases in which the High Court of Australia has exhibited what might be described as a ‘generosity of spirit’ to would-be taxpayers whose charitable status has been called into question. In *Aid/Watch*, the Court ruled that an organisation formed to monitor and evaluate the delivery of foreign aid by Australian government agencies was a charity even though it was engaged, consistently with its objects, in the sorts of political activities that traditionally have been regarded as anathema to charity. This article considers where we might feasibly locate the boundaries of the High Court’s reasoning in *Aid/Watch*, in light of charity law as a whole. In other words, as a matter of charity law, what are the limits of *Aid/Watch*? Thinking about this question demands: (a) some understanding of what the High Court in *Aid/Watch* said with certainty; and (b) a wider review of charity law to see which of its rules and principles may bear upon cases about political purposes now that *Aid/Watch* has been decided.

Introduction

Charity law is in many ways the centrepiece of civil society regulation in Australia. But at the same time as our understanding of civil society has deepened, and the political, social, economic and cultural setting in which civil society activity is undertaken has changed, charity law in Australia has remained largely the same as it was in the late nineteenth century. Even as significant reform of charity law has been achieved in England and Wales, Scotland, Northern Ireland, the Republic of Ireland and New Zealand, the Australian legal landscape with respect to charity has been left mostly untouched. Much of the blame for this situation must be laid at the feet of successive governments, which for many years have talked about, but failed to achieve, substantive reform of charity law.

Against this backdrop of longstanding government inaction, recent judicial generosity to charities in Australia is worthy of note. In a trio of cases decided over the past few years, the High Court of Australia has exhibited what might be described as a ‘generosity of spirit’ to would-be taxpayers whose charitable status has been called into question. In *Central Bayside General Practice Association Ltd v Commissioner of State Revenue*,¹ the Court held that a corporation remained a charity notwithstanding that, over time, it had come to be almost wholly reliant on government for its funding. In *Commissioner of Taxation v Word*

¹ (2006) 228 CLR 168 (‘*Central Bayside*’).

Investments Ltd,² the Court confirmed the charitable status of a corporation that operated a business but applied the profits of its business to charitable purposes.³ And in *Aid/Watch v Incorporated Commissioner of Taxation*,⁴ the Court ruled that an organisation formed to monitor and evaluate the delivery of foreign aid by Australian government agencies was a charity even though it was engaged, consistently with its objects, in the sorts of political activities that traditionally have been regarded as anathema to charity. In each of *Central Bayside*, *Word Investments*, and *Aid/Watch*, the Court was asked by a would-be taxpayer to review and relax charity law with an eye to social and economic developments, and in each case the Court responded to that challenge by expanding the range of the charitable in Australian law.

Whether or not judicial interventions like those in *Central Bayside*, *Word Investments*, and *Aid/Watch* are to be welcomed depends on the answers to a variety of questions, many of which have little to do with the content of charity law and everything to do with the proper role of courts in a liberal democracy and the appropriate design of the tax and transfer system with considerations such as distributive justice and the provision of public goods in view. For present purposes, such large questions may be put to one side. Instead, I take a narrow focus, examining only *Aid/Watch* and asking just one question with respect to that case: where might we feasibly locate the boundaries of the High Court's reasoning in *Aid/Watch*, in light of charity law as a whole? In other words, as a matter of charity law, what are the limits of *Aid/Watch*?⁵ Thinking about this question demands: (a) some understanding of what the High Court in *Aid/Watch* said with certainty; and (b) a wider review of charity law to see which of its rules and principles may bear upon cases about political purposes now that *Aid/Watch* has been decided.

Aid/Watch

To begin with, then, what did the High Court in *Aid/Watch* say with certainty? It seems to me that the Court said at least two things with certainty. First, to the extent that there was, prior to *Aid/Watch*, a rule in Australian law stating that political purposes may not be charitable,

² (2008) 236 CLR 204 ('*Word Investments*').

³ The federal government has recently announced its intention to introduce legislative amendments to provide clarity in respect of cases like *Word Investments*: see Commonwealth of Australia, *Budget Paper No 2* (Budget, 2011-2012) 36, available at <http://budget.australia.gov.au/2011-12/content/download/bp2.pdf>.

⁴ [2010] HCA 42 ('*Aid/Watch*').

⁵ This narrow focus excludes consideration of the constitutional implications of *Aid/Watch*, which are discussed by George Williams in his contribution to this symposium.

that rule was repealed in *Aid/Watch*.⁶ The majority, consisting of French CJ, Gummow, Hayne, Crennan and Bell JJ, put the matter beyond any doubt, stating that ‘[w]hat ... this appeal should decide is that in Australia there is no general doctrine which excludes from charitable purposes “political objects”’.⁷ And in her dissenting judgment, even Kiefel J rejected the proposition that ‘the political nature of an organisation’s main purpose should mean its outright disqualification from charitable status’.⁸ Only Heydon J, who also dissented, refused to express an opinion on the validity of the rule against political purposes in Australian law.⁹ In clearly repealing the rule against political purposes, the High Court in *Aid/Watch* has put Australian law out of alignment with the law of the United Kingdom, New Zealand and Canada, where a rule against political purposes is still recognised.¹⁰

The second clear ruling in *Aid/Watch* was the narrow ruling that determined the dispute between the Commissioner of Taxation and Aid/Watch: according to the majority, ‘the generation by lawful means of public debate ... concerning the efficacy of foreign aid directed to the relief of poverty’ is a charitable purpose.¹¹ While this purpose did not meet the description of ‘relief of poverty’, ‘advancement of education’ or ‘advancement of religion’, the majority in *Aid/Watch* thought that it was nonetheless a purpose ‘beneficial to the community’¹² in the sense necessary to bring it within the four-fold taxonomy of types of charitable purpose referred to by Lord Macnaghten in the celebrated case of *Commissioners for Special Purposes of Income Tax v Pemsel*.¹³ In his dissenting judgment, Heydon J was not prepared to accept the proposition that generating public debate about poverty relief is a

⁶ That there was such a rule in Australian law prior to *Aid/Watch* appears to be beyond doubt: see *Royal North Shore Hospital of Sydney v Attorney General of New South Wales* (1938) 60 CLR 396 (HCA), but note the judgment of Santow J in *Public Trustee v Attorney-General of New South Wales* (1997) 42 NSWLR 600, recognising qualifications to the rule.

⁷ [2010] HCA 42, [48].

⁸ [2010] HCA 42, [69].

⁹ [2010] HCA 42, [51] and [63].

¹⁰ United Kingdom: *Bowman v Secular Society Ltd* [1917] AC 406 (HL); *McGovern v Attorney-General* [1982] Ch 321 (Slade J); *Southwood v Attorney-General* [2000] WTLR 1199 (CA). New Zealand: *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA); *Re Collier (deceased)* [1988] 1 NZLR 81 (Hammond J); *In re Draco Foundation (NZ) Charitable Trust* HC Wellington CIV 2010-485-1275, 15 February 2011 (Ronald Young J); *In re Greenpeace of New Zealand Incorporated* HC Wellington CIV 2010-485-829, 6 May 2011 (Heath J). Note, however, that in this last case, Heath J was reluctant to apply the rule against political purposes, stating (at [59]) that ‘[i]n modern times, there is much to be said for the majority judgment in *Aid/Watch*.’ Canada: *Re Positive Action Against Pornography and Minister of National Revenue* (1988) 49 DLR (4th) 74 (FCA); *Human Life International in Canada Inc v Minister of National Revenue* [1998] 3 FC 202 (FCA); *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 (SCC); *Action by Christians for the Abolition of Torture v Canada* (2002) 225 DLR (4th) 99 (FCA).

¹¹ [2010] HCA 42, [47].

¹² [2010] HCA 42, [47].

¹³ [1891] AC 531 (HL) (‘*Pemsel*’), 583.

charitable purpose;¹⁴ moreover, as I will discuss below, Heydon J took a narrower view than the majority did of what is entailed in generating public debate.¹⁵ And Kiefel J's dissenting judgment appeared to equivocate on the question whether or not generating public debate about poverty relief could be charitable in the absence of some element of education.¹⁶ But notwithstanding the doubts of the dissenting judges, the majority's narrow ruling was clearly stated and must now be regarded as part of the law of Australia.

Somewhere between the proposition that there is no longer a rule against political purposes in Australian law, and the proposition that generating public debate about the delivery of foreign aid directed at the relief of poverty is charitable, the limits of *Aid/Watch* are to be found. It is important that courts in future cases – and now also those charged with introducing the long-awaited statutory definition of charity into Commonwealth law¹⁷ – identify and monitor those limits, so that charities, taxing authorities, and the soon-to-be-created regulator of charities¹⁸ may act with confidence as to what the law requires. To a degree, guidance on finding the limits of *Aid/Watch* may be found in the judgments of the majority and the dissenters in that case. However, courts that are called upon to determine future cases about political purposes, and legislators required to fashion a statutory definition of charity, may now have to look further than *Aid/Watch*, to other rules and principles of charity law, in working out the implications of *Aid/Watch*. As I see it, at least two questions may arise for consideration.

Public debate about governmental activities

The first of these questions relates to the narrow proposition that the majority in *Aid/Watch* endorsed, which was the proposition that generating public debate about the efficacy of foreign aid directed to the relief of poverty is a charitable purpose. The question is this: in light of *Aid/Watch*, in what circumstances will generating public debate about governmental activities *other* than the delivery of foreign aid directed to the relief of poverty be a charitable purpose? The judgment of the majority provided some guidance on this matter. Recall that in *Pemsel* Lord Macnaghten referred to a four-fold taxonomy of types of charitable purpose, a

¹⁴ At one point in his reasons, Heydon J proceeded on the assumption that generating public debate about poverty relief is charitable: [2010] HCA 42, [58]. However, he nowhere indicated whether or not he accepted that assumption.

¹⁵ [2010] HCA 42, [58]-[59].

¹⁶ [2010] HCA 42, [69], [73] and [86].

¹⁷ See Commonwealth of Australia, above n 4, 37, stating the government's intention to legislate for a statutory definition to take effect from 1 July 2013.

¹⁸ See *ibid*, at 322-323, referring to the establishment of an Australian Charities and Not-for-Profits Commission from 1 July 2012.

taxonomy that sets out what are typically described as the ‘heads’ of charity. These are ‘relief of poverty’, ‘advancement of education’, ‘advancement of religion’ and ‘other purposes beneficial to the community’. In *Aid/Watch*, the majority had this to say:¹⁹

[T]he generation ... of public debate ... concerning the efficacy of foreign aid directed to the relief of poverty ... is a purpose beneficial to the community within the fourth head in *Pemsel*.

...

It ... is unnecessary for this appeal to determine whether the fourth head encompasses the encouragement of public debate respecting activities of government which lie beyond the first three heads (or the balance of the fourth head) identified in *Pemsel* and, if so, the range of these activities.

There are several points to make about this passage. First, the majority appeared to accept that generating public debate about governmental activities falling under any of the four heads of charity – ‘relief of poverty’, ‘advancement of education’, ‘advancement of religion’, and ‘other purposes beneficial to the community’ – can be a charitable purpose. This means that entities that seek to contribute to public discussion of governmental activities as diverse as the provision of social welfare, the funding of non-government schools, and state sponsorship of faith-based organisations should feel confident that they are within the realms of the charitable in light of *Aid/Watch*. But secondly, the majority expressed caution about endorsing as charitable contributions to public debate about governmental activities that are not themselves charitable within the taxonomy laid out in *Pemsel*.

This leads to a third point, which is best expressed as a question. Assuming that the caution exhibited by the majority in the passage quoted above is well-founded, how is a distinction to be drawn between governmental activities that are charitable within Lord Macnaghten’s taxonomy, and governmental activities that are not so charitable? The answer to this question turns, of course, on the scope of the ‘fourth head’ of charity, ‘other purposes beneficial to the community’. The scope of the ‘fourth head’ is famously obscure. On the one hand, there is authority for the proposition that a purpose may be charitable under the ‘fourth head’ only where it is analogous to an established charitable purpose, or even only where it is analogous to a purpose listed in the preamble to the Statute of Charitable Uses of 1601, the *fons et origo* of modern charity law.²⁰ On the other hand, many classes of purpose have been recognised as charitable under the ‘fourth head’ even though they have not been analogous to established

¹⁹ [2010] HCA 42, [47]-[48].

²⁰ See *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138 (HL); *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304 (HCA).

charitable purposes: purposes to do with animal welfare are possibly the best-known.²¹ And to complicate matters further, there is a line of authority that supports the proposition that the purposes of government, whatever their precise character, may constitute such a class.²² This line of authority has not gone unchallenged, and in at least one Victorian case a gift to a government department for its general purposes was held not to be charitable.²³ However, in my view the question whether or not the purposes of government are always charitable under the ‘fourth head’ is not settled in Australian law, and it may arise for consideration in future cases where the limits of the narrow ruling of the majority in *Aid/Watch* are tested.

A fourth and final point about the narrow ruling of the majority in *Aid/Watch*: the caution expressed by the majority, as to whether or not generating public debate about governmental activities is always charitable, might not have been well-founded. In this regard, it is worth noting that the majority clearly did not think that generating public debate about governmental activities is charitable because of any direct or indirect effect it might have on those activities themselves. Thus, for the majority, where a charity’s purpose is to agitate for law reform, a court need not concern itself with the merits or otherwise of the law reform in question before determining that the purpose is a charitable one.²⁴ In this aspect of its reasoning, the majority in *Aid/Watch* departed both from the traditional rule against political purposes, founded on the notion that it is impossible for a court to determine the public benefit of law reform,²⁵ and from *National Anti-Vivisection Society v Inland Revenue Commissioners*,²⁶ a political purposes case in which the House of Lords did assess the merits of a proposed law reform and made a finding that the public benefit test was not satisfied on the evidence. Arguably, courts have in the past invoked the rule against political purposes to avoid having to determine the public benefit of law reform in cases raising controversial social issues.²⁷ By finding that the public benefit test may be applied in political purposes

²¹ See, eg, *Re Cranston* [1898] 1 IR 431 (CA); *In re Wedgwood* [1915] 1 Ch 113 (CA).

²² I discuss these cases in Matthew Harding, ‘Distinguishing Government from Charity in Australian Law’ (2009) 31 *Sydney Law Review* 559, 563-566.

²³ *In re Cain (dec’d)* [1950] VLR 382 (Dean J).

²⁴ [2010] HCA 42, [45]: ‘A court administering a charitable trust for [the purpose of seeking law reform] is not called upon to adjudicate the merits of any particular course of legislative or executive action or inaction which is the subject of advocacy or disputation.’

²⁵ *Bowman v Secular Society Ltd* [1917] AC 406, 442 (Lord Parker of Waddington): ‘a trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit’.

²⁶ [1948] AC 31 (HL).

²⁷ *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA), *Re Positive Action Against Pornography and Minister of National Revenue* (1988) 49 DLR (4th) 74, *Human Life International in Canada*

cases without considering the merits or otherwise of law reform, the majority in *Aid/Watch* has ensured that courts may continue to steer clear of such controversy notwithstanding that the rule against political purposes has been repealed.

Rather than taking the view that generating public debate about governmental activities is charitable because of any effect it might have on those activities, the majority in *Aid/Watch* considered that generating public debate about governmental activities is apt to produce public benefit because of its effects on the political culture of liberal democracy in Australia. So much was clear from the majority's discussion of the importance of freedom of political expression to the system of government established under the Commonwealth Constitution.²⁸ If it is the effects of public debate on political culture, and not on governmental activities, that matter, then it is difficult to see why courts in cases like *Aid/Watch* ought to be concerned about the character of the governmental activities that are subject to public debate when determining whether or not generating the public debate in question is a charitable purpose. And this is why, in *Aid/Watch*, the majority's caution about the scope of its narrow ruling might have been misplaced.

Public debate and public benefit

To find the limits of *Aid/Watch*, then, it is necessary to consider the possible effects that public debate about governmental activities might have on political culture, which leads to the second question that I think may arise for consideration in the future in light of *Aid/Watch*. The second question is this: in what circumstances will generating public debate about governmental activities satisfy the 'public benefit' test that is applied to all purposes falling within the 'fourth head' of charity as outlined in *Pemsel*? The public benefit test applies differently to purposes falling under the different 'heads' of charity. In the case of purposes answering the description of 'relief of poverty', benefit to the public as opposed to a private class need not be demonstrated,²⁹ while in the case of purposes under the 'head' of 'advancement of education', courts do demand evidence that benefit is not confined to a private class.³⁰ In cases about purposes under the 'head' of 'advancement of religion', courts usually presume public benefit but sometimes demand that it be established on the

Inc v Minister of National Revenue [1998] 3 FC 202 and *Action by Christians for the Abolition of Torture v Canada* (2002) 225 DLR (4th) 99 may have been cases of this type.

²⁸ [2010] HCA 42, [44]-[45].

²⁹ See, eg, *Re Compton* [1945] Ch 123 (CA); *Dingle v Turner* [1972] AC 601 (HL).

³⁰ *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 (HL).

evidence.³¹ In the case of purposes under the ‘fourth head’ of charity – and, after *Aid/Watch*, we know that the purpose of generating public debate about governmental activities is such a purpose – public benefit must always be demonstrated on the evidence.³² Consequently, in future cases where entities argue that they are charitable in law because their purpose is to generate public debate about governmental activities, they will have to satisfy courts, adducing evidence as they go, that the public will benefit as a result of that purpose.

At this point, the various possible cases might be sorted into four groups. First, there are cases in which an entity has the purpose of *facilitating* public debate about governmental activities, perhaps by sponsoring conferences, seminars or meetings at which such debate might be conducted. It is highly likely that an entity with this type of purpose is a charity in light of *Aid/Watch*; the view may be attributed fairly to the majority and the two dissenting judges in that case that facilitating public debate about governmental activities is for the public benefit. However, it is worth pointing out that a strong argument can be made that an entity with the purpose of facilitating public debate about governmental activities probably satisfied the legal definition of charity even before *Aid/Watch* was decided, because facilitating public debate about governmental activities very likely was not a political purpose according to the pre-*Aid/Watch* law, and instead probably amounted to a type of ‘advancement of education’ that satisfied the public benefit test.³³ To my mind, this indicates the possibility that the majority in *Aid/Watch* thought that the public benefit test can be satisfied by purposes entailing the generation of public debate about governmental activities other than by facilitating such debate. But if I am wrong, and the majority did not think this, then *Aid/Watch* may amount to little more than an illustration of the settled proposition that purposes meeting the description of the ‘advancement of education’ are charitable where they have a public character.

That the majority in *Aid/Watch* did think that the public benefit test may be satisfied by purposes entailing the generation of public debate about governmental activities other than by facilitating it may be seen more clearly by dwelling on a second type of case. This is the case where an entity has the purpose of *contributing* to public debate on governmental activities, by making and criticising arguments and assertions in the public sphere, with the aim of

³¹ See the cases discussed in Matthew Harding, ‘Trusts for Religious Purposes and the Question of Public Benefit’ (2008) 71 *Modern Law Review* 159.

³² *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31.

³³ For the relevant principles, see Gino Dal Pont, *Law of Charity* (LexisNexis Butterworths, Chatswood, 2010) Chapter 9.

informing, persuading, or even browbeating others. Aid/Watch was itself an entity with such a purpose: it regarded itself, and was regarded by the High Court, as a ‘campaigning’ or ‘activist’ group prosecuting a certain agenda with respect to Australia’s foreign aid delivery.³⁴

The Court was divided as to the circumstances in which the purpose of contributing to public debate on governmental activities may benefit the public. Heydon J did not address the question of public benefit in his dissenting judgment, but his reasons rested in large measure on the conceptual point that an entity cannot ‘generate public debate’ by seeking to impose its view on others, as opposed to contributing to public debate in a discursive way, by inviting or joining a public conversation.³⁵ In light of this conceptual analysis, it is reasonable to attribute to Heydon J the view that the public benefit test is met only in circumstances where an entity has the purpose of contributing to public debate in a way that does not entail ‘campaigning’ or ‘activism’. The other dissenter, Kiefel J, addressed the question of public benefit squarely: for Kiefel J, ‘reaching a conclusion of public benefit may be difficult where the activities of an organisation largely involve the assertion of its views’.³⁶ This does not rule out a finding of public benefit in respect of a purpose of ‘campaigning’ or ‘activism’ about governmental activities, but it certainly expresses considerable scepticism about the possibility of such a finding.

In contrast, the majority in *Aid/Watch* was prepared to recognise ‘campaigning’ and ‘activism’ about governmental activities as contributions to public debate that are capable of satisfying the public benefit test of charity law. In my view, the majority expressed this quite clearly. The majority referred to the view of Dixon J, set out in the earlier case of *Royal North Shore Hospital of Sydney v Attorney-General for New South Wales*, that ‘when the main purpose of a trust is agitation for legislative or political change, it is difficult for the law to find the necessary tendency to the public welfare’.³⁷ The majority went on to discuss the freedom of political expression that is instrumental to the operation of the system of government established by the Commonwealth Constitution,³⁸ before making the following statement.³⁹

³⁴ For Aid/Watch’s view of itself as a ‘campaigning’ organisation, see <http://www.aidwatch.org.au>

³⁵ [2010] HCA 42, [58]-[59].

³⁶ [2010] HCA 42, [69].

³⁷ (1938) 60 CLR 396, 426, quoted at [2010] HCA 42, [42].

³⁸ [2010] HCA 42, [44].

³⁹ [2010] HCA 42, [45].

The system of law which applies in Australia thus postulates for its operation the very ‘agitation’ for legislative and political changes of which Dixon J spoke in *Royal North Shore Hospital*. ... [I]t is the operation of these constitutional processes which contributes to the public welfare.

I believe that this part of the majority’s reasoning reveals that the majority clearly accepted that contributions to public debate about governmental activities, answering the description of ‘agitation’, may satisfy the public benefit test. And ‘agitation’ seems to contemplate precisely the ‘campaigning’ and ‘activism’ that so bothered Heydon J and Kiefel J.

When it comes to future cases in which entities have the purpose of contributing to public debate about governmental activities, the limits of *Aid/Watch* will ultimately turn on what the judges deciding those cases, and the legislators crafting a statutory definition of charity for Commonwealth law, think about the value, in a liberal democracy, of political expression taking the form of ‘campaigning’ or ‘activism’. This question has troubled even political philosophers,⁴⁰ so there is no reason to think that judges or legislators will find it easy to answer, or that all judges and legislators will answer it in the same way.⁴¹ That said, as I noted above there is considerable support in the judgment of the majority in *Aid/Watch* for an expansive view of the range of contributions to public debate that might satisfy the public benefit test, even where those contributions are characterised by what Heydon J described as ‘rancour and asperity’.⁴²

A third type of case is the case where an entity has the purpose of *lobbying* government with respect to governmental activities. It is highly unlikely that such a purpose is charitable in law, even in light of *Aid/Watch*, because lobbying, as opposed to facilitating or contributing to public debate, is highly unlikely to satisfy the public benefit test. Of course, a distinction must be drawn between an entity that has the purpose of lobbying government, and an entity that has a charitable purpose (say, ‘advancement of religion’) and engages in lobbying in a

⁴⁰ See, eg, Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, Cambridge MA, 2000) Chapter 10, especially the discussion of John Stuart Mill’s ‘epistemic argument’ at 380-381.

⁴¹ For discussion of the issue, see: Elias Clark, ‘The Limitation on Political Activities: A Discordant Note in the Law of Charities’ (1960) 46 *Virginia Law Review* 439; RBM Cotterrell, ‘Charity and Politics’ (1975) 38 *Modern Law Review* 471; CEF Rickett, ‘Charity and Politics’ (1982) 10 *New Zealand Universities Law Review* 168; Perri 6 and Anita Randon, *Liberty, Charity and Politics: Non-Profit Law and Freedom of Speech* (Dartmouth, Aldershot, 1995) especially Chapter 8; GFK Santow, ‘Charity in its Political Voice – a Tinkling Cymbal or a Sounding Brass?’ (1999) 18 *Australian Bar Review* 225; Adam Parachin, ‘Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes’ (2008) 45 *Alberta Law Review* 871.

⁴² [2010] HCA 42, [59].

way that is ancillary to that charitable purpose. The latter type of case has never presented a problem, even where the rule against political purposes has been applied, because, as a matter of charity law, charities have always been free to engage in political activities in support of charitable purposes.⁴³ I say, ‘as a matter of charity law’, because there may well be public policy considerations against permitting even such ancillary lobbying, considerations that have to do with maintaining and strengthening democratic institutions and practices.⁴⁴ However, those considerations, which are not specific to lobbying by charities, are for another day. For the moment, I simply wish to note that in the former type of case – the case where an entity’s primary purpose is lobbying government – it is difficult to see how the public benefit test could be satisfied given that the purpose entails private communications between the entity in question and government.

Finally, consider a fourth type of case. This is the case where an entity has the purpose of *forming or supporting a political party*. Although the case law reveals that courts have occasionally tolerated such a purpose, the prevailing view has been that party political purposes cannot be charitable.⁴⁵ This view has probably survived *Aid/Watch*, but it is not entirely clear on what basis it might rest now that the rule against political purposes has been repealed. To my mind, there are two possibilities. First, it might be thought that the purpose of forming or supporting a political party does not satisfy the public benefit test, because the aim of a political party is to acquire power through forming or participating in government. This proposition lacks attraction. Putting simplistic cynical impressions of party politics to one side, if the most that could be said about political parties in Australia were that the aim of such parties is to acquire power, our political system would be sadly broken. Surely political parties are formed and maintained for a variety of purposes, including facilitating political expression and participation and contributing to public debate on a range of matters relating to government. Arguably, then, in a post-*Aid/Watch* world, forming or supporting a political party may satisfy the public benefit test of charity law because it is a purpose that either answers the description of ‘generating public debate about the activities of government’ or is analogous to purposes of that description such that it too satisfies the public benefit test.⁴⁶

⁴³ *McGovern v Attorney-General* [1982] Ch 321; *Public Trustee v Attorney-General of New South Wales* (1997) 42 NSWLR 600.

⁴⁴ See Joo-Cheong Tham, *Money and Politics: The Democracy We Can’t Afford* (UNSW Press, Sydney, 2010).

⁴⁵ See the excellent discussion in LA Sheridan, ‘Charity versus Politics’ (1973) 2 *Anglo-American Law Review* 47. For the prevailing view, see *Royal North Shore Hospital of Sydney v Attorney General of New South Wales* (1938) 60 CLR 396, 426 (Dixon J).

⁴⁶ See Rickett, above n 42, 173: ‘Of course political parties are essential to the well-being of society’.

A second possibility is that forming or supporting a political party is not a charitable purpose in Australian law even if it yields public benefit, on public policy grounds. I am not sure what those grounds might be: indeed, at a time when encouraging political participation is one of the great challenges that face liberal democratic states, it might be thought that the policy considerations militate in favour of viewing the formation or support of political parties as charitable. But whatever the policy grounds for the persistence of a rule against party politics in charity law, courts in future cases, as well as legislators, may have to grapple with them now that the rule against political purposes has been repealed. Interestingly, the status of party political purposes was raised during argument in *Aid/Watch*, and some members of the Court seemed far from convinced that because of public policy considerations such purposes cannot be charitable.⁴⁷ However, no trace of this line of thinking survived in the judgments of the Court.

Conclusion

The long days of government inaction on the reform of charity law may finally be drawing to a close. Firm government commitments have now been made to establish an independent regulator of charities and to introduce a statutory definition of charity into Commonwealth law. Judicial innovations like those in *Central Bayside*, *Word Investments*, and *Aid/Watch* may no longer be so urgently required to ensure that charity law keeps pace with social and economic developments. But in respect of *Aid/Watch*, careful reflection on the implications of the High Court's repeal of the rule against political purposes will still be necessary, if only because the new statutory definition of charity will have to take *Aid/Watch* into account. The reasoning of the judges in *Aid/Watch* itself, viewed in the setting of charity law as a whole, will be of considerable assistance in finding limits to the recent judicial generosity towards political purposes. But that assistance will not suffice. The limits of *Aid/Watch* will be fully revealed only in light of ongoing deliberation on some of the more difficult questions of political philosophy, questions about individual freedom, the common good, and the relationship between citizens and their government in a liberal democratic state. And that is a burden that government bears as it moves towards the implementation of statutory reform of Australian charity law.

Acknowledgements

My thanks to Joyce Chia, Fiona Martin and Ann O'Connell for comments on a draft.

⁴⁷ See [2010] HCATrans 154, 143-203.

THE
MODERN LAW REVIEW

Volume 71

March 2008

No 2

Trusts for Religious Purposes and the Question of
Public Benefit

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It is a well-established principle that no trust may be regarded as charitable in law unless carrying out its purposes will benefit the public. Trusts for religious purposes have traditionally been presumed by courts to be for the public benefit. However, the presumption of public benefit will be removed from the law in early 2008 when section 3(2) of the Charities Act 2006 comes into force. At that time, two questions are likely to attract interest. First, to what extent, and in what ways, has the application of a presumption of public benefit assisted courts up to now? Secondly, without the assistance of the presumption, how might courts go about ascertaining whether the public will benefit in future cases? The article takes up these two questions with respect to trusts for religious purposes.

INTRODUCTION

It is a well-established principle that no trust may be regarded as charitable in law unless carrying out its purposes will benefit the public. The 'public benefit test', as it has come to be known, has, over the years, given rise to a considerable body of case law. One group of cases has raised questions about the extent to which, and in what sense, the purposes of a charitable trust must be *public* in character.¹ Another group of cases has raised questions about whether the purposes of a trust, if carried out, will *benefit* the public. Within this second group of cases, a distinction has been drawn among trusts falling under the four traditional 'heads' of charity famously set out by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v Pemsel*.² In the case of trusts falling under the first three traditional heads of charity – trusts whose purposes are recognised in law as the relief of poverty, the advancement of education, or the advancement of religion – courts have presumed public benefit unless the contrary has been proven based on evidence. However, in the case of trusts falling under the fourth traditional head of charity – trusts for purposes beneficial to the community not falling under one of the first three traditional heads of charity – courts have applied no such presumption.³

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1 See eg, *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Inland Revenue Commissioners v Baddeley* [1955] AC 572; *Dingle v Turner* [1972] AC 601.

2 [1891] AC 531, 583.

3 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 ('*Vivisection case*').

Against this backdrop, the enactment of the Charities Act 2006 is an event of great significance for the law relating to charitable trusts. Among its other innovations, the act finally severs the longstanding connection between the definition of charitable purpose and the preamble to the Statute of Charitable Uses 1601.⁴ Moreover, even though the Charities Act explicitly preserves the public benefit test and the general law understanding of the meaning of public benefit,⁵ the legislation removes the presumption of public benefit that has been applied in the past in cases on trusts falling under the first three traditional heads of charity.⁶ When the provisions of the Charities Act relating to public benefit come into force in early 2008,⁷ whether a purpose that is otherwise charitable is for the public benefit will have to be determined, based on the evidence before the court, without the application of any presumption.⁸ As a consequence, from that time there is likely to be interest in questions relating to public benefit on the part of litigants and judges. In particular, interest is likely to centre on two questions. First, to what extent, and in what ways, has the application of a presumption of public benefit assisted courts up to now? Secondly, without the assistance of the presumption, how might courts go about ascertaining whether the public will benefit in future cases?

In this article, I take up these two questions with respect to trusts falling under one of the traditional heads of charity: trusts for the advancement of religion. In the future, questions of public benefit are likely to be of particular interest when it comes to trusts under this head of charity, because in addition to removing the presumption of public benefit, the Charities Act widens the meaning of religion for the purposes of the law relating to charitable trusts and thereby makes it less likely that cases on trusts for religious purposes will be determined on the basis that the purposes in question do not advance religion.⁹ The article proceeds in three stages. First, I consider the extent to which, and the ways in which, the presumption of public benefit has, up to now, assisted courts in cases on trusts for religious purposes. Secondly, I identify two approaches from within the case law – on trusts for religious purposes and on trusts falling under the other traditional heads of charity – which might be available to courts once the presumption of public benefit is

4 Charities Act 2006, s 2.

5 Charities Act 2006, s 3(3).

6 Charities Act 2006, s 3(2).

7 Cabinet Office (Office of the Third Sector), *Charities Act 2006: Implementation Plan* (5 December 2006) at www.cabinetoffice.gov.uk/thirdsector/documents/charityreform/implementationplan.pdf (visited 18 October 2007).

8 The Charity Commission is required, under section 4 of the Charities Act, to issue guidance explaining the public benefit requirement. The Commission has initiated a consultation process with a view to issuing this guidance in June 2008. See Charity Commission, *Consultation on Draft Public Benefit Guidance* (March 2007) at www.charity-commission.gov.uk/library/enhancingcharities/pdfs/pbconsult.pdf (visited 18 October 2007). However, although the Commission's guidance will assist in knowing how the Commission will address the question of public benefit when it considers applications for registration, it will not address how a court will determine whether a purpose stated by a putative settlor or a testator is for the public benefit. That will be a matter for the court, applying the relevant case law.

9 Charities Act 2006, s 2(3)(a): "religion" includes – (i) a religion which involves belief in more than one god, and (ii) a religion which does not involve belief in a god". Cf *Re South Place Ethical Society* [1980] 1 WLR 1565; Charity Commissioners, *Application for Registration as a Charity by the Church of Scientology (England and Wales)* (17 November 1999) ("CoS") at www.charity-commission.gov.uk/Library/registration/pdfs/cosfulldoc.pdf (visited 18 October 2007).

removed from the law. In doing so, I assess both the likelihood that courts will take up these approaches as well as their suitability. Thirdly and finally, I look at whether human rights jurisprudence might offer a way forward when considering questions of public benefit in cases on trusts for religious purposes.

THE PRESUMPTION OF PUBLIC BENEFIT

Something like a presumption of public benefit appears to have been present in the case law on trusts for religious purposes for centuries, even if it has not always been explicitly acknowledged. In early cases on trusts for religious purposes, courts associated religion and charity naturally and looked favourably on trusts for religious purposes without even considering whether there was evidence that the public would benefit if the purposes in question were carried out. Because these early cases arose between the time of the Reformation and the advent of religious toleration in England, the fact that courts naturally associated religion and charity – as opposed to naturally associating Anglicanism and charity – is not immediately apparent. However, the association may be discerned clearly even in cases where trusts were struck down as void because they were for religious purposes that were not tolerated in English law at the time.

For example, take *Attorney-General v Baxter*.¹⁰ The case entailed an attempt to create a trust for the maintenance of a group of non-conformist clergymen. Sir Francis North, the Keeper of the Great Seal, struck down the trust as a superstitious use. Nonetheless, he said that there was a charitable intention and he decreed that the fund be applied *cy-près* for the maintenance of a chaplain at Chelsea College.¹¹ *Attorney-General v Baxter* appears to have turned on two principles: first, a superstitious use must be struck down as void; but secondly, a trust for religious purposes is a trust for charitable purposes, and a trust for charitable purposes is to be recognised to the extent that the law permits. The natural association of religion and charity meant that whether the public would benefit from the maintenance of non-conformist clergymen was simply not considered. Nor was that question considered when Sir Francis North's decree was reversed by the Charity Commissioners after the passage of the Act of Toleration 1689.¹² In 1689, the first of the two principles set out above no longer applied to purposes, like the maintenance of non-conformist clergymen, connected with dissenting Protestantism. That left only the natural association of religion and charity, in light of which the trust, being a trust for religious purposes, was regarded as charitable.¹³

Then there is *Da Costa v Da Paz*, the celebrated case in which a testator had bequeathed a fund of money for the support of a Jesuba 'wherein to read, and instruct youth in the Jewish religion.'¹⁴ Lord Hardwicke LC refused to uphold the bequest, as it was for a superstitious use. However, in doing so, the Lord Chan-

¹⁰ (1684) 1 Vern 248.

¹¹ *ibid.*

¹² *Attorney-General v Hughes* (1689) 2 Vern 105. See also G.H. Jones, *History of the Law of Charity 1532–1827* (Cambridge: Cambridge University Press, 1969) 81.

¹³ See also *Attorney-General v Hickman* (1732) 2 Eq Cas Abr 193.

¹⁴ (1754) 1 Dick 259.

cellor stated that the purposes for which the bequest was made were 'not void by law'.¹⁵ As was the case in *Attorney-General v Baxter*, Lord Hardwicke decreed that the fund be applied *cy-près*, and a footnote to the report of the case states that the fund was applied, under the Sign Manual, to a foundling hospital.¹⁶ Gareth Jones describes the Lord Chancellor's statement, to the effect that the purposes of the Jesuba were 'not void by law', as enigmatic.¹⁷ However, the meaning of the statement becomes clearer once it is understood that the bequest would have been upheld if Judaism had been tolerated in English law at the time. Lord Hardwicke's statement demonstrates that, in his view, there was no reason to strike down the bequest apart from the non-toleration of Judaism in English law. The Lord Chancellor's view is best understood as resting on a natural association of religion and charity. And this interpretation of *Da Costa v Da Paz* is strengthened by the demonstrated willingness of courts to uphold such bequests as charitable after the passage of the Jewish Relief Act 1846.¹⁸

Thirdly, consider *Cary v Abbott*.¹⁹ A testator made residuary provision in his will for a trust for the purpose of 'educating and bringing up poor children in the Roman Catholic faith'.²⁰ The next of kin filed a bill challenging the validity of the disposition, but the Attorney-General argued that the residue should be applied *cy-près* under the Sign Manual because the testator had a charitable intention. Sir William Grant MR declared that the disposition was void because it was for a superstitious use.²¹ However, he then had this to say.

[W]henver a testator is disposed to be charitable in his own way, and upon his own principles, we are not to content ourselves with disappointing his intention, if disapproved by us; but we are to make him charitable in our way and upon our principles. If once we discover in him any charitable intention, that is supposed to be so liberal as to take in objects, not only within his intention, but wholly adverse to it.²²

The Attorney-General was then ordered to apply for a Sign Manual. The statement of the Master of the Rolls stood for the interesting proposition that a general charitable intention, although frustrated owing to the Chantries Act 1547, might yet be realised in ways that were directly contrary to the specific intention of a testator. But for our purposes, the statement is more interesting because the Master of the Rolls simply assumed that the intention behind a trust for the purpose of bringing up children in the Roman Catholic faith was charitable in character.

The natural association of religion and charity in these early cases cannot be equated with a presumption of public benefit, because at the time when the cases were decided there was no specifically articulated public benefit test in the law relating to trusts for charitable purposes. However, in the early cases, the natural association of religion and charity performed a role similar to that played by the presumption of

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ Jones, n 12 above, 143.

¹⁸ See Jones, *ibid* for the cases.

¹⁹ (1802) 7 Ves Jun 490.

²⁰ *ibid.* 490.

²¹ *ibid.* 494.

²² *ibid.* 495.

public benefit in modern cases. It enabled courts to view trusts for religious purposes favourably without requiring evidence on the basis of which such a favourable view might be justified. In the modern law, the presumption of public benefit has enabled such a favourable view to be formed in the absence of evidence by operating as a fact-finding tool. A finding that carrying out the purposes of a trust will benefit the public is a finding of fact. As a finding of fact, it ordinarily ought to be based on evidence presented to the court. However, in the modern law, the presumption of public benefit has aided courts by obviating the need to base a finding of public benefit on evidence. A presumption of public benefit may be discerned operating in this way in cases where there is little or no evidence for or against a finding of public benefit. But the presumption has also played a tie-breaker role in cases where there is some evidence for and against a finding of public benefit. And it has operated where there has been little or no evidence for a finding of public benefit but some evidence against such a finding. In this last type of case, the evidence against a finding of public benefit has been insufficient to rebut the presumption.

A good example of a presumption of public benefit operating in a case where there was no evidence for or against a finding of public benefit may be seen in the report of the decision of the Charity Commissioners to register Sacred Hands Spiritual Centre as a charity. According to the report, having determined that the purposes of the Centre advanced religion, the Charity Commissioners

considered that the necessary public benefit would be shown unless there was reason to consider that Spiritualism was not for the public benefit. The Commissioners did not consider that there was any evidence which established that Spiritualism was not for the public benefit.²³

As a result, the Centre was eligible for registration. In the case law, a presumption of public benefit seems to have operated in similar circumstances in *Neville Estates Ltd v Madden*.²⁴ The question there was whether a trust for the purposes of a synagogue was a trust for charitable purposes. The membership of the synagogue took the form of an unincorporated association, closed to the public. Had membership been open to a section of the public – for instance, had it been open to all people of the Jewish faith living near the synagogue – there would have been evidence on the basis of which a finding of public benefit could be made. However, membership of the synagogue was not open in that way. At the same time, Cross J thought that the fact that membership of the synagogue was closed to the public carried little evidentiary weight, because the members of the synagogue did not spend all of their time in cloistered seclusion.²⁵ Therefore, there was little evidence in the case for or against a finding of public benefit. However, Cross J continued:

the court is, I think, entitled to assume that some benefit accrues to the public from the attendance at places of worship of persons who live in this world and mix with

23 Charity Commissioners, *Decision of the Charity Commissioners to Register Sacred Hands Spiritual Centre as a Charity* (5 September 2003) at [5.1.4] at www.charity-commission.gov.uk/Library/registration/pdfs/sacreddecision.pdf (visited 18 October 2007).

24 [1962] 1 Ch 832.

25 *ibid.* 853.

their fellow citizens. As between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none.²⁶

Justice Cross' application of a presumption of public benefit in this passage overcame the lacuna in the evidence and enabled him to uphold the trust.

To see a presumption of public benefit assisting a court where there was some evidence for and against a finding of public benefit, consider *Holmes v Attorney-General*.²⁷ There, Walton J had to decide whether the purposes of a religious sect known as the Exclusive Brethren were charitable. There was evidence before the court indicating that members of the public were allowed to attend certain of the sect's meetings and that members of the sect engaged in proselytising activities on the street. Such evidence, although it was slight, weighed in favour of a finding of public benefit. In addition to this evidence, there was further evidence that the sect engaged in practices, referred to enigmatically in the report of the case as 'shutting up' and 'withdrawal', that brought about the traumatic break up of families.²⁸ This further evidence was also slight and came from one of the sect's adherents whose testimony was supportive of the sect. Because the Exclusive Brethren were a religious group, Walton J presumed their purposes to be for the public benefit. The presumption enabled Walton J to make a finding of public benefit even though, in the absence of the presumption, it is unlikely that there would have been more evidence for such a finding than there would have been against.

In *Holmes v Attorney-General*, a presumption of public benefit operated as a tie-breaker in a situation where there was some evidence both for and against a finding of public benefit. In other cases, such a presumption has enabled courts to uphold trusts for religious purposes even though there appeared to be little or no evidence for a finding of public benefit but some evidence against such a finding. *Thornton v Howe* may be an example.²⁹ A testatrix attempted to create a trust of the residue of her estate for the purpose of 'printing, publishing and propagation of [*sic*] the sacred writings of the late Joanna Southcote'.³⁰ Southcote's writings showed that she believed herself to be pregnant with the second Messiah and that she believed she was a medium of divine revelation, either through inspiration or through communication with the Holy Ghost. In delivering his judgment, Sir John Romilly MR described Southcote as a 'foolish, ignorant woman'³¹ and suggested that her beliefs might be 'devoid of foundation'.³² Nonetheless, he upheld the trust, stating that the purpose of extending the knowledge of the Christian

26 *ibid.* 853 (emphasis added). See also *Joyce v Ashfield Municipal Council* [1975] 1 NSWLR 744; upheld on appeal by the Privy Council in *Ashfield Municipal Council v Joyce* [1976] 1 NSWLR 455.

27 *The Times* (London) 12 February 1981, 8.

28 *Holmes v Attorney-General* was referred to Walton J by the Charity Commissioners, who had determined that 'shutting up' and 'withdrawal' were contrary to the public interest but did not know whether that determination rebutted the presumption of public benefit for the purposes of charity law: P. W. Edge and J. Loughrey, 'Religious Charities and the Juridification of the Charity Commission' (2001) 21 *Legal Studies* 36, 48–49.

29 (1862) 31 Beav 14.

30 *ibid.* 14.

31 *ibid.* 18.

32 *ibid.* 20.

religion should be considered charitable and that the court should make no distinction between one religion or sect and another.³³ By contrast, according to the Master of the Rolls, trusts for purposes 'adverse to the very foundations of all religion' or 'subversive of all morality' should be struck down as void.³⁴ It is arguable that a presumption of public benefit determined the outcome of *Thornton v Howe*. Moreover, it is arguable that such a presumption determined the outcome of the case despite the fact that the evidence weighed against making a finding of public benefit. It is difficult to see, in the absence of a presumption of public benefit and all else being equal, how a court could find, as a matter of fact, that the public would benefit by the dissemination of beliefs 'devoid of foundation'. However, because Sir John Romilly did not refer explicitly to a presumption of public benefit in *Thornton v Howe*, it is ultimately a matter of supposition whether or not such a presumption was applied in that case.³⁵

If the application of a presumption of public benefit is a matter of supposition with respect to *Thornton v Howe*, it is certainly not when it comes to the more recent case of *Re Watson (deceased), Hobbs v Smith*.³⁶ A testatrix made provision in her will for a trust for the publication and distribution to the public of the religious writings of a retired builder called H. G. Hobbs. Hobbs and the testatrix had, prior to her death, both belonged to a small group of non-denominational Christians. Justice Plowman received expert evidence that the intrinsic worth of Hobbs' writings was 'nil' and that, although the writings might confirm members of the group in their beliefs, those writings would not in any way extend knowledge of the Christian religion.³⁷ However, in the opinion of the same expert, the writings were not adverse to the foundations of religion or morality.³⁸ Justice Plowman referred in his judgment to the evidence of the expert. However, citing *Thornton v Howe*, he also stated explicitly that he would assume the purposes in question to be for the public benefit unless the contrary was shown. Clearly, Plowman J thought that the contrary had not been shown, despite the evidence of the expert, and he upheld the trust as being for charitable purposes.³⁹ In *Re Watson*, there was evidence before the court which weighed against making a finding of public benefit. But Plowman J appears to have upheld the trust in question by applying a presumption of public benefit despite the existence of that evidence. Another way of putting this is to say that the evidence weighing against a finding of public benefit was insufficient to rebut the presumption.

In summary, the case law reveals that a presumption of public benefit has, up to now, assisted courts to a considerable degree and in several ways in cases on trusts for religious purposes. In early cases, before a public benefit test was specifically articulated, courts associated religion and charity naturally, with the result that

³³ *ibid.* 19–20.

³⁴ *ibid.* 20.

³⁵ For commentary on *Thornton v Howe*, see: M. Chesterman, *Charities, Trusts and Social Welfare* (London: Weidenfeld and Nicolson, 1979) 158; H. Picarda, 'New Religions as Charities' (1981) 131 *New Law Journal* 436; S. T. Woodfield, 'Doing God's Work: Is Religion Always Charitable?' (1996–99) 8 *Auckland University Law Review* 25, 35.

³⁶ [1973] 3 All ER 678.

³⁷ *ibid.* 682.

³⁸ *ibid.* 683.

³⁹ *ibid.* 688.

trusts for religious purposes were upheld to the extent that the law of the time permitted. In modern cases, a presumption of public benefit has obviated the need to base findings of public benefit on evidence presented to the court. This has enabled courts to uphold trusts for religious purposes in cases where there was little or no evidence on the basis of which a finding of public benefit might be made, and in cases where there was evidence both for and against a finding of public benefit. Moreover, in some cases, a presumption of public benefit has enabled courts to uphold trusts for religious purposes even though there was evidence weighing against a finding of public benefit, where the evidence has been regarded by the court as insufficient to rebut the presumption.

OTHER APPROACHES IN THE CASE LAW

Once the presumption of public benefit is removed from the law, courts will have to approach the question of public benefit in ways that do not entail the application of the presumption. The case law reveals that at least two such approaches have, in the past, been adopted. One of these approaches – which I describe below as evaluation – is likely to be taken up by courts in future cases on trusts for religious purposes, at least in the absence of an alternative. However, it appears to be an unsuitable approach in cases where evidence is adduced of intangible public benefit. The other approach – which I describe below as deference – overcomes the problems associated with evidence of intangible public benefit, but it is unlikely to be taken up by courts in future cases because of authoritative judicial statements disapproving of it. Moreover, there are reasons to doubt that it should be applied, at least in cases on trusts for religious purposes.

Evaluation

Once the presumption of public benefit is removed from the law, the most obvious approach for courts to take in cases on trusts for religious purposes is the approach that courts have taken in the past in cases on trusts falling under the fourth traditional head of charity in respect of which a presumption of public benefit has never been applied. This approach requires that a court consider the evidence before it on the question of public benefit, and then do one of two things: either make a finding of fact, based on the evidence before it, that carrying out the purposes of the trust will benefit the public; or refuse to make such a finding of fact because there is insufficient evidence to support it.⁴⁰ If a finding of public benefit is made, then the trust should be upheld. If such a finding is not supported by the evidence, then the trust should be struck down. Put broadly, this approach requires that the court evaluate the purposes of the trust before it on the basis of the evidence.

40 Or, indeed, make a finding of fact that carrying out the purposes of the trust will be detrimental to the public. However, in any case where the evidence supports a finding of public detriment it will also be insufficient to support a finding of public benefit, and only the latter finding is required if the trust is to be struck down. See *Coats v Gilmour* [1948] Ch 340, 345 per Lord Greene MR.

The classic case is the *Vivisection* case.⁴¹ The question before the House of Lords was whether the National Anti-Vivisection Society was established for charitable purposes, its *raison d'être* being the abolition of all experimentation on living animals for whatever reason. By a majority of four to one, their Lordships declared that the purposes of the Society were not charitable.⁴² In doing so, their Lordships pointed out that the question of public benefit in a case on a trust falling under the fourth traditional head of charity must be determined by the court evaluating the purposes of the trust before it on the basis of the evidence.⁴³ The Society had argued that the public would benefit by its purposes being carried out because the abolition of animal experimentation would bring about the moral improvement of society as a whole. However, considerable evidence had been put before the Commissioners of Income Tax, who had initially decided the matter, proving the great medical and scientific benefit that had resulted from animal experimentation.⁴⁴ The House of Lords found that this medical and scientific evidence far outweighed whatever evidence of moral improvement the Society had put before the Commissioners.⁴⁵ Consequently, their Lordships thought that there was no basis for a finding of public benefit in the case and this led them to the conclusion that the purposes of the Society could not be regarded as charitable.⁴⁶

At first glance, the *Vivisection* case appears to be a model for how courts might determine the question of public benefit in cases on trusts for religious purposes that arise after the removal of the presumption of public benefit from the law. Indeed, once the public benefit provisions of the Charities Act come into force in early 2008, the approach to the question of public benefit taken up by the House of Lords in the *Vivisection* case – evaluating purposes on the basis of evidence – is likely to be taken up by courts in cases on trusts for religious purposes as well, at least in the absence of an alternative. However, difficulties attend the approach. These difficulties remained in the background in the *Vivisection* case itself, because of the nature of the evidence before the court in that case. However, once the presumption of public benefit is removed from the law, in future cases on trusts in respect of which the presumption has traditionally been applied, the difficulties with an approach requiring evaluation on the basis of evidence may come to the fore and may render such an approach unworkable. Moreover, it is arguable that this is especially likely to happen in cases on trusts for religious purposes.

In the *Vivisection* case, the medical and scientific evidence against a finding of public benefit was overwhelming. This meant that the House of Lords did not have to consider closely the Society's argument that the abolition of animal experimentation would bring about the moral improvement of society as a whole. Whatever evidence of moral improvement the Society had, it was

⁴¹ n 3 above.

⁴² *ibid.* 40 per Viscount Simon; 60–75 per Lord Simonds; 41–52 per Lord Wright; 75–79 per Lord Normand, 52–60 per Lord Porter in dissent. Viscount Simon and Lord Normand agreed with Lord Simonds.

⁴³ *ibid.* 44–47 per Lord Wright; 65–66 per Lord Simonds.

⁴⁴ *ibid.* 33–34.

⁴⁵ *ibid.* 47–48 per Lord Wright.

⁴⁶ Their Lordships also considered that the purposes of the Society could not be charitable because they had a political character: *ibid.* 49–52 per Lord Wright; 61–63 per Lord Simonds; 75–78 per Lord Normand.

outweighed by the evidence of the public detriment that would flow from the abolition of animal experimentation. However, in other cases on trusts arising under the fourth traditional head of charity, evidence of moral improvement appears to have been regarded by the court as sufficient to support a finding of public benefit.⁴⁷ This raises some interesting questions. What is moral improvement? What constitutes evidence of it? How may such evidence be weighed sensibly against evidence of material – for example, medical and scientific – benefit? Questions like these were addressed by some of their Lordships in the *Vivisection* case, but not answered fully.⁴⁸ These unanswered questions about moral improvement manifest a problem that has the potential to arise more widely in cases on trusts for charitable purposes, whether those purposes fall under the fourth traditional head of charity – as the purposes of trusts in moral improvement cases have done – or not. The wider problem is perhaps best stated in the form of a question: if determining public benefit is a matter of evaluating the purposes of a trust based on the evidence, what counts as sufficient evidence of public benefit?

Where there is evidence of tangible benefit to the public and no other evidence, this question will be relatively easy to answer. A trust for the purpose of constructing or furnishing a building in which members of the public who desire to may worship according to the rites of a particular religion might fall into this category of case.⁴⁹ Tangible benefit will flow from such a trust to the extent that material provision is made for acts of worship. Similarly, where there is evidence of tangible detriment to the public, as there was in the *Vivisection* case, and there is little or no evidence of tangible benefit, it will be relatively easy to say that there is insufficient evidence of public benefit. In the *Vivisection* case itself, tangible detriment would have resulted from the purposes of the Society being carried out because material medical and scientific advances that depended on animal experimentation would have been frustrated.

The problem of what counts as sufficient evidence of public benefit will arise in cases where there is little or no evidence of tangible benefit or detriment, but there is evidence of intangible benefit. While the moral improvement cases show that courts in the past have made findings of public benefit where there was evidence of only intangible benefit, the moral improvement cases cannot be regarded as firmly established in the case law.⁵⁰ Moreover, it is arguable that the moral improvement cases rest on the assumption that most people would accept the proposition that carrying out the purpose in question would bring about moral improvement.⁵¹ If the moral improvement cases do rest on such an assumption, they rest on a weak foundation. In the absence of evidence that most people accept the proposition that carrying out a purpose would bring about moral improvement, there is no reason to assume that most people accept that proposi-

47 *Re Snowcroft* [1898] 2 Ch 638; *In re Wedgwood* [1915] 1 Ch 113; *In re Grove-Grady* [1929] 1 Ch 557; *Re Hood* [1931] 1 Ch 240; *Re Price* [1943] Ch 42; *Re South Place Ethical Society*, n 9 above.

48 n 3 above, 44–46 per Lord Wright; 70 per Lord Simonds.

49 See the authorities referred to in J. Warburton, D. Morris and N. F. Riddle (eds), *Tudor on Charities* (London: Sweet & Maxwell, 9th ed, 2003) at [2–057], although cf the unfortunate decision of Lord Lyndhurst LC in *Mitford v Reynolds* (1842) 1 Ph 185.

50 *Vivisection* case, n 3 above, 44–47 per Lord Wright; *CoS*, n 9 above, 26–34.

51 *Vivisection* case, n 3 above, 49 per Lord Wright; 72–73 per Lord Simonds.

tion. And in the moral improvement cases, there is no indication that courts have had the benefit of such evidence. To make the assumption in the absence of supporting evidence is to apply a presumption of public benefit in a circumlocutory fashion and to point to a doubtful justification for doing so. In any event, even if it is right to assume that most people would accept a proposition about intangible public benefit in a moral improvement case, such an assumption cannot be made in every case where the court has evidence of only intangible benefit. In particular, such an assumption seems singularly inappropriate in a modern case on a trust for religious purposes; in a community characterised by religious diversity, it cannot be assumed that most people accept any given proposition about the intangible public benefit that will flow from carrying out a religious purpose.

Another difficulty with an approach requiring evaluation on the basis of evidence in cases on trusts for religious purposes relates to the way in which evidence of intangible public benefit is likely to come before a court in such a case. Evidence of intangible public benefit is likely to take the form of testimony of expert witnesses. A good example of evidence relating to public benefit taking this form may be found – with respect to a trust for the advancement of education – in the case of *Re Pinion (deceased), Westminster Bank Ltd v Pinion*.⁵² A testator had purported to create a trust of artworks and furniture in a studio for the purpose of displaying them and thereby educating the public. His wife sought to invalidate the trust and argued that the artworks and the furniture were of no value and therefore displaying them could not serve to educate anyone. At trial, Wilberforce J upheld the trust because he was able, based on the evidence of expert witnesses, to identify some chairs in the collection that might, if properly presented in a museum, have some educative effect.⁵³ However, the Court of Appeal reversed Wilberforce J's decision, pointing to the fact that the expert witnesses were unanimously of the opinion that, putting the chairs to one side, the collection had no artistic or educational merit or value whatsoever.⁵⁴ The trust failed as a result. In *Re Pinion*, expert evidence enabled the court to determine the question of public benefit notwithstanding that the evidence related to a 'matter of taste' and therefore related to the intangible effect that displaying the collection was likely to have on the public that might view it.⁵⁵

Re Pinion reveals that where an expert witness forms an opinion about the intangible public benefit that might – or might not – flow from carrying out a purpose, the court may be able to determine the question of public benefit by drawing an inference from the expert's opinion. If the expert's opinion is that intangible public benefit will flow from carrying out the purposes of a trust, then the court may infer, from that opinion, the fact of public benefit. But once again, problems emerge. For example, how many experts must share the opinion in question before the court is justified in drawing the inference? Does it depend on the matter in respect of which the opinion is given? What if the experts

⁵² [1964] 1 All ER 890.

⁵³ *Re Pinion, Westminster Bank Ltd v Pinion* [1963] 2 All ER 1049, 1057.

⁵⁴ n 52 above, 893–894 per Harman LJ, with whom Davies LJ (at 894) and Russell LJ (at 894–896) agreed.

⁵⁵ *ibid.* 894 per Harman LJ.

disagree? In addition to these problems – which may arise in any case where a court relies on expert evidence – one further problem would emerge if courts were to rely on expert evidence to determine questions of public benefit in cases on trusts for religious purposes. This further problem is well illustrated by the facts of a case that I considered above, *Re Watson*.⁵⁶ Imagine that Plowman J had not been permitted to apply a presumption of public benefit in that case. His Lordship had evidence before him from an expert witness to the effect that the intrinsic worth of the religious writings whose dissemination was the purpose of the trust in question was ‘nil’.⁵⁷ Had Plowman J determined the question of public benefit by drawing an inference from the opinion of the expert witness, his Lordship would have refused to make a finding of public benefit and the trust would have failed. The testatrix, the author of the religious writings in question, and the potential readers of those writings, were all non-denominational Christians. The expert witness, on the other hand, was an Anglican clergyman.⁵⁸ Therefore, if the question of public benefit had been determined based on the expert evidence, Plowman J would have determined whether the public would benefit from the carrying out of a non-denominational Christian purpose by adopting an Anglican perspective.

The problem that is illustrated by the facts of *Re Watson* is a problem in light of what are regarded, from a liberal perspective, as proper constraints on judicial decision-making. In a community that adheres to liberal principles, it is thought that a decision-maker, such as a judge, must provide reasons for his or her decisions that may be accepted by everyone irrespective of their religious beliefs.⁵⁹ In a case on a trust for religious purposes, if a judge determines the question of public benefit by drawing an inference from the opinion of an expert witness, the judge points to that opinion as a reason – and possibly the primary reason – for his or her decision. If the opinion is informed by religious beliefs, the judge points to a reason that will not be accepted by everyone irrespective of their religious beliefs; indeed, it is not likely to be accepted by anyone who does not share the religious beliefs of the expert whose opinion it is. This violation of liberal principles will be of particular concern where one or more of the parties before the court does not accept the religious beliefs that inform the expert evidence, and where the consequence of the judge determining the question of public benefit by drawing an inference from the opinion of the expert witness is that the trust in question is struck down. To strike down a trust is, ordinarily, to cause detriment to those persons who wish to see the trust upheld. And to cause detriment to persons in violation of liberal principles is of more than theoretical concern. The possibility that detriment could be caused in such circumstances is a strong reason for thinking that it will be inappropriate for courts to adopt an approach requiring evaluation based on the evidence in cases on trusts for religious purposes, where the evidence is of only intangible benefit and takes the form of testimony of expert witnesses.

⁵⁶ n 36 above.

⁵⁷ *ibid.* 682.

⁵⁸ *ibid.* 683.

⁵⁹ See generally J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1996) Lecture VI; J. Rawls, ‘The Idea of Public Reason Revisited’ in his *Collected Papers*, ed. S. Freeman (Cambridge, Mass.: Harvard University Press, 2001) ch 26.

Deference

Not surprisingly, the problems associated with evaluating the purposes of a trust based on evidence of only intangible benefit have emerged in their most acute form in cases on trusts for religious purposes where evidence has been adduced of the spiritual benefit that will flow to the public as a result of carrying out the purposes in question. Evidence of spiritual benefit – such as evidence of the effectiveness of intercessory prayer or a sacramental rite – is clearly not susceptible of proof in a court of law. Therefore, in cases where evidence of spiritual benefit has been put before the court, the court has not evaluated the purposes in question based on that evidence. Moreover, in these cases a presumption of public benefit has not typically been applied.⁶⁰ Even though no explanation has been offered for refusing to apply the presumption in cases where claims of spiritual benefit have been made, this refusal appears to be warranted. A presumption is justified only to the extent that it is likely to reflect the true facts of a situation.⁶¹ If the true facts of the situation cannot be known, there is no way of saying with certainty that any presumption is justified in that situation. This is the case when it comes to claims of spiritual benefit. In the absence of evidence that spiritual benefit is likely to exist in cases where claims about it are made, there is no reason to presume the existence of spiritual benefit, and it is just such evidence that is lacking in these cases.

Given that problems of proof mean that courts have not made findings of fact about spiritual benefit and given that the same problems render a presumption of public benefit inappropriate in cases entailing claims about spiritual benefit, it is not surprising that some courts have refused to uphold trusts in such cases. During the nineteenth century, trusts in respect of which claims of spiritual benefit might have been made were struck down because such claims were not in fact made and there was a lack of evidence of tangible benefit.⁶² For instance, in *West v Shuttleworth*, a will trust for the purpose of having masses said for the souls of the testatrix and her husband was found not to be characterised by a charitable intention because there was no evidence that anyone but the testatrix (and presumably her husband) would benefit from the purpose being carried out.⁶³ A similar conclusion was reached by Sir Montague E. Smith, delivering the judgment of the Privy Council, in *Yeap Cheah Neo v Ong Cheng Neo*.⁶⁴ There, a perpetual gift of a house in Penang for the purpose of performing rites of ancestor worship was struck down because there was no evidence that anyone would benefit from the performance

60 P. Luxton, *The Law of Charities* (Oxford: Oxford University Press, 2001) at [4.46], argues that courts have only presumed public benefit in cases on trusts for religious purposes where the purposes have entailed the dissemination of religious doctrine. On this basis, it is possible to distinguish *Gilmour v Coats* [1949] AC 426, discussed below, from a case like *Thornton v Howe*. However it is not possible, on this basis, to distinguish *Gilmour v Coats* from other cases in which religious purposes not entailing the dissemination of religious doctrine were in view: for example, *Neville Estates Ltd v Madden*.

61 *Nelson v Nelson* (1995) 184 CLR 538, 602 per McHugh J.

62 A point made, with respect to *Cocks v Manners*, by Lord Simonds in *Gilmour v Coats*, n 60 above, 445.

63 (1835) 2 Myl & K 684.

64 (1875) LR 6 PC 381.

of the rites but the family whose ancestors were to be worshipped there.⁶⁵ In *Cocks v Manners*, Sir John Wickens VC, in the absence of any evidence that could lead to a finding of public benefit, struck down a trust for the purposes of a closed and contemplative order of nuns notwithstanding that it was clearly a trust for religious purposes.⁶⁶ And in *Re Joy*, a trust for 'united prayer' was struck down in the absence of evidence of benefit to anyone except for the individuals doing the praying.⁶⁷

In *Gilmour v Coats*, the high water mark of the judicial refusal to uphold trusts for religious purposes in the absence of evidence of tangible benefit, evidence of spiritual benefit was centre stage.⁶⁸ The case arose because of an attempt to create a trust for the purposes of a Carmelite nunnery at Notting Hill in London. The Carmelite order, founded by Saint Theresa of Avila in 1562, has two primary aims: the contemplation of divine things; and intercession for the souls of others. It is a closed order. Evidence in *Gilmour v Coats* was given at first instance by the Prioress of the Notting Hill nunnery and by the Roman Catholic Archbishop of Westminster, Cardinal Griffin. Based on that evidence, the court was invited to make two findings of fact: first, that the nuns' intercessory prayers caused the grace of God to be bestowed on those for whom the nuns prayed; and secondly, that the nuns' pious lives were a source of edification to others. It was hoped that, having made such findings of fact, the court would be unable to resist the conclusion that the purposes of the Carmelite nunnery were for the public benefit and therefore charitable.

But the House of Lords stated that these were matters about which findings of fact could not be made. Lord Simonds put it thus with respect to the first finding of fact that the court had been invited to make.

My Lords, I would speak with all respect and reverence of those who spend their lives in cloistered piety, and in this House of Lords Spiritual and Temporal, which daily commences its proceedings with intercessory prayers, how can I deny that the Divine Being may in His wisdom think fit to answer them? But, my Lords, whether I affirm or deny, whether I believe or disbelieve, what has that to do with the proof which the Court demands that a particular purpose satisfies the test of benefit to the community? Here is something which is manifestly not susceptible of proof.⁶⁹

His Lordship dealt with the second finding of fact that the court had been invited to make as follows.

[A court] would assume a burden which it could not discharge if now for the first time it admitted into the category of public benefit something so indirect, remote, imponderable and, I would add, controversial as the benefit which may be derived by others from the example of pious lives.⁷⁰

⁶⁵ *ibid.* 396. See also C. H. Sherrin, 'Public Benefit in Trusts for the Advancement of Religion' (1990) 32 *Malaya Law Review* 114, 126–128.

⁶⁶ (1871) 12 LR Eq 574, 585.

⁶⁷ (1889) 60 LT 175. See also *Hoare v Hoare* (1887) 56 LT 147; *Re White* [1893] 2 Ch 41; *Gleeson v Phelan* (1914) 15 SR (NSW) 30.

⁶⁸ n 60 above.

⁶⁹ *ibid.* 446.

⁷⁰ *ibid.* 447. The other members of the House of Lords agreed with Lord Simonds on both points: Lord du Parc at 450–454; Lord Normand at 454; Lord Morton of Henryton at 454; Lord Reid at 454–462.

It being impossible to make findings of fact with respect to the evidence that had been presented by the Prioress and Cardinal Griffin, the House of Lords in *Gilmour v Coats* was left in exactly the position that Sir John Wickens had been in when he decided *Cocks v Manners*. There was no basis for a finding of public benefit and the trust had to fail as a result.⁷¹

Since *Gilmour v Coats* was handed down, it has met with a mixed reception.⁷² Whether the case reflects a utilitarian⁷³ or even a Protestant⁷⁴ bias in the English law on charitable purposes, and whether the House of Lords provided adequate guidance to trial judges, and indeed to the Charity Commission, on how to deal with questions of public benefit in analogous cases,⁷⁵ are matters for another day. For now, it will suffice to make two observations in light of *Gilmour v Coats*, and in light of the earlier authorities where claims of spiritual benefit were not made and trusts were struck down in the absence of evidence of tangible benefit. First, in future cases where claims of spiritual benefit are made, the removal of the presumption of public benefit from the law ought to be of little significance, because the presumption was not typically applied in such cases to begin with. Secondly, because the presumption of public benefit has not been applied in cases where claims of spiritual benefit have been made, courts that have upheld trusts in such cases have had to develop a technique for doing so. This technique is deference.⁷⁶

The technique of deference entails the court making a finding of public benefit based on evidence that the putative settlor or the testator believed that carrying out the purposes under scrutiny would benefit the public. In other words, it entails the

71 Strictly, this is not true as the court was invited to make a third finding of fact: that the nunnery, being open to any woman with the requisite vocation, enabled a section of the public – composed of such women – to live more fully a life in accordance with their beliefs, aspirations and goals. The House of Lords took the view that it could not be for the public benefit to assist persons to carry out purposes that were not themselves proven to be for the public benefit, and that the third finding of fact was precluded on that basis: *ibid*, 449 per Lord Simonds.

72 Compare *Re Warre's Will Trusts* [1953] 2 All ER 99; *Leahy v Attorney-General for New South Wales* [1959] AC 457; *Re Le Cren Clarke (deceased), Funnell v Stewart* [1996] 1 All ER 715, where *Gilmour v Coats* was applied, with *Neville Estates Ltd v Madden*, n 24 above; *Association of Franciscan Order of Friars Minor v City of Kew* [1967] VR 732; *Re Banfield (deceased), Lloyd's Bank Ltd v Smith* [1968] 2 All ER 276; *Joyce v Ashfield Municipal Council*, n 26 above; *Crowther v Brophy* [1992] 2 VR 97, where it was distinguished.

73 H. Cohen, 'Charities – A Utilitarian Perspective' [1983] *Current Legal Problems* 241.

74 M. Blakeney, 'Sequestered Piety and Charity – A Comparative Analysis' (1981) 2 *Journal of Legal History* 207, *contra* C. E. F. Rickett, 'An Anti-Roman Catholic Bias in the Law of Charity?' [1990] *Conveyancer* 34.

75 J. C. Brady, 'Public Benefit and Religious Trusts: Fact or Fiction' (1974) 25 *Northern Ireland Legal Quarterly* 174; Sherrin, n 65 above.

76 Arguably, the Charity Commissioners developed another technique for upholding a trust in a *Gilmour v Coats*-type case in their decision in *The Society of the Precious Blood* (1995) 3 Decisions of the Charity Commissioners 11–17. The Society was, according to its constitution, a closed order of nuns dedicated to intercessory prayer. However, in practice, the nuns were involved in community work in a variety of ways. The Charity Commissioners took into account evidence of the Society's activities as well as its stated purposes in reaching the conclusion that the Society was charitable. This technique may be available to courts where there is evidence that an organisation's activities bring tangible benefit to the public. However, it will not be available where, as was the case in *Gilmour v Coats*, there is no such evidence, either because an organisation engages in no community activities or because a trust is for abstract purposes and not for the purposes of a particular organisation.

court deferring to the beliefs of the putative settlor or the testator when deciding the question of public benefit. Deference may entail the court drawing inferences from the opinions of expert witnesses. However, unlike in cases where the court infers, from expert evidence, the fact of public benefit itself, in a case characterised by deference the court infers, from expert evidence, facts about the putative settlor's or the testator's beliefs. The technique of deference has found favour in Ireland in case law on trusts for the purpose of saying masses for the dead. However, it is unlikely to be embraced by English courts in cases on trusts for religious purposes arising after the removal of the presumption of public benefit from the law. This is because it has been considered and rejected decisively in English cases of the highest authority on trusts for religious purposes as well as trusts arising under the fourth traditional head of charity. Moreover, courts are right to be suspicious of the technique of deference, particularly when it comes to trusts for religious purposes.

The story of how the technique of deference came to find favour in Ireland begins with the case of *Attorney-General v Delaney*.⁷⁷ There, a testatrix had left money on trust for the purpose of having masses said for the repose of her soul and the soul of her brother. The Barons of the Exchequer refused to recognise the purpose as charitable. Their reason for doing so appears to have been that the masses might have been said in a location inaccessible to the public, such as a private chapel.⁷⁸ Dr Delaney, who was the Roman Catholic Bishop of Cork and the defendant in the case, filed an answer in evidence which set out Roman Catholic doctrine relating to the mass. The answer stated that the mass, whether said in public or in private, aims to 'bring down [God's] blessings on the whole world.'⁷⁹ Dr Delaney argued that the testatrix would have believed this statement of doctrine to be true and that the court ought to make a finding of public benefit from the point of view of one who had that belief. In other words, Dr Delaney urged the court to defer to the belief of the testatrix that saying the mass would bring spiritual benefit to all people. However, the Barons rejected Dr Delaney's argument, Palles CB stating that the court must be able to ascertain the public benefit of the mass and that the mass cannot 'derive the element of public benefit from the efficacy spiritual or temporal which, according to the faith of the testatrix, [it] may possess.'⁸⁰ This represented an application of the orthodox principle, also applied years later by the House of Lords in *Gilmour v Coats*, that where findings of fact may not be made about the benefit to the public of carrying out religious purposes, the purposes must be regarded as non-charitable.

However, Dr Delaney's argument as well as the answer that he had filed in evidence in *Attorney-General v Delaney* resurfaced some years later in another Irish case, *O'Hanlon v Logue*, in which the Court of Appeal was required to consider whether saying masses for the dead was a charitable purpose.⁸¹ In *O'Hanlon v Logue*, Dr Delaney's answer on the nature of the mass was again admitted into evidence, but this time the court made a finding of public benefit based on the

⁷⁷ (1875) 10 IR (CL) 104.

⁷⁸ *ibid.* 128–129 per Palles CB, 132 per Fitzgerald B and Dowse B.

⁷⁹ *ibid.* 107.

⁸⁰ *ibid.* 129.

⁸¹ [1906] 1 IR 247.

doctrine set out in that answer, rather than on evidence of tangible benefit. Chief Baron Palles, who had been party to the decision in *Attorney-General v Delaney*, now refused to support that decision.⁸² He stated,

[W]hen [the court] knows doctrines [like those stated in Dr Delaney's answer], although it knows that, according to them, such an act has the spiritual efficacy alleged, it cannot know it objectively and as a fact, unless it also knows that the doctrines in question are true. But it can never know that they are objectively true, unless it first determines that the religion in question is a true religion. This it cannot do. It not only has no means of doing so, but it is contrary to the principle that all religions are now equal before the law. It follows that there must be one of two results: either – (1) the law must cease to admit that *any* divine worship can have spiritual efficacy to produce a public benefit; or (2) it must admit the sufficiency of spiritual efficacy, but ascertain it according to the doctrines of the religion whose act of worship it is.

The first alternative is an impossible one.⁸³

In *O'Hanlon v Logue*, faced with a lack of evidence of tangible benefit, the Court of Appeal decided not to deny that the purpose in question was charitable, as had happened in *Attorney-General v Delaney* and would happen in England in *Gilmour v Coats*. Instead, the court decided to defer to the belief of the testatrix that saying masses for the dead conferred a spiritual benefit on the public.⁸⁴

If the Charities Bill that was recently before the Irish Parliament is enacted, it will render the technique of deference unnecessary in cases raising questions of spiritual benefit in that jurisdiction. That is because, in stark contrast to the English Charities Act, the Irish Charities Bill affirms a presumption of public benefit for all trusts for religious purposes, including those in respect of which claims of spiritual benefit are made.⁸⁵ However, given that in England the Charities Act removes the presumption of public benefit from the law, it might be thought that the technique of deference that has in the past been used by the Irish courts could now be taken up by the English courts, not only in cases where claims of spiritual benefit are made, but also in other cases where trusts for religious purposes are under scrutiny. It might be thought that some support for using the technique could be drawn from *In re Caus*, *Lindeboom v Camille*⁸⁶ and *Crowther v Brophy*,⁸⁷ both non-Irish cases on saying masses for the dead in which Dr Delaney's answer was admitted into evidence and the trust in question was upheld. However, in neither of these cases was the technique of deference actually deployed. In *In re Caus*, despite the fact that counsel had accepted Dr Delaney's answer as evidence of the nature of the mass, Luxmoore J upheld the trust before him citing two reasons for his finding of public benefit: first, saying masses would edify members of the wider church; and secondly, a trust for saying masses would assist in the

⁸² *ibid.* 264.

⁸³ *ibid.* 276 (emphasis in original). See also FitzGibbon LJ at 279 and Holmes LJ at 285 for similar statements.

⁸⁴ See also *Re Cranston* [1898] 1 IR 431 (an animal welfare case); *Attorney-General v Becher* [1910] 2 IR 251; *Nelan v Downes* (1916–17) 23 CLR 546.

⁸⁵ Charities Bill 2007, s 3(4) at www.oireachtas.ie/documents/bills28/bills/2007/3107/b3107d.pdf (visited 18 October 2007).

⁸⁶ [1934] 1 Ch 162.

⁸⁷ n 72 above.

endowment of the priests who were to perform the rite, the remuneration of priests being undoubtedly a charitable purpose.⁸⁸ Similar reasons formed the basis of a finding of public benefit in the Australian case of *Crowther v Brophy*.⁸⁹ And in *In re Hetherington (deceased)*, the most recent English case on trusts for saying masses for the dead, Dr Delaney's answer appears not to have been admitted into evidence, and the trusts were upheld by Sir Nicholas Browne-Wilkinson V-C on the basis that priests would be thereby remunerated and to the extent that the masses would be said in public.⁹⁰ Moreover, the Vice-Chancellor seemed to take the unusual step of applying a presumption of public benefit in a case about saying masses when he stated that a gift for that purpose was 'prima facie charitable.'⁹¹

These cases show that it not possible to draw support for the technique of deference from non-Irish law. Moreover, English decisions of the highest authority reject the technique. In the *Vivisection* case, the House of Lords overruled an earlier decision in which the technique of deference had been deployed to uphold a trust under the fourth traditional head of charity.⁹² In doing so, their Lordships stated clearly that, with respect to a trust falling under the fourth traditional head of charity – a type of trust that has never attracted a presumption of public benefit – it is not open to a court to make a finding of public benefit from the point of view of the putative settlor or the testator.⁹³ As we have seen already, their Lordships emphasised that the court must examine the available evidence and make a finding of fact on the question of public benefit; in other words, the court must evaluate the purposes of the trust before it.⁹⁴ And in *Gilmour v Coats*, having refused to apply a presumption of public benefit or to consider evidence of spiritual benefit, the House of Lords again rejected the technique of deference, this time in a case specifically about a trust for religious purposes.⁹⁵ In the light of these two leading cases, it is difficult to see how a court could take up the technique of deference in any case – including a case on a trust for religious purposes – arising after the removal of the presumption of public benefit from the law.

Furthermore, even if it might be thought that the technique of deference could be revisited by the courts in light of the Charities Act, it must be remembered that there are sound reasons for rejecting the technique. In *Re Hummeltenberg, Beatty v London Spiritualistic Alliance*, a case on a trust under the fourth traditional head of charity, Russell J famously said that,

[i]f a testator by stating or indicating his view that a trust is beneficial to the public can establish that fact beyond question, trusts might be established in perpetuity for the promotion of all kinds of fantastic (although not unlawful) objects, of which the training of poodles to dance might be a mild example.⁹⁶

⁸⁸ n 86 above, 169–170. The point about edification has almost certainly not survived *Gilmour v Coats*, but the point about remuneration of priests has: *In re Hetherington (deceased)* [1990] 1 Ch 1.

⁸⁹ n 72 above, 100–101 per Gobbo J.

⁹⁰ n 88 above, 11–13.

⁹¹ *ibid.* 13.

⁹² n 3 above, 32. The earlier decision was *In re Foveaux* [1895] 2 Ch 501 per Chitty J.

⁹³ *Vivisection* case, n 3 above, 44 per Lord Wright; 65 per Lord Simonds.

⁹⁴ *ibid.* 44–47 per Lord Wright; 65–66 per Lord Simonds.

⁹⁵ n 60 above, 446 per Lord Simonds; 452 per Lord du Parcq; 456–460 per Lord Reid.

⁹⁶ [1923] 1 Ch 237, 242. See also *In re Grove-Grady*, n 47 above.

It is possible to imagine equally bizarre religious purposes being admitted as charitable if the technique of deference were to be deployed indiscriminately: think of a trust for the purpose of putting a Bible on the moon. However, in cases entailing religious purposes, the shortcomings of deference go beyond the possibility of such follies. It is also possible to imagine religious purposes which a putative settlor or a testator might believe to be for the public benefit but which, if carried out, would harm the public although not sufficiently to be impugned on grounds of interference with public safety or morality. For example, imagine a trust for the purpose of converting fundamentalist Christians to a fundamentalist brand of Islam. Or imagine a trust for the purpose of promoting the teaching of creationism instead of the theory of evolution to pupils in secular schools. The potential for such activities to cause discord in the community, while not necessarily presenting a threat to public safety or morality, is great. Assuming that such purposes are religious, in neither case is it clear that a court ought to identify them as being for the public benefit.⁹⁷ Yet if the court were to deploy the technique of deference, it would, all else being equal, be compelled to make a finding of public benefit in each of these cases.⁹⁸

In summary, the technique of deference overcomes the problems associated with evidence of intangible public benefit in cases on trusts for religious purposes. However, it is unlikely to be taken up by courts in such cases once the presumption of public benefit is removed from the law. First, it has been disapproved by the House of Lords in two leading cases. And secondly, it may compel findings of public benefit in cases on trusts for religious purposes where such findings are not justified or desirable. Moreover, as we have seen, the other approach in the existing case law that will be available to courts once the presumption of public benefit is removed from the law – evaluating the purposes of trusts based on the evidence – encounters difficulties in cases where evidence of intangible public benefit is adduced, and such evidence is especially likely to be adduced in cases on trusts for religious purposes. Given the shortcomings of these two approaches, it may be necessary for courts in future cases on trusts for religious purposes to look further than the existing case law when determining the question of public benefit. One area to which courts may look is the human rights jurisprudence introduced into England by the Human Rights Act 1998. Indeed, courts may be forced to have regard to that jurisprudence in cases where, on human rights grounds, parties appeal the decisions of trial judges or the Charity Commission in cases on trusts for religious purposes. Whether human rights jurisprudence offers a way forward when considering questions of public benefit in such cases is the question to which I now turn.

97 Arguably, teaching creationism does not advance religion: see generally *Keren Keyemeth Le Jisroel Limited v Commissioners of Inland Revenue* [1931] 2 KB 463; Charity Commissioners, *Application for Registration of Good News for Israel* (5 February 2004) at www.charity-commission.gov.uk/Library/registration/pdfs/gnfddecision.pdf (visited 18 October 2007). However, whether or not teaching creationism advances religion does not affect the point that I make in the text.

98 All else might not be equal, for instance, if the purposes have a political character such that the court refuses to regard them as charitable: *Vivisection* case, n 3 above; *McGovern v Attorney-General* [1982] Ch 321.

HUMAN RIGHTS JURISPRUDENCE: A WAY FORWARD?

The effect that human rights jurisprudence will have on charity law, and particularly on the law relating to trusts for religious purposes, remains largely to be seen, despite some consideration of that jurisprudence by the Charity Commissioners in their decision regarding the Church of Scientology,⁹⁹ and despite some attention from scholars.¹⁰⁰ There is insufficient space here to explore this topic fully. Instead, I tentatively address one specific question: does human rights jurisprudence offer a way forward when considering the question of public benefit in cases on trusts for religious purposes? I address this question by considering how human rights arguments might have affected two past cases if they had arisen in a legal landscape such as the one that will exist from early 2008: a landscape that includes the Human Rights Act and all that is entailed in that Act, and in which the presumption of public benefit has been removed from the law relating to trusts for charitable purposes. The two cases that I concentrate on are *Thornton v Howe* and *Gilmour v Coats*.

A consideration of the relevant human rights jurisprudence starts with Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁰¹

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 14 is also relevant.

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.¹⁰²

According to section 6(1) of the Human Rights Act, '[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right' –

⁹⁹ CoS, n 9 above, 6–12, 39–40.

¹⁰⁰ F. Quint and T. Spring, 'Religion, Charity Law and Human Rights' (1999) 5 *Charity Law and Practice Review* 153; Edge and Loughrey, n 28 above, 51–64; Luxton, n 60 above at [1.82]–[1.126]; P.W. Edge, *Legal Responses to Religious Difference* (The Hague: Kluwer Law International, 2001) 158–159; P.W. Edge, *Religion and Law: An Introduction* (London: Ashgate, 2006) 65–67.

¹⁰¹ 4 November 1950, 213 UNTS 221 ('Convention'). On the right to freedom of religion under the Convention generally, see C. Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001).

¹⁰² See also Protocol 12 to the Convention, setting out a general prohibition of discrimination, whether with respect to the exercise of a Convention right or not.

including a right set out in Article 9 or Article 14 – unless the public authority in question is required so to act by legislation.¹⁰³ A person with standing may bring proceedings challenging an act that is unlawful under section 6(1), whether by way of judicial review, an action for breach of statutory duty, or an appeal.¹⁰⁴

In *Thornton v Howe* a trust for the purpose of disseminating the religious writings of Joanna Southcote was upheld despite the fact that there was no evidence on the basis of which a finding of public benefit could be made.¹⁰⁵ Now take *Thornton v Howe* out of its nineteenth century setting and imagine that it is about to be decided in a legal landscape such as the one that will exist from early 2008. The trust will almost certainly be struck down because of the lack of evidence of public benefit. If the trust is struck down, the property which the testatrix directed to be applied to the dissemination of Southcote's writings will instead be distributed according to the rules governing intestacy. Unless other funds can be obtained, Southcote's writings will not be disseminated in the way contemplated by the testatrix.

In the hypothetical modern-day *Thornton v Howe*, can the trustee appeal successfully against the decision on the basis of section 6(1) of the Human Rights Act? For the appeal to succeed, the appellate court will have to be convinced that the decision is incompatible with a Convention right.¹⁰⁶ Under Article 9(1) of the Convention, the testatrix, along with other followers of Joanna Southcote, has a right to freedom of religion. To the extent that the right is a right to freedom of religious belief, it seems that the decision is compatible with the right; the decision leaves the followers of Joanna Southcote no less free to believe what they believe. However, Article 9(1) also provides that the testatrix, along with other followers of Joanna Southcote, has a right to manifest her religion, and Article 9(2) states that this right may be limited only in legally prescribed ways that are necessary in the interest of public safety, order, health or morals, or for the protection of the rights and freedoms of others. The trustee might argue that this right to manifest religion has been curtailed by the decision to strike down the trust, because as a consequence of that decision religious writings that would otherwise have been disseminated will not be disseminated and religion will not be manifested to that extent. Moreover, the trustee might argue that, although the decision is legally prescribed because it is within the jurisdiction of the court, it is not necessary in the interest of public safety, order, health or morals, or for the protection of the rights and freedoms of others.¹⁰⁷ If an appellate court accepts this argument, it will have to conclude that the only finding of fact open to the lower court

103 Human Rights Act 1998, s 6(2). Both a court and the Charity Commission satisfy the definition of 'public authority': Human Rights Act 1998, s 6(3)(a); CoS, n 9 above, 6.

104 Standing requirements are set out in the Human Rights Act 1998, s 7. See also S. Grosz, J. Beatson and P. Duffy, *Human Rights: The 1998 Act and the European Convention* (London: Sweet & Maxwell, 2000) at [4–25]–[4–29].

105 n 29 above. See text to n 29 and following.

106 Grosz, Beatson and Duffy, n 104 above at [4–48].

107 Decision-makers are permitted a wide margin of appreciation in determining what is necessary for public safety, order, health or morals, or to protect the rights and freedoms of others: *Manousakis v Greece* (1996) 23 EHRR 387. However, in *Thornton v Howe*, the Master of the Rolls stated explicitly that there was no concern about public safety or morals; nor could permitting the dissemination of Southcote's writings have threatened the rights and freedoms of others.

on the evidence – the finding that no public benefit would flow from carrying out the purpose in question – has led to a decision that is incompatible with a Convention right.¹⁰⁸

Of course, there are formidable obstacles to such an argument succeeding. For instance, the appellate court will have to be satisfied that the dissemination of Southcote's writings manifests *religion* as opposed to beliefs of a non-religious character. And it will have to be shown how limiting the ability of a person or group to disseminate religious writings constitutes a limitation of the right to *manifest* religion.¹⁰⁹ However, if an argument based on human rights jurisprudence were to succeed despite these obstacles, it would lead to an interesting situation in the hypothetical modern-day *Thornton v Howe*. A finding of public benefit may be required under the Charities Act if the trust is to be upheld and yet such a finding may not be possible given the evidence, but to determine the question of public benefit such that the trust is struck down may be incompatible with an Article 9 right. In this situation, human rights jurisprudence is a way forward, but to a judicial stalemate.

Now take *Gilmour v Coats*.¹¹⁰ There, a trust for the purposes of a closed and contemplative order of Carmelite nuns was struck down because it could not be proven that those purposes, if carried out, would benefit the public. Evidence of spiritual benefit was of no probative value.¹¹¹ Once again, imagine that *Gilmour v Coats* is about to be decided by a trial judge in the legal landscape of the near future. If the trust is struck down, the nuns will lose a benefit that would have accrued to them if the trust had been upheld. However, given the facts of *Gilmour v Coats*, there is no reason to believe that the order will cease to exist or that its religious activities will change as an immediate consequence of the decision. The nuns will simply be poorer than they might have been.

Given this, a human rights argument in a hypothetical modern-day *Gilmour v Coats* will have to assume a relatively sophisticated form. It will not be possible for the nuns to argue that their freedom of religious belief has been interfered with. Nor will the nuns be able to argue that the decision has curtailed their ability to manifest their religion by making it immediately impossible for them to do something that they would otherwise have done.¹¹² However, the nuns may argue that their freedom to manifest their religion is, as a consequence of the decision, limited in another sense. It might be argued that the decision to strike down the trust means that the members of the order are unlikely to be able to continue undertaking their activities for as long or as extensively as would have been the case if the trust had been upheld. In their decision regarding the Church of Scientology, the Charity Commissioners suggested that, to the extent that a decision failing to confer a financial benefit on a religious organisation means that the reli-

108 It might also be open to the trustee to argue unlawful interference with the right to freedom of expression under Article 10 of the Convention. However, owing to the constraints of space, I do not address that argument here.

109 On what constitutes a limitation of the right to manifest religion, see generally: Evans, n 101 above, Chapters 6 and 7; Edge, *Religion and Law*, n 100 above, 55–61.

110 n 60 above.

111 See text to n 68 and following.

112 Although it might be possible to make this argument if, for example, as a direct consequence of the trust being struck down, the order will have to disband.

gious activities of the organisation will be curtailed, it might be possible for the organisation to argue that the decision is incompatible with its Article 9 right.¹¹³ The nuns might be able to make something of this view of the Charity Commissioners in arguing that their Article 9 right has been interfered with unlawfully. In making this argument, the nuns will face difficulties of the type that I alluded to above when discussing the hypothetical modern-day *Thornton v Howe*. But if the argument is successful, judicial stalemate will ensue once again.

In the hypothetical modern-day *Gilmour v Coats*, even if the nuns are unsuccessful in arguing that the decision is incompatible with their Article 9 right, they may nonetheless argue that, under Article 14, they have been discriminated against on the ground of religion. Put shortly, their argument would be that a financial benefit, in the form of putative trust property, has been denied to them on the basis that they carry out their religion in private, that similar financial benefits are permitted to other religious groups that carry out their religion in public, and that this constitutes discrimination on the ground of religion. The argument would be strengthened by the fact that Article 9 explicitly refers to the freedom 'in community with others', and in 'private', to manifest religion in matters of 'worship', 'practice' and 'observance'. This seems to contemplate the activities of Carmelite nuns. An argument based on discrimination, just like an argument based on Article 9, would face difficulties. Differential treatment is acceptable so long as it has an objective and reasonable justification,¹¹⁴ and in their decision about the Church of Scientology, the Charity Commissioners stated their view that the public benefit test was such a justification.¹¹⁵ However, it has been pointed out that in their decision the Charity Commissioners did not supply detailed reasons for that view.¹¹⁶ It therefore appears likely that the matter will arise for consideration in future cases. A successful appeal based on Article 14 of the Convention will once again generate a judicial stalemate: the only finding available to the lower court on the question of public benefit will have led that court to a decision that discriminates on the ground of religion and is therefore unlawful under the Human Rights Act.

Arguably, the Human Rights Act provides a tool for breaking out of the stalemate. Section 6(2)(a) states that a public authority has acted lawfully if, 'as the result of one or more provisions of primary legislation, the authority could not have acted differently', even if the decision of the authority in question was inconsistent with a Convention right. The Charities Act makes clear that a charitable purpose must be for the public benefit and that the question of public benefit is to be determined without applying a presumption.¹¹⁷ It might be argued that a court which strikes down a trust for religious purposes because there is no evidence of tangible public benefit could not have acted differently given the provisions of the Charities Act. And if this is the case, an appeal against the decision of such a court based on human rights grounds will fail. If such an argument were accepted by an appellate court, it would break the stalemate that would be generated when the

113 CoS, n 9 above, 10.

114 *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252.

115 CoS, n 9 above, 11, 39.

116 Edge and Loughrey, n 28 above, 60–61.

117 Charities Act 2006, s 2(1)(b) and s 3.

only finding on the question of public benefit available to a court has led to a decision that is incompatible with a Convention right.¹¹⁸ However, the argument contains a *non sequitur*. From the fact that the Charities Act requires a court to make a finding of public benefit and prohibits the application of a presumption as a fact-finding tool, it does not follow that the Charities Act necessarily requires the court to evaluate the purposes of a trust for religious purposes based on evidence of only tangible public benefit. Nor does it follow that the Charities Act necessarily requires a court to strike down a trust where there is no such evidence. It would be consistent with the Charities Act for a court to adopt, say, the technique of deference in a case on a trust for religious purposes. In light of this *non sequitur*, it simply cannot be asserted that a court that strikes down a trust for religious purposes because there is no evidence that carrying out those purposes will benefit the public in a tangible way 'could not have acted differently' because of the provisions of the Charities Act.

CONCLUSION

As we have seen, once the presumption of public benefit is removed from the law, possible approaches to the question of public benefit that may be drawn from the existing case law on trusts for charitable purposes will not be problem-free in their application to cases on trusts for religious purposes. Moreover, human rights jurisprudence seems to offer a way forward to judicial stalemate in some such cases and may therefore add new problems to existing ones. The extent to which this is a concern depends on which of two views one holds. First, it might be thought that trusts for religious purposes in respect of which there is no evidence of tangible public benefit ought to be struck down and that the removal of the presumption of public benefit from the law now ensures that this will happen. The holder of this view will think it appropriate that the range of religious purposes that are regarded as charitable in law will surely contract in the future.¹¹⁹ Secondly, it might be thought that all trusts that advance religion should be upheld irrespective of whether there is evidence that carrying out their purposes will generate tangible public benefit. This second view appears to be consistent with the approach to the question of public benefit in the Irish Charities Bill 2007, which retains a presumption of public benefit for trusts for religious purposes.¹²⁰ The holder of the second view is likely to be concerned that it appears there will be no problem-free way of upholding some trusts for religious purposes once the presumption of public benefit has been removed from the law. It remains to be seen which of these two views English courts will adopt in future cases.

¹¹⁸ It might, however, lead the appellate court to declare, under section 4 of the Human Rights Act, that the Charities Act is incompatible with a Convention right. This would bring about a stalemate of a different kind.

¹¹⁹ For arguments that religious purposes should not be regarded as charitable, see A. W. Lockhart, 'Case Comment' (1984–7) 5 *Auckland University Law Review* 244; Edge, *Religion and Law*, n 100 above, 111.

¹²⁰ n 85 above. It is also consistent with the view that trusts for religious purposes ought to be exempt from the public benefit test: see F. H. Newark, 'Public Benefit and Religious Trusts' (1946) 62 *LQR* 213; Brady, n 75 above.

DEFINING CHARITY

Not-for-Profit
Project, Melbourne
Law School

A Literature Review

23 February 2011

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Defining Charity

A LITERATURE REVIEW

INTRODUCTION

This section of the project focuses not on defining ‘not-for-profit’, but rather on the **definition of ‘charity’**, which concerns only a part of the NFP sector. This is because the common law has developed, over centuries, a technical legal meaning of the term ‘charity’, often although perhaps misleadingly referred to as a legal ‘definition’ of charity.¹ This common law meaning was developed largely in the context of trusts law, where charitable status confers a range of legal privileges. However, charitable status has taken on increased significance as a large number of statutes confer benefits on charities—most importantly, in the form of taxation concessions. The common law meaning also governs the term ‘charity’ and its analogues when used in statutes, unless there is compelling evidence to the contrary.²

While judges and commentators have criticised the adequacy of this common law definition of ‘charity’ for over a hundred years, a **debate** about reform of this common law definition has intensified **in the past decade** as part of wider public policy debates about reforming the ‘third sector’, the ‘voluntary sector’ or the ‘not-for-profit sector’.³ In 2001, an ad hoc Inquiry into the Definition of Charities and Related Organisations (Charities Definition Inquiry) was commissioned by the Australian Government to examine the issue in the context of the introduction of the Goods and Services Tax (GST).⁴ Although this Inquiry recommended a modernised statutory definition of the term ‘charity’, the resulting legislation only clarified the charitable status of three particular types of organisations.⁵

¹ As numerous authors have observed, the ‘definition’ is better characterised as a classification than a definition.

² *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] 1 AC 531, 580.

³ For a discussion of the different shades of meanings in these terms, see Håkon Lorentzen, ‘Sector Labels’ in Rupert Taylor (ed), *Third Sector Research* (Springer, 2010) 21.

⁴ The Inquiry was convened as a result of negotiations between the Australian Democrats and the then Coalition Government concerning the impact of the GST on not-for-profit organisations. It was chaired by Ian Sheppard (a former judge of the Federal Court), and its other members were Robert Fitzgerald and David Gonski.

⁵ *Extension of Charitable Purpose Act 2004* (Cth). This deemed self-help groups and closed and contemplative orders to be for the public benefit (s 5), and deemed the provision of non-profit child care to be a charitable purpose (s 4). The provision of rental dwellings under a National Rental Affordability Scheme was also deemed a charitable purpose under s 4A in 2008: *National Rental Affordability Scheme (Consequential Amendments) Act 2008* (Cth) Sch 2. This legislation was enacted following a further inquiry by the Board of Taxation into a Charities Bill 2003 (Cth), which originally proposed a statutory definition along the lines of the recommendation in the Charities Definition Inquiry. However, the Bill was controversial because it appeared to include a more restrictive limit on political advocacy. See The Board of Taxation, *Consultation on the Definition of a Charity* (December 2003) <http://www.taxboard.gov.au/content/content.aspx?doc=reviews_and_consultations/definition_of_a_charity/default.htm&pageid=007>.

Between 1996 and 2005, the definition of charity was also considered in England and Wales,⁶ Scotland,⁷ Ireland,⁸ New Zealand,⁹ Canada¹⁰ and South Africa.¹¹ As a result, although in 2001 only one jurisdiction was reported as having a statutory definition of charity,¹² in 2011 there is legislation defining charitable purpose in England and Wales,¹³ Northern Ireland,¹⁴ Scotland,¹⁵ and Ireland.¹⁶ In South Africa, as a result of this debate the use of the term 'charity' was replaced in taxation legislation by the broader category of 'public benefit organisations'.¹⁷

One consequence of this extensive debate is that there is a **surprisingly substantial literature** on the apparently narrow question of the definition of 'charity'. This literature takes two principal forms: 1) public policy reports, whether produced by governmental agencies, commissioned by government from independent committees, produced on the initiative of third sector organisations, or produced by academics; and 2) academic commentary. In particular, the definitional debate has been extensively considered in the various jurisdictions of the United Kingdom.

⁶ Commission on the Future of the Voluntary Sector, *Meeting the Challenge of Change: Voluntary Action in the 21st Century* (National Council for Voluntary Organisations, 1996) ('Deakin Report'); Cabinet Office Strategy Unit (UK), *Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector* (September 2002) <<http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/strat%20data.pdf>>; Home Office (UK), *Charities and Not-for-Profits: A Modern Legal Framework, The Government's Response to 'Private Action, Public Benefit'* (Government Response, July 2003) <<http://web.archive.org/web/20030731053149/www.homeoffice.gov.uk/docs2/charitiesnotforprofits.pdf>>.

⁷ Commission on the Future of the Voluntary Sector in Scotland, *Head and Heart* (Scottish Council for Voluntary Organisations, March 1997) ('Kemp Report'); Scottish Charity Law Review Commission, *CharityScotland* (2001) <<http://www.scotland.gov.uk/Topics/People/15300/22097>> ('McFadden Report'); Paul Spicker, Sue Morris and Veronica Strachan, *Consultation on the Review of Scottish Charity Law: Analysis of the Responses* (Centre for Public Policy and Management, The Robert Gordon University, 17 April 2002) <<http://www.scotland.gov.uk/Publications/2002/04/14545/3128>> ('McFadden Report Responses').

⁸ Law Society of Ireland Law Reform Committee, *Charity Law: The Case for Reform* (July 2002) <<http://www.lawsociety.ie/Documents/members/charityreport.pdf>>; Department of Community, Rural and Gaeltacht Affairs, *Establishing a Modern Statutory Framework for Charities* (Consultation Paper, December 2003) <<http://www.pobail.ie/en/CharitiesRegulation/Archives/file,4024,en.pdf>>; Oonagh B Breen, *Establishing a Modern Statutory Framework for Charities* (Department of Community, Rural and Gaeltacht Affairs, September 2004) <<http://www.pobail.ie/en/CharitiesRegulation/Archives/file,4024,en.pdf>>.

⁹ Sir Spencer Russell, *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (1989) ('Russell Report'); Inland Revenue, New Zealand, *Tax and Charities* (Discussion Paper, 14 June 2001) <<http://www.taxpolicy.ird.govt.nz/publications/year/2001>>; Working Party on Registration, Reporting and Monitoring of Charities, *First Report by the Working Party on Registration, Reporting and Monitoring of Charities* (28 February 2002) <<http://web.archive.org/web/20041206033102/http://www.treasury.govt.nz/charities/>>.

¹⁰ Ontario Law Reform Commission, *Report on the Law of Charities* (1996); Arthur B C Drache and Frances K Boyle, *Charities, Public Benefit and the Canadian Income Tax System: A Proposal for Reform* (Kahanoff Foundation, 1999) <http://www.icnl.org/programs/location/crossregional/globalforum/ConferenceMaterials/Charity_definition.doc>; Panel on Accountability and Governance in the Voluntary Sector, *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector* (February 1999) <http://www.ecgi.org/codes/documents/broadbent_report_1999_en.pdf> ('Broadbent Report').

¹¹ Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa, *Ninth Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa: Fiscal Issues Affecting Non-Profit Organisations* (1999) <<http://www.finance.gov.za/publications/other/katz/default.aspx>> ('Katz Commission').

¹² *Charities Act 1980* (Barbados). See Ian Fitzhardinge Sheppard, Robert Fitzgerald and David Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001), Attachment E ('Charities Definition Inquiry').

¹³ *Charities Act 2006* (UK) ss 1–3.

¹⁴ *Charities Act (Northern Ireland) 2008* (NI) ss 1–3.

¹⁵ *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) ss 7–8.

¹⁶ *Charities Act 2009* (Ireland) s 3.

¹⁷ *Income Tax Act 1962* (South Africa) s 30.

This literature review is **structured** as follows. In order to set the material in context, there is a brief introduction explaining the common law definition of charity and its significance in the current law. The reasons for and against changing this definition are then outlined. The bulk of this review focuses on the core of the definitional debate—whether, and if so how, this common law meaning should be changed. This is structured in terms of different types of reform proposals. The rest of the review considers particular problems with the definition, including most notably the distinction between charitable and political purposes, and the debate about the charitable status of religion.

Scope of the review

This literature review has examined, to the extent possible, the key **reform documents** in the following **jurisdictions**: Australia, the United Kingdom, Ireland, Canada, and New Zealand. It should be noted that, although the United States definition of charity shares a similar origin,¹⁸ the definitional debate has not been prominent in that jurisdiction.¹⁹ The literature review has also considered, to the extent possible, the **academic debate** in legal and public policy journals on the definition in these jurisdictions. Reference is sometimes made to literature in other jurisdictions, such as South Africa and Singapore. A number of materials, however, were unable to be examined as they were not available in Australia or online. References to them in this review have been sourced from other material.

While the legal meaning of charity is broadly similar in these common law jurisdictions, there are a number of **contextual differences**. One significant difference is that, in England and Wales, there has long been an **administrative regulator of charities** in the form of the Charity Commission. The Charity Commission is the body that determines charitable status at first instance, and provides considerable advice and guidance in this respect. To this extent, the Commission can be seen as ‘administering’ the definition and, in certain respects, modernising the definition.²⁰ In contrast, until recently, other jurisdictions have not had the advantage of an administrative regulator specific to charities.²¹

Another significant difference is that the **taxation consequences** of charitable status vary from jurisdiction to jurisdiction. In Australia, for example, donations to ‘charitable institutions’ are not automatically eligible for income tax deductions.²²

There are also significant **constitutional differences** between the jurisdictions. Australia is, like Canada and the US, and unlike New Zealand or Ireland, a federal jurisdiction. However, in Canada, the provinces

¹⁸ Although originally the tax exemptions were interpreted to refer to the ‘popular’ meaning of charity, since 1959 Treasury Regulations governing the Internal Revenue Code have stated that the term is interpreted according to its “generally accepted legal sense”: 26 CFR §1.501(c)(3)–1(d)(2).

¹⁹ This is attributable to the breadth of the US tax exemptions, and because the Internal Revenue Service interprets the law through regulations and rulings: Drache and Boyle, *Proposal for Reform*, above n 10, 15. In 1958, Reiling observed that the relative lack of litigation suggested that the common law definition was working well: see Herman T Reiling, ‘Federal Taxation: What Is a Charitable Organization?’ (1958) 44 *American Bar Association Journal* 525.

²⁰ Some have suggested that the Charity Commission may have gone too far in this respect: see Peter W Edge and Joan M Loughrey, ‘Religious Charities and the Juridification of the Charity Commission’ (2001) 21 *Legal Studies* 36.

²¹ There is now such a regulator for Scotland (the Office of the Scottish Charity Regulator, or OSCR); Ireland (Charities Regulatory Authority); and New Zealand (Charities Commission). The taxation authority is the primary regulator in Australia (the Australian Taxation Office); Canada (Charities Directorate, Canada Revenue Agency); and the United States (the Internal Revenue Service).

²² *Income Tax Assessment Act 1997* (Cth) s 30.15, subdiv 30–B.

are given exclusive legislative power to regulate charities.²³ In the United Kingdom, the supervision and regulation of charities is devolved to the Scottish Executive and the Northern Ireland Assembly, but tax is reserved to the United Kingdom.

THE LEGAL MEANING OF 'CHARITY'

The **legal meaning** of the term 'charity' is distinct from the '**popular**' meaning of the term. This 'popular' sense has been described as 'the relief of any form of necessity, destitution or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief'.²⁴ The technical legal meaning is broader in some respects, and narrower in others, than its 'popular' or dictionary sense.²⁵

The technical legal meaning of charity can be thought of as being composed of three elements. First, it is commonly classified into **four 'heads' of charity**, as adopted by Lord Macnaghten in *Pemsel's* case: the relief of the poor, aged or impotent; the advancement of education; the advancement of religion; and 'other purposes beneficial to the community' (the 'fourth head').²⁶ The *Pemsel* classification itself is sometimes referred to as the 'definition' of charity.

Second, the orthodox view is that a purpose alleged to be charitable under the fourth head of charity must be 'within the spirit and intendment' of the **preamble** in the *Statute of Charitable Uses 1601*²⁷—namely, it must fall within or be analogous to one of the 10 specific charitable purposes listed in the preamble.²⁸ These purposes naturally reflect the preoccupations and politics of the Elizabethan period.²⁹ This is so even though the *Statute of Charitable Uses* was not intended to define charity but rather to establish a mechanism for investigating and remedying abuses of charitable trusts, and although the requirement can only be traced back to 1804.³⁰

Third, within this overall framework, there have been centuries of **case law** which further refine the parameters of charity. The following **rules** have developed from this body of case law:

- The purpose must be for the '**public benefit**'. Where the purposes are to relieve poverty, advance education or religion, courts have tended to presume that the purposes are charitable.³¹ The

²³ *The Constitution Act, 1867* (Canada) s 92(7).

²⁴ *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] 1 AC 531, 572.

²⁵ G E Dal Pont and S Petrow, *Law of Charity* (LexisNexis Butterworths, 2010) [2.2].

²⁶ *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] 1 AC 531. The classification appears to have been adopted from a classification advanced by counsel (Sir Samuel Romilly) in *Morice v Bishop of Durham* [1804] 9 Ves 399; 32 ER 656. See Gareth H Jones, *History of the Law of Charity, 1532–1827* (Cambridge University Press, 1969) 124.

²⁷ 43 Eliz I, c 4.

²⁸ These purposes are: the relief of the aged, poor and impotent; the maintenance of sick and maimed soldiers and mariners; the repair of bridges, ports, havens, causeways, churches, seabanks and highways; the maintenance of schools and colleges; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; marriages of poor maids; the supportation, aid and help for young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; and the aid and ease of any poor inhabitants concerning payment of fifteens, setting out soldiers, and other taxes.

²⁹ See, eg, B Bromley and K Bromley, 'John Pemsel Goes to the Supreme Court of Canada in 2001: The Historical Context in England' (1999) 6 *Charity Law and Practice Review* 115; G W Keeton, 'The Charity Muddle' (1949) 2 *Current Legal Problems* 86, 92–96.

³⁰ [1804] 9 Ves 399; 32 ER 656. See Jones, *History of the Law of Charity*, above n 26, 120.

³¹ Dal Pont and Petrow, *Law of Charity*, above n 25, [3.38].

purpose must be both 'beneficial' (in a broad sense) and must benefit a sufficient section of the public.

- The concept of 'charity' is not static, but **evolves** as the community does.³² This evolution usually takes the form of expansion of the concept through analogy to existing case law.
- The donor's **motive** is **irrelevant** to the charitable status of a purpose, except so far as the motive is incorporated into the purpose of the gift.³³
- A purpose that is **illegal** or against **public policy** cannot be charitable.³⁴
- There can be no **distribution of profit** for private purposes.³⁵
- A **political purpose** is not a charitable purpose, although political means can be used if ancillary to a charitable purpose.³⁶ The High Court, however, has recently decided that this rule does not apply in Australia.³⁷

The case law also provides a rich resource for making analogies between recognised charitable purposes and purposes advanced as charitable.

THE IMPORTANCE OF 'CHARITY'

The term 'charity' is much contested because of the consequences that follow from charitable status, principally the availability of **legal privileges in trusts law**, and eligibility for **taxation concessions**. There are a range of other statutory consequences. The National Roundtable for Not-for-profit Organisations has found that a legal outcome, including entitlements to benefits, turns on charitable status in some 15 Commonwealth Acts and 163 state and territory Acts.³⁸ However, in many cases equivalent benefits are extended to other categories of organisations.

In jurisdictions with a regulator specifically for charities, charitable status also has the effect of subjecting the organisation to **regulation**. Finally, charitable status is often perceived as enhancing an organisation's **credibility** with the public, particularly in jurisdictions which have a Charity Commission or like body.³⁹ The following section briefly explains the legal benefits of charitable status.

³² See *Morice v Bishop of Durham* [1804] 9 Ves 399; 32 ER 656. This is discussed in Dal Pont and Petrow, *Law of Charity*, above n 25, [2.7].

³³ *Ibid* [2.8].

³⁴ *Ibid* [3.46]–[3.52].

³⁵ *Ibid* [3.23].

³⁶ *Bowman v Secular Society Ltd* [1917] AC 406.

³⁷ *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42.

³⁸ National Roundtable of Non-Profit Organisations, *The Assessment of Charitable Status in Australia: Current Practice and Recommendations for Improvement* (2007) <http://www.aph.gov.au/Senate/Committee/economics_ctte/charities_08/submissions/sub170c.pdf>.

³⁹ National Council for Voluntary Organisations, *For the Public Benefit? A Consultation Document on Charity Law Reform* (2001), [1.3.18].

Trusts law

Under common law, the only **valid** trusts created for purposes (rather than for specified beneficiaries) are charitable trusts,⁴⁰ with the exception of an anomalous group of cases concerning tombs and animals.⁴¹ Further, a range of **privileges** are conferred on charitable trusts:

- *Interpretative*: A favourable construction is placed on ambiguous terms in cases of charities;
- *Removal or relaxation of certain requirements*:
 - Rule against indestructibility—charities can be expressed to last indefinitely;
 - Rule against testamentary delegation—a testator can delegate to a trustee the power to select and apportion a charitable bequest;
 - Certainty of object—as long as a purpose is identified as charitable, there is certainty of object, and there does not need to be an identifiable beneficiary;
- *Court powers*: A court has inherent jurisdiction to settle an administrative scheme to achieve the charitable objects, and if it is impossible or impracticable to carry out a specified charitable object, then the court may, in defined circumstances, apply the gift to a purpose or object as near as possible (cy-près) to the original object (known as a cy-près scheme).⁴²

The evolution of the common law and statutory developments has diminished the significance of these privileges.⁴³ In particular, the practical significance of charitable status declined as a result of the introduction in Australia of '**saving**' **legislation** which validates gifts capable of including both charitable and non-charitable objects,⁴⁴ with Victoria enacting the first such legislation in 1915.⁴⁵ This legislation addressed the common situation where gifts for 'benevolent' or 'philanthropic' purposes were held to be invalid.⁴⁶

Taxation law

The greater contemporary significance of the term 'charity', however, is in a range of **taxation concessions** available for charities. In Australia, federal tax concessions include, most significantly, income tax exemptions; exemptions and rebates for fringe benefits tax; certain concessions in relation to GST; and deductibility of gifts to such charities from income tax.⁴⁷ State and territory jurisdictions also offer (inconsistent) relief in respect to indirect taxes, including: payroll tax; taxes on land transfers; land tax; motor vehicle taxes; mortgage insurance duties; and gaming taxes.⁴⁸

However, only some of these concessions depend upon the use of the term 'charitable' and, even in that case, other conditions typically need to be satisfied. For example, a more restrictive term, 'public

⁴⁰ On the basis that other trusts are not enforceable: *Re Astor's Settlement Trusts* [1952] 1 All ER 1067.

⁴¹ On these, Dal Pont and Petrow, *Law of Charity*, above n 25, [10.16]–[10.17].

⁴² *Ibid* [6.1]–[6.7].

⁴³ See generally G Dal Pont, 'Why Define Charity? Is the Search for Meaning Worth the Effort?' (2002) 8 *Third Sector Review* 5.

⁴⁴ See the discussion in Dal Pont and Petrow, *Law of Charity*, above n 25, [13.32]–[13.47].

⁴⁵ *Trusts Act 1915* (Vic) s 79. This followed a famous decision in *In the Will of Forrest* [1913] VLR 425.

⁴⁶ Dal Pont and Petrow, *Law of Charity*, above n 25, [13.4].

⁴⁷ The various concessions are set out in Productivity Commission, *Contribution of the Not-for-Profit Sector* (Research Report, 11 February 2010) <<http://www.pc.gov.au/projects/study/not-for-profit/report>>, App E.

⁴⁸ *Ibid* App E.

benevolent institution', is used in Australia both in deductions from income tax for gifts,⁴⁹ and in fringe benefits tax concessions.⁵⁰ Even where the term 'charitable institution' is used, such as in the income tax exemption, there are a range of other specified entities (such as religious, educational, scientific institutions) which also benefit from the same concessions.⁵¹

Other statutory consequences

While modern legislation confers significant *privileges* upon 'charities', earlier mortmain legislation penalised charities. **Mortmain legislation**, enacted in the 18th century, voided bequests of land to charity and vested that property in heirs and family. The policy was intended to benefit families and to ensure that land was not 'locked up' in the powerful hands of charities and, by association, the Catholic Church. This policy encouraged a liberal definition of 'charity' at common law which was of significant historical consequence.⁵²

Modern legislation, however, confers a range of benefits upon charities. These include **exemptions** from anti-discrimination legislation (excepting in the ACT); exemptions in betting, gaming and lotteries legislation; exemptions from specific levies; and exemptions from regulations or statutory restrictions.⁵³

'Charity'—not the be-all and end-all

The common law meaning of 'charity' does not, however, govern all statutes. As noted earlier, the relationship between charitable status and taxation concessions in Australia is complex. Even in the UK, taxation concessions apply to different categories of charity.⁵⁴

Some statutes expressly include an alternative definition of 'charity'. In the fundraising legislation of some Australian states, the term 'charity' is defined either more restrictively than the common law definition (in the case of South Australia and, to some extent, Western Australia) or more broadly (in the case of New South Wales, Queensland and Tasmania).⁵⁵ In the 19th century, state and territory Acts enabling the incorporation and supervision of charitable institutions typically included **restrictive definitions**.⁵⁶ Overseas examples of restrictive statutory definitions also exist.⁵⁷

In addition, although there are many statutory provisions on which charitable status may confer a benefit, in many of those statutes the **benefit is not restricted to charities**. For example, section 12 of the *Housing Assistance Act 1978* (Cth) enables housing grants to bodies including 'voluntary, non-profit, charitable or

⁴⁹ *Income Tax Assessment Act 1997* (Cth) s 30.45.

⁵⁰ *Fringe Benefits Tax Assessment Act 1986* (Cth) s 57A.

⁵¹ *Income Tax Assessment Act 1997* (Cth) s 50.5.

⁵² Jones, *History of the Law of Charity*, above n 26, 106–119.

⁵³ See generally Dal Pont and Petrow, *Law of Charity*, above n 25, [7.18]–[7.20].

⁵⁴ J Warburton, "'Charity'—One Definition for All Tax Purposes in the New Millennium?" [2000] *British Tax Review* 144.

⁵⁵ Dal Pont, 'Why Define Charity?', above n 43, 22–23. Victoria and the ACT regulate fundraising generally.

⁵⁶ The various definitions in colonial legislation are cited in *Swinburne v Federal Commissioner of Taxation* (1920) 27 CLR 377, 384–385.

⁵⁷ See, eg, *War Damage Act 1943* (UK) s 69, which restricted the scope of the Act to a) relief of poverty; b) "the making of provision for the cure or mitigation or prevention of, or for the care of persons suffering from or subject to, any disease or disability or infirmity affecting human beings (including the care of women before, during and after childbirth)"; c) the advancement of religion and d) the advancement of "education, learning, science or research". Other examples from New Zealand, India and Sri Lanka are discussed in Lim Kien Thye, 'Clearing the Charity Muddle—A Statutory Proposal' (1984) 26 *Malaya Law Review* 133, 147.

other housing management bodies or groups as are approved', and section 23 of the *Sex Discrimination Act 1984* (Cth) confers an exemption on a 'charitable or other non-profit-making body'.⁵⁸

ARGUMENTS FOR AND AGAINST THE 'DEFINITION'

Retaining the definition

Logically, the first question in the definitional debate is whether there is anything wrong with the technical legal meaning of charity. In 1952, the Nathan Committee in the UK observed that most of its legal witnesses were **broadly satisfied with the definition**.⁵⁹ The common law definition was subsequently supported by the UK Government in 1955 in its response to the Nathan Committee,⁶⁰ and in 1959 by the Newark Committee in Northern Ireland.⁶¹ In 1965, the Victorian Chief Justice's Law Reform Committee similarly recommended against enactment of a statutory definition.⁶² A similar view was taken in New Zealand and the UK in 1989.⁶³ There are also academic supporters of the common law definition, notably Bromley in Canada and Picarda in the UK.⁶⁴ The principal argument for this view is that the **underlying policy rationale** of the common law definition is more or less **correct**.

The other primary arguments advanced in favour of retaining the common law definition principally relate to flexibility, feasibility, and certainty. The **flexibility** argument favours the **common law method** of analogical reasoning as flexible and capable of adapting to changed circumstances. This argument naturally turns on views as to the desirable balance between flexibility and certainty in the law.

The common law definition arguably provides more **certainty** because of its link to existing case law (both within the jurisdiction and abroad) and that a statutory definition will sever that link, creating greater uncertainty.⁶⁵ The **feasibility** argument is that it is impossible to satisfactorily define the concept of charity, at least in any short form capable of being inserted in legislation.⁶⁶ As a result, the common law will in any event 'fill the gaps' of any statutory definition.⁶⁷

⁵⁸ This provision exempts accommodation providers from sex discrimination if they provide accommodation solely on the basis of sex or marital status.

⁵⁹ United Kingdom, *Report of the Committee on the Law and Practice Relating to Charitable Trusts* (Cmd 8710, December 1952), 126 ('Nathan Report').

⁶⁰ United Kingdom, *Government Policy on Charitable Trusts in England and Wales* (Cmd 9538, 1955), [2]–[3].

⁶¹ Northern Ireland, *Charity Committee Report* (Cmd 396, 1959) ('Newark Committee Report').

⁶² Victorian Chief Justice's Law Reform Committee, *Report on Charitable Trusts* (1965), 44.

⁶³ Russell, *Russell Report*, above n 9; Secretary of State for the Home Department, *Charities: A Framework for the Future* (Cmd 694, May 1989) ('White Paper'). See Kate Tokeley, 'A New Definition for Charity?' (1991) 21 *Victoria University of Wellington Review* 41.

⁶⁴ Blake Bromley, 'Answering the Broadbent Question: The Case for a Common Law Definition of Charity' (1999) 19 *Estates, Trusts & Pensions Journal* 21; Hubert Picarda, 'The Preamble to the Statute of Charitable Uses in 1601: Peter Pan or Alice in Wonderland?' (2002) 8 *Third Sector Review* 229.

⁶⁵ United Kingdom, *Government Policy on Charitable Trusts in England and Wales*, above n 60, [2]–[3]; Northern Ireland, *Newark Committee Report*, above n 61. See Note, 'The Newark Report on Charities' (1959) 13 *Northern Ireland Legal Quarterly* 188.

⁶⁶ L Sheridan and George Keeton, *The Modern Law of Charities* (University College Cardiff Press, 3rd ed, 1983) 23–29; Trevor C W Farrow, 'The Limits of Charity: Redefining the Boundaries of Charitable Trust Law' (1993) 13 *Estates and Trusts Journal* 306; R Meagher and W Gummow, *Jacobs' Law of Trusts in Australia* (Butterworths, 6th ed, 1997) 182.

⁶⁷ See, eg, Secretary of State for the Home Department, *White Paper*, above n 63, [2.11]. The Paper also expressed concern that some trusts which had long been held to be charitable might be excluded. While this could be remedied by preserving those charities by legislation, the Paper argued that this could not be justified on policy grounds.

Reforming the definition

The case for reforming the definition can be usefully divided, for the purposes of analysis, into three classes of criticism. First, there are criticisms based on the **'formal'** characteristics of the law—its **uncertainty**, its **incoherence**, and its **inaccessibility**. The typical argument is that the scope of the 'definition' is intolerably uncertain, complex and difficult to apply, enlarging the potential for litigation.⁶⁸ Further, it is argued that the development of the 'definition' is not guided by any coherent principle(s),⁶⁹ and the 'definition' is unduly legalistic and inaccessible to the layperson.⁷⁰

These arguments rest on a consensus about the desirability of certainty, coherence and accessibility in the law. This taps into a larger debate about the appropriate **balance between flexibility and certainty** in the law, and to perceptions about the desirability of the common law method.⁷¹ This criticism also suggests that the goal of reform is **clarification**.

Second, there are **'procedural'** or **'institutional'** issues about who decides whether a body or purpose is 'charitable'. These may be further divided into three related issues. One issue is whether an administrative body should have the effective power to determine charitable status. This concerns the appropriate role of **administrative bodies** in determining legal matters. Another issue is whether there is a need for a faster and cheaper method of **review or appeal** of that decision,⁷² which concerns access to justice.

The last procedural issue concerns the **appropriate body to determine charitable status**, in light of both their institutional role and their politics.⁷³ This reflects a broader debate about the appropriate roles of the judiciary and legislature in a democratic polity. For example, there are arguments about the articulation of policy in case law; the democratic nature of decision-making in determining charitable status; and the role of majority views in influencing decisions on charity.⁷⁴

The third class of criticism involves **'substantive'** questions about what should fall within the **scope of charity**, questions which provoke considerable differences. There are two opposing ends of the spectrum: those who think the current 'definition' is **too broad**, partly because of its divergence from the 'popular'

⁶⁸ See Norman Bentwich, 'The Wilderness of Legal Charity' (1933) 49 *Law Quarterly Review* 520, 521–522; Keeton, 'The Charity Muddle,' above n 29, 92; United Kingdom, *Nathan Report*, above n 59, 126; L A Sheridan, 'Nature of Charity' (1957) 23 *Malayan Law Journal* lxxxvi; Secretary of State for the Home Department, *White Paper*, above n 63, [2.9].

⁶⁹ See, eg, *Re Tetley* [1923] 1 Ch 258; *Gilmour v Coats* [1949] AC 426.

⁷⁰ Victorian Legal and Constitutional Committee, *Report to Parliament on the Law Relating to Charitable Trusts* (No 34, 1989), 24.

⁷¹ For example, Brunyate argued that the analogical method was "hardly a rule on which good decisions can be made or the right decision distinguished from the wrong": John Brunyate, 'The Legal Definition of Charity' (1945) 61 *Law Quarterly Review* 268, 276. Contrast the view that the "search for absolute certainty and consistency is as unrealistic and misguided as the search for the blue bird of happiness": Picarda, 'The Preamble to the Statute of Charitable Uses,' above n 64, 251. This is noted in National Council for Voluntary Organisations, *For the Public Benefit?*, above n 39, [3.3.3].

⁷² See, eg, House of Commons Expenditure Committee, *Charity Commissioners and Their Accountability* (HC Paper 495-I, 30 July 1975), [29]; Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Charity Law and Voluntary Organisations* (1976), [94] ('Goodman Report'); Panel on Accountability and Governance in the Voluntary Sector, *Broadbent Report*, above n 10, 51–52; Myles McGregor-Lowndes, 'A Taxing Definition: A Comment on the Industry Commission's Draft Proposals for Defining Community Social Welfare Organisations' (1995) 2 *Canberra Law Review* 121, 130.

⁷³ Some argue that the judiciary also has a role in mediating social policy: Bromley, 'Answering the Broadbent Question,' above n 64. Others favour a democratic legislature: see, eg, James C Brady, 'The Law of Charity and Judicial Responsiveness to Changing Social Need' (1976) 27 *Northern Ireland Legal Quarterly* 198.

⁷⁴ Charles Mitchell, 'Redefining Charity in English Law' (1999) 13 *Tolley's Trust Law International* 21, 43.

meaning of charity,⁷⁵ and partly because of the fiscal implications of a broad definition;⁷⁶ and those who think the current ‘definition’ is **too narrow**.⁷⁷ This substantive aspect is often obscured by debate about the ‘formal’ characteristics of the law. This class of criticism taps into broader questions about the role of tax policy and, more importantly, **differing philosophical views on the role of civil society**. The deeper debate here is over the value of charity and the appropriate role of the government in supporting charity.

REFORM PROPOSALS

History

There is a long history of proposals for reforming the definition of ‘charity’, as Appendix I (which lists the key reports and their recommendations) illustrates. In **Australia**, the issue was considered by the Victorian Chief Justice’s Law Reform Committee in 1965, by a Victorian interdepartmental working party on the administration of charities in 1980, by the Victorian Legal and Constitutional Committee in 1989, and most comprehensively in the 2001 Charities Definition Inquiry.⁷⁸

The debate has been most extensive in the **United Kingdom**. In England and Wales, the debate received some attention in Royal Commissions and Committees reviewing taxation in 1920, 1936 and 1955;⁷⁹ and was considered in greater detail by the Nathan Committee in 1952 and in the resulting White Paper in 1955.⁸⁰ The issue was revived between 1947 and 1976 with the release of reports by the House of Commons Expenditure Committee, the English Charity Law Reform Committee, and in particular by the

⁷⁵ For example, Gavan Duffy J complained: “‘Charity’ is in law an artificial conception, which during some 300 years, under the guidance of pedantic technicians, seems to have strayed rather far from the intelligent realm of plain common sense”: *Re Howley* [1940] IR 109, 114. Isaacs J thought it would be “strange” to impute to the legislature an intention to relieve the following from taxation: a home for starving and forsaken cats; the promotion of vegetarianism; and “the promulgation of ... Conservative principles combined with mental and moral improvement, Socialism, anti-vivisection principles”: *Chesterman v Federal Commissioner of Taxation* (1923) 32 CLR 362, 383–384. This view continues today: see National Council for Voluntary Organisations, *For the Public Benefit?*, above n 39, [2.3.1], [2.3.8]. The New Zealand Department of Inland Revenue openly explained that its consideration of reviewing the definition was prompted by two major concerns, one of which was the possibility that the exemption was “too widely available”, although it noted this may be a “perception” only: Inland Revenue, New Zealand, *Tax and Charities*, above n 9, [4.1]–[4.2].

⁷⁶ See, eg, Jeffrey Hackney, ‘The Politics of Chancery’ [1981] *Current Legal Problems* 113, 127.

⁷⁷ For judicial criticisms, see, eg, *Incorporated Council of Law Reporting for England and Wales v Attorney General* [1971] Ch 626, 647. See also Bentwich’s description of charity law as having the “worst root of title, an ancient and obsolete Statute”; Bentwich, ‘The Wilderness of Legal Charity,’ above n 68, 522. See also United Kingdom, *Nathan Report*, above n 59, 126; Hackney, ‘The Politics of Chancery,’ above n 76; Inland Revenue, New Zealand, *Tax and Charities*, above n 9, [4.3]. This was clearly also the approach taken by the Charities Definition Inquiry: Sheppard, Fitzgerald, and Gonski, *Charities Definition Inquiry*, above n 12.

⁷⁸ Victorian Chief Justice’s Law Reform Committee, *Report on Charitable Trusts*, above n 62; Victorian Legal and Constitutional Committee, *Report to Parliament on the Law Relating to Charitable Trusts*, above n 70. The Tasmanian Law Reform Commission considered the limited question of the charitable status of sport, recreation and leisure in 1984: Law Reform Commission of Tasmania, *Report on Variations of Charitable Trusts* (No 38, 1984).

⁷⁹ United Kingdom, Royal Commission on the Income Tax, *Report* (Cmd 615, March 1920) (‘Colwyn Commission’); Income Tax Codification Committee, *Report* (Cmd 5131, April 1936); United Kingdom, Royal Commission on the Taxation of Profits and Income, *Final Report* (Cmd 9474, June 1955) (‘Radcliffe Report’).

⁸⁰ United Kingdom, *Nathan Report*, above n 59; United Kingdom, *Government Policy on Charitable Trusts in England and Wales*, above n 60.

Goodman Report, commissioned by the National Council of Voluntary Organisations (NCVO).⁸¹ The debate was reconsidered in a White Paper in 1989⁸² and in 1996 by another non-governmental inquiry, the Deakin Commission.⁸³ The debate was revived again by the NCVO through a consultation paper in 2001.⁸⁴ This was followed by a Cabinet Office Strategy Unit report in 2002 which the Government largely accepted in 2003,⁸⁵ and the proposals of which were largely implemented in the *Charities Act 2006* (UK).

In addition, the definitional debate received separate consideration in **Northern Ireland** in the Newark Report in 1959;⁸⁶ and in **Scotland**, with the Kemp Commission Report in 1997⁸⁷ and the McFadden Report of 2001.⁸⁸ The Scottish and Northern Ireland governments then engaged in separate processes of reforming charity law and regulation between 2002 and 2008,⁸⁹ taking into account the parallel reform process in England and Wales, which resulted in the *Charities and Trustee Investment (Scotland) Act 2005* and the *Charities Act (Northern Ireland) 2008*.

In **Ireland**, the Law Reform Committee of the Law Society published in 2002 an extensive report on reforming charity law, including the definition,⁹⁰ which was followed by a government consultation paper in 2003.⁹¹ This ultimately led to the enactment of a statutory definition in the *Charities Act 2009* (Ireland). In **New Zealand**, the issue has been considered by the Russell Report, which recommended no change to the definition in 1989,⁹² and in other reports between 2001 and 2002.⁹³ However, the government chose not to adopt a modern definition in the *Charities Act 2005* (NZ), which includes a definition that reflects the common law.⁹⁴

⁸¹ English Charity Law Reform Commission, *Charity Law—Only a New Start Will Do* (Parliamentary Paper 23, 1974); House of Commons Expenditure Committee, *Charity Commissioners and Their Accountability*, above n 72; Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72.

⁸² Secretary of State for the Home Department, *White Paper*, above n 63.

⁸³ Commission on the Future of the Voluntary Sector, *Deakin Report*, above n 6.

⁸⁴ National Council for Voluntary Organisations, *For the Public Benefit?*, above n 39.

⁸⁵ Cabinet Office Strategy Unit (UK), *Private Action, Public Benefit*, above n 6; Home Office (UK), *A Modern Legal Framework*, above n 6.

⁸⁶ Northern Ireland, *Newark Committee Report*, above n 61.

⁸⁷ Commission on the Future of the Voluntary Sector in Scotland, *Kemp Report*, above n 7.

⁸⁸ Scottish Charity Law Review Commission, *McFadden Report*, above n 7.

⁸⁹ In Scotland, see Spicker, Morris, and Strachan, *McFadden Report Responses*, above n 7; Scottish Executive, *Charity Regulation in Scotland: The Scottish Executive's Response to the Scottish Charity Law Review Commission Report* (16 December 2002) <<http://www.scotland.gov.uk/Publications/2002/12/15993/15522>>. In Northern Ireland, an Advisory Panel was established in March 2004 and consultations were held in 2005, leading to the *Charities Act (Northern Ireland)*: see Explanatory Notes to the Act and Department for Social Development (Northern Ireland), *Consultation on Draft Primary Legislation Proposal for an Order in Council: The Charities (Northern Ireland) Order 2006 July* (Consultation Paper, July 2006), App 1.

⁹⁰ Law Society of Ireland Law Reform Committee, *Charity Law: The Case for Reform*, above n 8.

⁹¹ Department of Community, Rural and Gaeltacht Affairs, *Establishing a Modern Statutory Framework for Charities*, above n 8. An analysis of consultation responses was also published: Breen, *Establishing a Modern Statutory Framework for Charities*, above n 8.

⁹² Russell, *Russell Report*, above n 9.

⁹³ Inland Revenue, New Zealand, *Tax and Charities*, above n 9; Working Party on Registration, Reporting and Monitoring of Charities, *Second Report* (31 May 2002) <<http://web.archive.org/web/20041206033102/http://www.treasury.govt.nz/charities/>>.

⁹⁴ *Charities Act 2005* (NZ) s 5(1). This was taken from the *Income Tax Act 1994* (NZ) s OB 1.

In **Canada**, the issue of reforming the definition received very detailed consideration by the Ontario Law Reform Commission in 1996,⁹⁵ and in 1999 by the Broadbent Report⁹⁶ as well as by two charity lawyers, whose recommendations were subsequently endorsed by the Canadian Bar Association.⁹⁷ The Ontario Law Reform Commission rejected a statutory definition and preferred that courts and administrators re-frame the relevant law in line with the principles it suggested.⁹⁸ The Broadbent Report recommended that Canadian governments should arrive at more appropriate language through a democratic process involving the voluntary sector.⁹⁹ It also recommended that, for the purposes of identifying which organisations could issue tax receipts for charitable donations for the purpose of tax credits, the existing definition of charity should be retained but that Parliament should add other organisations to that list, on the advice of a task force involving both government and the voluntary sector.¹⁰⁰ No such reforms have been implemented, however.

The issue of the definition of ‘charity’ for taxation purposes was also considered in the context of a wide-ranging taxation review in **South Africa**, the Katz Commission, which resulted in the replacement of the category of charity by a category of ‘public benefit organisation’ in its taxation legislation.¹⁰¹

Overview

Several major types of reform proposals can be identified:

- **Contracting** the definition by statute;
- **Codification** of the case law in statute;
- **Clarification** of specific parts of the law, through judicial interpretation or statute;
- **Dividing the category of ‘charity’**, either by creating specialist definitions in different areas of the law, or by creating a hierarchy of charitable organisations;
- Shifting the focus away from charity to a **broader unifying principle**, principally ‘public benefit’ or ‘not-for-profit’;
- Imposing **administrative safeguards** through a system of registration or endorsement;¹⁰² and
- **Enacting a classification** that states the meaning of charity, as developed by common law, and potentially expands its scope (as implemented in the UK and Ireland, and as suggested by the Charities Definition Inquiry).

The different approaches have tended to be popular in different historical periods, and tend to reflect an increasingly expansive view of the scope of charity. The following section reviews these approaches in rough chronological order.

⁹⁵ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10.

⁹⁶ Panel on Accountability and Governance in the Voluntary Sector, *Broadbent Report*, above n 10.

⁹⁷ Drache and Boyle, *Proposal for Reform*, above n 10.

⁹⁸ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 227.

⁹⁹ Panel on Accountability and Governance in the Voluntary Sector, *Broadbent Report*, above n 10, 51–53.

¹⁰⁰ *Ibid* 53–55.

¹⁰¹ Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa, *Katz Commission Report*, above n 11. See *Income Tax Act 1962* (South Africa) s 30.

¹⁰² See, eg, Peter Broder, ‘The Legal Definition of Charity and Canada Customs and Revenue Agency’s Charitable Registration Process’ (2002) 17 *The Philanthropist* 3, 23. Most jurisdictions now require registration of charities for the purposes of qualifying for taxation concessions, which enables a degree of oversight.

Contracting the definition

Perhaps the most straightforward approach would be to **enact a statutory definition** of charity that is **more restrictive** than the common law meaning, one that is clearly influenced by the fiscal privileges attached to charity. This approach received significant support in the early part of the 20th century, but appears to have fallen into disfavour. For example, in 1926 **Isaacs J** clearly expressed his support for a more restrictive view in several cases, culminating in a cry for the ‘popular’ sense of charity to be legislated.¹⁰³

This approach was also taken by the **Colwyn Commission** in the UK in 1920.¹⁰⁴ Its proposal focused on criteria which would justify the income tax exemption, namely on charitable bodies which “primarily affect people with small incomes, or perform duties which, in the absence of private charity, would fall upon the State, a limitation which would not exclude charities which have for their object the saving of life, the relief of the poor, or the care of the sick and aged.”¹⁰⁵ However, noting the likely opposition to its proposal, the serious effect on the income of many institutions, and the fact that it had not taken any evidence on the matter, it merely recommended that “for the purposes of Income Tax ‘charities’ should be specifically re-defined by Parliament”.¹⁰⁶

Another suggestion in this vein was **Bentwich’s** proposal in 1933 of a statutory definition aligning the popular and legal connotation of charity. While he did not propose a specific definition, he indicated this statutory definition should be along broad lines,¹⁰⁷ approving of the judicial statement in *Re Cranston*¹⁰⁸ that the essential attributes of a “legal charity are that it shall be unselfish and public, that the beneficiaries shall form a class worthy in numbers or importance of consideration as a public object of generosity, and that it shall be philanthropic or benevolent, that is, dictated by a desire to do good.”¹⁰⁹

In 1955, the **Radcliffe Commission** in the UK largely endorsed the reasoning of the Colwyn Commission.¹¹⁰ While it supported the general idea of tax relief for charities, it was concerned at the width of the term.¹¹¹ It agreed that the term did not align with the popular meaning; was unduly wide, indefinite, and archaic; and considered that its determination was far from principled.¹¹² Further, it argued there was no public control of the object of charity or regular scrutiny of charities.¹¹³ It thought a statutory definition was “rather an obvious reform”,¹¹⁴ suggesting one along similar lines to existing English legislation that omitted the fourth ‘head’ of charity.¹¹⁵ It also rejected a proposal for an

¹⁰³ *Young Men’s Christian Association of Melbourne v Federal Commissioner of Taxation* (1926) 37 CLR 351, 358–359. See also *Isaacs J in Swinburne v Federal Commissioner of Taxation* (1920) 27 CLR 377; *Chesterman v Federal Commissioner of Taxation* (1923) 32 CLR 362. This was effective to the extent that the term ‘public benevolent institution’ was inserted instead in one provision of the income tax legislation.

¹⁰⁴ *Colwyn Commission*, above n 79, [307].

¹⁰⁵ *Ibid* [307].

¹⁰⁶ *Ibid* [307].

¹⁰⁷ Bentwich, ‘The Wilderness of Legal Charity,’ above n 68, 526.

¹⁰⁸ *Re Cranston* [1898] 1 IR 431.

¹⁰⁹ Bentwich, ‘The Wilderness of Legal Charity,’ above n 68, 526.

¹¹⁰ United Kingdom, Royal Commission on the Taxation of Profits and Income, *Radcliffe Report*, above n 79, 171.

¹¹¹ *Ibid* 170.

¹¹² *Ibid* 167, 172–173.

¹¹³ *Ibid* 168.

¹¹⁴ *Ibid* 171.

¹¹⁵ It suggested a provision in the *War Damage Act 1945* (UK); see above n 57.

administrative body which could allow tax exemptions to those outside the scope of the legal definition.¹¹⁶

A quite different proposal was floated by the **New Zealand Inland Revenue** in 2001, when it suggested as a possible option a general definition of charity, with a set of detailed guidelines, and a requirement of approval for specified purposes.¹¹⁷ The aim of this was to restrict the definition of charity. In doing so, it rejected enacting a definition restricting it to (for example) the relief of poverty, illness, distress or other suffering for two reasons: it would exclude many organisations already recognised as charities, and it would create a division between charities for tax and other purposes.¹¹⁸

Codification of the case law

Enact the four ‘heads’

In 1952, the **Nathan Committee** considered the question of definitions in some depth. It noted a division between legal and lay witnesses, with legal witnesses inclined to favour the common law definition.¹¹⁹ It considered there was general agreement that the content of charity was “about right”, and agreed with the common view that an enumeration of all charitable objects would be “impractical and wrong in principle”, because it would reduce flexibility and would almost certainly be incomplete.¹²⁰ It considered that, to retain flexibility, the law must continue to be made by judges and “that it is a complete delusion to suppose that to start with a clean slate would reduce the number of difficult cases or the volume of litigation.”¹²¹ However, it favoured a statutory classification along similar lines to the common law, on the grounds of the need for accessibility.¹²² The proposal was not adopted by the UK Government, on the basis that enacting the common law classification would achieve nothing and potentially cause harm by severing the link with case law.¹²³

A similar proposal was floated but not preferred by the **Ontario Law Reform Commission**. The Commission considered that, if statutory codification was required, it should merely be an enactment of the *Pemsel* heads or a modest improvement thereof, as this would minimise confusion between the federal and provincial regimes, and the general definition allowed sufficient scope to make decisions on a case-by-case basis.¹²⁴

New Zealand has codified the *Pemsel* heads in its *Income Tax Act 1994*, which defines ‘charitable purpose’ 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”. This definition is repeated in the *Charities Act 2005* (NZ).

¹¹⁶ United Kingdom, Royal Commission on the Taxation of Profits and Income, *Radcliffe Report*, above n 79, 174.

¹¹⁷ Inland Revenue, New Zealand, *Tax and Charities*, above n 9, [5.9]–[5.10]. An example of a general definition was given: “A charitable purpose means a humanitarian purpose that, when viewed objectively, makes a direct positive contribution to the well-being of society as a whole.”

¹¹⁸ *Ibid* [5.19]–[5.20].

¹¹⁹ United Kingdom, *Nathan Report*, above n 59, 126.

¹²⁰ *Ibid* 132.

¹²¹ *Ibid* 137.

¹²² *Ibid* 134–140.

¹²³ United Kingdom, *Government Policy on Charitable Trusts in England and Wales*, above n 60, [2].

¹²⁴ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 166.

Thye proposed a statutory definition for Singapore codifying the common law in 1983. This expressly included the promotion of health, security of other essential services, social, welfare, community or humanitarian work or service. It also refined the first three ‘heads’ and included a saving provision for imperfect trusts.¹²⁵

Clarification of aspects of the law

In the middle part of the 20th century, the most popular approach appeared to be clarifying some of the uncertainties of the law, whether through legislation or otherwise. The two most significant examples of this approach are the **Goodman Report** in 1975, and the **Ontario Law Reform Commission** report in 1996 (although arguably both approaches could be classified differently).

Guidelines

The **Goodman Report** considered that, while the law was basically sound, there were certain ‘grey’ areas which it recommended clarifying through the adoption of detailed modern guidelines on charitable purpose, which were set out in Appendix I of the Report.¹²⁶ The guidelines were avowedly broad.¹²⁷ Although these guidelines were in fact adopted in statutory form by Barbados,¹²⁸ the Report itself did not suggest that the guidelines should be enacted.

Conceptual definition

The **Ontario Law Reform Commission** similarly considered the issue in depth, but in a novel way. First, it identified a ‘**real**’ definition of charity. In its view, the real understanding of charity was composed of two principal elements: 1) doing good, 2) for others. In relation to the first element, it identified this essentially as altruism in the sense of provision to others of the “material, social, or emotional means” to pursue basic human goods. It drew on the theories of the natural law philosopher John Finnis to identify these basic or ‘ultimate’ human goods.¹²⁹ It considered that the distinction between the ‘popular’ meaning of charity (restricted to the relief of deprivation) and the broader connotations of philanthropy was one only of “degree”, which reflected the degree of deprivation of the beneficiaries and the means of flourishing.¹³⁰ In relation to the second element, it considered that ‘others’ referred to a sense of ‘emotional or obligational distance’, so that ‘others’ (for example) did not include family or friends.¹³¹

The Commission concluded that the unifying principle of a charitable act was that its “form, actual effect, and motive are the provision of the means of pursuing a common or universal good to persons who are remote in affection and to whom no moral or legal obligation is owed”.¹³² It considered that this ‘conceptual definition’ of charity explained some of the underlying doctrine and provided a proper

¹²⁵ Thye, ‘Clearing the Charity Muddle,’ above n 57.

¹²⁶ Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72.

¹²⁷ *Ibid* I, [18].

¹²⁸ *Charities Act 1980* (Barbados), ss 2–3. This is excerpted in Sheppard, Fitzgerald, and Gonski, *Charities Definition Inquiry*, above n 12, Attachment E.

¹²⁹ These included life, knowledge, play, aesthetic experience, friendship, religion, practical reasonableness: Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 147–148.

¹³⁰ *Ibid* 149.

¹³¹ *Ibid* 150.

¹³² *Ibid* 158.

interpretation of what was beneficial to the public.¹³³ Ultimately, it concluded that there was “no true divergence between the common-law definition and the real meaning of charity, and therefore there is no case to be made for a general or basic reform.”¹³⁴ Instead, clarification should be achieved through case law and public administration, bearing this ‘real definition’ in mind. While defining its approach as one of clarification, however, the ambition of this conceptual approach goes significantly beyond mere doctrinal clarification.

Doctrinal clarification

More traditional examples of this approach appear in the academic commentary in the middle of the 20th century. For example, in 1945 **Brunyate** proposed a **judicial redefinition** of the law, drawing from the case law. His proposal sought to unify the ‘fourth head’ of charity by moving gifts for the relief of distress and gifts for quasi-educational purposes into other heads, which would leave the rationale of the fourth head that such purposes derived not from an “instinctive human urge, but solely from the benefit to the community”.¹³⁵ Brunyate also advocated clarification of the term ‘public’ and ‘benefit’ in the requirement of public benefit. He preferred a judicial redefinition on the grounds of flexibility, certainty and feasibility,¹³⁶ and on the basis that the common law was “founded on the right principle”—namely, public benefit—although he thought clarification was needed to modernise the law and make it more accessible.¹³⁷

Keeton rejected Brunyate’s approach as too didactic, arguing that ultimately one was forced to rely on the social acumen of the judges. However, Keeton was inclined to ask “for a little more boldness in the formulation of principles”, and suggested a periodic restatement by the House of Lords of such principles.¹³⁸ In 1960, Keeton repeated his view that there was a regrettable focus on definition. He saw no value in enacting the common law classification, arguing that would only improve the situation if it enumerated broad classes of trusts, rather than focusing on subjects.¹³⁹ **Sheridan and Keeton** did, however, set out a **revised classification** of charitable purposes for doctrinal purposes.¹⁴⁰ Keeton’s view was later echoed by **Bentham**, although in Bentham’s view there might be something to be gained by defining ‘public’.¹⁴¹

Legislative clarification

Another approach was to recommend **legislation** only to **remedy specific defects**. This was done, for example, through the *Recreational Charities Act 1958* (UK) and similar legislation in Australia, and was supported by **Luxton** as a preferable approach.¹⁴²

This was also the approach of the **Victorian Legal and Constitutional Committee** in 1989, which recommended that specific new purposes be added to the meaning of charity by legislation where there

¹³³ Ibid 175.

¹³⁴ Ibid 227.

¹³⁵ Brunyate, ‘The Legal Definition of Charity,’ above n 71, 281.

¹³⁶ Ibid 280, 286–287.

¹³⁷ Ibid 287.

¹³⁸ Keeton, ‘The Charity Muddle,’ above n 29, 102.

¹³⁹ G W Keeton, ‘Some Problems in the Reform of the Law of Charities’ (1960) 13 *Current Legal Problems* 22, 23.

¹⁴⁰ Sheridan and Keeton, *The Modern Law of Charities*, above n 66, 60–62.

¹⁴¹ Richard W Bentham, ‘Charity Law and Legislation: Recent Developments’ [1962] *Current Legal Problems* 159, 161–162.

¹⁴² Peter Luxton, *The Law of Charities* (Oxford University Press, 2001) [1.57].

was evidence of clear momentum of community support for its inclusion.¹⁴³ The Committee rejected a statutory definition as not being feasible.¹⁴⁴ It recommended that, in order to keep the law up-to-date, the Attorney-General should consider new purposes on an ongoing basis.¹⁴⁵ This was also the approach adopted by the **Australian Government** following the Charities Definition Inquiry in the *Extension of Charitable Purposes Act 2004* (Cth), following a suggestion of the Board of Taxation.¹⁴⁶

Division of the term 'charity'

An alternative approach focuses on dividing the term 'charity'. This has taken two forms: **separation** of charitable status in **trusts law** from charitable status in **taxation law**; and the creation of a **hierarchy** of charities.

Division by policy function

The first approach was first famously advocated by Geoffrey Cross, later **Lord Cross**, in 1956. In his view, the

*best hope of bringing some order into the law of charity lies in separating the question whether a trust should be regarded as a charitable trust for the purpose of the general law of trusts from the question whether it should enjoy any special fiscal privileges. They are two quite different questions: yet as the law stands today an answer to one automatically answers the other.*¹⁴⁷

In his view, a more generous view should be taken in trusts law, since this only enlivened a limited range of legal privileges which could be justified by public policy. The only requirements for validity should be that it was not a trust for private individuals, and it should confer an appreciable benefit (broadly interpreted) of some sort on the public.¹⁴⁸ In taxation, a more restrictive definition should apply, although he thought the statutory definition recommended by the Radcliffe Commission needed clarification.¹⁴⁹ Cross indicated that the tax exemption could be "plainly justified" where the State would "feel [the expense] proper to incur itself if it was not defrayed by charity",¹⁵⁰ echoing the reasoning of the Colwyn Commission.

This approach was further elaborated, in respect of the validation of public purpose trusts, by **Gravells** in 1977.¹⁵¹ It has since been supported by **other commentators**, including Bright,¹⁵² Malik,¹⁵³ and Dal

¹⁴³ Victorian Legal and Constitutional Committee, *Report to Parliament on the Law Relating to Charitable Trusts*, above n 70, 33.

¹⁴⁴ Ibid 31.

¹⁴⁵ Ibid 34.

¹⁴⁶ The Board of Taxation, *Consultation*, above n 5, [2.34]–[2.36].

¹⁴⁷ Geoffrey Cross, 'Some Recent Developments in the Law of Charity' (1956) 72 *Law Quarterly Review* 187, 204.

¹⁴⁸ Ibid 205.

¹⁴⁹ Ibid 206–208. This included the question of whether the exemption could be claimed by institutions with other objects as long as the exemption was used for the limited purposes identified, and a need to explain the meanings of poverty, education and religion.

¹⁵⁰ Ibid 204..

¹⁵¹ n P Gravells, 'Public Purpose Trusts' (1977) 40 *Modern Law Review* 397. The Goodman Report also recommended further consideration be given to validating all purpose trusts: Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [24].

¹⁵² Susan Bright, 'Charity and Trusts for the Public Benefit—Time for a Rethink?' [1989] *Conveyancer* 28, 36–37.

¹⁵³ Nuzhat Malik, 'Defining "Charity" and "Charitable Purposes" in the United Kingdom' (2008) 11 *International Journal of Not-for-Profit Law* <http://www.icnl.org/knowledge/ijnl/vol11iss1/special_2.htm>.

Pont.¹⁵⁴ **Dal Pont**'s suggested 'horses for courses' approach extended also to the field of fundraising law, from which 'charity' should be removed entirely or a different definition enacted.¹⁵⁵ In the US, **Colombo and Hall** have similarly stated that "[b]inding the law of tax exemption to precisely the same category of activities historically covered by charitable trust law is ... manifestly absurd".¹⁵⁶

The **mainstream** view, however, appears to be that it would be **manifestly inconvenient** to have a division of charity law,¹⁵⁷ on various grounds such as duplication and complexity, and its incongruence from the 'real' nature of the category.¹⁵⁸ Thye further argued that the content of charity helped to determine the level of public benefit that justified tax expenditure, and thought it was implicit in the law that all charities should be treated alike.¹⁵⁹

Hierarchy of charities

A less influential approach has been to divide charities into a hierarchy. For example, the **minority** report of the **Goodman Committee** recommending a hierarchy of privileges, with the top tier restricted to charities helping the disadvantaged.¹⁶⁰ A similar proposal has been made by others, including the **Duke of Edinburgh**,¹⁶¹ and **Michael Gousmett**.¹⁶² **Farrow** has proposed a 'two-tiered system' for the purposes of trusts and taxation law, which would apply the same test with different thresholds of public benefit.¹⁶³

Administrative safeguards

This was an approach considered by the **New Zealand Inland Revenue** Department in its Discussion Document in 2001.¹⁶⁴ Their proposals in this respect were to 1) retain the existing definition but enable the tax exemption only to be claimed by registered charities, and to require that a charity continue to carry out charitable activities to retain the exemption; or to 2) enable the government, on recommendation by the Minister of Finance, to override a decision and deregister a charity, subject to requirements of promulgation by Order in Council and gazettal. A similar proposal was set out by **Broder**.¹⁶⁵ In some respects, this approach has been adopted in Canada, Australia and New Zealand

¹⁵⁴ Dal Pont, 'Why Define Charity?', above n 43, 22. See also Mackay, who argued that charitable status should be considered as synonymous with 'preference': Lindsay McKay, 'The London Hospital Decision—The Need for Surgery in the Law of Charities' (1976) 13 *New Zealand Law Journal* 292, 295.

¹⁵⁵ Dal Pont, 'Why Define Charity?', above n 43, 26–30.

¹⁵⁶ John D Colombo and Mark A Hall, *The Charitable Tax Exemption* (Westview Press, 1995) 39.

¹⁵⁷ See, eg, Northern Ireland, *Newark Committee Report*, above n 61; Brady, 'The Law of Charity and Judicial Responsiveness to Changing Social Need,' above n 73, 214.

¹⁵⁸ See, eg, Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 165; National Council for Voluntary Organisations, *For the Public Benefit?*, above n 39, [3.6.2].

¹⁵⁹ Thye, 'Clearing the Charity Muddle,' above n 57, 143. He also argued that there were other questions, including whether a cy-près scheme would apply, and whether grant-making trusts would retain fiscal privileges.

¹⁶⁰ Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, 143–144. This suggested restricting the definition to 'prevention and relief of deprivation', and requiring the benefit to be equally accessible to relevant members of the community: 145. This minority report, unlike the majority report, did not have paragraphs.

¹⁶¹ He proposed that highest tax relief be given to humanitarian activities and lesser relief to community benefit and environmental benefit organisations in the 11th Arnold Goodman Charity Lecture, 'Charity or Public Benefit' (1994) (London: Charities Aid Foundation).

¹⁶² Michael Gousmett, 'A Legislative Definition of "Charitable Purpose"' [2003] *New Zealand Law Journal* 78.

¹⁶³ Farrow, 'Limits of Charity,' above n 66.

¹⁶⁴ Inland Revenue, New Zealand, *Tax and Charities*, above n 9, [5.4]–[5.5].

¹⁶⁵ Broder, 'The Legal Definition of Charity,' above n 102, 24.

through the relatively recent addition of requirements for approval and endorsement in taxation legislation. However, the focus of this is less definitional than to enable regulation.

Broad definition based on unifying principle

A more radical approach has been to recommend a move away from specific categories and focus instead on a broad unifying principle, principally that of '**public benefit**'. This approach was particularly prominent in the 1970s and 1990s in public policy reports sponsored by non-governmental organisations.

Perhaps the most radical approach was formulated by the **Charity Law Reform Committee**, a non-governmental group established in England in the 1970s. Its proposal was to replace 'charity' with an entirely new category based entirely on the **formal criteria that it did not distribute profit** (to be known as the Non-Profit Distributing Organisation or NDPO). The NPDO would be subject to strict regulations designed to prevent leakage of funds to private purposes and to ensure accountability. In its view, this would help modernise the law, remove the uncertainty and subjectivity of the category of 'charity', release charities from restrictions on their activities, and "invigorate" public life through the injection of financial aid.¹⁶⁶

This proposal was considered and rejected by the **House of Commons Expenditure Committee** in 1975,¹⁶⁷ which was influenced by the Inland Revenue's concerns about the financial implications of the proposal, the potential for abuse, the complexity of administration and the consequent burden on the Inland Revenue.¹⁶⁸ However, this Committee appeared to recommend a definition based on an **underlying criterion of public benefit**. While it left it up to the drafting experts to specify a definition, it considered it necessary to restate the law in terms "more appropriate to the present day" through some underlying criterion,¹⁶⁹ and expressly endorsed the breadth and flexibility of the fourth 'head' of charity in adapting to new circumstances.¹⁷⁰ It recommended that all charities should be required to satisfy the test of purposes beneficial to the community, including charities admitted under the first three heads.¹⁷¹

Gladstone advocated a similar approach in 1982, suggesting that '**public benefit**' should be deemed to signify only benefits that are generally accessible or available, or which may be used or shared by all members of the community, while not excluding benefits that are by their nature advantageous only to a few. He suggested an exclusionary criterion, where selection was based on an obligatory fee of more than 75% of the benefit obtained unless the majority of those fees were met by charitable or other public grants, or less than the ordinary weekly supplementary benefit rate for a person living alone.¹⁷²

¹⁶⁶ English Charity Law Reform Commission, *Charity Law—Only a New Start Will Do*, above n 81. An extract is published in the minutes of evidence accompanying the report of the House of Commons Expenditure Committee, *Charity Commissioners and Their Accountability*, above n 72. The proposed regulations include a requirement of a considerable registration fee; annual audited accounts; caps on member benefits and employee income; prohibition of associations with for-profit companies; no tax concessions on trading profits; and winding-up distribution clauses.

¹⁶⁷ The Goodman Committee also rejected this suggestion on the basis that it would abolish the concept of charity and radically alter its commonly accepted meaning: Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [23].

¹⁶⁸ House of Commons Expenditure Committee, *Charity Commissioners and Their Accountability*, above n 72, [28].

¹⁶⁹ *Ibid* [32].

¹⁷⁰ *Ibid* [33].

¹⁷¹ *Ibid* [34], [62].

¹⁷² Francis Gladstone, *Charity, Law and Social Justice* (Bedford Square Press, 1982) 147–148.

This emphasis on public benefit as the underlying principle resurfaced in the 1990s. In New Zealand, **Tokeley** advocated an approach focusing on public benefit, arguing that this came closer to the popular meaning of charity while being clearer, simpler, and modern, and that this principle was both relevant and rational.¹⁷³

In England and Wales, the **Deakin Commission** in 1996 recommended abolishing the four 'heads' of charity and establishing instead a single overarching category formulated in terms of "benefit to the community", which would "embody the essential altruism implicit" in such organisations. It did not go on to further refine this definition, suggesting instead that this should be considered by the Law Commission.¹⁷⁴

The following year, the **Kemp Commission** in Scotland similarly argued for a new legal definition based on the concept of public benefit. Its view was that this should not be narrowly codified and should reflect the current range of charitable activity.¹⁷⁵

In 1999, it was similarly **suggested** to the **Supreme Court of Canada** that it should reframe the test based on the broad notion of public benefit.¹⁷⁶ In the same year, **Mitchell** also proposed replacing the common law rules with a rebuttable public benefit test, combined with periodic restatements of policy principles.¹⁷⁷

The focus on 'public benefit' was also prominent in two major reports in Canada and South Africa in 1999, in the context of taxation. In Canada, **Drache** and **Boyle** produced a thorough report in 1999 on the federal *Income Tax Act* definition of charity,¹⁷⁸ a report which was endorsed in principle by the Canadian Bar Association.¹⁷⁹ Their proposal focused on abandoning the category of 'charity' and creating instead two categories of '**public benefit organization**' and '**mutual benefit organization**'.¹⁸⁰ Three categories of public benefit organizations were proposed: those that carry on 'public benefit activities', 'umbrella public benefit organizations', and 'charities' (to grandfather in existing charities). 'Public benefit activities' were defined as "actions designed to promote activities or provide services which are intended to improve the quality of life of the community or of a group within the community",¹⁸¹ and "group within the community" was also defined.¹⁸² A lengthy list of certain purposes was also to be presumed by statute to be 'public benefit activities'. This included charitable activities, advocacy activities, and political activities of up to 10% of the organization's income of the preceding

¹⁷³ Tokeley, 'A New Definition for Charity?', above n 63.

¹⁷⁴ Commission on the Future of the Voluntary Sector, *Deakin Report*, above n 6, [3.2.6].

¹⁷⁵ Commission on the Future of the Voluntary Sector in Scotland, *Kemp Report*, above n 7, [1.7.7], [7.14.3].

¹⁷⁶ *Vancouver Society of Immigrant and Visible Minority Women v MNR* [1999] 1 SCR 10, [197].

¹⁷⁷ Mitchell, 'Redefining Charity in English Law,' above n 74, 45.

¹⁷⁸ Drache and Boyle, *Proposal for Reform*, above n 10. This focused on the statutory definition on the premise that it would be too difficult to amend the common law definition in light of the federal structure in Canada: *Ibid* 7, 20–21.

¹⁷⁹ Broder, 'The Legal Definition of Charity,' above n 102, 9.

¹⁸⁰ Drache and Boyle, *Proposal for Reform*, above n 10, 22, 78. This was intended to deny tax benefits to mutual benefit organizations.

¹⁸¹ *Ibid* 73.

¹⁸² *Ibid* 73–74. It was defined as a group of individuals having in common one or more specified characteristics: age, nationality, race, ethnicity, country of origin, gender, marital status, sexual orientation, residence in a geographic location including a province, municipality or neighbourhood, a physical or mental disability, a physical or mental illness or disadvantaged economic status. However, self-help organizations could not primarily be related by blood, marriage or adoption.

year, as well as a wide range of progressive social activities.¹⁸³ Both political and advocacy activities were further defined.¹⁸⁴ The list included a residual category of analogous activities to enable a degree of flexibility.

The **Katz Commission** in South Africa similarly recommended a new category of ‘**exempt public-benefit organizations**’, which would be eligible for income tax exemptions. The principal controlling criterion was that of “public benefit”, but this would be given greater certainty through a list of purposes or activities in a schedule or gazetted category.¹⁸⁵ The Commission recommended a number of purposes to be included in such a schedule.¹⁸⁶ Further, the Commission recommended that a number of other formal characteristics be required to qualify, such as registration under the *Non-Profit Organisations Act* (which would impose certain disclosure requirements); a formal written constitution and legal structure; a minimum number of members; and requirements as to disbursements and remuneration levels.¹⁸⁷

This recommendation was implemented in **s 30 of the *Income Tax Act 1962*** (South Africa), which defines public benefit activity as any activity listed in Part 1 of the Ninth Schedule and other activities so gazetted by the Minister “to be of a benevolent nature, having regard to the needs, interests and well-being of the general public”.¹⁸⁸ Subsection b then defines ‘public benefit organisations’ as having as their “sole or principal object” the carrying on of public benefit activities, where such activities are carried “on in a non-profit manner and with an altruistic or philanthropic intent” and where no such activity is “intended to directly or indirectly promote the economic self-interest of any fiduciary or employee” other than by reasonable remuneration, and where each activity is for the benefit of, or widely accessible to the general public including any sector thereof (other than small and exclusive groups). The Schedule defining ‘public benefit activity’ is an extensive list comprising 11 main categories. The Schedule also

¹⁸³ Ibid 74–76. The list of purposes included the promotion of tolerance and understanding of groups within the community as well as peoples of different nations; the promotion of the status of women and the culture, language and heritage of Canadians with origins in other countries; the promotion of world peace, good citizenship and volunteerism, and patriotism; the promotion of values associated with the Canadian Charter of Rights and Freedoms; the provision of legal advice to those who cannot afford it, and advice to those in financial or other need; provision of services with purposes similar to those offered by governments; employment training and advice; consumer information and services; advancement of ethical and moral teaching and studies; self-help groups of certain kinds; preservation of the environment; community economic and social development; special accommodation needs; amateur sports which encourage youth participation; provision of open recreational and leisure-time facilities; and animal welfare.

¹⁸⁴ Ibid 77–78. Political activities were defined as activities ‘ancillary and incidental to the organization’s purposes so long as those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office, but does not include advocacy activities’. ‘Advocacy activities’ include the “dissemination of information related to the objects of the organization including opinions, factual information which is substantially and demonstrably true, and includes involvement in debate and discussion about issues relating to the objectives of the organization including the support of or opposition to actual or proposed legislation in Canada but does not include political activities.”

¹⁸⁵ Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa, *Katz Commission Report*, above n 11, [6.1.2].

¹⁸⁶ Ibid [6.1.4]. This lists charity and altruism; upliftment and development of indigent and disadvantaged communities; welfare and social services; religion, philosophy and belief; politics, public policy and advocacy; education; job training; recreation and sport; culture and arts; physical and mental health; environment; provision of professional services for indigent persons for free or significantly reduced prices; international organisations directed to promotion of peace, friendship, cultural exchange and other beneficial purposes; museums; and institutions for the advancement of science.

¹⁸⁷ Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa, *Katz Commission Report*, above n 11, [6.1.2].

¹⁸⁸ Subsection 2 requires that the gazettal be tabled in Parliament within 12 months of publication.

includes a list identifying a subset of purposes eligible for tax deductions for donations in respect of grant-making institutions.¹⁸⁹ Accountability and organisational requirements are also imposed.

This focus on ‘public benefit’ continued in two important reports in the UK in 2001, albeit in different forms. The NCVO’s **Charity Law Reform Advisory Group** did not recommend a statutory definition, but recommended that, to emphasise the centrality of public benefit, the requirement of **public benefit should be applied across all heads** of charity.¹⁹⁰ The proposal was intended to continue the common law test, while enabling examination of a wider group of considerations.¹⁹¹ Commentators, however, criticised this proposal partly on the basis of the difficulty of proving intangible benefits in relation to religion, and partly because of a fear of the illiberal results of the scrutiny of cultural initiatives.¹⁹²

In 2001, the **McFadden Report** recommended that there should be **four defining principles** for a charity: its overriding purpose was for the public benefit; it did not distribute profit; it was independent;¹⁹³ and it was non-party political.¹⁹⁴ As noted above, concerns were raised about the vagueness of the definition¹⁹⁵ and its divergence from the taxation legislation in the UK.¹⁹⁶

In addition to public benefit, **altruism** has surfaced occasionally as a key unifying principle. **Chesterman** has argued for a clearer articulation and more uniform imposition of a requirement of ‘substantial disinterestedness’, while acknowledging that the imprecision of the ‘degrees of altruism’ may make it inappropriate as a legal criterion.¹⁹⁷ As is discussed below, the **Charities Definition Inquiry** recommended that altruism should be a required element of the definition of charity. As discussed above, the **Ontario Law Reform Commission** also saw ‘altruism’ as a key element of the conceptual definition of charity. While the **New Zealand Working Group** did not include this in its proposed definition, it thought it should remain as a test.¹⁹⁸ **Broder** has also suggested using altruism as a touchstone for analogising new charitable purposes.¹⁹⁹

¹⁸⁹ *Income Tax Act 1962* (South Africa) s 18A(1)(a)(ii).

¹⁹⁰ National Council for Voluntary Organisations, *For the Public Benefit?*, above n 39, [4.2.3]. In its view, there were likely to be ‘unforeseen negative results’ if a statutory definition was enacted: [4.2.4]. It did not recommend abolishing the first three heads on pragmatic grounds: [4.2.2].

¹⁹¹ *Ibid* [4.2.4]–[4.2.5].

¹⁹² See Picarda, ‘The Preamble to the Statute of Charitable Uses,’ above n 64, 254. Similar concerns were raised by Matthew Harding, ‘Trusts for Religious Purposes and the Question of Public Benefit’ (2008) 71 *Modern Law Review* 159.

¹⁹³ Rec 4 provided that, in determining independence, the proposed regulator should have regard to: how the organisation has been established; how trustees are appointed; the level of discretion available to trustees; and the funding arrangements of the organisation. Some respondents observed that this criterion was not entirely clear: Spicker, Morris, and Strachan, *McFadden Report Responses*, above n 7, [7].

¹⁹⁴ Scottish Charity Law Review Commission, *McFadden Report*, above n 7. This document does not have page numbers or other pinpoints.

¹⁹⁵ Quoted in Spicker, Morris, and Strachan, *McFadden Report Responses*, above n 7, [3.3].

¹⁹⁶ *Ibid* [3]–[5].

¹⁹⁷ Michael Chesterman, *Charities, Trusts, and Social Welfare* (Weidenfeld and Nicolson, 1979) 349–350. In particular, Chesterman argues that charity law’s failure to pay attention to altruism has led to inequalitarian results such as the charitable status of fee-paying schools in contrast to the non-charitable status of friendly societies.

¹⁹⁸ Working Party on Registration, Reporting and Monitoring of Charities, *Second Report*, above n 93, 13.

¹⁹⁹ Broder, ‘The Legal Definition of Charity,’ above n 102, 18.

Enact and clarify

The most popular, and in recent years most successful, approach has been to enact a statutory definition that both **restates the common law and clarifies** problematic parts of the charity law, with the potential for expanding the scope of the common law definition

This was the approach adopted by the **Australian Charities Definition Inquiry** in 2001. It recommended enacting a definition of charity with the following requirements: that it be a not-for-profit entity; and that it has a dominant purpose or purposes that are a) charitable, b) altruistic and c) for the public benefit.²⁰⁰ It also recommended abolition of the requirement that a purpose fall within the ‘spirit and intendment of the Elizabethan preamble’.²⁰¹

Crucially, it recommended a **statutory list of charitable purposes** in the form of broad categories, with some specific purposes listed within those categories.²⁰² In addition to the existing heads, it included as major categories the advancement of: health, social and community welfare; culture; and the natural environment. It specifically included in ‘other purposes beneficial to the community’ the promotion of human rights and animal welfare. The recommendation also clarified the position of certain other groups, such as child care services, community development, and preventative activities.²⁰³ It recommended retaining the common law test of ‘public benefit’, framing it as comprising three tests: aimed at achieving a universal or common good, having practical utility, and directed to the benefit of the general community or a sufficient section thereof.²⁰⁴ As noted above, it considered this should be strengthened by the concept of altruism.²⁰⁵

The Inquiry also combined this approach with a **proposed hierarchy** of community organisations, including a narrower subset of ‘benevolent charities’ and a broader category of altruistic community organisations. ‘Benevolent charities’ would encompass charities with the dominant purpose of benefiting the disadvantaged.²⁰⁶ This would give the government an option to select which preferences should be conferred on which group, and was designed to replace the category of ‘public benevolent institution’.

Although the recommendations of the Inquiry were not implemented in Australia, the Inquiry’s definition proved influential overseas. In **New Zealand** in 2002, the **Working Party** on Registration, Reporting and Monitoring of Charities adopted essentially the same list of charitable purposes, with some modification for the circumstances of New Zealand.²⁰⁷ The same year, the Law Society of **Ireland’s Law Reform Committee** recommended the proposed definition in the Charities Definition Inquiry as a basis for developing a definition in Ireland.²⁰⁸ However, it preferred an approach where the list of charitable

²⁰⁰ Sheppard, Fitzgerald, and Gonski, *Charities Definition Inquiry*, above n 12, Rec 3.

²⁰¹ Ibid Rec 11.

²⁰² Ibid Rec 13.

²⁰³ Ibid 7–8.

²⁰⁴ Ibid Rec 6.

²⁰⁵ Ibid 123–124. This recommendation was one of the few not to be welcomed by the sector and was not included in the subsequent *Charities Bill (Exposure Draft) 2003* (Cth).

²⁰⁶ Sheppard, Fitzgerald, and Gonski, *Charities Definition Inquiry*, above n 12, 9–10.

²⁰⁷ Working Party on Registration, Reporting and Monitoring of Charities, *Second Report*, above n 93. Its adoption of this proposal was based on the desire for harmony with Australia and a need to clarify particular aspects of the definition: Ibid 11–12.

²⁰⁸ Law Society of Ireland Law Reform Committee, *Charity Law: The Case for Reform*, above n 8, 85.

purposes should be enacted in the form of guidelines for the decision-maker to consider in exercising its discretion to determine charitable status.²⁰⁹

In September 2002, the **UK Cabinet Office Strategy Unit** proposed a similar statutory definition of charity to the Inquiry, albeit with greater emphasis on the test of public benefit.²¹⁰ This proposal was based on a desire to clarify, modernise, and make logical the law, while retaining the flexibility of the common law.²¹¹ The proposed definition would have two elements. First, an organisation would need to satisfy the common law test of **public benefit**, which would need to be proven across all ‘heads’ of charity (namely, the presumption of public benefit would be removed for the first three heads of charity). Second, it must have a charitable purpose within an **inclusive statutory list of charitable purposes**. In doing so, the Strategy Unit rejected the Deakin Commission’s approach emphasising the sole principle of public benefit.²¹² The combination of the test of public benefit with a list of charitable purposes was intended to increase certainty, enshrine the independence of the sector, and avoid the cumbersome nature of extensive secondary legislation or guidelines.²¹³

The list of purposes was broadly similar to that in the Charities Definition Inquiry, with additional inclusions being the promotion of conflict resolution and reconciliation and amateur sport.²¹⁴ As a result of submissions, the Government later supported the inclusion of the promotion of animal welfare, the provision of social housing, and the advancement of science.²¹⁵ The proposals were overwhelmingly supported and were enacted in the *Charities Act 2006* (UK).

As both Scotland and Northern Ireland are bound by the taxation legislation of the UK, the approach adopted in England and Wales proved decisively influential in the parallel reform processes in those jurisdictions. The **Scottish Government** similarly rejected the broad ‘public benefit’ approach of the McFadden Report,²¹⁶ deciding that the definition of charity should be the same as in England and Wales, and considered that the proposed definition was broadly consistent with the recommendations in the McFadden Report.²¹⁷ This was reflected ultimately in the definition included in the *Charities and Trustee Investment (Scotland) Act 2005*.

In 2003, the **Irish Government** proposed a similar statutory definition. As in England and Wales, the issue was one of clarity and modernisation of the law.²¹⁸ It proposed a fairly similarly list of charitable purposes to the Charities Definition Inquiry, together with the common law requirement of public benefit.²¹⁹ The submissions in response strongly supported clear modern statutory criteria, with some

²⁰⁹ Ibid 85.

²¹⁰ This emphasis originally appeared in the preceding discussion document released by the sector: National Council for Voluntary Organisations, *For the Public Benefit?*, above n 39.

²¹¹ Home Office (UK), *A Modern Legal Framework*, above n 6, [4.9]–[4.10], [4.12].

²¹² Commission on the Future of the Voluntary Sector, *Deakin Report*, above n 6, [3.2.6].

²¹³ Cabinet Office Strategy Unit (UK), *Private Action, Public Benefit*, above n 6, [4.17].

²¹⁴ Home Office (UK), *A Modern Legal Framework*, above n 6, [3.5].

²¹⁵ Ibid [3.14]–[3.18].

²¹⁶ Consultation on this report had indicated that respondents were concerned about the uncertainty caused by such a broad test, as well as the potential for divergence with English law and UK taxation statutes: Spicker, Morris, and Strachan, *McFadden Report Responses*, above n 7, [3], [3.3].

²¹⁷ Scottish Executive, *Charity Regulation in Scotland*, above n 89.

²¹⁸ Department of Community, Rural and Gaeltacht Affairs, *Establishing a Modern Statutory Framework for Charities*, above n 8.

²¹⁹ Ibid 7–8.

suggesting amendments including a focus on advocacy and the promotion of human rights.²²⁰ Ultimately, this led to the enactment of a similar statutory definition in s 3 of the *Charities Act 2009* (Ireland).²²¹

Administering the Definition

Another approach is to change the structure for administering the definition. In all jurisdictions, the cost of appealing decisions on charitable status has limited the extent to which the common law definition responds to social change. Two proposals have therefore been suggested: the creation of, or a conferral of jurisdiction on, a **Tribunal or lower court**,²²² and **public funding for appeals**.²²³ The UK has established a Charity Tribunal, which is now part of the general First-Tier Tribunal.²²⁴

Another suggestion has been to **empower the Charity Commission to refer matters** to the courts without charge.²²⁵ Broder has also suggested giving the Charities Directorate in Canada the power to extend the definition using analogy.²²⁶

In jurisdictions where the **taxation department effectively determines charitable status**, reformers agree that this places undue emphasis on tax exemptions, as well as complaining specifically about the efficiency and effectiveness of these institutions.²²⁷ It has been suggested that, rather than focusing upon a statutory definition, it would be better to put effort into a **Charity Commission**.²²⁸ However, there have also been complaints about the quasi-judicial nature of the Charity Commission. Edge and Loughrey, for example, suggest that this quasi-judicial law-making function may be incompatible with the *Human Rights Act 1998*.²²⁹

²²⁰ Breen, *Establishing a Modern Statutory Framework for Charities*, above n 8, 20–21.

²²¹ One key difference is that the Irish legislation includes a strengthened statutory presumption of public benefit for religion, as discussed below.

²²² See, eg, Charity Law Reform Committee, *Charity Law—The Need for Openness and Accountability* (1976), 59–60; Chesterman, *Charities, Trusts, and Social Welfare*, above n 197, 403 (to be assisted by guidelines by relevant welfare departments); Gladstone, *Charity, Law and Social Justice*, above n 172, 162–163; *Deakin Report*, above n 6, [3.3.3]–[3.3.5]; Panel on Accountability and Governance in the Voluntary Sector, *Broadbent Report*, above n 10, 55 (proposing the Tax Court as a court of first instance); Arthur B C Drache and W Laird Hunter, 'A Canadian Charity Tribunal: A Proposal for Implementation' (2000) 15 *The Philanthropist* 3, 12; National Council for Voluntary Organisations, *For the Public Benefit?*, above n 39, ii.

²²³ Gladstone, *Charity, Law and Social Justice*, above n 172, 163; Commission on the Future of the Voluntary Sector, *Deakin Report*, above n 6, [3.3.2]; Drache and Boyle, *Proposal for Reform*, above n 10, 74–76.

²²⁴ See Debra Morris, 'The First-Tier Tribunal (Charity): Enhanced Access to Justice for Charities or a Case of David Versus Goliath?' (2010) 29 *Civil Justice Quarterly* 491.

²²⁵ Charity Law Reform Committee, *Charity Law—The Need for Openness and Accountability*, above n 222, 59. It preferred however the option of a Tribunal. There is now power for the Charity Commission or the Attorney-General to refer matters to the Tribunal: *Charities Act 1993* (UK) Sch 4, inserting Sch 1D.

²²⁶ Broder, 'The Legal Definition of Charity,' above n 102, 19.

²²⁷ For Canada, see, eg, Drache and Boyle, *Proposal for Reform*, above n 10, 59–62; Drache and Hunter, 'A Canadian Charity Tribunal,' above n 222, 9–12. Cf Bromley, 'Answering the Broadbent Question,' above n 64, 33–34. For New Zealand (prior to the Charity Commission), see, David Brown, 'The Definition of Charity—Elizabeth I or II?' [2002] *New Zealand Law Journal* 72, 79.

²²⁸ J Malady, 'Charity Law's Public Benefit Test: Is Legislative Reform in the Public Interest?' (2003) 3 *QUT Law & Justice Journal* <<http://www.austlii.edu.au/au/journals/QUTLJJ/2003/25.html>>. See also Brown, writing in the context of reform in New Zealand in 2002, who favoured a broad statutory definition with detailed guidelines, administered by a Charity Commission: Brown, 'The Definition of Charity—Elizabeth I or II?,' above n 227.

²²⁹ Edge and Loughrey, 'Religious Charities and the Juridification of the Charity Commission,' above n 20, 51.

Drache and Hunter have proposed in the Canadian context instead a **Charity Tribunal** replacing the Charities Directorate of the Canadian Revenue Agency.²³⁰ This would initially have limited jurisdiction in relation to obtaining and revoking charitable status, and would expand in function once it was well established.²³¹

A more radical 'administrative' approach is suggested by **Pappas**, in one of the rare US commentaries on the definitional issue. He approaches the question of definition through a consideration of the rationales supporting the taxation subsidies, rather than a question of the 'real' nature of charity. The three major rationales he canvasses are that charities perform important moral and social services worthy of support; that charities perform functions similar to governments for the public welfare; and that the subsidies support pluralism and enable decision-making outside of the government sector.²³² He then examines which decision-maker is the most appropriate body to take into account these rationales, and concludes that the **judiciary** is the most sensitive to the pluralistic concerns and the most appropriate decision-maker.²³³

Public benefit

A related issue is **clarification of the test of 'public benefit'** itself, and the distinction between the 'private interest' of a group of individuals and 'public interest' in the sense of a 'sufficient section of the public'. An early proposal by **Brunyate** would have clarified this by restricting the 'public' only to geographical sections of the public,²³⁴ which would have greatly restricted the scope of charitable purposes.

There has been considerable debate about the appropriateness of the **Compton-Oppenheim test** which excludes a section of the community related to a single or several persons, such as educational trusts for company employees.²³⁵ The **Nathan Committee** rejected calls to repeal this test because it feared extending the scope of charitable status.²³⁶ Other commentators have argued that this test needs to be confined.²³⁷ The **Goodman Committee** thought the principle was right, but suggested a transitional period of 21 years to take into account the effect of the test on trusts that had already been established. It also suggested that trustees should be empowered to widen the terms of the trust within the first seven years.²³⁸

In contrast, the **House of Commons Expenditure Committee** thought the decision was 'incomprehensible', and expressed the view that its new test of 'purposes beneficial to the community' would give the courts a

²³⁰ Drache and Hunter, 'A Canadian Charity Tribunal,' above n 222; Arthur B C Drache and W Laird Hunter, 'A Canadian Charity Tribunal: A Proposal for Implementation (Part II)' (2001) 16 *The Philanthropist* 4.

²³¹ Drache and Hunter, 'A Canadian Charity Tribunal,' above n 222, 5.

²³² This debate will be examined in a separate literature review on taxation concessions.

²³³ Dean Pappas, 'The Independent Sector and the Tax Laws: Defining Charity in an Ideal Democracy' (1990) 64 *Southern California Law Review* 461.

²³⁴ Brunyate, 'The Legal Definition of Charity,' above n 71, 281–282.

²³⁵ *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

²³⁶ United Kingdom, *Nathan Report*, above n 59, 135–136.

²³⁷ See, eg, Cross, 'Some Recent Developments in the Law of Charity,' above n 147, 190. Cross argues that the test should be confined to educational trusts.

²³⁸ Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [39].

more “rational and equitable basis on which to interpret the law”.²³⁹ While the **Ontario Law Reform Commission** thought the test could be seen as an attempt to approximate its test of emotional or obligational distance from the donor, it considered the test misleading and thought that the size of the beneficiary class merely indicated public benefit.²⁴⁰ The **New Zealand Inland Revenue** proposed clarifying that the *Compton-Oppenheim* test should not apply in particular to Maori organisations.²⁴¹

Another issue concerns the charitable status of trusts for particular **ethnic or national groups**. In the view of the Goodman Committee, trusts motivated and effective to injure those excluded by its terms should be contrary to public policy and void. There may be a case where the group experiences a particular need, but it considered there were fundamental objections even where the aim might be benevolent.²⁴²

The Ontario Law Reform Commission supported a similar approach **focusing on the motivation** behind such a trust, because in its view the judiciary was capable of developing a “sufficiently subtle doctrine against certain forms of discrimination”.²⁴³ In its view, invalidating such trusts could be justified because charities were given favourable treatment because they made common goods available altruistically, and in the case of malevolently discriminatory provisions these goods were not provided for the ‘common’ good or altruistically. Certain categories ought to be more ‘suspect’ than others, and discrimination in favour of races that were disadvantaged should normally be valid.²⁴⁴

Broder, arguing for the recognition of organisations for minority and immigrant groups, suggested clearer criteria for determining what constituted the ‘public’ in legislation or regulations (either in relation to the fourth ‘head of charity or universally’); creating a presumption that certain activities should be charitable; distinguishing between self-help and self-promotion groups in legislation or regulation; and providing better training in applying the Charter for assessors.²⁴⁵

There has also been some attempt to analyse the ‘benefit’ part of the test. **Brunyate** proposed a classification of three types of benefits: direct and tangible benefit to each member of the community (which satisfied the test); direct benefit to a particular class with indirect benefit to the community at large (which did not, excepting for organs of the State); and intangible benefits which benefit the community in a broad sense.²⁴⁶ In his view, the third type of benefit only satisfied the test if those purposes were generally accepted by the “enlightened opinion of the time” as being wholly for the public benefit.²⁴⁷ **Keeton**, however, thought Brunyate’s definition was full of “unsolved difficulties”, referring in particular to his test of public benefit.²⁴⁸ **Cohen**, attempting to identify the underlying values for determining public

²³⁹ House of Commons Expenditure Committee, *Charity Commissioners and Their Accountability*, above n 72, [52].

²⁴⁰ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 178–179.

²⁴¹ Inland Revenue, New Zealand, *Tax and Charities*, above n 9, [5.2.4]–[5.2.5].

²⁴² Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [42]–[43].

²⁴³ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 217.

²⁴⁴ *Ibid* 218.

²⁴⁵ Broder, ‘The Legal Definition of Charity,’ above n 102, 34–38.

²⁴⁶ Brunyate, ‘The Legal Definition of Charity,’ above n 71, 282.

²⁴⁷ *Ibid* 282–283.

²⁴⁸ Keeton, ‘The Charity Muddle,’ above n 29.

benefit, argued that judicial reasoning here depended largely upon a consequentialist utilitarian approach.²⁴⁹

Reframing the test

The **Ontario Law Reform Commission** proposed that the 'public benefit' test be reframed. In its view, three principal tests were implicated:²⁵⁰ 1) whether the purpose pursued was charitable; 2) whether the project chosen was of sufficient practical utility; and 3) whether someone other than the donor or those related to the donor benefited.²⁵¹ In line with this, it proposed reframing the test in terms of whether the project: 1) advanced a common good; 2) did so in a practical or useful way, and 3) whether it benefited strangers.²⁵² It did not consider, however, that it was necessary to reform this test in statute, but that this could be clarified judicially.

Section 8 of the **Scottish Charities and Trustees Investment Act 2005** requires consideration in determining public benefit of a) the extent of private benefit and b) the extent of 'disbenefit' to members of the public, and c) whether the condition of obtaining the benefit is unduly restrictive if the benefit is to be provided to a section of the public only. A similar approach has been taken in the legislation in Northern Ireland.

ADVOCACY AND POLITICS

Other than the broad question of reforming entirely the definition of 'charity', the second most controversial definitional issue concerns the role of **advocacy** and political activity. In most common law countries, there are restrictions on the political activity of charities that derive from the common law definition of 'charity'. Briefly put, the general restriction is that the **purposes of a charity cannot be political, but charities may engage in political activity that is ancillary or incidental to charitable purposes**. These restrictions originate in the 1917 English decision of *Bowman v Secular Society*,²⁵³ which was entrenched by the *National Anti-Vivisection Society* case in 1947.²⁵⁴ These restrictions only exist in common law legal systems with a regime of charity law.²⁵⁵

Political purposes were defined broadly in *McGovern v Attorney-General* to include: furthering the interests of a particular political party; procuring changes in the laws of a country; or a reversal of government policy or governmental decisions in a country.²⁵⁶ In that case, Amnesty International was found not to be charitable, and the position of human rights organisations has been generally considered

²⁴⁹ Harvey Cohen, 'Charities—a Utilitarian Perspective' [1983] *Current Legal Problems* 241.

²⁵⁰ The Commission observed that this was not frequently recognised as a formal requirement, but considered that it explained the variation of 'public benefit' between heads: Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 183.

²⁵¹ *Ibid* 166.

²⁵² *Ibid* 175.

²⁵³ [1917] AC 406. It has generally been accepted that *Bowman* wrongly interpreted the law as it stood: see Adam Parachin, 'Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes' (2007) 45 *Alberta Law Review* 871, 877–880.

²⁵⁴ *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31.

²⁵⁵ Perri 6 and Anita Randon, *Liberty, Charity, and Politics: Non-Profit Law and Freedom of Speech* (Aldershot, 1995) 6–7. They found that this difference could not be explained in terms of levels of political activity, democracy, political stability, or influence; or in terms of historical traditions, liberal rights, legal personality, or regulation of NFPs: 41–44.

²⁵⁶ *McGovern v Attorney-General* [1982] Ch 321, 340.

a problem case in the doctrine of political purposes, although this is partly remedied in some jurisdictions by later administrative decisions and legislation accepting the charitable status of such organisations.²⁵⁷

In December 2010, however, a majority of the High Court of Australia decided that **this rule had no application in Australia**, justifying this in relation to the Australian constitutional position and in particular the implication of freedom of communication and the provision for referenda.²⁵⁸ It considered that generating public debate in respect of the first three heads of charity, at least, was potentially for the public benefit, and therefore fell within the fourth head of charity. The precise limits of this doctrine, however, remain untested. Australia now has the most expansive definition of charity in respect of advocacy of all the jurisdictions surveyed in this review.

Other important variations exist between the jurisdictions. The regime in the **United States** is the most distinctive. Modern authority there has not followed the English rule on political purposes in the context of trusts law.²⁵⁹ Instead, the regulation of political activity is achieved through **legislative restrictions in its tax code**, which alters the context of discussion significantly.²⁶⁰ In particular, it has resulted in limited discussion of the relationship between politics and charity outside the context of taxation.²⁶¹

In the US, the legislative restrictions on political activity apply generally to all organisations falling within s 501(c)(3) of the Internal Revenue Code. The earliest restriction, introduced in 1934, disqualifies such organisations from tax exempt status if a “substantial part” of their activities involve propaganda or influencing legislation (the **‘lobbying’ restriction**). Until 1990, the academic literature focused largely on this restriction.²⁶²

²⁵⁷ In the UK, the promotion of human rights has been included within the statutory list of charitable objects: see *Charities Act 2006* (UK) s 2(2)(h); *Charities Act (Northern Ireland) 2008* (NI) s 2(2)(h); *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) s 7(2)(j). The Charity Commission of England and Wales had previously recognised similar organisations. In Canada, the guidance of the Canada Revenue Agency notes that such organisations are eligible for charitable status, but it remains unacceptable to attempt to pressure national governments to change the body of international human rights agreements; to pressure a particular national legislature or government to sign an international human rights agreement or to enact or alter domestic human rights legislation; or to attempt to persuade a number of countries to enact or amend human rights legislation: Canada Revenue Agency, *Charities and Giving—Upholding Human Rights and Charitable Registration* (15 May 2010) <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/hmn-rghts-eng.html>>.

²⁵⁸ *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42, [44]–[49].

²⁵⁹ See, most famously, *Taylor v Hoag*, 116 A 826 (Pa, 1922). This is discussed in Note, ‘Charitable Trusts for Political Purposes’ (1951) 37 *Virginia Law Review* 988; Oliver A Houck, ‘On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws’ (2003) 69 *Brooklyn Law Review* 1, 5–8.

²⁶⁰ For example, the legal commentary is often based on the rationale for tax exemptions. Some argue that the prohibition can be justified as a ‘quid pro quo’ for tax subsidies: see David B Tobin, ‘Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy’ (2006) 95 *Georgetown Law Journal* 1313, 1317. Others argue against the tax exemptions on the basis that the exemption is provided for services the government would otherwise perform: Note, ‘Income Tax Disadvantages of Political Activities’ (1957) 57 *Columbia Law Review* 273, 285; Ann M Murphy, ‘Campaign Signs and the Collection Plate—Never the Twain Shall Meet?’ (2003) 1 *Pittsburgh Tax Review* 35, 35. Others have argued on the basis of tax principles of horizontal and vertical equity: see, eg, Richard J Wood, ‘Pious Politics: Political Speech Funded Through IRC 501(c)(3) Organizations Examined Under Tax Fairness Principles’ (2007) 39 *Arizona State Law Journal* 209.

²⁶¹ An exception is Houck, ‘On the Limits of Charity,’ above n 259.

²⁶² Elias Clark, ‘The Limitation on Political Activities: A Discordant Note in the Law of Charities’ (1960) 46 *Virginia Law Review* 439; James H Fogel, ‘To the IRS, ‘Tis Better to Give Than to Lobby’ (1975) 61 *ABA Journal* 960; David B Weaver, ‘Taxes and Lobbying—The Issue Resolved’ (1963) 31 *George Washington Law Review* 938; Ronald S Borod, ‘Lobbying for the Public Interest—Federal Tax Policy and Administration’ (1967) 42 *New York University Law Review* 1087; Note, ‘The Revenue Code and a Charity’s Politics’ (1967) 73 *Yale Law Journal* 661; Note, ‘The Sierra Club, Political Activity and Tax Exempt Charitable

In 1954, a prohibition was introduced on participating or intervening in political campaigns (the '**electioneering**' restriction). More recent scholarship, sparked by increasing enforcement of this prohibition, has focused on this restriction.²⁶³ In 1969, **private foundations** were subjected to separate regulation, and penalised through excise taxes for engaging in any 'lobbying' activities. Further, subsequent amendments enabled organisations to elect to be assessed against an alternative 'quantitative' test (the '**safe harbour**' provisions) which sets out a permissible level of expenditure on lobbying activities depending on the income of the organisation.²⁶⁴

The legislation and **regulations** in the US are very **specific** in identifying the types and extent of political activities that are prohibited. There are also significant **constitutional** differences from the position in Australia, including the entrenchment of the principles of freedom of speech, equal protection, the prohibition on the establishment of religion, the guarantee of the free exercise of religion, and the constitutional doctrine that prohibits unduly 'vague' legislation.

Another difference in the US has been the judicial focus on the potential effect of advocacy **on the political process**, in contrast to the English tradition which justifies the restrictions on the basis of the limits of the constitutional competence of judges. There are also important **political differences**, such as the much more politically activist role of church and religion, which partly explains the special focus of the literature on churches and religion;²⁶⁵ the greater influence of financial donations to the political process;²⁶⁶ the fear of the influence of private foundations; a traditional suspicion of the 'mischief of faction'; and the more activist role of judges. Given the wealth of literature on this topic and the quite different legal and political context of the commentary, this review has not canvassed all of the US literature although it has reviewed the most significant articles. In particular, the review has excluded to some degree the literature on electioneering and churches.

Status' (1967) 55 *Georgetown Law Journal* 1128; Theodore L Garrett, 'Federal Tax Limitations on Political Activities of Public Interest and Educational Organization' (1971) 59 *Georgetown Law Journal* 561; Alvin J Geske, 'Direct Lobbying Activities of Public Charities' (1972) 26 *Tax Lawyer* 305; Mortimer M Caplin and Richard E Timbie, 'Legislative Activities of Public Charities' (1975) 39 *Law and Contemporary Problems* 183; James A Moore, Barbara J Washburn and Eugene Goldman, 'Restrictions on Lobbying Activities by Charitable Organizations: Proposed Legislative Remedies' (1976) 3 *Journal of Legislation* 17; James H Nix, 'Limitations on the Lobbying of Section 501(c)(3) Organizations: A Choice for Public Charities' (1979) 81 *West Virginia Law Review* 407; Note, 'The Tax Code's Differential Treatment of Lobbying Under Section 501(c)(3): A Proposed First Amendment Analysis' (1980) 66 *Virginia Law Review* 1513; Tommy F Thompson, 'The Availability of the Federal Tax Exemption for Propaganda Organizations' (1985) 18 *UC Davis Law Review* 487; Laura Brown Chisolm, 'Exempt Organization Advocacy: Matching the Rules to the Rationales' (1987) 63 *Indiana Law Journal* 201; Richard L Haight, 'Lobbying for the Public Good: Limitations on Legislative Activities by Section 501(c)(3) Organizations' (1988) 23 *Gonzaga Law Review* 77.

²⁶³ See, eg, Laura Brown Chisolm, 'Politics and Charity: A Proposal for Peaceful Coexistence' (1989) 58 *George Washington Law Review* 308; Johnny Rex Buckles, 'Not Even a Peep—The Regulation of Political Campaign Activity by Charities Through Federal Tax Law' (2006) 75 *University of Cincinnati Law Review* 1071.

²⁶⁴ The history of these developments and the legislation are described extensively in several works, including: Houck, 'On the Limits of Charity,' above n 259, 8–37.

²⁶⁵ See, eg, Robert E Trautmann, 'Conflicts Between the First Amendment Religion Clauses and the Internal Revenue Code: Politically Active Religious Organizations and Racially Discriminatory Private Schools' (1983) 61 *Washington University Law Quarterly* 503; Wilfred R Caron and Deidre Dessingue, 'IRC 501(c)(3): Practical and Constitutional Implications of 'Political' Activity Restrictions' (1985) 2 *Journal of Law and Politics* 169; Edward McGlynn Gaffney, Jr, 'On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics' (1990) 40 *DePaul Law Review* 1; Murphy, 'Campaign Signs and the Collection Plate,' above n 260; David Andersen, 'Political Silence at Church: The Empty Threat of Removing Tax-Exempt Status for Insubstantial Attempts to Influence Legislation' [2006] *Brigham Young University Law Review* 115; Meghan J Ryan, 'Can the IRS Silence Religious Organizations?' (2007) 40 *Indiana Law Review* 73.

²⁶⁶ This is discussed by Houck, 'On the Limits of Charity,' above n 259, 86–88.

Although **Canada** largely adopts the traditional common law restrictions,²⁶⁷ these restrictions are also **entrenched** in the taxation legislation.²⁶⁸ Further, guidance by the taxation authority offers a ‘**safe harbour**’ test based on a sliding scale of expenditure, in a manner similar in operation to the US.²⁶⁹ Another important difference involves the role of the Canadian *Charter of Rights and Freedoms*.²⁷⁰

In the **United Kingdom**, the recent enactments of statutory lists of charitable purposes now includes a number of inherently ‘political’ purposes, such as the promotion of human rights, which arguably undermines the justification for the restrictions on political activity.²⁷¹ Recently, the Charity Commission has also adopted a more liberal attitude towards political activity in its guidance.²⁷² Recent reforms there have also been promoted by a Labour Government that aimed to foster the political ‘voice’ of the third sector, to counter in part the declining engagement with traditional party politics.²⁷³

Classifying the debate

The relevant literature—which overwhelmingly rejects the justifications for the current restrictions—reveals six major issues in this field. First, there are ‘**functional**’ debates about the nature and function of charity in the contemporary age, and its relationship with politics. Second, there are ‘**political**’ debates about the advantages and disadvantages of charities engaging in political activity for the health of the political process itself. Third, there are ‘**constitutional**’ debates about which branch of government has the authority and capacity to judge the political activities of charities. Fourth, there are ‘**rights-based**’ debates which focus on the tension between the restrictions on political activity and rights, principally the freedom of expression. Fifth, there are debates about the **uncertainty** of the current position. Finally, there are ‘**reform proposals**’ which offer ways of either drawing the line between politics or charity, or reframing the restrictions.

The ‘functional’ debate

This debate focuses on the conception of the **role of charity and its relationship with politics**, and is particularly prominent in public policy reports. The current restrictions on advocacy are sometimes justified by an intuitive conception that the ‘**true nature**’ of charity is not political,²⁷⁴ and by the fear that

²⁶⁷ Paul Michell, ‘The Political Purposes Doctrine in Canadian Charities Law’ (1995) 12 *The Philanthropist* 3, 13.

²⁶⁸ *Income Tax Act*, RSC 1985 s 149.1(6.1)–(6.2). In addition, political expenditures are excluded from the disbursement quota, which requires charitable organisations to expend a certain percentage of income each year: s 149.1(1.1)(b).

²⁶⁹ Canada Revenue Agency, *Policy Statement—Political Activities* (CPS 22, 2 September 2003) <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html>>.

²⁷⁰ Arguments that such provisions conflict with the Charter have failed, however: see *Vancouver Society of Immigrant and Visible Minority Women v MNR* [1999] 1 SCR 10.

²⁷¹ Advisory Group on Campaigning and the Voluntary Sector, *Campaigning and the Voluntary Sector* (23 May 2007) <<http://www.bond.org.uk/resources.php/302/campaigning-and-the-voluntary-sector>>; Alison Dunn, ‘Charities and Restrictions on Political Activities: Developments by the Charity Commission for England and Wales in Determining the Regulatory Barriers’ (2008) 11 *International Journal of Not-for-Profit Law* 51.

²⁷² The Charity Commission for England and Wales, *Speaking Out Guidance on Campaigning and Political Activity by Charities* (No CC9, March 2008) <<http://www.charity-commission.gov.uk/Publications/cc9.aspx>>. Compare, for example, the criticisms in Gladstone, *Charity, Law and Social Justice*, above n 172, 110–114.

²⁷³ See also Advisory Group on Campaigning and the Voluntary Sector, *Campaigning and the Voluntary Sector*, above n 271, 2, [1.2].

²⁷⁴ A more extreme version is posited as an ‘antithetical agency hypothesis’ by Buckles, ‘Not Even a Peep,’ above n 263, 1092–1095. This hypothesis suggests each sector seeks to serve the community entirely separately from each other, so should have no voice in the other sector. However, he points out that the ‘complementary agency hypothesis’, where state and charity work side by side, better describes the current legal relationship.

removing such restrictions will divert resources away from charity to politics.²⁷⁵ Further, it is sometimes argued that such restrictions protect donors from the 'misuse' of their donations, and protect the 'brand' of charity which would be undermined by too close an association with political activity.²⁷⁶

The strongest and most consistent claim by reformers, however, is that **the distinction between 'charity' and 'politics' misconceives the true role of charity**. Typically, reformers argue that political activity is better conceptualised as an essential, and perhaps the most effective,²⁷⁷ method of achieving charitable purposes.²⁷⁸ Further, it is argued that since charitable purposes naturally tend to involve questions of distribution of political power, law and policy, the distinction between charity and politics is artificial.²⁷⁹ Parachin goes further and argues that the advocacy debate is symptomatic of the absence of a true concept of charity in the common law.²⁸⁰

This distinction is also **anachronistic**, as the expansion of government and legislative activity in the 20th century has enlarged the sphere of 'politics' dramatically.²⁸¹ As well, advocacy is increasingly important

²⁷⁵ See, eg, Murphy, 'Campaign Signs and the Collection Plate,' above n 260, 81; Tobin, 'Political Campaigning by Churches and Charities,' above n 260, 1319. It is discussed, but not supported by Parachin, 'Distinguishing Charity and Politics,' above n 253, 887. Similar arguments have been considered and rejected in relation to churches: see, eg, Steffen n Johnson, 'Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organisations' (2001) 42 *Boston College Law Review* 875, 885–887.

²⁷⁶ This suggestion finds favour in Frances R Hill, 'Corporate Philanthropy and Campaign Finance: Exempt Organizations as Corporate-Candidate Conduits' (1996) 41 *New York Law School Law Review* 881; Murphy, 'Campaign Signs and the Collection Plate,' above n 260, 81; Lloyd Hitoshi Mayer, 'Gasping Smoke: Enforcing the Ban on Political Activity by Charities' (2007) 6 *First Amendment Law Review* 1, 6. There is empirical evidence of the potency of this belief in health charities in the UK: Alison Dunn, 'Hippocratic Oath or Gordian Knot? The Politicisation of Health Care Trustees and Their Role in Campaigning' (2007) 18 *King's Law Journal* 481, 497. This view is also discussed in (although not supported by) Note, 'The Sierra Club, Political Activity and Tax Exempt Charitable Status,' above n 262, 1137; Houck, 'On the Limits of Charity,' above n 259, 85–86; Advisory Group on Campaigning and the Voluntary Sector, *Campaigning and the Voluntary Sector*, above n 271, [1.10.2].

²⁷⁷ See, eg, Clark, who argues that the restrictions target those whose message is "aimed at the one agency, government in all its forms, which can effect the most immediate solution to society's problems": Clark, 'The Limitation on Political Activities,' above n 262, 452.

²⁷⁸ See, eg, Caplin and Timbie, 'Legislative Activities of Public Charities,' above n 262, 196–198; Gladstone, *Charity, Law and Social Justice*, above n 172, Ch 5; Bright, 'Charity and Trusts for the Public Benefit,' above n 152, 34; Alison Dunn, 'Charity Law as a Political Option for the Poor' (1999) 50 *Northern Ireland Legal Quarterly* 298; Advocacy Working Group and Laurie Rektor, *Advocacy—The Sound of Citizens' Voices* (Position Paper, Voluntary Sector Initiative, 2002) <http://www.vsi-isbc.org/eng/policy/pdf/position_paper.pdf>; Betsy A Harvie, *Regulation of Advocacy in the Voluntary Sector: Current Challenges and Some Responses* (Voluntary Sector Initiative, 2002), 4–5; Nicola Silke, "'Please Sir, May I Have Some More?'" Allowing New Zealand Charities a Political Voice' (2002) 8 *Canterbury Law Review* 345; Advisory Group on Campaigning and the Voluntary Sector, *Campaigning and the Voluntary Sector*, above n 271, [1.4.1]–[1.4.3]; Senate Standing Committee on Economics, *Inquiry into the Disclosure Regimes for Charities and Not-for-Profit Organisations* (2008) <http://www.aph.gov.au/Senate/committee/economics_ctte/charities_08/index.htm>, [8.16].

²⁷⁹ This is explored in detail by Arthur Drassinower, 'The Doctrine of Political Purposes in the Law of Charities: A Conceptual Analysis' in Jim Phillips, Bruce Chapman, and David Stevens (eds), *Between State and Market: Essays on Charities Law and Policy in Canada* (McGill-Queen's University Press, 2001) 288. See also Borod, 'Lobbying for the Public Interest,' above n 262, 1104–1105; Dunn, 'Charity Law as a Political Option for the Poor,' above n 278.

²⁸⁰ Parachin, 'Distinguishing Charity and Politics,' above n 253, 899. This criticism is echoed by Eleanor Burt, 'Charities and Political Activity: Time to Rethink the Rules' (1998) 69 *Political Quarterly* 23, 29.

²⁸¹ Clark, 'The Limitation on Political Activities,' above n 262, 454; Borod, 'Lobbying for the Public Interest,' above n 262, 1116; John Michael Clear, 'Political Speech of Charitable Organizations Under the Internal Revenue Code' (1974) 41 *University of Chicago Law Review* 352, 366; Advisory Group on Campaigning and the Voluntary Sector, *Campaigning and the Voluntary Sector*, above n 271, [1.4.1].

because of trends such as devolution in service delivery, decreasing policy development by governments, and increased consultation processes.²⁸²

Drassinower has suggested an original analysis of the doctrine based on the relationship between charity and politics.²⁸³ In his view, the doctrine of political purposes demarcates a distinction between a non-political idea of the public, and a 'political' idea of the public, and a distinction between changes *in* a society, and changes *of* a society. Charity and politics can be **distinguished** through the level of **fundamental political agreement** underpinning them, which makes the doctrine incoherent as the distinction between charity and politics is itself political. In his view, however, the doctrine can be remedied through a re-rationalisation of the doctrine in terms of '**legality**' or natural law, which can be conceived of as non-political standards in that they are "basic minimal presuppositions of politics".²⁸⁴ The doctrine therefore is clarified by saying that a trust for political purposes is invalid unless "it can be shown to seek to remedy a situation that violates the human conditions of dignity."²⁸⁵

The Advisory Group on Campaigning and the Voluntary Sector have also criticised the notion that **the charity 'brand'** has to be protected from the infections of politics. In its view, the "voluntary sector has become the natural home for a huge swathe of civic action" and many donors wish to contribute to such action. It suggested that the donors themselves would put their money elsewhere if they disapproved.²⁸⁶ It also suggested that the "bedrock" of public trust was the sector's independence from government, and campaigning organisations exemplified that independence.²⁸⁷

Perri 6 and **Randon** have also countered this argument, noting that it is not proven that donors do not wish their donations to be spent on campaigning (indeed, there is some evidence to the contrary).²⁸⁸ Further, the argument is paternalistic; imperfections in the information can be improved; and donors do not need greater protection than investors or purchasers in for-profit firms.²⁸⁹ Brunson similarly points out that there is no reason the "tax law needs to protect public charities from themselves."²⁹⁰

One gap in the literature concerns discussion of **what is meant by 'politics'**, which is commonly assumed to focus on governmental institutions. An exception is Dunn, who defines politics in terms of "reconciling and furthering the interests within communities on both a micro and macro-level."²⁹¹ Chesterman also conceives of politics more broadly, when he argues that charity is 'political' in the sense that it empowers people to influence or control the conduct of the beneficiaries, and in the sense that the assertion of a space for charity can be potentially conservative in its support for the continuation of an unequal social structure.²⁹² Chesterman makes the point that the distinction between charity and politics is ideological by

²⁸² Harvie, *Regulation of Advocacy in the Voluntary Sector*, above n 278, 7–9.

²⁸³ Drassinower, 'The Doctrine of Political Purposes in the Law of Charities,' above n 279.

²⁸⁴ Ibid 306.

²⁸⁵ Ibid 306.

²⁸⁶ *Campaigning and the Voluntary Sector*, above n , [1.10.3].

²⁸⁷ Ibid [1.10.5].

²⁸⁸ See Harvie, *Regulation of Advocacy in the Voluntary Sector*, above n 278, 6. This cites a survey showing strong support by Canadians for a range of advocacy activities by charities.

²⁸⁹ 6 and Randon, *Liberty, Charity, and Politics*, above n 255, 157–159.

²⁹⁰ Samuel D Brunson, 'Rethinking Public Charities and Political Speech' [2010] SSRN eLibrary <<http://ssrn.com/paper=1596863>>. See also Burt, 'Charities and Political Activity,' above n 280, 28.

²⁹¹ Dunn, 'Charity Law as a Political Option for the Poor,' above n 278, 303.

²⁹² Chesterman, *Charities, Trusts, and Social Welfare*, above n 197, 354–358.

obscuring the broader political implications of charity, and by narrowly construing politics to exclude “accepted relations and the mechanisms of class dominance”.²⁹³ In his view, reform proposals that advocate ‘re-drawing’ the line between charity and politics are themselves “a political affirmation”.²⁹⁴

The ‘political’ debate

This debate, which is particularly prominent in the American literature, focuses on the effect of political activity by charities on the political process itself. The pre-eminent rationale given in the US for the restrictions on political activities is that allowing political activity by charities will **undermine the political process** in two ways.

First, it would encourage greater political activity by not-for-profits. This evokes Madison’s early fears of the **‘mischief of faction’**: fears of political paralysis, the weakening of political authority, the generation of political distrust and economic stagnation, the promotion of single-issue positions; and the creation of polarised activities.²⁹⁵ It would also promote propaganda, diluting the quality of political speech.

Second, it would **skew the balance of political speech** (the ‘political neutrality’ argument). It is suggested that tax concessions would unfairly subsidise political speech by charities.²⁹⁶ This would be unfair because the tax system should not distort the political playing field; because taxpayers (and the government)²⁹⁷ would be forced to subsidise positions they did not agree with; and because the tax concessions favour the better-off and thus would amplify their political voice.²⁹⁸ Further, it would undermine the regulation of campaign finance by encouraging ‘funnelling’ through tax-exempt organisations,²⁹⁹ although this is now less likely because of the decision of the US Supreme Court in *Citizens United*.³⁰⁰

On the other hand, reformers commonly focus on the **benefit of political activity** to the political process itself.³⁰¹ In a democracy, political speech and debate should be encouraged. Modern arguments are also influenced by contemporary political philosophies emphasising citizen participation and engagement in

²⁹³ Ibid 367.

²⁹⁴ Ibid 368.

²⁹⁵ J Craig Jenkins, ‘Nonprofit Organizations and Political Advocacy’ in Walter W Powell and Richard Steinberg (eds), *The Nonprofit Sector: A Research Handbook* (Yale University Press, 2nd ed, 2006) 307, 307.

²⁹⁶ This has been especially influential in US case law: see *Slee v Commissioner* 42 F2d 184 (2nd Cir, 1930); *Cammarano v United States* 358 US 498 (1959). See, eg, Tobin, ‘Political Campaigning by Churches and Charities,’ above n 260, 1317–1318. See generally Jenkins, ‘Nonprofit Organizations and Political Advocacy,’ above n 295, 307.

²⁹⁷ Broder, ‘The Legal Definition of Charity,’ above n 102, 25.

²⁹⁸ See, eg, Dean E Sharp, ‘Reflection on the Disallowance of Income Tax Deductions for Lobbying Expenditures’ (1959) 39 *Boston University Law Review* 365, 381–382; Hill, ‘Corporate Philanthropy and Campaign Finance,’ above n 276, 940; Wood, ‘Pious Politics,’ above n 260, 216.

²⁹⁹ See, eg, Johnson, ‘Of Politics and Pulpits,’ above n 275; Tobin, ‘Political Campaigning by Churches and Charities,’ above n 260. Others have argued that the restriction may in fact be a key attraction for using it is a conduit for campaign finance: Hill, ‘Corporate Philanthropy and Campaign Finance,’ above n 276, 924.

³⁰⁰ *Citizens United v Federal Election Commission* 130 S Ct 876 (2010). This case ruled that campaign finance laws amounted to unconstitutional restrictions on the political speech of corporations and unions, although it upheld limits on their ability to donate directly to campaigns.

³⁰¹ Senate Standing Committee on Economics, *Disclosure Inquiry*, above n 278, [8.18].

decision-making, and the value of political pluralism.³⁰² In this view, the ‘public benefit’ resides in the value of the debate itself,³⁰³ and charitable status should be accorded to both sides of a debate.³⁰⁴

It is also commonly argued that **political activity by charities** is **especially beneficial**. Such activity is seen as partially correcting inherent inequalities in political speech, by representing minorities and other under-represented interests.³⁰⁵ It also improves the quality of information provided to decision-makers, because of the closer connection of charities with the ‘voiceless’ and their practical expertise in the workings of policy and law.³⁰⁶ These benefits are enhanced by the independence of charities from the government.

As well, advocates observed that **background social and structural inequalities** already structured the distribution of political speech. These included: comparable tax advantages conferred on business and other groups without political restrictions³⁰⁷ (including, in Canada, political parties and candidates);³⁰⁸ biases in favour of larger charities; and the structural advantage of the status quo over those advocating for change.³⁰⁹ Indeed, Clark suggested that given the general breadth of tax privileges, the burden of justification should be on those excepting political charities from the general rule.³¹⁰

Further, the necessary **selectivity of enforcement** created its own distortions,³¹¹ punishing the politically vulnerable organisations,³¹² while allowing others to flout the prohibitions.³¹³ Commentators also rejected the argument that taxpayers were involuntarily forced to subsidise activities they did not approve of. As they pointed out, this applied generally to all government decisions,³¹⁴ and the subsidy was available for

³⁰² Lynn Lu, ‘Flunking the Methodology Test: A Flawed Tax-Exemption Standard for Educational Organizations That Advocate a Particular Position or Viewpoint’ (2004) 29 *New York University Review of Law and Social Change* 377; Jonathon Garton, *The Regulation of Organised Civil Society* (Hart Publishing, 2009) 71–75.

³⁰³ Silke, ‘Please Sir,’ above n 278, 364; Parachin, ‘Distinguishing Charity and Politics,’ above n 253, 884.

³⁰⁴ J Stevens and D J Feldman, ‘Broadcasting Advertisements by Bodies with Political Objects, Judicial Review and the Influence of Charities Law’ [1997] *Public Law* 615, 622; Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [73]; Tokeley, ‘A New Definition for Charity?’, above n 63, 51.

³⁰⁵ Clark, ‘The Limitation on Political Activities,’ above n 262, 456–458; Caplin and Timbie, ‘Legislative Activities of Public Charities,’ above n 262, 198–199; Chisolm, ‘Exempt Organization Advocacy,’ above n 262; Jenkins, ‘Nonprofit Organizations and Political Advocacy,’ above n 295, 307.

³⁰⁶ Edward W Wachtel, ‘David Meets Goliath in the Legislative Arena: A Losing Battle for an Equal Charitable Voice?’ (1972) 9 *San Diego Law Review* 944; Richard Bridge, ‘The Law of Advocacy by Charitable Organizations: The Case for Change’ (2001) 21 *Estates Trusts & Pensions Journal* 92; Advisory Group on Campaigning and the Voluntary Sector, *Campaigning and the Voluntary Sector*, above n 271, [1.4.1], [1.7.3].

³⁰⁷ See, eg, Borod, ‘Lobbying for the Public Interest,’ above n 262; George Cooper, ‘Taxation of Grassroots Lobbying’ (1968) 68 *Columbia Law Review* 801, 818–819; Clear, ‘Political Speech of Charitable Organizations,’ above n 281, 371; Caplin and Timbie, ‘Legislative Activities of Public Charities,’ above n 262, 184, 200; Bridge, ‘Law of Advocacy by Charitable Organizations,’ above n 306, 111–112; Broder, ‘The Legal Definition of Charity,’ above n 102, 28.

³⁰⁸ Bridge, ‘Law of Advocacy by Charitable Organizations,’ above n 306, 112–113.

³⁰⁹ Clark, ‘The Limitation on Political Activities,’ above n 262, 457–460; Garrett, ‘Federal Tax Limitations on Political Activities,’ above n 262, 583–585; Chisolm, ‘Exempt Organization Advocacy,’ above n 262, 252; Advisory Group on Campaigning and the Voluntary Sector, *Campaigning and the Voluntary Sector*, above n 271, [1.7.2], [1.9.9]–[1.9.10].

³¹⁰ Clark, ‘The Limitation on Political Activities,’ above n 262, 452.

³¹¹ Note, ‘The Revenue Code and a Charity’s Politics,’ above n 262, 671; Cooper, ‘Taxation of Grassroots Lobbying,’ above n 307, 820–821; Caplin and Timbie, ‘Legislative Activities of Public Charities,’ above n 262, 195.

³¹² Borod, ‘Lobbying for the Public Interest,’ above n 262, 1104.

³¹³ Brunson, ‘Rethinking Public Charities and Political Speech,’ above n 290, 43.

³¹⁴ Chisolm, ‘Politics and Charity,’ above n 263, 339; 6 and Randon, *Liberty, Charity, and Politics*, above n 255, 155; Burt, ‘Charities and Political Activity,’ above n 280, 27.

a wide array of viewpoints.³¹⁵ Some also contested the assumption that the tax exemption amounted to a subsidy.³¹⁶

Some critiques were more **tempered**. For example, Dunn observes that there is a tension between engaging the ‘voice’ of the public through encouraging participation, and protecting the public’s ‘voice’ at the same time, particularly when there are resource inequalities within the sector.³¹⁷ Jenkins argues that although there would still be inequality of political speech, this is a picture of ‘imperfect pluralism’.³¹⁸ Similarly, 6 and Randon argue that, while competition between interest groups may not be ‘optimal’, it is a ‘second-best’ solution for a non-ideal world.³¹⁹

‘Constitutional’ debates

This debate concerns the competence and authority of various branches of government. In *Bowman and National Anti-Vivisection Society*, ‘**constitutional**’ rationales were given to support the restriction, namely: the **court could not determine if a political change is for the public benefit**³²⁰ (and it should be assumed therefore that the law is correct as it stands); and the legislature is better placed to resolve the controversy than the judiciary, since debates about these controversies would **compromise the impartiality of the judiciary**.³²¹

Commentators have **overwhelmingly rejected** these rationales.³²² If the statement that judges cannot determine public benefit is interpreted as a statement about **judicial inability**, it is observed that courts are commonly required to judge public benefit (and other broad standards, such as the ‘ancillary’ or incidental’ test itself) in other aspects of charity law, and indeed judged public benefit in *National Anti-Vivisection Society* itself.³²³ Further, there are “few people better qualified”³²⁴ than judges to assess whether a change in the law would be of public benefit, and judges already call for changes to the law.³²⁵ Others have also pointed out that the question of merit is avoided in determining the charitable

³¹⁵ Clear, ‘Political Speech of Charitable Organizations,’ above n 281, 372; Johnson, ‘Of Politics and Pulpits,’ above n 275, 892–893.

³¹⁶ Brunson, ‘Rethinking Public Charities and Political Speech,’ above n 290, 19. The ‘subsidy’ issue is discussed further in the literature review on taxation.

³¹⁷ Dunn, ‘Charities and Restrictions on Political Activities,’ above n 271. Dunn argues, for example, that the Charity Commission’s guidance makes a conceptually difficult distinction between furthering and supporting charitable purposes; and fails to recognise that public agencies can be lobbied in regard to work that is not ‘governmental’ in nature.

³¹⁸ Jenkins, ‘Nonprofit Organizations and Political Advocacy,’ above n 295, 326.

³¹⁹ 6 and Randon, *Liberty, Charity, and Politics*, above n 255, 202–203.

³²⁰ *Bowman v Secular Society Ltd* [1917] AC 406, 442. See, eg, L A Sheridan, ‘The Political Muddle—A Charitable View’ (1977) 19 *Malaya Law Review* 42, 58.

³²¹ *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 50, 62–63. See also *McGovern v Attorney-General* [1982] Ch 321, 337.

³²² See generally Parachin, ‘Distinguishing Charity and Politics,’ above n 253, 880–881.

³²³ L A Sheridan, ‘Charity Versus Politics’ (1973) 2 *Anglo-American Law Review* 47; Tokeley, ‘A New Definition for Charity?,’ above n 63, 51; G F K Santow, ‘Charity in Its Political Voice—A Tinkling Cymbal or a Sounding Brass?’ (1999) 18 *Australian Bar Review* 225, 229; Advisory Group on Campaigning and the Voluntary Sector, *Campaigning and the Voluntary Sector*, above n 271, [1.5.4]–[1.6.6].

³²⁴ L A Sheridan, ‘Charitable Causes, Political Causes and Involvement’ (1980) 2 *Philanthropist* 5, 12.

³²⁵ 6 and Randon, *Liberty, Charity, and Politics*, above n 255, 161.

status of religions.³²⁶ Parachin noted that even remaining silent on the issue of public benefit “implicitly communicates” normative value judgments.³²⁷

In the UK, the removal of the presumption of public benefit by legislation now requires judges to decide public benefit,³²⁸ as the Charity Commission had done even before the presumption was removed.³²⁹ In Australia, Santow has suggested avoiding this difficulty by severing non-charitable purposes.³³⁰

Another form of rebuttal lies in the repeated suggestion (drawing on the ‘political’ debate above) that the **public benefit lies in the political debate itself**, rather than in the end sought to be achieved.³³¹ This would make the test of ‘public benefit’ easier to judge.

The claim can also be interpreted as a claim about the **constitutional role of judges**—that is, judges can but should not assess public benefit.³³² However, such a claim has been rejected as inconsistent with the role of judges in developing the common law, and their increasing involvement with political questions, especially in jurisdictions with written Constitutions and human rights legislation.³³³ Parachin argues it misstates the relationship between the courts and the legislature, as well as the nature of the decision on public benefit.³³⁴ Further, the fact that judges must inevitably rule in favour of one party has not, in other contexts, been considered to undermine their impartiality.³³⁵

Some have suggested that, in truth, this claim of judicial ‘incapacity’ reflects an **aversion to adjudicating on politically controversial matters**.³³⁶ Clark, while expressing some sympathy for the decision-maker, felt that the law simply had to face the “embarrassment” of drawing the line somewhere.³³⁷ On the other hand, the Ontario Law Reform Commission considered the “acknowledged debatability” of political objectives was a “valid reason” for the restrictions on political activity, but in some cases, there was “truly no doubt” about the value of the objectives, as in the case of Amnesty International.³³⁸

The even weaker argument that the law must be **judged as correct as it stands** has been rejected as “descriptively inaccurate ... and theoretically unsound”,³³⁹ as it requires the judges to approve the “eternal correctness of all our law”;³⁴⁰ fails to recognise the ways the law takes into account its fallibility;³⁴¹ and is inconsistent with the assumption that public benefit cannot be judged.³⁴²

³²⁶ See, eg, Houck, ‘On the Limits of Charity,’ above n 259, 6.

³²⁷ Parachin, ‘Distinguishing Charity and Politics,’ above n 253, 885–887.

³²⁸ Advisory Group on Campaigning and the Voluntary Sector, *Campaigning and the Voluntary Sector*, above n 271, [1.6.8]–[1.6.10].

³²⁹ Dunn, ‘Charity Law as a Political Option for the Poor,’ above n 278, 314.

³³⁰ Santow, ‘A Tinkling Cymbal,’ above n 323, 230–231.

³³¹ Ó and Randon, *Liberty, Charity, and Politics*, above n 255, 160.

³³² This point is well made in Drassinower, ‘The Doctrine of Political Purposes in the Law of Charities,’ above n 279, 293–294.

³³³ Broder, ‘The Legal Definition of Charity,’ above n 102, 26; Parachin, ‘Distinguishing Charity and Politics,’ above n 253, 883.

³³⁴ Parachin, ‘Distinguishing Charity and Politics,’ above n 253, 883–884.

³³⁵ Ó and Randon, *Liberty, Charity, and Politics*, above n 255, 161–162.

³³⁶ Tokeley, ‘A New Definition for Charity?,’ above n 63, 51.

³³⁷ Clark, ‘The Limitation on Political Activities,’ above n 262, 461–462.

³³⁸ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 222.

³³⁹ Parachin, ‘Distinguishing Charity and Politics,’ above n 253, 880.

³⁴⁰ Sheridan, ‘Charitable Causes, Political Causes and Involvement,’ above n 324, 12.

³⁴¹ Parachin, ‘Distinguishing Charity and Politics,’ above n 253, 880–881.

Another ‘constitutional’ criticism that is less often discussed involves the **breadth of the discretionary power** of decision-making bodies in restricting the scope of political activity.³⁴³ In the US context, Swibel and Tobin have proposed administrative reforms to enhance the legitimacy of investigations by the Internal Revenue Service.³⁴⁴

Rights-based debates

Legal scholars have also examined the tension between restrictions on political activity and competing rights, in particular the principle of **freedom of expression**.³⁴⁵ For example, 6 and Randon, in their extensive consideration of this issue, argue for greater freedom for charities to engage in political activity on the basis that this would improve the ‘free trade in ideas’, and as an aspect of **freedom of association**.³⁴⁶ Santow argued for a more sensitive interpretation of the restrictions in Australia, based on the value of freedom of expression.³⁴⁷ Similarly, in the UK, it has been argued that human rights law, including the freedom of expression, should inform the law of charity.³⁴⁸

The greatest debate has revolved around the **constitutionality of the restrictions in the US** in light of the Constitution’s guarantee of **freedom of speech**.³⁴⁹ This argument, however, has failed in the courts on the basis that failing to provide tax benefits did not restrict political speech,³⁵⁰ especially given the readily available alternative of establishing a ‘social welfare organisation’ to conduct advocacy under s 501(c)(4) of the Internal Revenue Code.³⁵¹ Similar arguments have been raised in relation to the

³⁴² 6 and Randon, *Liberty, Charity, and Politics*, above n 255, 161; Parachin, ‘Distinguishing Charity and Politics,’ above n 253, 885.

³⁴³ Note, ‘The Revenue Code and a Charity’s Politics,’ above n 262, 664; Caplin and Timbie, ‘Legislative Activities of Public Charities,’ above n 262, 194.

³⁴⁴ Swibel suggests four main improvements: requiring the IRS to comprehensively report on its investigations; codifying its current practice of relying on independent referrals; formalizing the penalty scheme; and creating a judicial remedy for a failure to follow enforcement procedures: E R Swibel, ‘Churches and Campaign Intervention: Why the Tax Man Is Right and How Congress Can Improve His Reputation’ (2007) 57 *Emory Law Journal* 1605. Tobin suggests an independent commission responsible for enforcing the ban and complaints review mechanisms: Tobin, ‘Political Campaigning by Churches and Charities,’ above n 260.

³⁴⁵ See, eg, Garrett, ‘Federal Tax Limitations on Political Activities,’ above n 262, 572–575; Broder, ‘The Legal Definition of Charity,’ above n 102, 28.

³⁴⁶ 6 and Randon, *Liberty, Charity, and Politics*, above n 255, 138–150. The principal argument is that competition between charities improves the quality and quantity of information in the ‘marketplace’ of ideas. In doing so, they also reject the public choice argument that freedom of speech actually produces socially adverse consequences (see Ch 10). See on freedom of association also Kay Guinane, ‘Wanted: A Bright-Line Test Defining Prohibited Intervention in Elections by 501(c)(3) Organizations’ (2007) 6 *First Amendment Law Review* 142, 165–166.

³⁴⁷ Santow, ‘A Tinkling Cymbal,’ above n 323, 225.

³⁴⁸ Stevens and Feldman, ‘Broadcasting Advertisements,’ above n 304, 622. In the case discussed in this article, Lord Woolf expressed the view that a restrictive interpretation of the doctrine was warranted because of the principle of freedom of expression.

³⁴⁹ Cooper, ‘Taxation of Grassroots Lobbying,’ above n 307, 830–841; Clear, ‘Political Speech of Charitable Organizations,’ above n 281; Caplin and Timbie, ‘Legislative Activities of Public Charities,’ above n 262, 201; Note, ‘The Tax Code’s Differential Treatment,’ above n 262; Benjamin Vaughn, ‘High Cost of Free Exercise: All Saints, the Service, and Section 501 (c)(3)’ (2007) 61 *Tax Lawyer* 981; Guinane, ‘Wanted,’ above n 346, 156–158. In the context of the electioneering restriction, see also Chisolm, ‘Politics and Charity,’ above n 263, 319–337.

³⁵⁰ *Cammarano v United States* 358 US 498 (1959).

³⁵¹ *Regan v Taxation with Representation of Washington* 461 US 540 (1983). For a discussion of the case law on this issue, see Houck, ‘On the Limits of Charity,’ above n 259, 38–48.

Canadian Charter,³⁵² but have similarly been unsuccessful before the courts.³⁵³ There has been some discussion of the implications of the *Human Rights Act* in the UK.³⁵⁴

In the US, the greatest focus has been on the relationship between legislative prohibitions on political activity and the constitutional principles of **freedom of religion**.³⁵⁵ In addition, the restrictions are arguably constitutionally invalid as a violation of the **Equal Protection Clause**,³⁵⁶ the **right to petition**,³⁵⁷ or under the doctrine prohibiting impermissible '**vagueness**' (in relation to the 'substantiality' test).³⁵⁸

Uncertainty

Perhaps the greatest consensus (outside of the US) rests on the undesirable degree of **uncertainty** about the permissibility of certain activities.³⁵⁹ In many cases, this is compounded by ignorance of the permissible scope of political activity.³⁶⁰ The result is a '**chilling effect**' where organisations avoid virtually all political activity,³⁶¹ and which distorts the preferences of donors.³⁶² It also deters some organisations from applying for charitable status, and results in complex and wasteful organisational structures.³⁶³

³⁵² Bridge, 'Law of Advocacy by Charitable Organizations,' above n 306, 121–122.

³⁵³ *Alliance for Life v MNR* (1999) 174 DLR (4th) 442.

³⁵⁴ Debra Morris, 'Political Activity and Charitable Status: In Search of Certainty' (1999) 23 *Exempt Organization Tax Review* 247.

³⁵⁵ See, eg, Joel E Davidson, 'Religion in Politics and the Income Tax Exemption' (1973) 42 *Fordham Law Review* 397; Trautmann, 'Conflicts Between the First Amendment Religion Clauses,' above n 265; Caron and Dessingue, 'IRC 501(c)(3),' above n 265; Ellis M West, 'The Free Exercise Clause and the Internal Revenue Code's Restrictions on the Political Activity of Tax-Exempt Organizations' (1986) 21 *Wake Forest Law Review* 395; Gaffney, Jr, 'On Not Rendering to Caesar,' above n 265; Jason M Sneed, 'Regaining Their Political Voices: The Religious Freedom Restoration Act's Promise of Delivering Churches from the Section 501 (c)(3) Restrictions on Lobbying and Campaigning' (1997) 13 *Journal of Law & Politics* 493; Erik J Ablin, 'The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns' (1999) 13 *Notre Dame Journal of Law, Ethics & Public Policy* 541, 567–569. It has also been argued that the combination of the burden on free speech and free exercise impeaches the constitutionality of the legislation: Ryan, 'Can the IRS Silence Religious Organizations?,' above n 265 (which suggests the IRS should apply a doctrine of deference); Swibel, 'Churches and Campaign Intervention,' above n 344 (which argues the restrictions are constitutional); Vaughn, 'High Cost of Free Exercise,' above n 349 (which suggests a direct expenditure rule).

³⁵⁶ See Gregory E Robinson, 'Charitable Lobbying Restraints and Tax Exempt Organizations: Old Problems, New Directions' [1984] *Utah Law Review* 337; Wachtel, 'David Meets Goliath,' above n 306. This is on the basis that businesses and other organisations are not similarly restricted. This can also be justified on public policy grounds of equality and improving the legislative process: see Geske, 'Direct Lobbying Activities of Public Charities,' above n 262.

³⁵⁷ Wachtel, 'David Meets Goliath,' above n 306, 955. The right to petition is not explicitly stated in the Constitution but is an implied right.

³⁵⁸ Borod, 'Lobbying for the Public Interest,' above n 262, 1106; Caplin and Timbie, 'Legislative Activities of Public Charities,' above n 262, 203.

³⁵⁹ Cooper, 'Taxation of Grassroots Lobbying,' above n 307, 824; Caplin and Timbie, 'Legislative Activities of Public Charities,' above n 262, 184–185; Dunn, 'Charity Law as a Political Option for the Poor,' above n 278, 299–300; Bridge, 'Law of Advocacy by Charitable Organizations,' above n 306; Lu, 'Flunking the Methodology Test,' above n 302, Guinane, 'Wanted,' above n 346.

³⁶⁰ Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [104].

³⁶¹ Myron Walker and Tim Rothermel, 'Political Activity and Tax Exempt Organizations Before and After the Tax Reform Act of 1969' (1970) 38 *George Washington Law Review* 1114, 1126; Advisory Group on Campaigning and the Voluntary Sector, *Campaigning and the Voluntary Sector*, above n 271, [1.9.7].

³⁶² Dunn, 'Charity Law as a Political Option for the Poor,' above n 278, 300.

³⁶³ Advisory Group on Campaigning and the Voluntary Sector, *Campaigning and the Voluntary Sector*, above n 271, [1.9.4]–[1.9.6].

The complaint about uncertainty is often coupled with an acceptance that the **distinction** made between charity and politics is **essentially correct**, but requires a more **generous and clearer articulation**. For example, there is widespread agreement that political parties should not be charitable, and espousing propaganda should not be included within the scope of charity. This is more often assumed than justified, but the rationales for this position include: political objectives destroy the element of 'altruism'; political parties should not 'masquerade' as charities because of the special financial privileges of charities; it would distort the political process;³⁶⁴ and it would undermine public trust in charities.³⁶⁵

A common suggestion has been to remedy uncertainty through **better guidance**.³⁶⁶ For example, the House of Commons Expenditure Committee, while taking a more generous view of allowable political activity, called for an up-to-date comprehensive judicial statement in the short term, followed by legislation providing that all political activity in pursuit of a charitable object shall not endanger charitable status, provided they remain subordinate to the main purposes of the charity.³⁶⁷

Recently, there have been revisions to the guidance in the UK and Canada.³⁶⁸ Nevertheless, there are still criticisms of the UK guidance, such as unclear and confusing aspects of the guidance,³⁶⁹ and ignorance of the guidelines remains a problem.³⁷⁰ The Advisory Group also argued that the **qualitative test** remained uncertain and inconsistent, pointing to a survey which indicated that 45% believed the threshold was crossed if more than a fifth of their resources were devoted to campaigning, and 25% that the threshold was crossed if it exceeded 30% of their resources.³⁷¹

Reform proposals

While some commentators have contented themselves with either rejecting the rationales for the current restrictions, the **mainstream approach** is to **articulate a better distinction** between permissible and impermissible political activity.³⁷² Different approaches have been taken. Some focus on the **ends** of such advocacy,³⁷³ such as being 'non-partisan' and not 'seeking political power in itself',³⁷⁴ or achieving public interest rather than private advantage.³⁷⁵

³⁶⁴ Secretary of State for the Home Department, *White Paper*, above n 63, [2.41].

³⁶⁵ Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [98]–[102], [104]; Secretary of State for the Home Department, *White Paper*, above n 63, [2.41].

³⁶⁶ Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [98]–[104]; Secretary of State for the Home Department, *White Paper*, above n 63, [2.44]–[2.46]; Senate Standing Committee on Economics, *Disclosure Inquiry*, above n 278, [8.22].

³⁶⁷ House of Commons Expenditure Committee, *Charity Commissioners and Their Accountability*, above n 72, [44]–[48].

³⁶⁸ For criticism of the earlier UK guidelines, see Alison Dunn, 'Charity Law—A Political Scandal?' (1996) 2 *Web Journal of Current Legal Issues* <<http://webjcli.ncl.ac.uk/1996/issue2/dunn2.html>>.

³⁶⁹ Morris, 'Political Activity and Charitable Status: In Search of Certainty,' above n 354.

³⁷⁰ Dunn, 'Hippocratic Oath or Gordian Knot?,' above n 276, 493 (reports that 48% in her survey of the health sector were unaware of the guidelines); Dunn, 'Charities and Restrictions on Political Activities,' above n 271.

³⁷¹ Advisory Group on Campaigning and the Voluntary Sector, *Campaigning and the Voluntary Sector*, above n 271, [1.9.2].

³⁷² Most commentators agree that there is an "unacceptable political realm", even if they reject the current dividing line, or the proposed justifications for them: Dunn, 'Charity Law as a Political Option for the Poor,' above n 278, 307; Parachin, 'Distinguishing Charity and Politics,' above n 253, 872–873.

³⁷³ Parachin, 'Distinguishing Charity and Politics,' above n 253, 890.

³⁷⁴ Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [98]–[102].

³⁷⁵ Borod, 'Lobbying for the Public Interest,' above n 262, 1115. Borod argues for administrative reform along the lines of the original formulation in the US legislation, focusing on the desire to prevent individuals associated with the organisation from

Others focus on the **type of activity**, distinguishing between ‘legislative matters’ and other kinds of advocacy (as is done in the US legislation and regulations).³⁷⁶ A similar approach focuses on **identifying particular partisan features** of the activity, drawing on US case law.³⁷⁷

A common approach (adopted in the Canadian guidance, and reflecting the distinction between ‘education’ and propaganda drawn in the case law) is to distinguish between **emotion** and **rhetoric**, which are ‘political’, and reasoned argument.³⁷⁸ The Joint Tables report in Canada suggested a combination of these constraints, suggesting that political activities be allowed provided that the activities could reasonably be expected to contribute to achieving charitable objects; and the activities were non-partisan, legal, within power, not based on information that the group knows or ought to know is misleading or inaccurate, and based on fact and reasoned argument.³⁷⁹

Some earlier commentators favoured distinctions that depended on the **degree of consensus about the good of the political object** (such as human rights),³⁸⁰ inspiring formulations such as that it could be charitable if all ‘right-thinking’ people would agree on the public benefit of the object,³⁸¹ or if that public benefit could be determined to be a ‘reasonable value judgment’.³⁸² An approach flowing from concerns about the distortion of political debate suggests that the distinction should focus on the **breadth of public support** enjoyed by the organisation, to prevent the amplification of already dominant voices in the political process.³⁸³

Santow, in Australia, grounding his approach in the freedom of expression and the comparable doctrine of qualified privilege in defamation, suggested a test in which courts ask whether political activity has reached a point where it interferes with, or overshadows, charitable objects.³⁸⁴ However, a manifestation of that expression in a political campaign is not necessarily of public benefit, because of the need to protect voters from ‘overwhelming propaganda’.³⁸⁵ In his view, the traditional approach focused unduly on the line between activity and purpose, and he argued for a more sensitive interpretative approach in which the cause of law reform and public participation in legislative and government processes may be considered for the public benefit, if the change is directed at an indubitably charitable purpose. Using

turning charity to personal advantage. The ‘private interest theory’ is also discussed by Buckles, ‘Not Even a Peep,’ above n 263, 1085–1090.

³⁷⁶ Note, ‘The Revenue Code and a Charity’s Politics,’ above n 262, 673–674. This was on the basis of equivalence with the deduction for lobbying expenses for businesses in the US. See also Note, ‘Income Tax Disadvantages of Political Activities,’ above n 260, 283.

³⁷⁷ Guinane, ‘Wanted,’ above n 346, 168. This suggested focusing on 1) a nexus to legislative issues; 2) references to an election, candidate, campaign or party; and 3) the qualifications and fitness of a candidate.

³⁷⁸ See, eg, Broder, ‘The Legal Definition of Charity,’ above n 102, 26. Cf, however, Parachin, ‘Distinguishing Charity and Politics,’ above n 253, 896–897.

³⁷⁹ Government of Canada and Voluntary Sector Initiative, *Working Together: Report of the Joint Tables* (August 1999) <http://www.vsi-isbc.org/eng/knowledge/working_together/pco-e.pdf>, 22.

³⁸⁰ Stevens and Feldman, ‘Broadcasting Advertisements,’ above n 304, 617.

³⁸¹ Brunyate, ‘The Legal Definition of Charity,’ above n 71, 282–283.

³⁸² Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [98]–[102].

³⁸³ Chisolm, ‘Exempt Organization Advocacy,’ above n 262, 282–284.

³⁸⁴ Santow, ‘A Tinkling Cymbal,’ above n 323, 232–233.

³⁸⁵ *Ibid* 233.

this approach, Santow argued that Amnesty International could be recognised as charitable in Australia, based on the ratification of the ICCPR and other recognition of human rights.³⁸⁶

Broder, in Canada, suggests several ‘thresholds’ of acceptable political activity: where there is no express advocacy of legislative, regulatory or administrative change; where an organisation supports, furthers or develops law and policy; where an applicant works to change law or policy; or where an organisation promotes specific policies or practices.³⁸⁷

Clark, in the US, argued for a greater emphasis on the **charitable nature of the purposes**. Economic pressure groups focused on private interests; hate groups sought anti-social ends; and political parties or groups focused on obtaining political power.³⁸⁸ He endorsed the liberal approach taken by the court in *Seasongood*³⁸⁹ which limited the disqualification to ‘direct action’ in terms of contact with the legislature, and broadly construed ‘education’ as including education in the name of good government.³⁹⁰

The **Ontario Law Reform Commission** saw the distinction in terms of **politics** being focused on **process**, while charity focuses on determining a ‘basic human good’.³⁹¹ It also argued that the fact that a project advanced an element of public policy did not mean it was charitable, because it could be aimed either at influencing opinion on what the law or public policy should be, or pursuing the enforcement of the law.³⁹² It supported Revenue Canada’s view of ‘political’ activity as involving acts intended to influence government policy directly or indirectly. It also broadly supported Revenue Canada’s threefold classification of political activities: 1) partisan activities (which should be excluded), and which should include interest group politics; 2) conversing with government on matters of direct or indirect concern (which should not be restricted, because it relied on full discussion and reasoning); and 3) activities that were ancillary (supporting or advancing the purpose) or incidental (a by-product of the purpose) to the charitable purposes, which should also not be restricted.³⁹³

Gladstone identified several possible options for reforming the restrictions on political activity: restricting tax concessions to non-party political organisations; enacting legislation providing for peace, racial harmony and human rights as valid charitable objects; creating a new category of ‘action organisations’ entitled to limited tax concessions; validating all ‘purpose trusts’ by legislation; enabling charities to engage in any political activity as a means to a non-political end; and fostering debate and dialogue to create a more liberal interpretation of existing law.³⁹⁴

Dunn suggested four possible approaches to permit greater latitude for political activity. The first two involve allowing charities falling within particular categories (and, in the alternative, only charities whose purposes aim to provide opportunities and choices for the poor) to conduct substantial political activity.

³⁸⁶ Ibid 235–253.

³⁸⁷ Broder, ‘The Legal Definition of Charity,’ above n 102, 32.

³⁸⁸ Clark, ‘The Limitation on Political Activities,’ above n 262, 453.

³⁸⁹ *Seasongood v Commissioner of Internal Revenue* 227 F2d (6th Cir, 1955).

³⁹⁰ Clark, ‘The Limitation on Political Activities,’ above n 262, 464.

³⁹¹ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 152–154. The Commission expressed the view that the distinction was largely ‘formal’, a distinction between what is being done and why it is being done, and therefore had to be evaluated in an open-textured way.

³⁹² Ibid 209–210.

³⁹³ Ibid 301.

³⁹⁴ Gladstone, *Charity, Law and Social Justice*, above n 172, 158.

She floated but did not favour the possibility of excluding government-funded charities from political activity, and finally suggested a more qualitative test of public benefit that focuses upon its purpose rather than form or method.³⁹⁵

A more radical approach is to **reject the distinction between charity and politics** as artificial, and suggests only minimal restrictions. For example, witnesses before the Goodman Committee proposed all political activity should be allowed subject only to a constraint based on harm,³⁹⁶ while Sheridan suggested limits such as irrationality, immorality, selfishness, illegality or change brought about other than by legislative or constitutional amendment.³⁹⁷ Lu suggests that the existing constraints on illegality and public policy are sufficient.³⁹⁸

The Advisory Group on Campaigning in the Voluntary Sector adopted a **'bright line' test**, recommending that charities should be able to engage in unlimited political campaigning provided it was in furtherance of charitable purposes and they did not support political parties. In particular, it recommended that trustees should be able to decide to engage exclusively in campaigning to further charitable purposes, and no resource limits should be placed on political campaigning.³⁹⁹ It recommended removal of the 'ancillary' test and encouraged more flexible interpretations by the Charity Commission.⁴⁰⁰ It considered that a 'lesser test', which already applied to charitable activities, could be applied where the Charity Commission would look to whether the trustees could reasonably argue that the advocacy of their purposes achieve public benefit. This would have the advantage of overcoming the artificial distinction between purposes and activities, and enable registration of organisations with conflicting or competing charitable purposes.⁴⁰¹ In its view, rather than seeking to suppress particular causes, the argument should begin with freedom of expression and exclude organisations if it did not observe the law or could not make a "reasoned and well informed case" as to why its objects were being advanced and its beneficiaries' interests being promoted.⁴⁰² In Canada, a similar proposal suggested that only support or promotion of political candidates, or promotion of a political ideology, should be prohibited in taxation legislation.⁴⁰³

Walker and Rothermel, writing in the US prior to the 'safe harbour' provisions, argued that the most acceptable reform for clarifying the 'substantial' test in US tax law was to **quantify the test** of 'substantiality' for ease of administration. This was in preference to either: distinguishing between types of tax exempt political activity, which would force the IRS to judge the qualitative merit of political activities; taxing all political activity, which would be "old fashioned and impractical"; and greatly broadening the scope of tax exempt political activity, which would be theoretically preferable but

³⁹⁵ Dunn, 'Charity Law as a Political Option for the Poor,' above n 278, 316–317.

³⁹⁶ Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [103].

³⁹⁷ Sheridan, 'The Political Muddle—A Charitable View,' above n 320, 4.

³⁹⁸ Lu, 'Flunking the Methodology Test,' above n 302.

³⁹⁹ Advisory Group on Campaigning and the Voluntary Sector, *Campaigning and the Voluntary Sector*, above n 271, [2.1].

⁴⁰⁰ *Ibid* [2.1]–[2.3].

⁴⁰¹ *Ibid* [1.6.12].

⁴⁰² *Ibid* [1.10.9].

⁴⁰³ This was suggested by the Institute for Media, Policy and Civil Society (IMPACS) (which was wound up in 2007) and the Canadian Centre for Philanthropy (now part of Imagine Canada). See Harvie, *Regulation of Advocacy in the Voluntary Sector*, above n 278, 30.

politically unlikely.⁴⁰⁴ Others echoed the call for percentage or absolute caps on political expenditure.⁴⁰⁵ Bridge advocated the US model, with its clearer definition of legislative activities and quantitative caps, for Canada.⁴⁰⁶ However, Dunn argued strongly against emphasising expenditure levels because this would disadvantage smaller charities.⁴⁰⁷

In Canada, Webb proposed the creation of an **'intermediate' organisation** (Registered Interest Organizations) between a charity and for-profit business, which would qualify for similar tax concessions but at a different level of tax deduction, and would be subject to different reporting requirements, but which could engage in unlimited lobbying.⁴⁰⁸ In the US, Cooper similarly proposed a 'public lobby' exempt organisation with some tax benefits but with special protective standards.⁴⁰⁹ Ablin has suggested a model based on disclosure of funding for political advertising.⁴¹⁰

Although the majority of reformers favour a more liberal regime, there are a minority who favour a **more restrictive regime**. For example, a report by Civitas suggested **re-classifying charitable organisations** into four groups: lobbying and campaigning organisations; charities that do not lobby and campaign; organisations divided into a charities arm and a campaigning area; and lobbying and campaigning coalitions that represent charities but are not charities themselves. This was intended to counteract the trend of involvement of charities in political activity.⁴¹¹ Michell has suggested that the problem can be resolved in the manner suggested by Cross and Dal Pont in relation to the general definition, namely the validation of purpose trusts for the purposes of trusts law and statutory restriction of the tax definition of charity.⁴¹² Others, including the Goodman Committee, have generally endorsed the current restrictions largely on the premise that charities may still form sister organisations for political advocacy.⁴¹³

RELIGION

Another controversial issue in the definition of charities is the scope of 'religion' for the purposes of charity law. The key issues involve: how religion is to be defined; and how to identify and prove public benefit.

⁴⁰⁴ Walker and Rothermel, 'Political Activity and Tax Exempt Organizations Before and After the Tax Reform Act of 1969,' above n 361, 1135.

⁴⁰⁵ Note, 'The Revenue Code and a Charity's Politics,' above n 262, 671; Ablin, 'Price of Not Rendering to Caesar,' above n 355, 585–586.

⁴⁰⁶ Bridge, 'Law of Advocacy by Charitable Organizations,' above n 306. This was advocated prior to the 'safe harbour' provisions in the Canadian guidelines.

⁴⁰⁷ Dunn, 'Charities and Restrictions on Political Activities,' above n 278.

⁴⁰⁸ Kernaghan Webb, *Cinderella's Slippers? The Role of Charitable Tax Status in Financing Canadian Interest Groups* (2000).

⁴⁰⁹ Inland Revenue, New Zealand, *Taxation of Maori Organisations* (Consultation Document, August 2001), 846–850.

⁴¹⁰ Ablin, 'Price of Not Rendering to Caesar,' above n 355, 583–584.

⁴¹¹ Nick Seddon, *Who Cares? How State Funding and Political Activism Change Charity* (Civitas: Institute for the Study of Civil Society, 2007).

⁴¹² Michell, 'The Political Purposes Doctrine,' above n 267.

⁴¹³ This has been supported in particular in the US, which makes it particularly easy by allowing the creation of organisations under s 501(c)(4) which are also entitled to tax exemption: see, eg, Murphy, 'Campaign Signs and the Collection Plate,' above n 260, 81–82.

Defining religion

In Australia, the **definition of religion** is governed by the decision of the High Court in *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)*, which concerned the exemption from payroll tax of a 'religious institution'.⁴¹⁴ This definition extends the scope of religion beyond theistic religions.

In England and Wales, the common law definition of religion was more restrictive, requiring faith in a god and worship in that god.⁴¹⁵ As Edge and Loughrey note, the Charity Commission extended the case law in significant ways by, for example, recognising **multi-theistic** religions.⁴¹⁶ The common law position has also been modified by s 2(3) of the *Charities Act 2006* (UK), which extends the scope to religions involving belief in more than one god and religions that do not involve belief in a god. In Ireland, the question of extending the concept beyond theistic religions divided the Law Society's Law Reform Committee.⁴¹⁷ In Canada, the common law approach of England and Wales prevails.⁴¹⁸ In the US, a 'subjective-functional' approach has been applied, focusing on whether "it is a sincere and meaningful belief occupying in the life of its possessor a place parallel to that filled by the God" in recognised religions.⁴¹⁹

There have been criticisms of these definitions. In 1945, Brunyate thought the content of religion was reasonably clear but that the case law had "presented great difficulty and produced considerable anomaly" in relation to questions of construction.⁴²⁰ The more substantive difficulty, however, is in constructing a definition that enables an **objective determination despite the inherent subjectivity of faith**, and which **encompasses the diversity of religious practices** and beliefs without being so broad as to be meaningless.

The **English definition** has tended to **objectivity** at the expense of inclusiveness. Blakeney, for example, has forcefully argued that the English definition is biased towards Protestantism, most clearly through the requirement of 'public' (rather than closed or contemplative) worship.⁴²¹ He argues the *Statute of Charitable Uses* is a "chauvinistic Protestant affirmation of the duty to perform 'good works'", and that the requirement of public benefit "reflects the Protestant view that religious activities ought to have utilitarian ends."⁴²² Blakeney and Brady have also argued that the requirement of public benefit reflects English

⁴¹⁴ *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120. Mason ACJ and Brennan J specified two criteria: belief in a supernatural Being, Thing or Principle; and acceptance of canons of conduct to give effect to that belief. Wilson and Deane JJ considered that the following were helpful indicia of a religion: belief in the supernatural; ideas relating to man's nature and place in the universe; adherents accept ideas as requiring or encouraging them to observe particular standards or codes of conduct or to participate in practices having supernatural significance; that the adherents constitute an identifiable group; and that the adherents themselves perceive it as a religion.

⁴¹⁵ *Re South Place Ethical Society, Barralet v Attorney-General* [1980] 1 WLR 1565.

⁴¹⁶ Edge and Loughrey, 'Religious Charities and the Juridification of the Charity Commission,' above n 20, 44.

⁴¹⁷ Law Society of Ireland Law Reform Committee, *Charity Law: The Case for Reform*, above n 8, 76. The position is not clarified in the *Charities Act 2009* (Ireland).

⁴¹⁸ See generally T S Carter, 'Advancing Religion as a Head of Charity: What Are the Boundaries?' (2007) 20 *The Philanthropist* 257.

⁴¹⁹ *United States v Seeger* 380 US 163 (1965).

⁴²⁰ Brunyate, 'The Legal Definition of Charity,' above n 71, 272–275.

⁴²¹ *Gilmour v Coats* [1949] AC 426. See, eg, James C Brady, 'Some Problems Touching the Nature of Bequests for Masses in Northern Ireland' (1968) 19 *Northern Ireland Legal Quarterly* 357.

⁴²² Michael Blakeney, 'Sequestered Piety and Charity—A Comparative Analysis' (1981) 2 *Journal of Legal History* 207, 209, 213.

rather than Irish law.⁴²³ Rickett, however, counters that the anti-Catholic bias, while clearly evident until the late 19th century, has since disappeared.⁴²⁴

In contrast, the **Australian and US definitions** have typically been criticised as being **too inclusive** at the expense of objectivity. The US approach has been criticised as unduly broad and circular;⁴²⁵ and the Australian definition has been criticised because of the vagueness of the concept of the 'supernatural'.⁴²⁶

Underlying some of these concerns about inclusiveness is a concern that **recognition as a 'religion'** both legitimises fringe or alternative religions and grants them a public subsidy. For example, Woodfield has suggested defining the concept of religion in terms of public benefit, to make the scope of the category more certain and as a way of justifying the public subsidy.⁴²⁷ Cross has suggested a restricted definition for taxation purposes, distinguishing between religions which commanded a substantial number of adherents and those which did not. He would, however, have preserved existing tax exemptions for religions.⁴²⁸ The House of Commons Expenditure Committee expressed hope that its proposed definitional test of 'purposes beneficial to the community' would assist in excluding **cults**.⁴²⁹ In the UK, a White Paper in 1989 sympathised with these anxieties but foresaw great difficulties in excluding these from charitable status,⁴³⁰ and suggested this was ultimately a problem of evidence which would still be required even if the law was changed.⁴³¹ This concern was recently manifested in a private member's bill in Australia which proposed a new statutory test of public benefit with the intention of excluding the Church of Scientology from charitable status.⁴³²

Another minor issue has been whether **ethical societies** should be eligible for charitable status, following a ruling that they were not.⁴³³ Some (including the Goodman Committee and the House of Commons Expenditure Committee) have suggested they should be eligible.⁴³⁴

⁴²³ Brady, 'Some Problems,' above n 421, 374; Blakeney, 'Sequestered Piety and Charity—A Comparative Analysis,' above n 422, 219.

⁴²⁴ C E F Rickett, 'An Anti-Roman Catholic Bias in the Law of Charity?' [1990] *Conveyancer and Property Lawyer* 34.

⁴²⁵ C G Hall, 'Aggiornamento: Reflections Upon the Contemporary Legal Concept of Religion' (1996) 27 *Cambrian Law Review* 7, 26–27.

⁴²⁶ See Wojciech Sadurski, 'On Legal Definitions of 'Religion'' (1989) 63 *Australian Law Journal* 834, 835–837. Note, however, that he claims the tautological and over-broad nature of the US definition is actually a source of strength.

⁴²⁷ Steve T Woodfield, 'Doing God's Work: Is Religion Always Charitable' (1996) 8 *Auckland University Law Review* 25.

⁴²⁸ Cross, 'Some Recent Developments in the Law of Charity,' above n 147, 208.

⁴²⁹ House of Commons Expenditure Committee, *Charity Commissioners and Their Accountability*, above n 72, [56]. They also expressed the strong view that it was unfair that some sects continued to be registered on the basis that they had been registered prior to the *Charities Act 1960*: [57]–[59].

⁴³⁰ Secretary of State for the Home Department, *White Paper*, above n 63, [2.22]–[2.23].

⁴³¹ *Ibid* [2.27]–[2.37].

⁴³² Tax Laws Amendment (Public Benefit Test) Bill 2010 (Cth). See also Senate Economics Legislation Committee, *Tax Laws Amendment (Public Benefit Test) Bill 2010* (7 September 2010) <http://www.aph.gov.au/senate/committee/economics_ctte/public_benefit_test_10/index.htm>.

⁴³³ *Re South Place Ethical Society, Barralet v Attorney-General* [1980] 1 WLR 1565. Dillon J rejected their inclusion, distinguishing between religions that concerned man's relationship with God from ethical societies that focused on man's relationship to man.

⁴³⁴ The Goodman Committee thought there should be some limitations, such as a requirement to establish certain basic concepts (which the Committee did not define), but they should be distinguished from political parties, and should have the capacity to distinguish between 'good' and 'evil' ethics: Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [54]. See also House of Commons Expenditure Committee, *Charity Commissioners and Their Accountability*, above n 72, [60]; Woodfield, 'Doing God's Work,' above n 427, 43.

A number of commentators have considered **alternative definitions** of religion. Perhaps the most limiting of these definitions is that proposed by Cross, which focused on three features he thought to be ‘common’ to religion: 1) an institutional character; 2) a belief that attendance at services and analogous events is beneficial; and 3) a desire to spread religion by missionary activity. While conceding that this definition was not “entirely satisfactory”, he considered it “probably the best that can be achieved” given the tension between religious neutrality and the “belief that any religion is better than none”.⁴³⁵

The **Ontario Law Reform Commission** argued against the current ‘minimalist’ definition as being merely a “covert way of applying a poorly articulated legal definition”.⁴³⁶ It preferred a more robust definition that focused on three elements: the worship and knowledge of God; pastoral and missionary propagation; and observances or practices. In its view, the tests of ‘public benefit’ or a ‘technical’ meaning of religion were not helpful to disqualify religions, because of its view that the good of religion itself was of public benefit, because religious activities were usually associated with charitable activities, and because practices and observances typically appeared irrational from an objective point of view.⁴³⁷

Sadurski developed a sophisticated concept of religion through a comparison of US and Australian law.⁴³⁸ In his view, the relationship between state and religion in these States is regulated by two principles, the non-establishment principle and the free exercise principle. These principles are in tension, but can be reconciled because they operate in distinct spheres—the non-establishment principle is designed to prevent a non-neutral merger of secular regulatory concerns and religious motives, while the free exercise principle prevents coercion of an individual and accords respect to all individual moral choices, provided they are harmless. The different purposes suggest different definitions of religion depending upon the principle involved—there should be a broad definition for the purposes of the free exercise of religion (including the determination of charitable status), and a narrow definition for the purposes of non-establishment..⁴³⁹ This view is echoed by **Carter** in Canada.⁴⁴⁰

Hall also developed a sophisticated ‘intermediate’ concept of religion which sought to be broad enough to comprehend the free exercise principle, and narrow enough to avoid fraud and beliefs rooted in morals and ethics.⁴⁴¹ In his view, the key to religion was the focus on ‘transcendental’ concerns which recognised the failure of human senses and reason to apprehend the “ultimate things which excel and extend beyond men’s immediate concerns”.⁴⁴² This could be indicated by indicia drawn from current religions, although Hall also rejected some factors as relevant.⁴⁴³ This approach was similar to the approach taken by the High Court in *Church of New Faith*, as it was an inductive approach analogising from recognised religions. In his view, however, there were three weaknesses to the doctrine in that case: the misleading implications of reference to the supernatural; the fact that no account was required of the

⁴³⁵ Cross, ‘Some Recent Developments in the Law of Charity,’ above n 147, 194–195.

⁴³⁶ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 192–196.

⁴³⁷ Ibid 195–197.

⁴³⁸ Sadurski, ‘On Legal Definitions of ‘Religion’,’ above n 426.

⁴³⁹ Ibid 834.

⁴⁴⁰ Carter, ‘Advancing Religion as a Head of Charity,’ above n 418. His view is that a broad definition is warranted because of religious plurality and the right of religious freedom.

⁴⁴¹ Hall, ‘Aggiornamento,’ above n 425, 9–10.

⁴⁴² Ibid 10, 12.

⁴⁴³ Ibid 14–16. He considered the following factors irrelevant: the sophistication of the religion; theism; the presence of a full moral code; plagiarism; the commercial nature of a religion; possible exploitation; and public acceptance.

ultimate Being, Thing or Principle; and its implicit assumption of religion as a “stark, coherent and structured body of thought”.⁴⁴⁴

Peñalver, writing in the context of US constitutional law, similarly adopts an analogical approach to religion, because of the evolutionary nature of religion. He proposes three criteria for a sound definition: 1) that it resemble as closely as possible an ordinary understanding of religion; 2) it has potential to evolve; and 3) it minimises the risk of judicial and pro-Western bias. The analogical approach must therefore take into account a broad range of different particular religions, and apply ‘negative guidelines’ to constrain Western bias.⁴⁴⁵

Brady has argued instead that the definition of religion should primarily be considered from a subjective point of view, subject to three limitations: that the belief must be at least rational, and not contrary to the general law of the land or to the principles of morality.⁴⁴⁶

The public benefit of religion

One of the peculiar difficulties of the head of ‘religion’ is the application of the requirement of ‘public benefit’ in religion. The common law has traditionally presumed that religion was for the public benefit. Woodfield observed that several factors underlay this **presumption**: 1) the historical connection between religion and charity, and the historically fundamental role of religion to the State; 2) the evidentiary difficulties of proving benefit;⁴⁴⁷ and 3) the mortmain legislation. She observed that, while the presumption could be supported by Finnis’ argument that inquiring into the origins of the universe and supernatural force is a ‘basic good’, this was not supported in case law or practice.⁴⁴⁸ Further, the presumption helped preserve religious neutrality by enabling judges to avoid determining the worth of a religion.⁴⁴⁹

The *Charities Act 2006* (UK) **removed** this presumption in the UK,⁴⁵⁰ but the presumption has been entrenched and strengthened in statute in Ireland.⁴⁵¹ The removal of the presumption has been criticised by Harding partly on the basis of the intangible nature of public benefit in the context of religions and

⁴⁴⁴ Ibid 23.

⁴⁴⁵ Eduardo Peñalver, ‘The Concept of Religion’ (1997) 107 *Yale Law Journal* 791. He proposes three ‘negative guidelines’: religious status should not be denied because 1) it fails to contain a concept of God or gods; 2) because of a lack of particular institutional features; and 3) because of a failure to focus on or distinguish the sacred or otherworldly.

⁴⁴⁶ Brady, ‘Some Problems,’ above n 421, 373.

⁴⁴⁷ James C Brady, ‘Public Benefit and Religious Trusts: Fact or Fiction’ (1974) 25 *Northern Ireland Legal Quarterly* 174, 177.

⁴⁴⁸ Woodfield, ‘Doing God’s Work,’ above n 427, 31–35.

⁴⁴⁹ Rickett, ‘An Anti-Roman Catholic Bias in the Law of Charity?,’ above n 424, 40.

⁴⁵⁰ *Charities Act 2006* (UK) s 3(2). Public benefit was, apparently, considered at the time of registration by the Charity Commission: Cabinet Office Strategy Unit (UK), *Private Action, Public Benefit*, above n 6, [4.3.3]. This also clarified that the public benefit was the direct benefit to adherents rather than community activities, and that it did not intend to change the principle that the celebration of a religious rite open to the public should be regarded as a public benefit.

⁴⁵¹ *Charities Act 2009* (Ireland) s 3(4). A determination that a gift for the advancement of religion is not of public benefit can only be made with the consent of the Attorney General: s 3(5), and is not subject to appeal: s 3(9). However, it excludes as gifts for the advancement of religion gifts for organisations or cults with the principal object of which is the making of profit, or that employs oppressive psychological manipulation of its followers, or for the purpose of gaining new followers: s 3(10). This is actually weaker than the previous legislation which conclusively presumed public benefit in the case of religion: *Charities Act 1961* (Ireland) s 45. The Law Society did not recommend any change to this provision in its report on charity law: Law Society of Ireland Law Reform Committee, *Charity Law: The Case for Reform*, above n 8, 76.

the doctrine of liberal religious neutrality.⁴⁵² Edge and Loughrey point out that even with a presumption the unproven nature of the benefits makes it impossible to weigh it against proven detriment.⁴⁵³

Several issues apply when public benefit is tested. First, what is the **benefit of religion**? In a secular society, one may well question the implicit assumption that some religion is better than none.⁴⁵⁴ Case law has tried to answer this question partly by referring to by-products of the religion which are of more tangible benefit—for example, works undertaken as a result of the charitable impulse, or for religious buildings—or by reference to religion as a wellspring of charity.⁴⁵⁵

Some commentators have suggested that the focus on tangible benefits or by-products fails to grasp the true benefit of religion.⁴⁵⁶ The Ontario Law Reform Commission, for example, considered that **religion was a ‘good’ in itself**, and was appropriately ‘other-regarding’ (fulfilling an essential element of its ‘real’ definition of charity) in the worship of God.⁴⁵⁷ Similarly, the Charity Law Reform Advisory Group felt that the benefit was the opportunity it provided to express belief and develop spirituality and morality, with the potential to benefit the public.⁴⁵⁸ The UK Cabinet Office considered that religious practice “tends to contribute to social and moral welfare of adherents”.⁴⁵⁹ Juneau identified the ‘good’ of religion as religion “makes us want to become better—it makes people better members of society”.⁴⁶⁰

Another issue is that gifts to religion naturally benefit the donor’s religion, and therefore appear to be of ‘**private benefit**’. The legal response to this issue has been to examine whether the religion was generally open for all to join, or to look at the number of adherents.⁴⁶¹ This debate was stimulated by the seminal case of *Gilmour v Coats*, which held the test of ‘public benefit’ was not met in relation to private prayers, since these did not confer a benefit upon the public.⁴⁶² This case has been criticised as being illogical, favouring Protestant religion, and failing to recognise that the ‘benefit’ of religion is spirituality itself.⁴⁶³ There were calls for it to be overturned before the Nathan Committee, although considered it was a more appropriate matter for Parliament or the courts to deal with.⁴⁶⁴ The Goodman Committee similarly ducked the issue, noting it had failed to reach a consensus and leaving it up to the Charity Commission or the courts to make a value judgment.⁴⁶⁵ In Australia, this issue has been resolved by s 5 of the *Extension of Charitable Purposes Act 2004* (Cth).

⁴⁵² Harding, ‘Trusts for Religious Purposes and the Question of Public Benefit,’ above n 192. See also Picarda, ‘The Preamble to the Statute of Charitable Uses,’ above n 64.

⁴⁵³ Edge and Loughrey, ‘Religious Charities and the Juridification of the Charity Commission,’ above n 20.

⁴⁵⁴ National Council for Voluntary Organisations, *For the Public Benefit?*, above n 39, [4.3.7].

⁴⁵⁵ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 156.

⁴⁵⁶ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 156; Edge and Loughrey, ‘Religious Charities and the Juridification of the Charity Commission,’ above n 20, 51; Carter, ‘Advancing Religion as a Head of Charity,’ above n 418, 265.

⁴⁵⁷ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 156.

⁴⁵⁸ National Council for Voluntary Organisations, *For the Public Benefit?*, above n 39, [4.3.7].

⁴⁵⁹ Cabinet Office Strategy Unit (UK), *Private Action, Public Benefit*, above n 6, [4.33].

⁴⁶⁰ Carl Juneau, ‘Is Religion Passé as a Charity?’ (2002) 17 *The Philanthropist* 34.

⁴⁶¹ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 156.

⁴⁶² *Gilmour v Coats* [1949] AC 426.

⁴⁶³ Hackney, ‘The Politics of Chancery,’ above n 76, 123.

⁴⁶⁴ United Kingdom, *Nathan Report*, above n 59, 129–130.

⁴⁶⁵ Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [55].

The **Ontario Law Reform Commission** considered *Gilmour* “self-contradictory”, because the more central acts of religion (such as worship) were seen as not charitable, while gifts for secondary or instrumental purposes were valued as charitable.⁴⁶⁶ Instead, it proposed that religion satisfied the element of ‘distance’ in the following ways. If the gift was used to sustain the infrastructure of the community, the ‘distance’ element was satisfied either because other members of the community benefited, or because the gift is to ‘God’. Where the gift is intended to support the religious lives of others, the distance requirement is met because strangers benefit. Where the gift is for the wider purposes of religion, it is additionally met because the public benefits from the works of religion.⁴⁶⁷

OTHER DEFINITIONAL ISSUES

Two minor definitional issues are discussed below: the charitable status of expensive private schools or medical facilities which effectively exclude the poor; and minor extensions and exclusions of charitable status.

Wealthy institutions

There is a continuing debate about the extent to which organisations that benefit the wealthy can be ‘charitable’. It is accepted that the phrase ‘relief of the poor, aged and impotent’ in the preamble to the Statute of Charitable Uses is disjunctive, so that the aged and impotent need not be poor to benefit from charity.⁴⁶⁸ Nevertheless, there is political controversy over whether **organisations primarily benefiting the wealthy should receive tax concessions**, especially in the UK in relation to independent public schools.⁴⁶⁹ This controversy is manifest in guidelines by the Charity Commission that emphasise its consideration of the extent of public access in applying the public benefit test.⁴⁷⁰

For example, **Hackney** has argued that the charitable status of such institutions evinced the ossified nature of charity law, which had failed to take into account the welfare state. He rejected the argument that these institutions indirectly benefited the community through ‘relieving’ other institutions, arguing that using that analogy meant that the Hilton could be interpreted as ‘relieving’ housing shortages.⁴⁷¹

Some have suggested that the apparent paradox of subsidising exclusive institutions can be **reconciled through existing doctrine**. Brunyate has argued that while relief of impotence is charitable whether a person relieved is rich or poor, the distinction is that other methods of relief “do not in the case of the rich achieve their genuine charitable object”.⁴⁷² There is a ‘boundary’ case where the disabled are poor only in that they cannot afford appropriate remedies.⁴⁷³ The Goodman Committee thought that, at some point, the size of the class benefited may restrict charitable status in some cases, and thought an

⁴⁶⁶ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 200.

⁴⁶⁷ *Ibid* 198–199.

⁴⁶⁸ Dal Pont and Petrow, *Law of Charity*, above n 43, [8.2].

⁴⁶⁹ For example, the UK Labour Party’s 1947 election manifesto committed it to withdrawing charitable status from independent schools: House of Commons Expenditure Committee, *Charity Commissioners and Their Accountability*, above n 72, [46].

⁴⁷⁰ The Charity Commission for England and Wales, *Charities and Public Benefit* (January 2008) <http://www.charity-commission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/public_benefit.aspx>, F10.

⁴⁷¹ Hackney, ‘The Politics of Chancery,’ above n 76, 122.

⁴⁷² Brunyate, ‘The Legal Definition of Charity,’ above n 71, 270–272.

⁴⁷³ *Ibid* 272.

assessment of this point was best left to the Charity Commission and the courts.⁴⁷⁴ The Ontario Law Reform Commission thought that the distinction could be made in terms of ‘practical utility’, since projects that aided only the rich were unlikely to be effective or useful.⁴⁷⁵

Others thought a **proposed redefinition** would assist. The House of Commons Expenditure Committee thought that their recommendation for a new test of ‘purposes beneficial to the community’ should only admit institutions which ‘manifestly devote the education they provide towards meeting a range of clear educational needs throughout the whole community’.⁴⁷⁶ The NCVO similarly thought its proposed strengthened test of public benefit would mean that indirect benefit would no longer be a ‘trump card’ for independent schools, and emphasise the requirement of public access in the public benefit test.⁴⁷⁷

Minor extensions and exclusions

There is substantial consensus that charitable status should include:

- the **prevention** as well as the relief **of poverty** (as the common law tends to favour activities with an “immediate and direct favourable impact”);⁴⁷⁸
- **self-help** organisations (which were deemed charitable by statute in Australia in 2004);⁴⁷⁹
- the **arts**, as its own independent head of charity;⁴⁸⁰
- the promotion of the **environment**;⁴⁸¹ and
- **foreign** charities.⁴⁸²

There has also been strong, although not universal, support for recognition of amateur **sport** as a charitable object of itself.⁴⁸³ There have also been suggestions to rationalise the head of ‘**education**’,⁴⁸⁴

⁴⁷⁴ Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [47]–[48], [60]–[61].

⁴⁷⁵ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 189.

⁴⁷⁶ House of Commons Expenditure Committee, *Charity Commissioners and Their Accountability*, above n 72, [50].

⁴⁷⁷ National Council for Voluntary Organisations, *For the Public Benefit?*, above n 39, ii.

⁴⁷⁸ Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [58].

⁴⁷⁹ The McFadden Report recommended that ‘self-help’ organisations could be charities if they 1) conferred wider public benefit as long as the membership is open, on objective public benefit criteria; and 2) the governance of these organisations reflect the public benefit culture: Scottish Charity Law Review Commission, *McFadden Report*, above n 7, 5. In subsequent consultations, it was noted that the report had not consulted widely on this issue and it was unclear whether it was meant to include other mutual organisations and membership organisations: Spicker, Morris, and Strachan, *McFadden Report Responses*, above n 7, [6].

⁴⁸⁰ Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [62].

⁴⁸¹ *Ibid* [79]–[85].

⁴⁸² Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 219. The Goodman Committee recommended facilitation of recognition of overseas charities. It also recommended that there should be a procedure whereby the Foreign Office could require a charity to stop its activity if the government believed it conflicted with UK public policy, subject to a requirement for publicity and an opportunity to object: Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [36].

⁴⁸³ Sport is not a charitable object in itself, but a sporting organisation may be charitable if it fulfils other charitable objects. Legislation in Australia follows the *Recreational Charities Act 1958* (UK). This deems the provision of sporting and leisure-time facilities charitable if it contributes to social welfare. See, eg, Broder, ‘The Legal Definition of Charity,’ above n 102, 45–47. The Goodman Committee suggested that only clubs which restricted its membership by election should not be eligible:

such as the Ontario Law Reform Commission's suggestion this should be re-framed as the pursuit of knowledge, and that other types of goods recognised under the head of 'education' should be independently recognised.⁴⁸⁵ The Goodman Committee thought it desirable that the giving of **advice** be eligible for charitable status, but that this required "particularly careful arrangements" to ensure the advice was unbiased,⁴⁸⁶ and also recommended that all **housing associations** should be charitable provided their bona fides were established.⁴⁸⁷ The Goodman Committee also recommended the validation of trusts for **local and denominational** groups, on the basis that the mainspring of the settlor's interest was in the personal connection with the beneficiaries, which should be admired.⁴⁸⁸

There also has been considerable consensus that the definition of 'charity' should recognise organisations which seek to advantage particular **disadvantaged ethnic groups**, including Indigenous groups⁴⁸⁹ and Maori groups in particular. On the other hand, there has been general consensus that the line of authority in the UK validating trusts for '**poor relations**' should be abolished,⁴⁹⁰ or that it should not be followed in other jurisdictions.⁴⁹¹

CONCLUSION

This literature review reveals several interesting features of the definitional debate. The apparently narrow issue of the definition of 'charity' has generated **considerable debate** in common law jurisdictions over a long period of time. This debate has been most intense in public policy reports, and has been promoted particularly by the voluntary sector. The debate has been **most intense** in the **United Kingdom**, where it has resulted in the enactment of statutory definitions, and least intense in the United States.

The principal issue in this debate has been the **desirability of clarification** and **extension** of the definition, most commonly in statutory form. There is an interesting historical shift, with early debates concerning restriction of the definition for taxation purposes, mid-century debates concerning clarification of the doctrine, and the end of the century concerned with progressive extension of the definition through legislation, beginning with the Australian Charities Definition Inquiry and ending with the enactment of statutory definitions throughout the United Kingdom and Ireland.

The second most controversial element of the debate has concerned common law restrictions on **advocacy**, which are almost universally condemned. The recent Australian High Court decision has

Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [71]. See also Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 155.

⁴⁸⁴ The Goodman Committee suggested giving research its own head: Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [63]–[64].

⁴⁸⁵ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 202–207.

⁴⁸⁶ Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [74].

⁴⁸⁷ *Ibid* [75]–[78].

⁴⁸⁸ *Ibid* [40].

⁴⁸⁹ Generally, the Australian cases have found such organisations such charitable, but there may be problems if the organisation is restricted by blood ties: see Fiona Martin, 'Prescribed Bodies Corporate Under the Native Title Act 1993 (Cth): Can They Be Exempt from Income Tax as Charitable Trusts?' (2007) 30 *University of New South Wales Law Journal* 713.

⁴⁹⁰ Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Goodman Report*, above n 72, [37]; Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 202–203.

⁴⁹¹ Ontario Law Reform Commission, *Report on the Law of Charities*, above n 10, 202–203.

removed that restriction in Australia, but much can still be learnt from the literature on this debate. A third controversy concerns the role of **religion**.

The literature review reveals a bewildering **variety of approaches** to the issue of the definition of charity, most obviously in the form of reform that is preferred (whether it be legislation, judicial redefinition, guidelines, doctrinal clarification or no change at all). The focus on the forms of reform, however, tends to mask underlying differences in conceptions of charity.

Further, these different approaches reflect deeper philosophical differences on the following issues:

- The scope and extent of the **inadequacies** of the present law;
- The existence and capacity of **administrative bodies** such as Charity Commissions;
- The practical availability of avenues of **appeal**;
- The justifications for **exempting** charities from **taxation**;
- The respective **roles** and value of **legislation** and the **common law**, which relate to views about the respective roles of the legislature and the judiciary;
- The respective roles of, and relationship between, **charity** and **politics**; and
- The general desirability of **change** and the extent of change.

Most importantly, this survey of the literature reveals the extent to which views on the definition reflect the diversity of deeper philosophical views on the **role of charity in modern society**. As time has passed, these views have changed, particularly as early optimism about the role of the welfare state has diminished and enthusiasm for civil society has renewed. As our societies have become more diverse in religion and more secular in orientation, the historical and contemporary ‘fount of charity’, religion, has come under more pressure. As the sphere of government has expanded and the practice of consultation has become embedded, the restrictions on advocacy have become more arcane. Ultimately, the definitional debate over charity reflects and refracts deeper, less clearly articulated, philosophical commitments concerning the purpose and role of charity in our society today.

APPENDIX I—KEY REPORTS

Year	Jurisdiction	Title	Approach
1920	England and Wales	United Kingdom, Royal Commission on the Income Tax, Report ('Colwyn Commission')	Raised issue of statutory definition for tax purposes. Recommended adoption of definition in order to make clear legal definition included more than just relief of poverty.
1936	England and Wales	Income Tax Codification Committee, Report ('Macmillan Committee')	Considered statutory definition proposals impracticable and considered current definition satisfactory.
1952	England and Wales	Report of the Committee on the Law and Practice relating to charitable trusts ('Nathan Committee')	Content of common law definition adequate, but recommended enactment of four 'heads' of charity for purposes of accessibility. Proposed removal of reference to preamble.
1955	England and Wales	United Kingdom, Royal Commission on the Taxation of Profits and Income, <i>Final Report</i> ('Radcliffe Report')	Suggested a statutory definition along the lines "the relief of poverty, the prevention or relief of distress, the advancement of education, learning and research, the advancement of religion" (that is, omitting fourth head).
1959	Northern Ireland	<i>Charity Committee Report</i> ('Newark Committee')	Decided against a statutory definition because of desire for uniformity and because would end up being a starting point for fresh case law.
1965	Victoria, Australia	Victorian Chief Justice's Law Reform Committee, <i>Report on Charitable Trusts</i>	Considered statutory definition would risk certainty, sever link with case law, and not feasible. Did not recommend reform.
1971	Queensland, Australia	Queensland Law Reform, <i>Report of the Law Reform Commission on the Law Relating to Trusts, Trustees, Settled Land and Charities</i>	Recommended preservation of preamble and rejected codification or major statutory alteration.
1974	England and Wales	English Charity Law Reform Commission, <i>Charity Law—Only a New Start Will Do</i>	Proposed new category of organisation, Non-Profit-Distributing Organisation (NPDO), which would be entitled to all the advantages of charities, but without restrictions on activities, and under stricter regulation.
1975	England and Wales	House of Commons Expenditure Committee, <i>Charity Commissioners and</i>	Recommended that legislation should require all charities to satisfy test of purposes beneficial to the community, which should apply to all heads.

		<i>their Accountability</i>	Left drafting to parliamentary draftsmen.
1976	England and Wales	Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, <i>Charity Law and Voluntary Organisations</i> ('Goodman Report')	Proposed restatement of common law principles in modern and simple language, with detailed guidelines as to expanded list of charitable purposes.
1979	New Zealand	Property Law and Equity Reform Committee, <i>Report on The Charitable Trusts Act 1957</i>	Gave consideration to question of statutory redefinition. Concluded no need to reform jurisdiction of Attorney-General.
1980	Victoria, Australia	Victorian Government Interdepartmental Working Party, <i>First Report on the Administration of Charities</i>	Rejected statutory definition but recommended further consideration of adoption of Goodman guidelines in legislation, regulations or administration.
1984	Tasmania, Australia	Tasmanian Law Reform Commission, <i>Report on the Variation of Charitable Trusts</i>	Considered only charitable status of recreation. Recommended deeming provision for recreational facilities and leisure-time.
1989	Victoria, Australia	Victorian Legal and Constitutional Committee, <i>Report to the Parliament on the Law Relating to Charitable Trusts</i>	Recommended legislation to add new specific purposes where community support was clear. Proposal for ad hoc additions to 'charitable' status to be considered by Standing Committee of Attorneys-General.
1989	England and Wales	<i>Charities: A Framework for the Future</i> ('White Paper')	Considered issue but thought no change was necessary, and risk of statutory definition outweighed advantages.
1989	New Zealand	<i>Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies</i>	Rejected statutory definition on basis of UK report.
1996	Ontario, Canada	Ontario Law Reform Commission, <i>Report on the Law of Charities</i>	Recommended doctrinal and administrative clarification, evaluated against 'real' definition of charity.
1996	England and Wales	<i>Meeting the Challenge of Change: Voluntary Action in the 21st Century</i> ('Deakin Commission')	Recommended category based on public benefit, and public benefit to a sufficient section of the public including black and minority groups.
1997	Scotland	Commission on the Future of the Voluntary Sector in Scotland, <i>Head and Heart</i> ('Kemp Commission')	Recommended broad category based on public benefit.

1999	Canada	Panel on Accountability and Governance in the Voluntary Sector, <i>Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector</i> ('Broadbent Report')	Recommended 'charity plus model' which would retain the existing definition of charity but would expand it to include a list of other public benefit purposes for the purposes of tax relief
1999	Canada	<i>Working Together: Report of the Joint Tables</i>	Extension of deemed 'charities' for purposes of tax relief to not-for-profit voluntary organisations which do not primarily promote interest of members, and whose activities (within certain parameters) should receive more public support than they do now.
1999	South Africa	<i>Ninth Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa: Fiscal Issues Affecting Non-Profit Organisations</i> ('Katz Commission')	Recommended replacement of 'charity' with category of 'public benefit organisations' for tax purposes.
2001	Australia	<i>Report of the Inquiry into the Definition of Charities and Related Organisations</i> ('Charities Definition Inquiry')	Recommended statutory definition including inclusive list of charitable purposes.
2001	Scotland	Scottish Charity Law Review Commission, <i>CharityScotland</i> ('McFadden Report')	Eligibility to be determined by four criteria: 1) overriding purpose for public benefit; 2) non-profit distributing; 3) independent; and 4) non-party political.
2001	England and Wales	National Council of Voluntary Organisations Charity Law Reform Group, <i>For the Public Benefit? A Consultation Document on Charity Law Reform</i>	Proposed strengthened test of public benefit across all four 'heads' of charity.
2001	Ireland	Ronan Cormacain, Kerry O'Halloran & A P Williamson, <i>Charity Law Matters: Is Charity Law in Northern Ireland an Appropriate Framework for Charitable Activity?</i>	Recommended consideration of definition in light of reviews in other jurisdictions, but recognised may need to be distinctive to jurisdiction.
2002	Ireland	Law Society of Ireland Law Reform Committee, <i>Charity Law: The Case for Reform</i>	Recommended statutory guidelines for decision-maker to consider in its discretion, based on the CDI Inquiry.
2002	Canada	Voluntary Sector Initiative, <i>Regulation of Advocacy in the Voluntary Sector: Current Challenges and Some Responses</i>	Considered possible responses to restrictions on advocacy.

2002	England and Wales	Cabinet Office Strategy Unit (UK), <i>Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector</i>	Proposed statutory definition with inclusive list of charitable purposes.
2003	England and Wales	<i>Charities and Not-for-Profits: A Modern Legal Framework, The Government's response to 'Private Action, Public Benefit'</i>	Adopted proposed statutory definition with minor extensions.
2003	Ireland	Department of Community, Rural and Gaeltacht Affairs, <i>Establishing a Modern Statutory Framework for Charities</i> (Consultation Paper)	Proposed statutory definition with inclusive list of charitable purposes.
2003	Australia	Board of Taxation, <i>Consultation on the Definition of a Charity</i>	Considered Charities Bill definition and proposed minor changes.
2004	Ireland	Department of Community, Rural and Gaeltacht Affairs, <i>Establishing a Modern Statutory Framework for Charities</i>	Reported on consultation responses to 2003 consultation paper.
2007	England and Wales	Advisory Group on Campaigning and the Voluntary Sector, <i>Campaigning and the Voluntary Sector</i>	Recommended a 'bright line test' for advocacy, allowing unlimited advocacy provided it was in furtherance of charitable purposes and they did not support political parties.
2010	Australia	Senate Economics Legislation Committee, <i>Tax Laws Amendment (Public Benefit Test) Bill 2010</i>	Reported on idea of public benefit test.

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