
F Definition of charity: charity law

F.1 Defining what is a charity

A fundamental element of regulation reform in the not-for-profit sector is defining what constitutes a charitable organisation. The 400th anniversary of the first statutory definition of charity (the *Statute of Elizabeth* in 1601) coincided with nearly all countries using that definition initiating reviews to examine whether that definition was still appropriate. The four categories of charitable purposes listed in box D.1 have become known as the *Pemsel* purposes.

Box F.1 The common law basis for defining charitable purpose

The common law definition of charity arose from a list of charitable purposes in the *Charitable Uses Act 1601* (also known as the *Statute of Elizabeth*), which had been interpreted and expanded into a considerable body of case law. The decision of *Commissioners for Special Purposes of Income Tax v Pemsel* (1891), identified four categories of charity which could be extracted from the *Charitable Uses Act*:

- the relief of poverty
- the advancement of education
- the advancement of religion
- other purposes beneficial to the community as a whole that the courts have identified as charitable.

While traditional charities qualify under the first three headings, other organizations that consider themselves charitable must qualify under the 'other purposes beneficial to the community' heading. To do so, the organisation must have a charitable purpose that is within the 'spirit and intendment' of the preamble to the *Charitable Uses Act 1601*.

Source: Wikipedia (2009).

Australia was the first cab off the rank with the Charity Definition Inquiry (CDI) in 2001. That inquiry's recommendations, although still largely unimplemented, were remarkably similar to reforms implemented later in England, Wales, Scotland, Ireland and Northern Ireland. In most common law countries, legal reforms to the

definition of charity were also accompanied by regulatory, tax and administrative reforms, and initiatives to encourage voluntarism and philanthropy.

F.2 Charity law in Australia

Charity law in Australia, at the Commonwealth and state/territory levels, closely follows the English definition of charity based on the Preamble to the *Statute of Elizabeth*. Furthermore, English case law is consistently used as the basis for Australian law in both federal and state courts, and federal and state jurisdictions have retained almost identical interpretations of the common law definition of charity.

There are 15 pieces of Commonwealth legislation and 163 pieces of state/territory legislation under which ascertaining entitlement to a benefit or some other legal outcome involves determining the charitable purpose or status of an organisation (NRNO 2007). There has not been a vibrant case flow so the case law has shown signs of ossification.

On 18 September 2000, the then Prime Minister, John Howard, announced the establishment of the Charity Definition Inquiry (CDI) into definitional issues relating to charitable, religious and community service not-for-profit organisations. He said (Howard 2000):

We need to ensure that the legislative and administrative framework in which they operate is appropriate to the modern social and economic environment. Yet the common law definition of a charity, which is based on a legal concept dating back to 1601, has resulted in a number of legal definitions and often gives rise to legal disputes. The Inquiry will provide the government with options for enhancing the clarity and consistency of the existing definitions with respect to Commonwealth law and administrative practice. These should lead to legislative and administrative frameworks appropriate for Australia's social and economic environment in the 21st Century.

In June 2001, the CDI made 27 recommendations, among which was the introduction of a statutory definition of 'charity' with an independent administrative body for federal law. It recognised the need to include 'prevention' as a legitimate charitable goal, for example, prevention of disease or prevention of poverty. It also recommended that charities would need to be altruistic and operate in the public benefit as currently defined by the common law.

After considering the inquiry report, the Federal Treasurer released a draft Bill in July 2003 which took the traditional four heads of charity and divided them into seven heads, following the spirit of the inquiry's recommendations. The seven heads were:

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- the advancement of health
 - the advancement of education
 - the advancement of social or community welfare
 - the advancement of religion
 - the advancement of culture
 - the advancement of the natural environment
 - any other purpose that is beneficial to the community.

The proposed seven heads raised only minor public comment. Other provisions in the draft Bill, however, caused significant public discussion, including a provision on advocacy, which had not been recommended by the CDI. A number of charitable organisations argued that the draft Bill was an attack on their ability to advocate on public policy issues (McGregor-Lowndes 2004).

The Board of Taxation handed its report on the workability of the proposed definition to the Treasurer in December 2003, and on 11 May 2004 the Federal Treasurer (Costello 2004) announced:

... [t]he common law meaning of a charity will continue to apply, but the definition will be extended to include certain child care and self-help groups, and closed or contemplative religious orders. The Government has decided not to proceed with the draft Charities Bill.

The Government enacted the *Extension of Charitable Purpose Act 2004* (Cwlth), which confined itself to enlarging the legal definition of charity for federal purposes to include child care, self-help groups and closed religious orders. These three extensions were relatively uncontroversial and all federal statutes (not just taxing acts) were subsequently modified by this legislation. However, the extension has not been taken up by any state jurisdiction to reform their definition of charity.

F.3 Charity law in the United Kingdom

In England and Wales, the process of charity law reform began with publication of a report by the National Council of Voluntary Organisations in 2001. The recommendations initially proposed in the Cabinet Office's Review of the Legal Framework for the Voluntary Sector were accepted by the government after a period of public consultation. The resulting Charities Bill was introduced to the Houses of Parliament in May 2005, received the Royal Assent in November 2006 and the first part of the *Charities Act 2006* duly came into force in February 2007.

Following the lead given by England and Wales, certain key outcomes were achieved by the law reform process in each of the UK jurisdictions, as evidenced in their respective new charity statutes, which reset a common baseline for charity law in the post-2001 period. The key components consisted of: statutory statements of core common law concepts and a new extended list of charitable purposes; changes to the regulatory framework including a new independent lead regulatory body, a Charity Appeals Tribunal, a Register of Charities and adjustments to the traditional roles of court and Attorney General; and an updating of the law relating to other matters such as trustees, fundraising, *Cy-Près*¹ and legal structures.

An important outcome of law reform in these jurisdictions has been the nature and extent of certain legislative changes made to the *Pemsel* purposes. These include the fact that in all jurisdictions, the task of determining charitable status no longer rests with the tax-collecting agency.

Prevention

The traditional emphasis on dealing exclusively with effects of poverty and distress rather than also with their causes has always been apparent in case law. An important outcome of the law reform processes in all UK jurisdictions has been a government concession that, in some instances, charitable purposes could accommodate ‘prevention’ as well as ‘relief’ — this has been particularly noticeable in all jurisdictions in respect of poverty and health.

Religion

A statutory definition of ‘religion’, first introduced by the 2006 Act in England and Wales, has since been replicated by an equivalent provision in Northern Ireland and by something similar in Scotland. This definition includes express reference to faiths that do not profess belief in a god as well as polytheistic religions.

Public benefit and Pemsel

Another outcome has been the removal of a variable application of the public benefit test to the *Pemsel* heads of charity (box F.1). ‘Charitable purposes’, as

¹ The legal doctrine of *Cy-Près* is a French term meaning ‘as close as possible’. When a gift is made by will or trust and it is no longer possible to follow the instructions of the donor, a judge, estate, or trustee may apply the *Cy-Près* doctrine to fulfil the donor’s wishes as nearly as possible. It is usually applied in the case of a gift made for charitable or educational purposes when the named recipient of the gift does not exist, has dissolved or no longer conducts the activity for which the gift is made (Farlex 2009).

defined under the new legislation, retains but extends the common law definition, given to it in *Pemsel* (that is, *Pemsel plus*) and subsequently interpreted by judicial precedent over many years and jurisdictions. In addition, all UK jurisdictions have committed to much the same set of ‘*Pemsel plus*’ charitable purposes. Their respective legislative provisions list, as separate purposes, a number of activities that have gained judicial recognition over time, largely as a consequence of the UK Charity Commission’s initiative. These include the advancement of animal welfare, the advancement of environmental protection or improvement, and the advancement of the arts, culture, heritage or science. The main exception is the promotion of amateur sport as a charitable purpose in its own right, rather than as a means of advancing other existing charitable purposes.

However, with remarkable consistency they also identify clusters of new purposes which cohere around clear social policy themes, revealing the matters central to government’s intended partnership arrangement with charity. These are:

- the advancement of human rights, conflict resolution or reconciliation, and promotion of multiculturalism
- the advancement of civil society
- the efficiency of charities
- the advancement of health and related services
- promoting the welfare of specific socially disadvantaged groups.

It is now mandatory to apply the public benefit test in respect of all charitable purposes in England and Wales, Scotland and Northern Ireland. All jurisdictions have modified this common law test by introducing statutory rules to guide interpretation and provide powers for further guidance to be supplied by the regulator. In both Scotland and Northern Ireland there is now a statutory requirement that, in applying the test, regard must also be had to any possible negative side effects.

As in England and Wales, the new lead regulatory bodies in Scotland and Northern Ireland will be responsible for establishing and maintaining a register of charities and overseeing the reporting regimes applicable to registered charities.

In all jurisdictions, the legislature has vested the new regulatory body with High Court powers and given it lead responsibility relative to the tax collecting agency. The creation of the Charity Tribunal for Northern Ireland and the Scottish Charity Appeals Panel, in addition to the Charities Appeal Tribunal already established in England and Wales, is intended to provide a cheap and swift alternative to the courts system for reviewing regulatory decisions.

F.4 Charity law in the Republic of Ireland

The Department of Community, Rural and Gaeltacht Affairs published *The Charities Bill 2007* in April 2007. The Bill was aimed at modernising charity legislation in the Republic. The *Charities Act 2009* was signed into law in February 2009, but did not come into force when the Act was signed. Instead, the Act will be introduced in stages by the Minister for Community, Rural and Gaeltacht Affairs.

The purpose of the Charities Act is to reform the law relating to charities in order to:

- ensure greater accountability
- protect against abuse of charitable status and fraud
- enhance public trust and confidence in charities and increase transparency in the sector.

The Charities Act allows for the creation of new institutions, such as a Charities Regulatory Authority, a Register of Charities and a Charity Appeals Tribunal and provides, for the first time in primary legislation, a definition of charitable purposes. Prior to the Act, the definition was based on case law with reference to the general categories established in the *Pemsel* case over a century ago.

Only organisations that pursue purely charitable purposes and provide services of public benefit will be eligible for inclusion in the new Register of Charities. The charitable purposes defined in the Act are:

- the prevention or relief of poverty or economic hardship
- the advancement of education
- the advancement of religion
- any other purpose that is of benefit to the community, which is specifically broken down in the Act to include:
 - the advancement of community welfare, including the relief of those in need by reason of youth, age, ill-health or disability
 - the advancement of community development, including urban or rural regeneration
 - the promotion of civic responsibility or voluntary work
 - the promotion of health, including the prevention or relief of sickness, disease or human suffering
 - the advancement of conflict resolution or reconciliation

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- the promotion of religious or racial harmony and harmonious community relations
 - the protection of the natural environment
 - the advancement of environmental sustainability
 - the advancement of the efficient and effective use of the property of charitable organisations
 - the prevention or relief of suffering of animals
 - the advancement of the arts, culture, heritage or sciences
 - the integration of those who are disadvantaged, and the promotion of their full participation in society.

Organisations that wish to present themselves to the public as charities, or raise funds directly from the public for charitable purposes, will have to seek and secure inclusion in the new Register of Charities. Organisations that are currently recognized as being charities by the Revenue Commissioners will be automatically included in the new register. Charities that are companies limited by guarantee will continue to be bound by all the requirements of company law (including those relating to the submission of annual audited accounts to the Companies Registration Office).

There will be no automatic entitlement to the tax relief schemes operated by the Revenue Commissioners who will continue to determine eligibility for tax relief for charities that are registered with the Charity Regulator.

The Act gives the Minister for Community, Rural and Gaeltacht Affairs powers to make regulations in relation to charitable fundraising, but it is intended in the first instance that codes of practice will be used to regulate the operational aspects of fundraising (Irish Social Finance Centre 2009).

F.5 Charity law in New Zealand

On 20 April 2005, the *Charities Act 2005* (NZ) was enacted. It retained the common law definition of charity as classified in the *Pemsel* case. The purpose of the Act was: firstly, to establish, for the first time in New Zealand's history, a Charities Commission; secondly, to provide for the registration of societies, institutions, and trustees of trusts as charitable entities; and, thirdly, to require charitable entities and certain other persons to comply with certain obligations. The intent behind the Act was to regulate and monitor the charity sector in New Zealand in order to increase public trust (Charities Commission 2009).

One role of the Charities Commission is to approve and register an applicant's charitable status, following which the entity will benefit from two fiscal advantages: exemption of the charitable trust from income tax; and gifts to the registered charitable trust will be exempt from gift duty, and donations may qualify for a tax credit for the donor. The *Charities Act 2005* is unique in that it gives special recognition to the contributions of Maori to their hapu or iwi.

In addition, the Office for the Community and Voluntary Sector (OCVS) was established in 2003. The purpose of the OCVS is '... to address overarching issues affecting the community and voluntary sector, and to raise the profile of the sector within government' (OCVS 2009). It is located within the Ministry for Social Development.

F.6 Charity law in Singapore

In a speech to Parliament on 7 July 1997, the Prime Minister of Singapore, Goh Chok Tong, outlined his vision for Singapore in the twenty-first century, emphasizing the need for a civil society where '... people participate actively and become involved in community and national issues'. In his speech he acknowledged that for civil society to grow, '... the government itself must be prepared to take a back seat, especially on local community issues, and allow some free play to develop'. It was acknowledged that one of the ways the government could promote the growth of a strong civil society was to review and revise the legal framework governing not-for-profit organisations.

The charitable sector in Singapore consists of a double tier: charities and Institutions of a Public Character (IPC). There are about 1900 registered charities. To be registered, a charity must satisfy the common law definition, as stated in *Pemsel*. There are about 500 IPCs in Singapore. IPC is a status conferred on a not-for-profit organisation in respect of which donors will be granted income tax deductions for any donation to it. They are generally required to be registered charities. An IPC must be beneficial to the community in Singapore as a whole rather than confined to sectional interests. The benefits of acquiring IPC status are a 2.5 times tax deduction for cash donations and approved in-kind donations (for example, computers, shares, artefacts, public sculptures, land and buildings).

In October 2005, following the considerable media exposure given to scandals involving the National Kidney Foundation and other organisations which highlighted problems of governance in the sector, the Inter-Ministry Committee on the Regulation of Charities and Institutions of Public Character was set up with a remit to develop a regulatory framework for charities. In its final report submitted

on 2 March 2006, which the government accepted, the committee recommended the appointment of a Commissioner of Charities (COC), under the purview of the Ministry of Community Development, Youth and Sports (MCYS 2009). The COC is assisted by six Sector Administrators, each overseeing the charities and IPCs within their sector's purview. These are: the Ministry of Information, Communications and the Arts, in respect of arts and heritage; the Ministry of Education, in respect of education; the Ministry of Health, in regard to healthcare; the National Council of Social Service, on social services/welfare; the People's Association, as regards community matters; and the Singapore Sports Council in relation to sports. Applications for charity or IPC status are assessed by the Commissioner of Charities or the relevant Sector Administrator.

The vision of the COC is of a well-governed and thriving charity sector with strong public support. Its strategy, comprising three strands, is:

- to ensure regulatory compliance;
- to promote good governance and best practice; and
- to be a proactive adviser to charities.

Data from the *Individual Giving Survey 2008* shows that public confidence in charities has increased from 83 per cent in 2006 to 90 per cent in 2008 (NVPC 2008).

In addition, there is the Charity Council, led by people sector representatives. The Council's objectives are to act as: *promoter*, by promoting good governance standards and best practices in the charity sector; *enabler*, by helping to build the capabilities of charities and enable them to comply with regulatory requirements and to be more accountable to the public; and as *advisor*, by advising the COC on key regulatory issues and proposals that have broad-ranging impact on the charity sector.

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