

CHARITY LAW'S PUBLIC BENEFIT TEST: IS LEGISLATIVE REFORM IN THE PUBLIC INTEREST?

PAUL HARPUR*

I INTRODUCTION

This paper explores the current position of the 'public benefit' test in relation to charitable institutions. Primarily this paper focuses on a proposed new definition for charities released in July 2003 by the Commonwealth government¹ and subsequent legislative moves in 2003, which support this proposal.² This paper will focus on one aspect of the proposed definition: the public benefit test. The paper will commence by examining the rationale behind this component of the definition for 'charities' and by examining the current common law test. The paper will then explore the proposed definition itself and critically evaluate it. First, the general approach to dividing the 'public benefit' test into three sub-questions which all are condition precedents to satisfying the test will be criticised. The inadvisability of leaving the explanation of 'or a sufficient section of the public' in its current form will be highlighted, as will the continued use of 'universal or common good' as a condition precedent test. The paper will then note the positive variances between the 2001 Charities Definition Inquiry and the 2002 proposed definition. Thirdly, the paper will compare the Australian situation to other common law jurisdictions. Finally recommendations will be made as to how the proposed definition could be improved before it is tabled as a Bill before parliament.

II RATIONALE BEHIND THE 'PUBLIC BENEFIT' REQUIREMENT FOR CHARITIES

When an organization holds itself out as a 'charity' various social welfare attributes are associated with that organization.³ However more important than the general public perception are the legal implications of being held a 'charity' at law.

When an organisation is held to be a 'charitable *institution*' or 'charitable *fund*' that organization enjoys various tax relief benefits. The scheme of tax relief costs the

* B Bus/LLB Student, Faculty of Law, QUT.

¹ A Bill for an Act to define charities and charitable purpose, and for related purposes 2002/2003; s 2 Short Title: This Act may be cited as the *Charities Act 2003*.

² Taxation Laws Amendment Bill (No 5) 2003 (Cth) implements part of the proposals while the Explanatory Memorandum, Taxation Laws Amendment Bill (No 5) 2003 continues the Government's position stated in the 2002 Press Release.

³ E Abery, 'Charities: A Target for Ralph?' (2000) 29 *Australian Tax Review* 4.

government consolidated revenue substantially.⁴ The 2001 Tax Expenditure Statement released by the Department of Treasury states the estimated cost of permitting a deduction for gifts to approved entities was \$300 million for the 2001/2002 income year. This massive relief is granted through a complicated scheme with the 'charity' and 'public benefit' requirements being central.⁵ The Charities Definition Inquiry⁶ estimated there are 19,000 charities, which employ staff, as opposed to charities which rely totally on volunteers. Those employing charities account for approximately 4.8% of people employed in Australia. The Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 5) 2003 (Cth) which forms part of the government's response to the 2002 Charities Report estimates the revenue cost of one part of the government's response 'is expected to be \$5 million in each of 2003-2004, 2004-2005 and 2005-2006'.⁷

While relief to charities seems positive, such relief has the correlative effect of denying the community from having the revenue allocated to other ventures. Simply put, the charity tax relief scheme has a high opportunity cost to the community. This opportunity cost means the public has a vested interest in ensuring only those purposes, which are truly for the public benefit, receive the tax benefits. This is the rationale behind the 'public benefit' test.

III ANALYSIS OF THE CURRENT 'PUBLIC BENEFIT' TEST

Before a purpose can be deemed 'charitable' the purpose must satisfy the 'public benefit' test and fall within the spirit and intention of the Statute of Elizabeth,⁸ unless it is a trust for the relief of poverty.

The object or purpose must be a charitable purpose as well as a publicly beneficial one, however the focus on the 'beneficial' aspect of the 'public benefit' test has not been as extensively explored as the interest in the examination of what constitutes the 'public'.

A What Constitutes a 'Benefit'?

A purpose is beneficial to the public if it goes towards achieving a universal common good and is not harmful to the public. While the provision of benefits is not limited to material benefits, the purpose must have some practical utility.⁹ Being beneficial to the public is a condition precedent to acquiring charitable status. What constitutes the 'benefit' to the public is often unclear and relies on personal opinion, for example in *Re*

⁴ G Santow, 'Charity in its Political Voice - A Tinkling Cymbal or a Sounding Brass?' (1999) 18 *Australian Bar Review* 3, 223-253.

⁵ Tax Issues for Charities in the New Millennium (2002) 7 *Deakin Law Review* 131.

⁶ Report of the Inquiry into the Definition of Charities and Related Organisations, June 2001, 3 ('Charities Definition Inquiry').

⁷ Explanatory Memorandum, Taxation Laws Amendment Bill (No 5) 2003.

⁸ *Income Tax Special Purposes Commissioners v Pemsel* [1891] All ER Rep 28 (Lord McNaughten); [1891] AC 531; *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138.

⁹ H Picarda, *The Law and Practice Relating to Charities* (Butterworths, 3rd ed, 1999) 19-29; HAJ Ford and WA Lee, *Principles of the Law of Trusts* (The Law Book Company, 2nd ed, 1990) 829-833; G Dal Pont, *Charity Law in Australia and New Zealand*, (Oxford University Press, 2000) 13-22.

*Pinion*¹⁰ a gift of an art studio to be set up as a museum was held not to be beneficial as the artwork lacked public utility and educative value.

*National Anti-Vivisection Society v Inland Revenue Commissioners*¹¹ concerned an association attempting to abolish experimentation on animals and repeal legislation which permitted experimenting on animals. The court acknowledged caring for animals was prima facie charitable and that the benefits such research gave to the community in the changed environment justified the experimentation. The court held the benefit from such changes were not in the public benefit and struck down a charity, which had existed since 1895.

The House of Lords in *Gilmour v Coats*¹² attempted to rationalize the subjective nature of the 'benefit' test. The court held:

The court can only act on *proof* of public benefit and not on belief; and the value of intercessory prayer was manifestly incapable of proof. The benefit to be derived by others from the example of pious lives was something too vague and intangible to satisfy the test of public benefit.¹³

The test of 'benefit' to the public generally is less of an issue than what is a charitable purpose. In *Vancouver Society of Immigrant & Visible Minority Women v Minister of National Revenue*¹⁴ the provision of support to immigrant workers, support for professionals and the settlement of refugees was constituted a 'benefit' to the public, but the charity failed as its objects did not constitute a 'charitable purpose'. While some public benefits do not satisfy 'charitable purposes', generally most 'charitable purposes' will satisfy the 'public benefit' test.¹⁵

B What Constitutes the 'Public'?

The 'public' refers to the general community or a 'sufficient section of it'. The test has been clarified through the *Compton/Oppenheim* test,¹⁶ which provides the number of potential beneficiaries of a charity must not be numerically negligible, and there must be no personal relationship between the beneficiaries and any named person or persons.¹⁷

The distinction between private benefits and public benefits is often uncertain. The court in *New Zealand Society of Accountants v Commissioner of Inland Revenue* noted:

While it has been repeatedly held that a trust to be charitable must be of a public nature, that is to say for the benefit of the community or a section of it, as opposed to a gift for the benefit of particular individuals or a fluctuating body of individuals, it is not possible, at least in the present state of the authorities, to state with any confidence how

¹⁰ [1965] Ch 85, CA, discussed in Picarda, above n 9, 61.

¹¹ [1948] AC 31.

¹² [1949] AC 426.

¹³ Picarda, above n 9, 108. See also Dal Pont, above n 9, 169-171.

¹⁴ (1999) 99 DTC 5034 (SCC).

¹⁵ P Meagher and W Gummow, *Jacobs Law of Trusts* (Butterworths, 6th ed, 1997).

¹⁶ Based on *Re Compton* [1945] 1 Ch 123 and *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

¹⁷ For discussion re difficulties with the Compton/Oppenheim test see M Chesterman, *Charities, Trusts and Social Welfare* (Weidenfeld and Nicolson, 1979) 155-157.

the line is drawn between the two or to say that it is drawn in the same way as between different types of charitable trust.¹⁸

The potential class of beneficiaries, which constitute the ‘public’ for the benefit, cannot be numerically negligible and the variable, which distinguishes them from other members of the community, must not depend upon any personal relationship, such as connections based on blood relationships.¹⁹ Clubs, literary societies and trade unions may all possess large member followings, however the members do not constitute ‘a section of the public’.

The distinguishing feature of each of these latter bodies is that it is an association, which takes power to itself to admit or exclude members of the public according to some arbitrary test which it sets up in its rules or otherwise. Each of them does oppose a bar to admission within it. It is not one of the groups into which the community as a matter of necessary organisation or by convention is divided, but it is in a sense an artificial entity which exists for the benefit of its members as members thereof and not as members of the public.²⁰

Once a personal element is a qualification the size of the class becomes immaterial.²¹

C *Relief of Poverty Exception*

The strict requirement to have the charitable purpose benefit the public or a sufficient section of it is totally relaxed in trusts for the relief of poverty as relieving poverty is seen as so intrinsically good and beneficial to the public to warrant the exemption. The House of Lords in *Dingle v Turner*²² upheld the validity of a trust to benefit poor employees of a company. The beneficiaries for this trust were determined by their relationship as employees to a specified firm. Without this exception this trust would have failed the ‘public’ requirement for charities.

The relief of poverty exception is not limited to the employment relationship. Any aggregate of individuals ascertained by relationship to an arbitrary test can enjoy the benefit of the relief of poverty exception.²³ The exception merely requires the trust to have the charitable purpose of the relief of poverty.²⁴

¹⁸ *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147, 155.

¹⁹ *Permanent Trustee Co of New South Wales Ltd v Presbyterian Church (NSW) Property Trust* (1946) 64 WN (NSW); P White, ‘Public Benefit - What is a Sufficient Section of Community?’ (2001) *Solicitors’ Journal Supplement* 31.

²⁰ *Re Income Tax Acts (No 1)* [1930] VLR 211, 222-3 (Lowe J); approved and adopted in *Thompson v FCT* (1959) 102 CLR 315, 323.

²¹ *Rhodes v Pharazyn* [1957] NZLR 556.

²² [1972] AC 601.

²³ *Re Scarisbrick* [1951] 1 Ch 622, 649 (Jenkins LJ) as discussed in Dal Pont, above n 9, 121.

²⁴ *Strathalbyn Show Jumping Club Inc v Mayes & Ors* [2001] SASC 73 (Bleby J); *Common Equity Housing Ltd v Commissioner of State Revenue Acting Capacity as Comptroller of Stamps* (1996) 96 ATC 4598 (Ashley J).

IV HISTORY LEADING TO PROPOSED DEFINITION.

For a substantial period of time there have been calls for parliament to legislate the definition of 'charitable purposes' and 'public benefit'. As Isaacs J in *Young Men's Christian Association v Federal Commissioner of Taxation*²⁵ explained:

It is obvious to me that in the interests of all concerned the meaning of Parliament should be legislatively declared beyond doubt. ... Litigation, perhaps protracted and expensive, is inevitable unless Parliament by a few words declares whether by 'charitable' it means to use that word in its ordinary modern sense, or in the technical Elizabethan sense that some quaint Chancery decisions in connection with trusts have affixed to it as its primary legal meaning.

In response to the various calls for reform, parliaments across the common law world have commissioned reports and some have even legislated the definition such as Barbados.²⁶ However in the majority, the number of reports outweighs the number of reforms.²⁷

In June 2001 the Commonwealth Government released the Report of the Inquiry into the Definition of Charities and Related Organisations.²⁸ Chapters 4 and 13 of the report comprehensively deal with the problems with the current approach. As these are available online²⁹ the paper does not intend to revisit the content in detail. Briefly the problems highlighted in chapter 13 focuses on:

- Uncertainty as to whether the legal definition of charity is met.

Due to the inability to provide a precise definition from the common law, charities are often uncertain if they are 'charitable' or not without going to court. It is extremely difficult for a charity's board to acquire a working knowledge of 400 years of caselaw.

- Difficulties with the poverty exception to public benefit.

²⁵ (1926) 37 CLR 351, 359.

²⁶ *Charities Act, The Laws of Barbados*, Volume VIII, Title XVIII, Chapter 243, LRO 1989 discussed below.

²⁷ Nathan Report (1952); The National Council of Social Service in the UK conducted a conference in 1974 attended by voluntary organisations and interested parties to discuss 'the problems of the present law'; Law Reform Commission of Tasmania, *Report on Variations of Charitable Trusts*, Report No 38 (1984); Legal and Constitutional Committee, Victoria, *Report to the Parliament on the Law Relating to Charitable Trusts* (May 1989); United Kingdom, *Charities: A Framework for the Future*, White Paper prepared by the Secretary of State for the Home Department, Cmd 694 (May 1989) ('UK White Paper'); Scottish Council of Voluntary Organisations, *Head and Heart: The Report of the Commission on the Future of the Voluntary Sector in Scotland* (1997); Voluntary Sector Roundtable, Panel on Accountability and Governance in the Voluntary Sector (February 1999); National Council of Voluntary Organisations, London, *For the Public Benefit?: A Consultation Document on Charity Law Reform* (2001); Charity Scotland, *Report of the Scottish Charity Law Review Commission* (May 2001); Report of the Inquiry into the Definition of Charities and Related Organisations (June 2001) ('Charities Definition Inquiry').

²⁸ Charities Definition Inquiry; The Review of New Zealand Internal Revenue Department's Issues Paper, Issues Paper No 4, 31 January 2001.

²⁹ <<http://www.cdi.gov.au/html/report.htm>>.

The current exception from the ‘public benefit’ test for trusts, which has the dominant purpose of the relief of poverty, can result in private benefits; especially the trusts for ‘poor relations’ or ‘poor employees’.

V PROPOSED COMMONWEALTH STATUTORY DEFINITION.

In August 2002 the Honourable Peter Costello MP Treasurer released a press release entitled ‘Government Response To Charities Definition Inquiry’.³⁰ The release provided a proposed statutory definition, which the Commonwealth Government intends to enact to commence operation on 1 July 2004. The Federal Government has now released a charities definition exposure draft entitled ‘A Bill for an Act to define charities and charitable purpose, and for related purposes’ or *Charities Act 2003*.³¹ Section 7 of this act provides the definition for the ‘public benefit’:³²

7 Public benefit

- (1) A purpose that an entity has is for the *public benefit* if and only if:
 - (a) it is aimed at achieving a universal or common good; and
 - (b) it has practical utility; and
 - (c) it is directed to the benefit of the general community or to a sufficient section of the general community.
- (2) A purpose is not directed to the benefit of a sufficient section of the general community if the people to whose benefit it is directed are numerically negligible.

Subsection (2) does not limit the other circumstances in which a purpose is not for the benefit of the general community or to a sufficient section of the general community.

VI CRITICAL EVALUATION OF PROPOSAL COMPARED WITH CURRENT LAW

It is not always the case that a statutory definition of a common law test clarifies or improves the law. The common law relating to charities has continually developed from the Statute of Elizabeth 1601 by reference to the spirit and intention of that statute. Reference to a statute, which is over 400 years old, certainly has the scope of being out dated.³³ The proposed Commonwealth statute seeks to clarify and modernise the definition.

D *The General Approach to the New ‘Public Benefit’ Test*

Section 7 of the proposed definition contains the ‘public benefit’ test. The proposal divides the test into two separate aspects: sub-section a and b deal with the ‘benefit’ aspect while sub-section c deals with the ‘public aspect’. It seems that the proposal

³⁰ P Costello MP Treasurer, ‘Government Response to Charities Definition Inquiry’ (Press Release No 049, 29 August 2002 (‘The Proposed Definition’)); cited in the Explanatory Memorandum, Taxation Laws Amendment Bill (No 5) 2003 as remaining the Government’s position.

³¹ Section 2, Short Title of the proposed A Bill for an Act to Define Charities and Charitable Purpose, and for Related Purposes.

³² The entire draft bill is available at <<http://www.taxboard.gov.au>>.

³³ P Brown, ‘The Definition of Charity - Elizabeth I or II?’ [2002] *New Zealand Law Journal* 72, 72-76; P Luxton, ‘Four Centuries of the Preamble to the Statute of Elizabeth’ (2001) 5 *New Law Journal* 13.

examines and adds up the linguistic elements of the whole entire phrase to create a multi-faceted 'public benefit' test.

This paper asserts that it is inadvisable to analyse and add up the linguistic elements of a whole phrase, as the ordinary meaning of the entire phrase should be the focus. McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs*,³⁴ highlighted the error in analysing and adding up the linguistic elements of a phrase instead of attending to define the meaning of the whole phrase.³⁵ McHugh J, citing with approval Zekia J,³⁶ explains individual words should not be read in a vacuum. The textual analysis is 'the primary source of ... interpretation'.³⁷ Similar sentiments were expressed by Murphy J in *Commonwealth v Tasmania ('The Tasmanian Dam Case')*³⁸ where his honour proposed an ordered yet holistic approach.

Individual words do affect the composite. In the context of analyzing an entire phrase or its individual composites, Starke and Dixon JJ in *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation*,³⁹ when analyzing what constitutes a 'public benevolent institution' ('PBI'), referred to the phrase as a compound or composite one. This did not mean the words making up the whole phrase had no individual role to play. The concern is that focusing on the individual words rather than the composite may alter the decision.⁴⁰ Despite this the High Court held that it was the ordinary meaning of the overall phrase, which had to be met. Thus while the objects of the house were 'benevolent', the house was not a 'benevolent institution' because such an approach contrasted with the ordinary meaning of the phrase.⁴¹ The position of PBIs was significantly different from the current position of charities.

Unlike PBIs, charities have a long common law tradition of which the proposal seeks to modify and not over turn. The proposed definition states, '[t]he legislative definition of a charity will closely follow the definition that has been determined by over four centuries of common law'.⁴² With 400 years of cases for guidance it seems doubtful any confusion should be created through analysing the composite elements of the phrase.

E *The Proposed 'Public' Aspect of the 'Public Benefit' Test*

Section 7 merely re-states the common law position on what constitutes the public: 'general community or a sufficient section of the community'. As a consequence the proposed definition has adopted all the contextual uncertainty of the common law test of

³⁴ (1997) 190 CLR 225.

³⁵ See also *Swinburne v Federal Commissioner of Taxation* (1920) 27 CLR 377, 384 (implicitly overturned by the Privy Council in *Chesterman v Federal Commissioner of Taxation* (1923) 32 CLR 362; (1925) 37 CLR 317 but not in a way to affect this issue).

³⁶ The European Court of Human Rights in *Golder v United Kingdom* 1975) 1 EHRR 524.

³⁷ *Ibid* 544.

³⁸ (1983) 158 CLR 1, 177.

³⁹ (1931) 45 CLR 224.

⁴⁰ See the approach of Dixon J at 232-33 in his comments on the sufficient existence of governmental association so as to satisfy the 'public'.

⁴¹ Applied by Allsop J in *Ambulance Service of New South Wales v Deputy Commissioner of Taxation for the Commonwealth of Australia* [2002] FCA 1023.

⁴² Non-Profit News Service, 'Release of Charities Definition Exposure Draft' (No 0039, 22 July 2003).

‘public’. In *Corporate Affairs Commission (SA) v Australian Central Credit Union*⁴³ the majority of the High Court explored the definition of ‘public’ in relation to the Company’s Code provisions:

The question whether a particular group of persons constitutes a section of the public ... cannot be answered in the abstract. For some purposes and in some circumstances, each citizen is a member of the public and any group of persons can constitute a section of the public. For other purposes and in other circumstances, the same person or the same group can be seen as identified by some special characteristic which isolates him or them in a private capacity and places him or them in a position of contrast with a member or section of the public.

In criticising the proposed definition for not clearly stating what constitutes a ‘section of the public’, consideration must be had to the subjective nature of the question. While a definitive in or out test may be inappropriate, it seems strange that the proposed definition in s 2 details purposes, which are not charitable, but no similar provision appears for sections of the public, which are excluded. The common law has developed such exclusionary rules, such as public defined by contract or blood, yet no such rules appear in the proposed definition. As a consequence charities still have to make reference to masses of cases to establish their legal position. One of the purposes of the proposed definition was clarity and simplicity; the omission of an explanation about what constitutes a ‘section of the public’ does not go to eliminate uncertainty.

F *The Proposed ‘Benefit’ Aspect of the ‘Public Benefit’ Test*

The proposed ‘benefit’ aspect has two facets: ‘universal or common good’ and ‘practical utility’. While ‘practical utility’ refers to the effect of the charitable act, to a degree this is axiomatic, the question of what constitutes ‘the common good’ has puzzled philosophers for centuries. The phrase ‘universal for the common good’ takes s 7 beyond mere charitable purposes as prescribed in s 4 of the proposed definition. While the intent behind the proposed definition is inter alia to ‘provide certainty’,⁴⁴ such a term has a wide scope for uncertainty. Focusing on the ‘universal common good’ as a condition precedent to charitable status could cause uncertainty.

Reference to a ‘universal or common good’ involves a consideration of what the law ought to achieve. Hart⁴⁵ and Fuller⁴⁶ argue laws should focus on what the law is and not on value laden notions of ‘ought’. Such questions are innately subjective and create inconsistency between judgments. Jeremy Bentham⁴⁷ scathingly asserts questions of moral values should be left to parliament and not to courts. He argues such an approach innately causes inconsistencies, as parties do not know the position of the law until a judgment is handed down. When this occurs, the judgment takes retrospective effect to the date of the incident, the subject matter of the action.

⁴³ (1985) 157 CLR 201, 208.

⁴⁴ P Costello MP Treasurer, ‘Government Response to Charities Definition Inquiry’ (Press Release No 049, 29 August 2002; Non-Profit News Service, ‘Media Coverage of the Charities Definition Exposure Draft’ (No 0041, July 2003).

⁴⁵ HLA Hart, *The Concept of Law* (Clarendon Press, 1961).

⁴⁶ Fuller, *Lon Luvois, The Morality of Law* (Yale University Press, revised ed, 1969).

⁴⁷ JH Burns and HLA Hart (eds), *J Bentham, An Introduction to the Principles of Morals and Legislation* (London, Athlone Press, 1970).

While it may seem strange to refer to abstract legal theories for this task, this was precisely the approach taken by the Charities Definition Inquiry Report⁴⁸ and by the Ontario Law Reform Commission⁴⁹ when they considered the theories of John Finnis. Legal theories by no means provide a clear notion of what constitutes the 'universal common good', however they demonstrate the massive divergence in opinion on what does constitute the 'universal common good.'

Aristotle for example determined the universal common good through his theory of extrapolation, which extrapolated from nature to humans.⁵⁰ He determined the State and political associations were predetermined by nature and therefore in the common good.

Saint Thomas Aquinas in his *Summa Theologica*⁵¹ contends the universal common good is reflected in *lex aeterna*,⁵² *lex divina*⁵³ and *lex naturalis*.⁵⁴ St Thomas Aquinas based his notions on Christian beliefs.

John Locke's social contract focuses on property rights. He asserts humans are happy to give up some of their liberties in exchange for the protection of property rights.⁵⁵ The universal common good is reflected in the protection of property rights.

John Finnis attempts to ascertain his seven universal common goods through 'objectively' examining the common values of human striving.⁵⁶ He argues all societies have striven for seven common human goods: life, knowledge, work/play, asthenic experience, sociability, practical reasonableness and religion. He argued these seven goods when applied with practical reasonableness reflect the universal common good.

Ronald Dworkin argues all universal or common goods return to one abstract legal notion: the metaphysical right to equal concern and respect.⁵⁷ This notion gives no concrete right, but gives the right that individual private/internal rights will not be limited by the community/external rights. Dworkin places the individual before any universal or common good.⁵⁸

This paper will not document the major differences in opinion in these theories here, as it is not sought to propound or reject any theory, but merely to highlight the massive differences in opinions on what constitutes the 'universal common good'. It is strange for a proposal seeking certainty to adopt such a vague statement, which in itself is entirely subjective on the individual's perception. The common law may not have been

⁴⁸ Chapter 13, 118.

⁴⁹ Ontario Law Reform Commission, *Report on the Law of Charities* (1996) Chapter 7. A copy of the report is reproduced on the Internet with the permission of the publishers at <<http://www.qut.edu.au/bus/ponc/charity>>.

⁵⁰ N Aristotle, *Ethics* (H Rackham trans) (William Heineman, London, 1938).

⁵¹ E Gratsch, *Aquinas's Summa: An Introduction and Interpretation* (Alba House, 1985); St Thomas Aquinas, *Summa Theologica* (Benziger Brothers Inc, 1947-48).

⁵² God's eternal immutable laws.

⁵³ Divine guidance from Scriptures.

⁵⁴ Rationalise natural law based upon the higher forms of laws.

⁵⁵ J Locke, *Two Treatises of Government*, edited by P Laslett (Cambridge University Press, 1964).

⁵⁶ J Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980).

⁵⁷ R Dworkin, *Law's Empire* (Belknap Press, 1986).

⁵⁸ R Dworkin, *Taking Rights Seriously* (New Impression With a Reply to Critics) (Duckworth, London, 1978).

entirely clear on the matter, however the term ‘universally in the common good’ contributes nothing and may increase the level of uncertainty until a body of case law develops. This paper suggests the government adopts an alternative phrase to prevent increasing the uncertainty.

G *Relief of Poverty Under the New Proposal*

Recent judgments have applied a narrow and reactive notion to charities for the relief of poverty. Angel J in *Northern Land Council v Commissioner of Taxes* provides an example of the narrow application of the relief of poverty:

The appellant is part of a statutory mechanism put in place to remedy past injustice. It has acquired a prominence and significance in representing Aboriginal interests in the north of the Northern Territory which is inconsistent with the notion that it voluntarily dispenses some form of welfare.⁵⁹

Anglicare Australia and Australian Council of Social Service (‘ACOSS’) submissions to the 2001 Charities Definition Inquiry⁶⁰ reflect the concerns that the current ‘relief of poverty definition is too narrow and reactive and does not provide adequate scope for a participatory process’. They argue a proactive approach is required to achieve sustainable poverty reduction.

Sections 7 and 8 of the proposed definition modernise the approach to poverty relief. The passive approach has been removed and a proactive approach taken. Relief is now granted to not-for-profit self-help groups who not only *give a man fish*, but also *teach him to fish so he can eat forever*.

H *Not-for-Profit Self-Help Groups Under the New Proposal*

Currently the charitable position of not-for-profit organizations with a membership base where benefit accrues to their members is often uncertain. Often such organizations have to demonstrate their dominant purpose is integral to the achievement of a charitable public benefit.⁶¹ The proposed definition substantially clarifies the position of such organizations in ss 7 and 8. Open and non-discriminatory self-help groups are exempt from the ‘public benefit’ test,⁶² providing they satisfy the criteria in s 8.

I *Problem with Relying on the courts to Mould Definition*

While the proposed definition comprehensively deals with charitable purposes in ss 4 and 5, the substance of the ‘public benefit’ test has not been clarified substantially. Already the Australian Tax Office has sought to clarify the confusion created by this definition.⁶³ As these directions are not binding, the task of expanding the definition to attempt to improve its clarity will fall to the courts and individual charities. Already

⁵⁹ [2001] NTSC 115, [52]; this decision was reversed by the Northern Territory Court of Appeal in *Northern Land Council v Commissioner of Taxes* [2002] NTCA 11 (Martin CJ, Mildren and Thomas JJ).

⁶⁰ Lord Macnaghten’s Heads of Charity, Chapter 15.

⁶¹ *Royal Australasian College of Surgeons v FC of T* (1943) 68 CLR 436; F Rickett, ‘Professional Associations and Charitable Status’ [1997] *New Zealand Law Journal* 49.

⁶² Section 7.

⁶³ Above, n 44, Non-Profit News Service No 0041.

charities and church groups have expressed concerns that 'the new definitions of a charity contained in the Bill may cost them their tax-exempt status if they speak out on social issues'.⁶⁴ If these groups remain reluctant to become involved in challenging the boundaries, it is difficult to see how the law can expand.

A systemic difficulty with relying on the common law to evolve is the institutions themselves. Courts are not as equipped as parliament to generate a coherent body of law. Judges decide retrospectively and are limited to the cases, which come before them. As the Charities Definition Inquiry notes⁶⁵ due to the expense of taking matters to appellate courts it is difficult for charity law to develop. The Canadian Supreme Court noted, 'the law in this area is in need of reform but there are limits to the degree of change that the common law can accommodate'.⁶⁶

Courts are restrained by the separation of powers doctrine, which places the primary law making capacity in the hands of the legislature. Additionally courts are bound by the laws of evidence and have to rely heavily on judicial notice. In *Metropolitan Fire Brigades Board v Commissioner of Taxation*⁶⁷ the Full Court disqualified a PBI on the basis fire brigades were a responsibility of government despite there being many volunteer fire brigades. The accuracy of judicial notice in such matters cannot match the investigative support at the disposal of the legislature.

Courts are additionally bound as they can only hear matters which are brought before them. Whilst it may seem natural for charities to attempt to modify laws and government policy to further their charitable purposes, charities are prohibited from having political purposes as their dominant purposes. Lord Parker noted:

Equity has as always refused to recognise such objects as charitable ... a trust for the attainment of political objects has always been held invalid, not because it is illegal, 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.⁶⁸

Recently the Victorian Civil and Administrative Tribunal considered if the Australian Conservation Foundation ('ACF') was acting for charitable purposes: does ACF not qualify as a charity because it is engaged in political activities?⁶⁹

The Tribunal held:

The ACF is plainly an organisation formed for the purposes of public benefit and on the face of its objects, and on the evidence before this tribunal, any objective or strategy that might fairly be called 'political' can in my view only be regarded as ancillary or incidental - you certainly would not 'eviscerate' the ACF if you removed from its constituent documents any reference to legislative change.⁷⁰

⁶⁴ 'Draft Legislation No Threat to Charities, Says Costello', 1 August 2003 <www.findlaw.com.au>.

⁶⁵ Chapter 4.

⁶⁶ Supreme Court Majority in *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue* [1999] 1 SCR 10, 15.

⁶⁷ (1990) 27 FCR 279.

⁶⁸ *Bowman v Secular Society Ltd* [1917] AC 406, 444.

⁶⁹ *Australian Conservation Foundation Inc v Commissioner of State Revenue* [2002] VCAT 1491 (Gibson C).

⁷⁰ *Ibid* 23.

The fact a charity was forced to defend itself for taking political steps to further their charitable purposes is likely to discourage other charities from political activity,⁷¹ as the Commonwealth government's approach requires charities to make political decisions to attempt to alter the common law. This approach may not be effective if charities are reluctant to become involved in political activities.

VII VARIANCES IN THE PROPOSED DEFINITION FROM THE CHARITIES DEFINITION INQUIRY.

Recommendation 7 of the Charities Definition Inquiry attempted to improve the definition by requiring 'that the dominant purpose of a charitable entity must be altruistic'. The committee provided the following definition of 'altruism':

Overall, the Committee considers that while the concept of altruism needs to be emphasised, it is not necessary to define the term any more precisely for the purposes of clarifying public benefit. In our view the concept of altruism is sufficiently understood within the community.⁷²

The committee felt that reference to dictionary meanings of 'altruism' would be sufficient: 'altruism may be defined as "unselfish concern for the welfare of others" or "regard for others as a principle for action"'.⁷³

As seen above the proposed definition does not mention 'altruism'. It is suggested that the omission of this term is a positive move. Introducing an untried term into a definition and relying entirely on judicial notice to import meaning into the word would not 'provide certainty', which was the Minister's intent in releasing the proposed definition.⁷⁴ The 'public benefit' test requires clarification and certainty and not an additional vague term. The British Cabinet Report in 2002 noted the Report of the Inquiry into the Definition of Charities and Related Organization's recommendation to incorporate the term 'altruism' 'would create unacceptable uncertainty in law, and would have few advantages'.⁷⁵

VIII THE 'PUBLIC BENEFIT' TEST IN FOREIGN JURISDICTIONS

J *England and Wales*

The *Charities Act 1993* (UK) repeats the terminology from the repealed *Charities Act 1960* (UK) which relied entirely on the common law. The public benefit test according to the 2002 British Cabinet Office report commented under the existing test the 'balance

⁷¹ L Thompson and M Kerr, 'Being Green - Charitable or Political?' (2003) 20(1) *Environmental & Planning Law Journal* 7.

⁷² Charities Definition Inquiry, Chapter 13.

⁷³ *Webster's New World Dictionary*, Compact School and Office edition, (The World Publishing Company, Cleveland, 1972); B Moore (ed), *The Australian Concise Oxford Dictionary of Current English* (Oxford University Press, 3rd ed, 1997); Melbourne. Chapter 13 Charities Definition Inquiry.

⁷⁴ Above, n 44, Press Release No 049.

⁷⁵ Cabinet Office Strategy Unit Publications, *Private Action, Public Benefit: A Review of Charities and the Wider Not-for Profit Sector* (September 2002) 4.6
<<http://www.pm.gov.uk/output/page85.asp>>.

of public and private benefit can be difficult to judge'.⁷⁶ The United Kingdom's Government response to 'Private Action, Public Benefit'⁷⁷ released in July 2003 concluded '[a]t present the definition is largely inaccessible to the lay person, because of its foundation in the common law'.⁷⁸ To remedy perceived difficulties with the current definition the United Kingdom government announced in February 2003, and confirmed in July 2003, that they were drafting a 'Charities Bill' to legislate the definition⁷⁹.

Despite the 'public benefit' being judged on a case by case basis, British charitable institutions have had some guidance from the Charity Commission which operates under the *Charities Act 1993* (UK). The Commission lists the following characteristics as indicative of the 'public benefit':

- The organisation benefits the public as a whole or a sufficient section of it.
- The beneficiaries are not defined in terms of a personal or contractual relationship.
- The beneficiaries should not be defined by an inappropriate or capricious link.
- Membership and benefits should be available to all those who fall within the class of beneficiaries.
- Any private benefit arises directly out of the pursuit of the charity's objects or is legitimately incidental to them.
- The amount of private benefit should be reasonable.
- Charges should be reasonable and should not exclude a substantial proportion of the beneficiary class.
- The service provided should not cater only for the financially well off. It should in principle be open to all potential beneficiaries.⁸⁰

The British report declined to implement a legislative definition rather relying on the British Charity Commission to provide guidance and to take matters to court where necessary:

It is not the aim of this reform to do away with existing case law. Removing all reference to existing case law would create significant uncertainty for existing charities, and would mean that many of the same points would have to be unnecessarily explored again by the courts.⁸¹

Legislation has not been tabled thus far to modify the 'public benefit' test in relation to charities. In relation to Community Benefit Societies there is a private Members Bill before the British Parliament to modify what organizations are deemed to be acting for the 'public benefit'.⁸²

⁷⁶ Ibid 4.5, 4.9.

⁷⁷ Cabinet Office Strategy Unit Publications, *Private Action, Public Benefit: A Review of Charities and the Wider Not-for Profit Sector* (September 2002) <<http://www.pm.gov.uk/output/page85.asp>>.

⁷⁸ See the report at 3.12: <<http://www.homeoffice.gov.uk/>>.

⁷⁹ See Forward, Charities and Not-for-Profits: A Modern Legal Framework, The Government's response to 'Private Action, Public Benefit', July 2003: <<http://www.homeoffice.gov.uk>>.

⁸⁰ Ibid 4.7.

⁸¹ Ibid 4.24.

⁸² The *Co-operatives and Community Benefit Societies Bill 2002* (UK) Bill 15 of 2002-03, Second Reading Speech, 31 January 2003; see also *Industrial and Provident Societies Act 2002* (UK) which modifies notions of 'public benefit' in other non-charitable associations.

The Charity Commission offers an administrative mechanism to hear and determine questions relating to charitable status. Often these determinations occur through the registration process with the Commission. These determinations are public and provide a guide to organizations what will constitute the 'public benefit'. For example:

In an *Application for Registration of Restorative Justice Consortium Limited* the Commission determined '[t]o promote restorative justice for the public benefit as a means of resolving conflict and promoting reconciliation'.⁸³ There was discussion seeking to clarify if there was a charitable purpose. On the issue of public benefit the Commission held 'it was clear that such purposes were for the benefit of the public without the need to consider further evidence on this aspect'.⁸⁴

In an *Application for Registration of Guidestar UK* the Commission held the purpose to 'promote the voluntary sector for the benefit of the public by establishing and maintaining a publicly available comprehensive database about the activities and finances of charities established in the United Kingdom' was for the public benefit.⁸⁵ The Commission held:

there was a substantial benefit to the public in having an effective voluntary sector and that both tangible benefits (such as engaging and directing efforts of individuals that wish to help those in need) and intangible benefits (such as encouraging altruism in society) to the public would arise. The Commission was satisfied that the promotion of the voluntary sector was of benefit to the public and that that public benefit was established by this purpose.⁸⁶

In addition to hearing registration applications the Charity Commission can conduct consultations and release discussion documents. The Commission is an administrative institution falling under the executive branch of government thus has a wider scope than a judicial body. The discussion document 'Review of the Register The Public Character of Charity' provided working definitions for organizations:

The discussion document defined 'benefit' as:

'Benefit' in this context means the net benefit to the public. A charity therefore must provide benefits for people at a level, which reflects their needs. Moreover a purpose which benefits a few individuals but harms many more people will not be a benefit to the public, as the harm outweighs the benefits. Such a purpose would not therefore be charitable.⁸⁷

To have sufficient public character the benefit

must be provided to the public at large or at least a sufficient section of the community. What this means in practice will depend on the purpose for which the organisation is set

⁸³ *Application for Registration of Restorative Justice Consortium Limited*, Charity Commission, Decision of the Charity Commissioners for England and Wales, 15 January 2003 <<http://www.charity-commission.gov.au>>.

⁸⁴ Ibid 5.7.

⁸⁵ *Application for Registration of Guidestar UK*, Charity Commission, Decision of the Commission, 7 March 2003, 3.1, 5.4, 5.6 <<http://www.charity-commission.gov.uk>>.

⁸⁶ Ibid 5.5.

⁸⁷ Charity Commission of England and Wales, 'Review of the Register The Public Character of Charity' (1999-2002) Discussion Document, 4 <<http://www.charity-commission.gov.uk>>.

up. For example, if the purpose of an organisation is to relieve the suffering caused by a very rare disease, a sufficient section of the public is all those who are suffering as a result of that rare disease.⁸⁸

While England and Wales do not have a legislative definition, they do have an administrative body providing regular guidance as to what constitutes the 'public benefit'. This approach has the benefit of not restricting the charitable sector by an inflexible legislative definition, while providing sufficient guidance to ensure certainty.⁸⁹

K Canada

The *Federal Income Tax Act* requires a Charity to be registered and then relies on a registration regulation, which reflects a conservative reading of the Common Law.⁹⁰ Consequently a conservative reading of the common law public benefit test is applied.

The New Zealand 'public benefit' test similarly relies entirely upon the common law.⁹¹ 'Charitable purpose' includes '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'.⁹²

The Review of New Zealand Internal Revenue Department's issues paper⁹³ notes the New Zealand courts have moved away from a orthodox approach adopted the uncertain 'personal nexus test'. As a consequence the position in New Zealand is extremely difficult for charities.⁹⁴

L Barbados

The only common law jurisdiction to comprehensively legislatively define charitable purposes and 'public benefit' is Barbados. Barbados has affectively merged the 'benefit' requirement for 'public benefit' and the 'charitable purposes' requirements into one requirement for which the statute provides a comprehensive definition of 26 heads of charity!⁹⁵ *The Charities Act, The Laws of Barbados*⁹⁶ provide:

4. 'Public benefit' includes benefit of a kind comprised within the scope of charitable purposes which is available to members of the public at large or to a section of the public ascertained by reference to some specified geographical area, but does not include such a benefit if the persons for whom it is intended to be available are to be ascertained by reference to their relationship with some body or other person, whether that relationship is one of blood, status, contract or otherwise.

⁸⁸ Ibid.

⁸⁹ Above, n 75, Chapter 3.

⁹⁰ *Income Tax Act* (RSC 1985, c1 (5th Supp)) s 248(1); P Broder, 'Charitable Registration Process' (2001) *The Canadian Centre for Philanthropy Public Affairs*.

⁹¹ Section OB 1 of the *Income Tax Act 1994* (NZ)

⁹² D McLay, 'Tax Decisions on Charities' (2003) *New Zealand Law Journal* 62

⁹³ 31 January 2001, Issues Paper No 4.

⁹⁴ D Brown, 'Charities and Public Benefit' [2001] *New Zealand Law Journal* 69.

⁹⁵ Sections 2 and 3 especially ss 3(a) – (z) of the *Charities Act, The Laws of Barbados*, Volume VIII, Title XVIII, Chapter 243, LRO 1989.

⁹⁶ Volume VIII, Title XVIII, Chapter 243, LRO 1989.

The Barbados definition merely re-states the common law definition of the ‘public benefit’ without providing additional meaningful guidance. To interpret the definition charities would still have to turn to the common law.

IX CONCLUSION

One of the major flaws of the Common Law definition of Charities is uncertainty. The proposed definition has not contributed to what constitutes the ‘public’ and may have actually confused what constitute a ‘benefit’ to the public through making the vague ‘universally in the common good’ a condition precedent to charitable status. Rather than attempting to definitively define the ‘public benefit’ it has recommended an approach similar to England and Wales be adopted. The British Charity Commission offers regular guidelines and decisions on charitable issues. One major benefit inherent in a Charity Commission is its flexibility. Charities meet the needs of the community. The community continually changes and charities must move to meet the community’s needs. Legislative definitions of what constitutes the ‘public benefit’ may not move with the changes and could impose yesterday’s answers to tomorrow’s public problems. Canada, New Zealand and Barbados all rely on the common law primarily to mold the definition. Courts face separation of powers restrictions in developing law. An executive body has the ability to be proactive and commission reports and form regulations. While this paper is not opposed to the notion of the Commonwealth establishing a general framework for what constitutes the ‘public benefit’, this paper takes the position that the effort could be better spent establishing a Australian Charity Commission to provide services similar to the British Charity Commission.