(1991) 21 VUWLR 41

A new definition for charity?

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The Report of the Working Party on Charities and Sporting Bodies recommended the establishment of a Commission for Charities in New Zealand, but at the same time concluded that no change should be made to the legal meaning of "charitable". This article is an assessment of these recommendations.

I INTRODUCTION

In November 1989 the Working Party on Charities and Sporting Bodies released a report to the Minister of Finance and the Minister of Social Welfare. The report considers various alternative methods of taxing charitable and sporting bodies,[1] and concludes that suggested alternatives to the existing taxation regime are deficient. Instead it prefers to retain the existing regime and to strengthen it to overcome abuses.[2] The terms of reference also included reporting about the establishment and role of a Commission for Charities.[3] The Working Party concludes that a Commission for Charities should be established to oversee the activities of charitable organisations, to register these organisations for taxation purposes, and to monitor resources within the sector.[4] The report furthermore discusses the definition of charity and whether it is possible to define charity in more detail.[5] It argues that changing the definition of charity is not the way to determine eligibility for preferential taxation treatment, and that the current definition of charity which has evolved over the years should apply in the meantime.[6]

The report raises two particular issues in respect of the definition of charity. First, who should make the decision as to whether an organisation is charitable or not? Secondly, should the present legal definition of charity be reformulated? This paper considers the first of these issues briefly and then discusses in greater detail the issue of redefining charity. It is argued that there is a clear need to redefine charity and that the Working Party is misled in concluding that the current definition of charity should continue to apply.

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1 *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Government Printer, Wellington, New Zealand, 1989).

2 Above n1, 26.

3 Above n1, ix.

4 Above n1, 59.

5 Above n1, 77, 78, 79, 82, 83 and 84.

6 Above n1, 79.

II THE PRESENT LAW

A *Who Decides Whether an Organisation is Charitable?*

For practical purposes, the Inland Revenue Department decides what is charitable when it considers whether to grant tax exempt status to an organisation. However, if a decision made by the Inland Revenue is challenged, it may be appealed to the High Court. Ultimately it is a court that will decide what is and what is not a charity.

B *The Legal Definition of Charity*

The basis of the legal definition of charity is the preamble to the Charitable Uses Act 1601.[7] In *Income Tax Special Purposes Commissioners* v *Pemsel*[8] Lord Macnaghten summarised the charitable purposes from the preamble in terms of four classes:

1) Trusts for the relief of poverty;
2) Trusts for the advancement of education;
3) Trusts for the advancement of religion; and
4) Trusts for other purposes beneficial to the community not falling under any of the preceding heads.

The preamble does not purport to be an exhaustive list of charitable purposes, but provides general guidance as to the kind of purpose which should be regarded as charitable. From this list of purposes the modern concept of charities has evolved. Traditionally the courts have taken the approach of ascertaining whether a particular purpose is sufficiently analogous to the preamble. Recently a more flexible view has been adopted, although it has not been met with universal approval.[9] This view permits the court to consider if the purpose is "within the spirit and intendment" or "within the equity" of the statute. In this way, the connection with the preamble has become less and less direct. Russell LJ in *Incorporating Council of Law Reporting for England and Wales* v *A-G*[10] suggested that a purpose beneficial to the community should be regarded as charitable under the fourth head, unless it was a purpose which

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7 "The relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; the repair of bridges, ports, havens, causeways, churches, seabanks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; the marriage of poor maids; the supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes".

8 [1891] AC 531.

9 See *Re South Place Ethical Society* [1980] 1 WLR 1565, where Dillon J expressed some doubts about this flexible approach, preferring the approach based on analogy with the preamble, and *New Zealand Society of Accountants* v *Commissioner of Inland Revenue* [1986] 1 NZLR 147, 157 where Somers J expressed similar concerns about a more flexible approach.

10 [1972] Ch 73, 88.

could not have been intended by the draftsman of the Elizabethan statute even if he had been aware of the changes which had taken place in society since 1601.

There is usually a further requirement cited, that the purposes must be for the public benefit.[11] If a purpose falls within one of the four classes *and* it is for the public benefit it will be charitable. Lord Macnaghten's classification has largely superseded the 1601 preamble although in cases under the head of "purposes beneficial to the community" the courts still refer to the preamble for guidance.[12] It is this head which has caused most problems and has given rise to a large volume of case law.

III WHO SHOULD DECIDE WHETHER AN ORGANISATION IS CHARITABLE?

The Working Party recommends that a Charity Commission be established in New Zealand.[13] It would be similar to the Charity Commission in England and Wales, which was set up in 1960. The latter has the general function of promoting the effective use of charitable resources by encouraging the development of better methods of administration. It maintains a central register of all charities in England and Wales. Registration of an organisation by the Commission is confirmation of its charitable status and as a consequence the Commission must be satisfied beyond doubt that the organisation can properly be defined as a charity in law The decisions about charitable status are made in accordance with the present legal definition of charity and appeals lie to the High Court against any decision made by the Commission regarding registration. Although the Working Party does not specifically say so, it presumably envisages that if a Commission were set up in New Zealand, appeals would similarly lie to the High Court against any decision made by the Commission regarding registration. So, as in England and Wales, it would still ultimately be the court which would decide what is and what is not charitable. The Commission would not in that respect be a totally independent body.

It has been suggested by some writers[14] that the judiciary is perhaps not the appropriate body for making these decisions and that a different body should be established. The desire to have an independent body making decisions about what is charitable is probably based on the belief that the judiciary does not have the ability to chart changes in social need and act in effect as the arbiter of social policy at any given

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11 This requirement does not apply to gifts/trusts etc which are for the relief of poverty: see *Dingle* v *Turner* [1972] AC 601.

12 See *Accountants* case, above n9, and *Centrepoint Community Growth Trust* v *CIR* [1985] 1 NZLR 673.

13 Above n1, 59, 63.

14 See, for example, CEF Rickett "Charity and Politics" (1982) 10 NZULR 169; JC Brady "The Law of Charity and Judicial Responsiveness to Changing Social Need" [1976] Northern Ireland Legal Quarterly 198; and J Hackney "The Politics of Chancery" [1981] Current Legal Problems 113, 127-128.

time. Its members seem to prefer the application of rigid settled rules. Brady comments, for example, that the courts[15]

> ... rightly take the view that it is the business of the legislature to mediate social policy and it is not without significance that our law of charity remains firmly rooted in the last legislative attempt to do so in the early seventeenth century.

But is it so obviously the job of the legislature to mediate social policy? Certainly it is often appropriate for the legislature to lay down some general principles to guide the judiciary in its decision-making. It is, however, inevitable that judges will sometimes be left with a certain degree of discretion. In many other areas judges do make social and moral value judgments and have developed a high degree of social acumen and courage.

Perhaps, after all, the judiciary does have to accept the challenge of making socially responsive decisions in the area of charity. It should not be aiming to escape this arena of value judgment. The law is not a totally rigid and objective body of rules. It must be flexible enough to permit change. If the courts are given some clearer legislative guidelines for the discharge of their responsibility in deciding what is and what is not charitable, they should then be capable of meeting the challenge successfully.

However, it is sensible to set up a system of registration of charities and to establish a body separate from the courts to take care of the actual administrative task of this registration. A Charity Commission would be a highly appropriate body. Complaints about any decision made by the Commission regarding registration could be made to the High Court.

IV WHAT ABOUT THE LEGAL DEFINITION OF CHARITY?

The Working Party concludes that charity is not in need of redefinition. It does not, however, discuss any of the very real problems within the present definition of charity, except to quote from the recent United Kingdom White Paper on charities the view that the law's developments in relation to the scope of charity "are not always tidy and can sometimes be confusing even to experts ...."[16] This section considers some of the problems with the present definition of charity, and argues that there is a clear need for redefining charity.

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15 Above n14, 203.

16 Above n1, 82, quoted from *Charities: A Framework for the Future*, British Government White Paper, presented to Parliament by the Secretary of State for the Home Department, May 1989 (HMSO, London, 1989) 6.

A *General Problems with the Present Definition*

The present definition of charity is not really "a definition" at all. *Pemsel's* four categories are merely a classification. The terms used are extremely vague and give no enunciation of a general principle to be used in determining what is and is not a charitable. The fourth head "other purposes beneficial to the community" is particularly vague and is only applicable with reference to the preamble to the Charitable Uses Act 1601 and the relevant cases. However in some cases it is hard to determine anything but a remote association with the objects in the preamble. For example, in *Re Dupree's Trusts*[17] Vaisey J held charitable a gift for the promotion of an annual chess tournament for boys and young men in Portsmouth and yet none of the purposes in the preamble seem to bear any resemblance to promoting chess. Furthermore, the preamble itself is not a definition but rather a list of objects which reflects the main areas of social need and concern at the time when the Act was passed. It was described by Lord Macnaghten as "a sort of index or chart".[18]

One of the main difficulties in present charity law is the need to find an analogy with the preamble, or sufficient analogy with some decided case in which a previously sufficient analogy has already been found. The preamble is from an ancient and obsolete statute. The courts must have regard to what Queen Elizabeth's legislators laid down nearly 400 years ago. It is not surprising that the courts have sometimes failed to adapt to changing social needs and circumstances. Since 1601, ideas and needs in society have been utterly transformed. Not only is the law tied down to these analogies but it also has no expressly formulated policy to guide the court in its decision. The result has been strained analogies and general confusion. In many cases the decisions are based on unjustified rules and verbal subtleties rather than on any recognised principle. The following two sections of the paper focus on two specific areas of charity law: Religion and Politics. These two areas are particularly problematic and are used to illustrate the difficulties with the present definition of charity.

B *Religion*

The advancement of religion has always been considered a charitable purpose, although for historical reasons the preamble to the 1601 statute only indirectly mentions religion by its reference to "the repair of churches".[19] The law has, however, come a long way from the 1601 Protestant concept of religion and is prepared to recognise as charitable the advancement of some strange beliefs.[20] The analogies with the preamble are becoming increasingly strained.

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17 [1945] Ch 16.

18 Above n8, 581.

19 The historical reasons for not including religious purposes were based on the desire to avoid the intervention of variable religions according to the pleasure of succeeding princes. The historical reasons are discussed more fully by F Moore "Reading Upon the Statute of Elizabeth" in G Duke *Law of Charitable Uses* (1676) 131, 132, and by Gareth Jones *History of the Law of Charity 1532-1827* (1969) 232-234.

20 See, for example, *Thornton* v *Howe* (1862) 31 Beav 14.

1 Neutrality

The law makes no distinction between one sort of religion and another. For example, trusts for the advancement of Hindu, Sikh, Islamic and Buddhist religions have been registered as charitable in England.[21] The law also assumes that any religion is at least likely to be better than none.[22] There are two concerns with this type of approach. The first concern is that charitable status is given to religious cults (such as the Divine Light Mission in England)[23] which are obscure and sometimes dangerous movements. Some of these religious cults have an influence on their adherents which is tantamount to brainwashing. The difficulty seems to be that the judges are so concerned with not weighing up the merits of one religion as against those of another that they are neglecting the fundamental question of public benefit. *Pemsel's* fourth category is the advancement of religion, but that does not mean that the advancement of any religion is charitable. The element of public benefit must still be satisfied.

The second concern about the courts' approach is that it allows the advancement of foolish opinions to be granted charitable status. One example of this was *Thornton* v *Howe*.[24] In this case a trust for the publication of the writings of Joanna Southcott, who claimed that she was with child by the Holy Ghost and would give birth to a new Messiah, was granted charitable status. The judge thought that Joanna's views were decidedly odd but said that a religious trust would be charitable if[25]

> ... the tendency were not immoral and although this court might consider the opinions sought to be propagated foolish or even devoid of foundation.

Where did the question of public benefit come into the decision? Did the judge actually consider the propagation of foolish views devoid of foundation as being for the public benefit, or has the insistence that the law stand neutral as between religions led to a situation where the public benefit element is no longer so significant? The judge did of course point out that the religious tenets cannot be immoral if the trust is to be charitable, but it does not follow that merely because a trust is not immoral it is necessarily for the public benefit.

Further concern has been expressed about the claim that the law is neutral as between religions. This concern is not that a neutral approach will allow too many religions to be granted charitable status, but rather that the claim of neutrality is a false claim. Michael Blakeney expresses this opinion in his article "Sequestered Piety and Charity - A Comparative Analysis."[26] He argues that contrary to its avowed policy of

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21 See above n16, 7.
22 *Gilmour* v *Coates* [1949] AC 426, 457-458 per Lord Reid.
23 House of Commons Parliamentary Papers 23, 1974-75, 387.
24 Above n20.
25 Above n20, 19.
26 (1981) 2 Journal of Legal History 207; see also CEF Rickett "An Anti-Roman Catholic Bias in the Law of Charity?" [1990] Conveyancer 34.

even-handedness, the law relating to religious charities exhibits a Protestant Christian bias, in that it requires proof of public benefit. The article, however, fails to explain what it is that is charitable about a trust which is not for the public benefit and why such a trust should be encouraged.

2 Humanism

It has been suggested that humanism and possibly other atheistic and agnostic philosophies should be upheld as charitable trusts.[27] In terms of *Pemsel's* four categories it would be hard to fit them into the "advancement of religion" category. If religion means a system of faith then perhaps it can be argued that humanism is a religion, because it involves faith in the importance of common human needs and an abstention from profitless theorizing. However if, as is more likely, religion means the human recognition of supernatural powers and especially of a God or gods, then humanism does not qualify as a religion. Humanism is the belief in man as a responsible and progressive intellectual being. It is not the belief in a god of any kind. In *Re South Place Ethical Society*[28] the view that a system of belief which did not involve faith in a diety could constitute a religion was rejected. However the position of Buddhism was deliberately left open. Buddhism is generally accepted by society as being a religion but it may not involve a belief in a god.

In the New Zealand case *Centrepoint Community Growth Trust* v *CIR*,[29] the court had to consider a trust which had as one of its principal purposes the advancement of the spiritual education and humanitarian teaching of all the messengers of God, and in particular of one Herbert Thomas Potter. The court held the trust charitable because it advanced religion. It was made clear that one of the reasons the trust was considered religious was because its spiritual attitudes and activities involved a belief in a supernatural being, thing or principle.[30] So it was essential to the concept of religion that the teachings involved beliefs relating not only to man's relationship to man but also to man's relationship to the supernatural.[31] The case shows just how difficult it can be to make this distinction when the evidence from the members of the group involves statements such as "... each one of us can contact the God within us"[32] and "[t]he religion at Centrepoint goes so far ... to state that men or women are part of God, that what I do in relationship to my fellow man I do as a son of God or a God given person".[33] It is difficult to distinguish beliefs in a God from beliefs in man when they are couched in these terms.

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27 See A Scott *The Law of Trusts* (3rd ed, 1967, supplements to 1970) para 377; Goodman Report (1976) 23 para 53.

28 Above n9.

29 Above n12.

30 Above n12, 698.

31 See *Re South Place Ethical Society* above n9, 924, where Dillon J takes the same approach.

32 Above n12, 687.

33 Above n12, 687.

A possibility also exists of classifying humanism as charitable under the second head in *Pemsel's* case, "advancement of education" or, under the fourth head, "other purposes beneficial to the community". The problems here are that the categories are still tied down to analogies with the 1601 preamble and any decided cases. Another difficulty is that the courts are unlikely to consider humanism as being for the public benefit. In *Bowman* v *The Secular Society*[34] Lord Parker seemed to suggest that a trust for a society with humanist objects would not be charitable. Picarda in his textbook[35] expresses the opinion that humanism should not be granted charitable status under any head of charity. His first reason for this view is that humanism is adverse to the very foundation of religion so cannot be for the public benefit. However, in an age where intellectual freedom is valued, it seems odd to dismiss all possibility of humanism being for the public benefit just because it involves a belief system with no God. Some humanist trusts involve principles which promote the highest social and moral standards. The public benefit in such a trust would seem to be more obvious than the public benefit in propagating foolish views devoid of foundation, as in Joanna Southcott's case. The second reason Picarda puts forward for denying humanist trusts charitable status is based on his view that such a trust would be political. Objections to denial of charitable status on such grounds are discussed in the section of this paper which deals with political activity.

The presumption is that any religion is better than none, but at times the law seems to have lost track of why this is so. The reason religion is usually charitable is because it is part of the ethic of religion to encourage service and giving. Religion can therefore be a fundamental source of charity and advancement of religion is certainly for the public benefit.[36] The question which should be addressed is not whether a particular organisation is religious but whether it is for the public benefit regardless of whether it is labelled as religious. The Working Party on Charities and Sporting Bodies, in reaching its conclusion that there is no need to redefine charity, fails to take into account any of these difficulties with the definition in regard to religion.

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34 [1917] AC 406, 445-446.

35 Hubert Picarda *The Law and Practice Relating to Charities* (1977) 57.

36 Cf *Gilmour* v *Coates* [1945] AC 426 where a religious trust did not involve advancement of religion. The case involved a gift to a closed order of purely contemplative nuns and was held not be charitable.

C *Politics*

A second area that the Working Party fails to consider is the judge-made rule that political purposes are not charitable.[37] The rule is a blanket one,[38] and no inquiry is permitted into whether the purpose falls within the spirit and intendment of the preamble, nor is an inquiry permitted into the benefits which the activity may bestow on the public. The potential that the activity is "political" is simply made the basis for refusing charitable status. However, it is arguable that none of the reasons given for this blanket rule adequately justify its existence. In all other areas of charity law the same tests are applied; ie consideration is given to the preamble and to questions of public benefit. Regardless of any consideration into whether these tests need clarifying or improving, the fact still remains that no good reason has been given for treating political purposes any differently from other purposes in charity law.

1 Political purposes which are ancillary to main purposes

In most of the cases the rule that political purposes are not charitable has been applied so that if a group is involved in any political activities it is not granted charitable status. The courts have usually been very reluctant to be seen to endorse any political purpose. However, in *Re Koeppler's Will Trusts*[39] the approach taken was to look at the *dominant purpose* to determine whether the trust was charitable. The political purposes were there regarded as merely ancillary to the dominant purpose which was considered by the court to be educational and therefore charitable. This approach is commonly taken by the courts in the United States.[40] Lords Porter and Normand in *National Anti-Vivisection Society* v *IRC*[41] also recognised that the existence of some political motive is not necessarily fatal.

This approach leads to inconsistencies in the cases because of the difficulty in determining what the dominant purposes of a particular trust are. In many of the cases where the court has held a trust to be political and therefore non-charitable it could be argued that political purposes were actually ancillary to some other dominant purpose. For example, in the *Anti-Vivisection Society* case the main purpose could be seen as prevention of cruelty to animals and in *Molloy*[42] the main purpose could be seen as the prevention of abortion. In both cases the purpose of seeking maintenance or alteration of the law could be argued to be ancillary to these main purposes, because it was merely a means of achieving an end. The distinction between ancillary and dominant purposes has caused considerable difficulties for charities involved in relief of poverty abroad. They have not been content to limit their activities to alleviating poverty directly, believing that more could be achieved by attacking the underlying causes of poverty

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37 See, for example, *Bowman*, above n34.

38 The only exception to the rule is if the political purposes are merely ancillary to some other charitable purpose. The limits and difficulties to this exception are discussed herein.

39 [1986] Ch 423.

40 See, for example, *Vanderbilt* v *Commissioner of Internal Revenue* 93 F (2d) 360 (1937).

41 [1948] AC 31, 55, 77.

42 *Molloy* v *Commissioner of Inland Revenue* [1981] 1 NZLR 688.

which may lie in the social structure of the countries concerned or in the policies of their governments.[43] In doing this they have often endangered their charitable status.

2 Reasons given for political purposes not being charitable

Propaganda

One reason for the courts denying political purposes charitable status is said to be that it is not for the public benefit to have pressure groups, propaganda campaigns, lobbying and the supply of distorted information which make independent judgment difficult.[44] There are two problems with this reasoning. First, there is a fine line between propaganda and education. Sheridan put it this way:[45]

> There is a thin line, difficult to discern and possibly without great legal significance, but there all the same, between trying to convert people to a point of view and informing them of its existence and of the reasons for it, between propaganda and education.

Secondly, this reason does not justify the denial of charitable status to all political activities, since not all political activities involve corrupt lobbying and the supply of distorted information. It may be charitable to advocate change in the law by putting forward suggestions on the basis of reasoned argument, but not charitable to put one's viewpoint forward by resorting to coercive techniques such as threats and bribes. The question should still be asked in respect of each particular case whether there is any benefit to the public.

The court should expound laws as they stand

Another reason for denying charitable status is that the court on deciding whether a trust is charitable must decide on the principle that the law is right as it stands, since to do otherwise would usurp the function of the legislature.[46] This reason is not very convincing when one considers that judges themselves change the law from time to time in their departing from precedents and in distinguishing and overruling decided cases. According to Rickett, "the whole essence of the common law is that judges participate over and are engaged in the development of the law *by change*".[47] Lord Atkin in *Donoghue* v *Stevenson*[48] was, for example, breaking new ground. If judges did not make such decisions and never took any notice of changing social conditions it would result in the stultification of the law.[49] This reason does not, therefore, seem adequate as a basis for denying charitable status to political trusts.

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43 Elizabeth Cairns makes this point in her book *Charities: Law and Practice* (1988) 22.

44 See *Re Hopkinson* [1949] 1 All ER 346, 350, where it was held that propaganda masquerading as education is not charitable.

45 LA Sheridan "The Political Muddle - A Charitable View?" (1977) 19 Mal LR 42, 70.

46 Above n13, 336 and see *Tyssen on Charitable Bequests* (1898 ed) at 176.

47 Above n14, 172.

48 [1923] AC 601.

49 See, further, LA Sheridan "Charity versus Politics" (1973) 2 Anglo-American Law Review 47, 57.

No sufficient means of judging public benefit

A further reason for denying charitable status to political purposes was given by Lord Parker in *Bowman*[50] and applied in the *Anti-Vivesection*[51] case and in *McGovern* v *Attorney-General*.[52] Lord Parker said: "... the court has no means of judging whether a proposed change in the law will or will not be for the public benefit".[53] This is a strain on credulity. In all other areas of charity law judges must make a decision on the question of public benefit;[54] why should political trusts be any different? The law thus arbitrarily discriminates against many worthwhile enterprises on the basis of alleged difficulties in judging public benefit. Public benefit is often a difficult question to decide, but the court has a duty to consider the question on the evidence available in each case. Nobles suggests that the rule against political purposes being charitable is merely a formula for allowing the courts to avoid adjudicating on issues regarded as controversial or "political".[55]

The argument becomes even less convincing in light of the fact that in some of the cases involving political purposes the courts do in fact make judgments on public benefit. In the *Anti-Vivesection* case the court clearly did make a judgment that vivisection was for the public benefit. In *Molloy* Somers J concluded that the public good in restricting abortion was not so self evident as to achieve the prerequisite of public benefit.[56] This seems to be the kind of judgment that Lord Parker claims it is impossible for a judge to make.

In respect of some issues it is hard to believe that the court has no means of judging the public benefit. For example, promotion of a change in laws which permit slavery or torture or cruelty to animals can surely be classed as within the spirit of the preamble to the Charitable Uses Act and as being for the public benefit. It is obviously more difficult when the issue is a more controversial one, such perhaps as abortion or fluoridation of water. However, even in these cases the court has a duty to decide the question of public benefit, and this includes considering the benefit gained from the fostering of public debate about important issues in society. As Rickett rhetorically asks in relation to the *Molloy* case:[57]

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50 Above n34.
51 Above n41, 42.
52 [1982] Ch 321, 334.
53 Above n34, 442.
54 Harvey Cohen makes this point in "Charities - A Utilitarian Perspective" [1983] Current Legal Problems 241, 255. He points out that this is particularly so in the fourth class of Lord Macnaghten's classification.
55 R Nobles "Politics, Public Benefit and Charities" (1982) 45 MLR 704, 707.
56 Above n42, 697.
57 Above n7, 171. See also RBM Cotterell in "Charity and Politics" (1975) 38 MLR 471, 474.

> Is there not some considerable public interest in fostering a full and committed debate on the issue of abortion? Is there not some considerable public interest in fostering any interest that people take in the law and its content?

Public debate provides an opportunity for an exchange of ideas and in particular it keeps governmental authorities abreast of the varied and complex issues coming before them. There is however a danger that in some cases only one viewpoint would be aired publicly.[58] However this does not mean that the privileges of being a charity would be operating to favour one side in a controversy. The public benefit would exist as long as both sides of the debate had the *opportunity* to be aired publicly.

Political impartiality

One reason for denying political activities charitable status, which is often referred to in cases involving promotion of a particular political party,[59] is that judges do not want to prejudice their reputation for political impartiality. This however is not a reason for charity and politics being per se incompatible but rather a reason why judges do not want to be involved in the task of selecting those political purposes which are compatible with charitable principles and rejecting those which are not. In actual fact the court need not make a decision on the worth of the particular political cause if it decides that the public benefit derives from the public debate on controversial issues. In any case, judges do make political, moral and social judgments in many of the cases they decide in other areas of law.

Charities with political involvement are often motivated by a desire to serve humankind. No adequate reason has been given as to why they should be denied privileges which are given to religion, the arts and education which also seek to serve humankind in differing ways. As Clark points out, the only difference is that the former aims its message directly to government which often leads to the most immediate solution to society's problems.[60] Real change in the world is highly political and as Bright comments:[61]

> They [the Charity Commissioners] state, for example, that charities must avoid "seeking to eliminate social, economic, political or other injustice". Surely this is the essence of what most people would regard as charitable activity!

D *Redefinition*

The Working Party on Charities and Sporting Bodies does not refer to any of the types of problems with regard to the present definition of charity as discussed above. Its report concludes that the definition of charity should not be reformulated and thus that

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58 See Elias Clark "The Limitations on Political Activities: Discordant Note in the Law of Charities" (1960) 46 Virginia LR 439, 458.

59 *Anglo - Swedish Society* v *IR Comrs* (1931) 47 TLR 295.

60 Above n58, 452.

61 Susan Bright "Charity and Trusts for the Public Benefit - Time for a Rethink?" [1989] Conveyancer 28, 32.

the current definition should continue to apply.[62] The report does, however, comment that if a Commission for Charities is established that body could then take a closer look at the definition.[63]

The Working Party is not alone in its view. Some academic writers have claimed that redefinition is unnecessary.[64] The recent British White Paper also deals in part with the issue of redefinition. The Paper concludes that redefinition is fraught with difficulty and might put at risk the flexibility of the present law. It is surprising that the White Paper can come to this conclusion after admitting that the law's development in this area is "not always tidy and can sometimes be confusing even to experts,"[65] and then going on to say:[66]

> It is perhaps not surprising that, as the threads reaching back to 1601 get longer and as the analogies which the courts employ become more extended, so the rationale for decisions on charitable status should not always be immediately apparent. This has undoubtedly led to a degree of uncertainty about the interpretation of the law which can inhibit innovative bodies from seeking charitable status.

One wonders how the White Paper can acknowledge such major defects and then decide that there are no advantages in attempting to redefine charity. It is not satisfactory to be critical of the present state of the law and then neglect the challenge of reforming it. This is a defeatist attitude. The Working Party on Charities and Sporting Bodies has reached a similarly defeatist conclusion in its report, although unlike the White Paper it can be partly excused on the grounds that the definition of charity was not part of its terms of reference.

Numerous writers on the other hand feel there is a clear need to redefine charity. As long ago as 1933 Bentwich considered the clearest and simplest remedy for the evil of litigation on charity would be for Parliament to enact a modern definition of charity.[67] In 1953 Fridman[68] expressed the same views. In 1975 a paper by the Charity Law Reform Committee expressed the view that the law was plainly unsatisfactory and that an entirely new approach was needed.[69] Brady[70] also favoured redefinition and regarded those critical of a new definition as a counsel of despair. Judges have also commented

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62 Above n1, 79.
63 Above n1, 91.
64 See, for example, GW Keeton "Charity Law in a Muddle" [1949] Current Legal Problems 86, 91; LA Sheridan "The Movement for Charity Reform" (1976) 2 Malayan Law Journal lii; and R Bentham "Charity Law and Legislation: Recent Developments" [1962] Current Legal Problems 159, 162.
65 Above n16, 6.
66 Above n16, 6.
67 N Bentwich "The Wilderness of Legal Charity" (1933) 49 LQR 520, 526.
68 GHL Fridman "Charities and Public Benefit" (1953) 31 Can Bar Rev 537.
69 English Charity Law Reform Commission "Charity Law - Only a New Start Will Do", reprinted in the House of Commons Parliamentary Papers 23, 1974-75, 48.
70 Above n14, 215.

on the lack of logic and consistency in the case law.[71] Relying on judicial valour to develop the law of charities pragmatically against the background of contemporary need has so far been a failure, as Brady points out:[72]

> Judicial pragmatism in our legal system has always been strongly tempered by judicial timidity and conservatism, and this has been demonstrably so in the development of our law of charity.

Bentwich supports this point: "We cannot expect judicial interpretation to unravel the judicial knots".[73] The legal definition of charity is clearly not satisfactory and it is time for a new definition to be sought.

E A Definition Based on Public Benefit

One possible approach for reformulating the definition of charity would be to enact a statutory definition based on "public benefit".[74] This would be a considerable improvement on the present law. First, it comes closer to the popular meaning of the word "charity". This is desirable, for as Bright comments:[75]

> ... if public confidence in the charitable sector is to be maintained it is surely important for the definition of charity to match the public conception of what charity is.

Secondly, such a definition is not vastly different from the old definition. It is however clearer, simpler and no longer related to the 1601 preamble. Relief of poverty, education and religious purposes which are for public benefit will still be charitable. The fourth category in *Pemsel's* case will also be the same apart from the need as at present to tie it to the 1601 preamble. Fortunately, the fourth category has been stretched to meet changing social needs but a new definition based on public benefit would remove the need for "stretching" the category and hiding decisions behind artificial analogies with the preamble and with decided cases.

Objects which were of great importance in 1601 are not nearly so important today. Social conditions have changed. The marriage of poor maids is no longer a concern in modern New Zealand. Many of the purposes referred to in the 1601 preamble which involve helping the needy have now been taken over by the welfare state. The state has now largely taken over the role of educating the young and giving pensions to the aged. The repair of bridges, ports and highways is in the hands of government agencies.

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71 See, for example, *Incorporated Council of Law Reporting* v *A-G* [1971] Ch 626, 647.

72 Above n14, 203.

73 Above n67, 526.

74 In *Incorporating Council of Law Reporting* v *A-G*, above n10, Russell LJ considers an approach based on public benefit to be the correct one, although he prefers to leave open a line of retreat based on the equity of the statute of Elizabeth I (at 88).

75 Susan Bright "Taking the Lid off Charity Fraud" (1989) 139 NLJ 711, 712.

Today new purposes are considered charitable. Social justice, helping the disadvantaged, human rights and political consciousness are all new charitable impulses.[76]

Another advantage of having a definition of charities based on "public benefit" or purposes beneficial to the community is that it ensures that decisions are made according to this relevant and rational principle. Presently the important issue is often the last in the line of questions asked. What is educational? What is religious? What is political? The obsession with the meaning of these words is clouding the real issue: what is charitable? If it is agreed that charitable activity is activity done voluntarily for the public benefit, then the questions can become relevant again. With a purported educational trust the concern will not necessarily be with whether the trust is educational (although if it is then the public benefit almost always follows) but the primary question would be whether the trust is for the public benefit. Rather than having to agonise over whether a trust providing squash courts to a college is educational, the task becomes that of proving that the squash courts are for the public benefit.[77] And instead of having to discuss whether a trust is non-political in order for it to have charitable status the task should be to prove that regardless of or even because of its political nature the trust is for the public benefit. Presently there is of course the fourth category of *Pemsel's* case as a general public benefit category but this is to be used with reference to 1601 preamble, so even here the question of public benefit is shackled to the Elizabethan era and the relevant question again becomes subsumed by irrelevant considerations, usually trying to establish the relevant analogy.

On the whole, the question of public benefit should be approached afresh. The question should be reapplied to each new set of facts and with regard to society's values at the time. However, to some extent previous decisions would be useful in helping judges to make the decision of what is for the public benefit, but case law should be used with care. Cases which emphasise, for instance, the analogies with the 1601 preamble or the rule against politics should be ignored.

The concept of public benefit involves two closely related issues. First, are the purposes in fact beneficial, and secondly, are the purposes beneficial to the public? Traditionally the first of these questions has been tied to the 1601 preamble and the *Pemsel* categories. With a new definition of charities based on public benefit the 1601 preamble will no longer be relevant, but obviously purposes such as education, relief of poverty, and most religions will still be considered to be for the public benefit. What is beneficial to the public is something which will change through time and charity law will be flexible enough to keep up with these changes.

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76 Vera Houghton discusses these changes in charitable impulses in an article "The Changing Role of Charities" in the book *Perimeters of Social Repair* (eds WHG Armytage and J Peel) (1978) 17-29.

77 So, for example, in *Re Chapman* (Unreported, High Court, Napier, 17 October 1989, CP 89/87) the task of Greig J would have been to decide whether a trust for the purpose of providing a grandstand at McLean Park, Napier, was for the public benefit. Instead, his Honour in this case took the approach of deciding whether the trust was for sporting purposes or for public recreation.

The second issue focuses on whether the purpose is of a sufficiently public nature and the present case law is useful in regards to this issue. To be of a sufficient public nature the trust must be for the benefit of the public or a section of the public as opposed to for the benefit of particular individuals or a fluctuating body of private individuals. In *Verge* v *Somerville*[78] Lord Wrenbury said that for a trust to be for the public benefit it had to be for "an appreciably important section of the community." In *Oppenheim* v *Tobacco Securities Trust Co Ltd*[79] it was said that to be charitable the number of possible beneficiaries must not be numerically negligible and that an aggregate of individuals ascertained by reference to some personal nexus, such as blood or contract, was not the public, or a section of the public for this purpose. Thus in *NZ Society of Accountants* v *Commissioner of Inland Revenue*[80] fidelity funds which benefited persons whose money had been stolen by an accountant or solicitor were held not charitable. The persons benefited as individuals and only as a result of the contractual or fiduciary relationship between the defaulting practitioner and the claimant. In the *Accountants* case, however, Somers J did discuss the possibility of a slightly different test, that whether a trust is public or private is a matter of degree in which the existence of a tie of blood or contract is but a feature to be considered.[81] This was the approach approved obiter by at least a majority of their Lordships in *Dingle* v *Turner*.[82] This approach explains why the relief of poverty trusts do not fail merely because the class to be benefited is defined by a personal nexus of some type. This is because the purpose of relief of poverty is of such an altruistic nature that there is an indirect benefit to the rest of the public. Similarly the cases about cruelty to animals are justified on the grounds that prevention of cruelty promotes public morality.[83] This may also be the approach which was taken by Richardson J in the *Accountants* case when he considered whether the public as a whole benefited from the fidelity funds. He concluded that the peace of mind that the public may gain from the awareness that if at some time their money is stolen by a lawyer or accountant they will have ultimate recourse to a fidelity fund is too remote and nebulous to be regarded as beneficial to the public.[84] Presumably if Richardson J had found some real, albeit indirect, benefit to the public he would have held the trust charitable regardless of the fact that the purpose only directly benefited a group of individuals ascertained by personal nexus. This approach seems preferable to the strict *Oppenheim* principle. The more flexible approach allows the courts to look beyond the personal nexus identification and consider how many individuals are benefitting and whether the rest of the public is somehow benefited indirectly in such an altruistic or eleemosynary way as to enable the purposes to be properly described as charitable.

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78 [1924] AC 496, 499.
79 [1951] AC 297.
80 Above n9.
81 Above n9, 159.
82 Above n11.
83 See *Re Wedgewood* [1914-15] All ER Rep 322. See for a recent New Zealand example, *Re Howey* (Unreported, High Court, Auckland, 7 September 1989, M 1321/87 Greig J).
84 Above n9, 153.

The approach taken by Somers J in the *Accountants* case is also a flexible one. He was of the opinion that it did not matter which of the tests for public benefit were used. If the test were one of public benefit the fidelity funds were precluded from qualifying as charitable. Somers J did not consider the funds to be of benefit to a sufficient section of the public because the prospective beneficiaries were a transient, non permanent number of individuals whose only common characteristic was that they deposited money with a solicitor or accountant who then stole that money. He was also concerned that the prospective beneficiaries could include companies which are inanimate persons. There have been no cases in which companies have been held the object of charity.[85] The approach taken by Somers J is fairly pragmatic and although he does not commit himself to one particular test for public benefit it seems his approach is to consider the trust as a whole and that whether it is private or public is a matter of degree.

It is rare, however, for the courts to go as far as granting charitable status to a trust which is of indirect benefit to the whole community but not also tangible and directly beneficial to some other section of the community, however small. The only trusts which the courts have granted charitable status to on this basis are those for the prevention of cruelty to animals.[86] However, in the future, if a definition were based on public benefit, perhaps the courts would become more willing to consider the possibility of granting charitable status to trusts which confer a significant indirect benefit on the whole community.

To some extent a decision as to public benefit will be influenced by the purposes of the trust. Lord Somerville mentioned this in *Baddeley* v *IRC*[87] and pointed out that a trust for the promotion of religion benefitting a very small class could be held charitable but that a recreational trust for exclusive use by the same class would not be charitable (although if it was for the use of the whole community it would be). Although Lord Somerville does not explain why this is so, it is probably because the religious trust not only confers a direct benefit on the small class it also confers an indirect benefit on the rest of the community (eg by increasing moral standards and encouraging people to give to others). The recreational trust on the other hand is of much less significance in terms of indirect benefit to the public so it needs to benefit directly a significant section of the community in order to satisfy the public benefit requirement.

The question of whether or not a trust can fairly be said to be for the public benefit is a question of degree. A pragmatic approach to ascertaining public benefit is required along with a willingness to assume the responsibilities of discretion by considering the unique circumstances of each individual case in the light of society's values at the time.

In regard to political activity this new definition based on public benefit would mean that judges would no longer simply assume that because an object is political it is not charitable. The question of public benefit would have to be confronted. Obscure dangerous religious cults and the proposition of foolish views devoid of foundation may

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85 Above n9, 156.
86 Above n83.
87 [1955] AC 572, 615.

not be granted charitable status. They may be religious but the question of public benefit might not be so easily satisfied if the courts were to look at them afresh. Some humanist trusts, on the other hand, might well be granted charitable status under the new definition. Many of the sporting trusts now denied charitable status might also gain charitable status under the new definition. This is especially so since modern opinion is of the view that healthy sport and fitness are for the public benefit and also the cases themselves in this area admit that sporting trusts can be for the public benefit.[88] Poverty trusts would also have to satisfy the requirement of public benefit (they do not in the present definition). This however would not be difficult for most poverty trusts. As Lord Evershed MR said in *Re Scarisbrick*,[89] "the relief of poverty is of so altruistic a character that the public element may necessarily be inferred thereby".

V CONCLUSION

The present legal definition of charity is failing to meet contemporary demands. It is failing because it is not based on a rational, flexible general principle but rather it is based on the preamble to a statute enacted in the Elizabethan era. The report from the Working Party on Charities and Sporting Bodies fails to encourage Parliament to change the status quo. For years writers have pointed out the deficiencies of the present definition and for years Parliament has failed to take take up the challenge of redefining charity. The time has well and truly come for Parliament to seek to establish a new and modern definition of charity.

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88 See, for example, *Re Nottage* [1895] 2 Ch 649, 655 and *National Anti-Vivisection Society* v *IRC*, above n41, 41-42.

89 [1951] Ch 622, 639.