MODERNISING CHARITY LAW IN IRELAND: A Reflection upon the Critical Drivers, Barriers and Outcomes of Charity Law Reform; Some Unresolved Issues and Future Challenges

Kerry O'Halloran[1]

1. Background

Charity law in Ireland is rooted in the common law and anchored on the Statute of Pious Uses 1634[2] and its not dissimilar[3] English predecessor the Statute of Charitable Uses 1601.[4] The *Pemsel*[5] classification of charitable purposes was accepted in Ireland and its judicial interpretation, aided by the 'spirit or intendment' rule,[6] has developed along much the same lines as in England & Wales. The law evolved to become more facilitative than interventionist in nature, was governed for the last 40 years or more by a conservative legislative framework consisting mainly of the Charities Acts of 1961 and 1973 as amended by the Social Welfare (Miscellaneous Provisions) Act 2002, which were closely modelled on the

1 Adjunct Professor, Australian Centre of Philanthropy and Nonprofit Studies, Queensland University of Technology, Australia. E-mail: k.ohalloran@qut.edu.au. Author of *Charity Law in Ireland* (2nd ed), Thomson Reuters, Dublin, Ireland (forthcoming, 2009).

2 10 Car. 1, Sess. 3, Cap. 1; "An Act for the Maintenance and Execution of Pious Uses", sometimes referred to as the Statute of Charles. The Act was repealed by the Statute Law Revision Act (Ireland) 1878.

3 Sir Edward Sugden LC in *Incorporated Society v. Richard* 3 Ir. Eq. Rep. 177 held that the Irish statute of 1634 and the English one of 1601 were to be treated as being of similar effect

4 43 Eliz. 1, Cap. 4.

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

6 Broadly speaking, this rule holds that even if a purpose cannot be defined as coming under one of the established heads of charity, it will nonetheless be construed as charitable if it can be interpreted as falling within the 'spirit or intendment' of the Preamble to the 1601 Act.

provisions of the English Charities Act 1960. This framework also included the Companies Acts of 1963 and 1990, the Tax Consolidation Act 1997 and the Freedom of Information Act 1997. The usual fundraising activities were governed by a quite separate set of statutes, viz the Street and House to House Collections Act 1962 and the Casual Trading Act 1995, while fundraising through the National Lottery was subject to the National Lotteries Act 1986. Also, set apart from the main body of charity law, were the statutes and administrative systems dealing with charitable exemption from rates.

During that period, the law was administered by a range of government bodies and legal structures, with quite traditional legal functions, applying common law principles and case law precedents in a manner broadly typical of other common law jurisdictions. The lead regulatory agency had always been the Revenue Commissioners with the Commissioners of Charitable Donations and Bequests (an antiquated forerunner to the present English Charity Commission) in a monitoring and support role. Charitable exemption from liability to pay taxes was determined by the Revenue Commissioners[7] and from rates by the Valuation Office,[8] both acting quite separately and independently of each other, unassisted by statutory definitions and each relying upon a somewhat different set of grounds. Consequently, not all entities recognised as charitable for general tax and legal purposes qualified for rates exemption in respect of their premises.[9] This period, however, was one in which Ireland was exposed to considerable domestic and international pressures for change that inexorably exposed the deficiencies in the above regulatory framework and prepared the ground for charity law reform.

2. The Drivers of Charity Law Reform

The fact that charity law reform in Ireland occurred when it did, and then took the direction it did, were matters determined by a mix of domestic and international factors.

7 Tax exemption is governed largely by the Tax Consolidation Act 1997 and the Finance Act 2002.

8 Rates exemption is governed by and s. 2 of The Valuation (Ireland) Acts, 1852 and 1854 and the Valuation Act 2001.

9 In *Valuation Tribunal decision, Rehab Lotteries Ltd v. Commissioner of Valuation* (Appeal No. VA89/229, 1991), it was contended that organising and running lotteries on behalf of charities, to facilitate their fundraising, was not in itself a charitable purpose. The Tribunal refuted this argument and held that third parties who facilitate fundraising on behalf of charities are viewed as doing so as agents of those charities, are thereby fully complicit in the charitable purposes of those charities and therefore entitled to charitable exemption from rates.

2.1 The Challenge of Socio-Economic Developments

In the early 1990s, after a long period of decline relative to the rest of northwest Europe, Ireland began to enjoy an unprecedented and relatively continuous economic boom. In the year 2000 this resulted in the highest rate of GDP growth ever recorded in an OECD member country and this upward trend was sustained until 2007/8. During this period it also underwent considerable socio-demographic changes. The rural/urban balance in population distribution was reversed from its previous 60/40 ratio, accompanied by a corresponding switch in emphasis from an agricultural based economy to one that became much more service based. The country was host to a growing number of multinational manufacturing companies and had a well-educated workforce concentrated in the high tech sector. The population increased significantly due partially to a sharp decline in the annual flow of young Irish emigrants leaving to seek employment opportunities elsewhere and to substantial and sustained immigration from the mid-1990s onwards including, from the late 1990s, a rise in the number of 'asylum seekers'. It changed also from being a homogenous mono-cultural society, coalesced around the Catholic Church and with the highest level of regular church attendance in Europe, to a much more multi-cultural and multi-faith society.

These changes were largely due to the ending of Ireland's isolationist policy with its focus on nurturing a newly found political identity and fostering the growth of an indigenous Irish Catholic culture. Instead Ireland embraced membership of the European Economic Community (EEC), now the European Union (EU), which it joined in 1973. This was followed in 1979 by the breaking of the fixed link between the Irish pound and sterling when Ireland joined the European monetary system (EMS) and in 2002 it distanced itself further from sterling when it abandoned its native currency for the euro. Ireland also became a member of the UN, the OECD and the Council of Europe. The economy and Irish society as a whole benefited greatly from Ireland's enthusiastic commitment to the EC.

The pace of socio-economic change left relatively untouched a range of long standing social problems and failed to prevent the emergence of many new ones. Poverty related difficulties still affected a large proportion of the population,[10] particularly those in rural areas, while family breakdown, homelessness and drug abuse had increased considerably. The 'travelling community' remained alienated and marginalised, the gap between rich and poor had grown and free access to a full programme of health and social care services continued to be problematic for those on low incomes. Immigration had introduced not just a larger workforce and a more

10 See, for example, two studies carried out by the independent Economic and Social Research Institute for the Department of Social Welfare and the Combat Poverty Agency, *Poverty in the 1990s - Evidence from the Living in Ireland Survey* and *A Review of the Commission on Social Welfare's Minimum Adequate Income*, both published in December 1996. These studies provide a wide variety of very useful information on poverty levels in Ireland.

multi-cultural society but also the 'asylum seekers' phenomenon,[11] racism, and new variants of inequity. The overspill of civil strife from the adjoining jurisdiction had, after 30 years, created an awareness of deep-seated problems of social inclusion in Ireland. Religion, or more specifically the role broadly played by the Roman Catholic Church in Irish society and in shaping the use of charity, had diminished as social mores and institutions of governance became more secularised. Charity, as traditionally defined, was no longer fit for purpose in terms of accommodating the many new and pressing social issues in contemporary Ireland.

2.2 Evolving Political Partnerships Between Government and Community

In Ireland, as elsewhere in the developed world, the retraction of the State in the late 20th century was accompanied by a corresponding rolling forward of the voluntary sector. This was partly the consequence of a political initiative aimed at broadening the established relationship between government and citizens, allowing the latter more participation and representation in the democratic process with the hope of thereby facilitating greater social cohesion. In a general move away from the constraints of the established model dominated by party politics and elected representatives, which seemed to be linked to the widespread phenomenon of citizen disengagement from politics as evidenced by low voter turnout at election time, governments sought to build new more participative bridges with the community. To revive and re-energise democracy, governments opened up new direct lines of engagement with their constituencies, experimented with formal partnership arrangements and developed 'third way' strategies, compacts etc.

Since 1987, this movement took the form of government cultivating a model of social partnership with certain groups designated as 'pillars' of contemporary Irish society (Employers, the Trades Unions and the Farming organizations). The community and voluntary sector was seen as the fourth pillar in this partnership arrangement with government.[12] For the past two decades this social partnership model, particularly the role played within it by the community and voluntary sector, has been viewed as of fundamental importance to the planning and implementation of social and economic strategy. The only legal framework available to delineate, however roughly, the role and the respective parameters of responsibility for government and the sector is that provided by the common law principles and the legislative provisions of charity law. It rapidly became apparent that the framework needed to be revised if it was to reflect the reality of contemporary rules of

11 Since 1995, asylum-seekers have probably constituted no more than 10% of all foreign immigrants to Ireland but have presented a considerable challenge to Irish social inclusion policies.

12 See, the national agreement *Towards 2016: the Ten-Year Framework Social Partnership Agreement 2006-2015* and *Towards 2016: Review and Transitional Agreement 2008-2009*, Government Publications, Stationery Office, Molesworth St., Dublin, 2006 and 2008.

engagement between government and the sector and facilitate the further development of the social partnership. Pressure mounted from the sector, channeled by such representative umbrella bodies as The Wheel, for that legal framework to be redrawn so as to give fuller recognition to the sector's interests and its social partnership role.

2.3 Defraying Government Public Service Expenditure

The newfound enthusiasm of the Irish government for promoting the growth of a vigorous and independent voluntary sector was, as elsewhere in the developed nations, prompted if not necessitated by a pressing need to share the costs of public service provision. The burden of responsibility had to be shifted to some extent towards the community and voluntary sector, where charities in particular had an entrenched involvement in health, education and social care services. This was also seen as, happily, serving the purpose of enhancing the capacity of democratic politics: encouraging the use of volunteers in public service provision being viewed by government as a means of promoting civic engagement and building social capital.

However, the uncertain line to be drawn between the responsibilities of government and charity to provide services or utilities for the public benefit has long been governed by charity law. If the bargain struck 60 years earlier with the creation of a quasi-welfare state was now to be renegotiated, then that law would need to be revised. Certain matters required particular attention: the broadening of 'charitable purposes' to permit charities to undertake new forms of activity or organisations with such activities to acquire charitable status; the legal requirement that charities be independent entities needed to be addressed etc. The government readily acknowledged the pressure to broaden the categories of bodies qualifying for charitable status "so as to ensure that the range of local community and personal development groups that have emerged in recent years can qualify".[13]

2.4 Inadequacies of the Regulatory Framework

Charity law reform in this jurisdiction has been triggered largely by failings in the mechanisms for ensuring accountability and transparency in relation to charities and charitable activity. Other concerns also played a part. As the larger charities extended their activities, engaging and competing in the market place in a manner almost indistinguishable from commercial businesses, the issue as to how to determine when a charity's 'ancillary and incidental' commercial interests were being pursued to the detriment of its public benefit objects and in breach of the 'exclusivity' rule was a matter of growing importance to its competitors. The appropriateness and effectiveness of the existing legal framework, as the means for

13 Ireland, Dept of Social Welfare - *Supporting Voluntary Activity: A Green Paper on the Community and Voluntary Sector* (Dublin: Stationery Office, 1997); subsequently endorsed in the White Paper, *op cit.*

differentiating and policing charitable as opposed to for profit activity, was being questioned. There were difficulties, also, in relation to the suitability of existing legal structures as the best means of channelling charitable activity.

In particular, questions were arising as to the appropriateness of the functions exercised by that conservative and benign non-interventionist body the Commissioners for Charitable Donations and Bequests[14] which was central to the relationship between government and charities in the Republic of Ireland. There was a growing focus on the need for systems to identify, register and regulate charities and provide an assessment of definitional matters, at least to the extent of questioning a continued need for the difference in the tests applied when determining eligibility for exemption from tax and rates.

2.5 Fundraising Concerns

The momentum for Irish charity law reform had been driven, most immediately, by concerns relating to fundraising,[15] which was in law and practice administered quite separately from the main body of charity law. The Street and House to House Collections Act 1962 and the Gaming and Lotteries Act 1956 (replaced by the Casual Trading Act 1995) were both too dated to adequately address the complexities of modern fundraising practice, nor did they deal with the more fundamental issues of identifying the organisations and the activities which constitute fundraising for charitable purposes. The law was more concerned to outline authorising procedures than to identify and proscribe abuses. While it continued to focus on raffles, church collections, door-to-door and street collections contemporary practice featured professional and entertaining fundraising techniques with the capacity to attract and possibly transfer overseas, within a very short period, a large volume of funds.

It was the political effect of some well-publicised scandals, particularly regarding the propriety of the fundraising methods employed by the Irish Society for the Prevention of Cruelty to Children, that forced the government to initiate a review. Indeed, at the launch of the Charities Bill, the Minister of State for Community, Rural and Gaeltacht Affairs explained that its purpose was "to deliver reform of the law relating to charities in order to ensure accountability and to protect against abuse of charitable status and fraud."

---

14 This body was established in 1844 under an "An Act for the more effectual application of Charitable Donations and Bequests in Ireland". Its intended purpose was to ensure that "the pious intentions of charitable persons should not be defeated by the concealment and misapplication of their donations and bequests to public and private charities in Ireland". Overseeing the proper management of charitable bodies and their funds was then its primary function and this remained the case in the early years of the 21st century.

15 See, for example, St J Moore, G., *The Law of Fundraising: Time for Change* (1997) 15 ILT 154 and *The Report of the Committee on Fundraising Activities for Charitable and Other Purposes*, Stationery Office, Dublin, 1990.

2.6 Good Governance Concerns

The widespread media coverage given to corporate scandals in the US (Enron etc) had a ripple effect in Ireland as elsewhere and awakened a general concern to ensure that standards of propriety prevailed in corporate boardrooms. The fact that, at the turn of the century, the law relating to charity governance remained essentially as set out in the Trustee Act 1893 was widely acknowledged to be a considerable weakness in preventing the spread of abusive practices. There was acknowledgment also that the registration requirement imposed upon incorporated charities did little to ensure adequate inspection of governance arrangements for entities that functioned as trusts. This was further compounded by the lack of any system for routinely auditing and inspecting the accounts of charities in Ireland which thereby provided opportunities for fiduciary abuse.

2.7 The International Climate for Charity Law Reform

For four hundred years the common law jurisdictions found it unnecessary to introduce formative legislation to define 'charity' and broaden its purposes to meet contemporary patterns of need.[16] However, the common law principles and parameters that had for so long determined charitable activity were, by the end of the 20th century, being impacted by developments in the law relating to matters such as human rights, equity, equality and discrimination. The extent and effects of embedded poverty, disease, climate change and economic collapse on the underdeveloped nations in Africa and elsewhere, compounded by the imbalance of aid/trade agreements with developed nations, steadily eroded the traditional role of charity. As the influence of international Conventions with attendant social justice concepts and associated case law gradually permeated domestic jurisprudence so the relevance of outdated public benefit constructs came to be increasingly open to challenge.

Suddenly, at the turn of the century, law reform became politically desirable and a protracted period of charity law review broke out - in Canada,[17] Australia,[18] New

16 With the notable exception of Barbados, which introduced a detailed statutory definition of charitable purposes in the Charities Act 1979, Cap. 243.

17 See Ontario Law Reform Commission, *Report on the Law of Charities*, Ontario, 1996.

18 See, the Charity Law Reform Committee report *Inquiry into the Definition of Charities and Related Organisations*, Canberra, June 2001.

Zealand,[19] the US[20] and in the UK[21] - across the common law world. In response to much the same pressures for change, and to ensure that its regulatory framework retained a working congruity with its neighbouring UK jurisdictions, Ireland also embarked upon charity law reform. Although the Irish reform process was first mooted in 1996,[22] though not launched until 2002,[23] it has taken somewhat longer than other nations to reach a legislative conclusion, perhaps because of the particular complications encountered in respect of reform implications for religious and political institutions in this jurisdiction. Nonetheless, the direction of reform and the outcomes achieved owe a good deal to the cues set within the international context.

3. The Barriers to Charity Law Reform

In Ireland, as in other jurisdictions, the most obvious challenges to achieving reform focussed on how to modernise the fundamental common law conceptual matters (e.g. charitable purposes and public benefit), certain rules (e.g. regarding political purposes, exclusivity, ancillary and incidental etc), the treatment of religious organisations and how to ensure a more effective regulatory framework (see, further, below). There were other barriers, however, some specific to the Irish context.

3.1 The Social Partnership Context

From the outset it was agreed that the Irish charity law reform process would be conducted by the government working closely with the community and voluntary

19 See, the Working Party on Charities and Sporting Bodies, *Report on the Accountability of Charities & Sporting Bodies*, 1997.

20 See, Panel on the Nonprofit Sector, *Strengthening Transparency, Governance, Accountability of Charitable Organisations*, final report to Congress and the Nonprofit Sector, Washington, 2005.

21 See, for England and Wales: the National Council for Voluntary Organisations, *For the Public Benefit? A Consultation Document on Charity Law Reform*, London, 2001 and *Private Action, Public Benefit, a Review of Charities and the Wider Not-For-Profit Sector*, London, September 2002. See, for Scotland: the Scottish Charity Law Review Commission report, *Charity Scotland*, Edinburgh, 2001. See, for Northern Ireland: the Charities Branch, Voluntary & Community Unit, Department for Social Development *Consultation on the Review of Charities Administration and Legislation in Northern Ireland*, Belfast, 2005.

22 See, the Department of Equality and Law Reform *Report of the Advisory Group on Charities/Fundraising Legislation*, November 1996.

23 See, the *Agreed Programme for Government* (2002). In December 2003, the Department of Community, Rural and Gaeltacht Affairs launched the public consultation process with the publication 'Establishing a Modern Statutory Framework for Charities'.

sector,[24] within the context of the social partnership. However, although this partnership model offered the most favourable forum for addressing matters that lie at the heart of the relationship between the social partners, it also presented certain risks for charities.

The more complicit the relationship between government and sector the more problematic it becomes for charities to retain autonomy and genuine independence while also continuing to subscribe to partnership policy. The drift into contract culture and increased dependence on State sources of funding has led to implicit government colonisation of the sector accompanied by a degree of disempowering of charities some of which have lapsed into proxy government bodies and many have been compromised in terms of their freedom to determine activity and to dissent from government policy. The issue of the independence of the sector and its constituent bodies, particularly charities, was certain to be a sticking point when it came to agreeing legislative provisions that would thereafter shape the respective roles of government and charity in relation to public benefit activity.

It is possible that continuing the statutory exemption of religious bodies (by far the largest and most powerful of Irish charities) from the public benefit test was such a sticking point. Also, the agreement to leave the monitoring and enforcement of standards in fundraising practice largely to self-regulation by the sector was, in all probability, a concession to the lobbying of sector representatives.

3.2 Need to Work within the Belfast Agreement

The Belfast Agreement[25] in 1998 established, among other things, a framework to promote the broad harmonisation of social policy goals between jurisdictions along both the north/south and the east/west axis of these islands. Clearly, jurisdiction specific charity law frameworks that strategically take into account common social issues and facilitate cross-jurisdiction charitable activity have the potential to make a considerable contribution to the development of a more civil society within and between the jurisdictions of these islands. This may help explain why the Irish reform process has taken so long. It is probable that the Irish government, being mindful of Agreement principles, has delayed finalising its process until it had the opportunity to fully consider the outcomes of equivalent processes in the neighbouring jurisdictions of the UK. Having done so, it is also probable that the Irish government then had to wrestle with the political implications resulting from

---

24 See, *Supporting Voluntary Activity: a White Paper for Supporting Voluntary Activity and for Developing the Relationship between the State and the Community and Voluntary Sector*, 2001, (the 'White Paper'). Also, see, *Supporting Voluntary Activity: a Green Paper on the Community Voluntary Sector and its Relationship with the State*, Department of Social Welfare, Dublin, Stationery Office, 1997 (the 'Green Paper').

25 See, Agreement reached in the multi-party negotiations (10 April 1998) and further at http://cain.ulst.ac.uk/events/peace/docs/agreement.htm

enacting provisions at variance with their UK counterparts (e.g. in respect of the advancement of religion and application of the public benefit test).

3.3 Need to be Convention Compliant

The European Convention on Human Rights (ECHR) was incorporated into Irish law through the European Convention on Human Rights Act 2003. Every organ of the State is now required to carry out its functions in a manner compatible with the State's obligations under the Convention. This gave rise to such issues of difficulty as whether a charity, particularly a government funded facility registered as a charity, was a juridical entity and if so whether it was a 'public body' for the purposes of accountability to Convention requirements. All legislation had to be formulated, in so far as possible, in a manner compatible with the ECHR.

3.4 Doctrine of Subsidiarity

Ireland's tradition of reliance upon NGOs has been accompanied by a reluctance to regulate their activities. No statutory regulatory system existed for facilitating transparency, monitoring effectiveness and ensuring public accountability in relation to the activities of charities, though some bodies were statutorily vested with related responsibilities. Partly this was due to the entrenched doctrine of subsidiarity, itself a by-product of the delicate relationship between Church and State, characterised by the vigour with which the former traditionally lobbied for its interests to be treated as synonymous with that of government while simultaneously policing the latter's intrusion into matters it judged to be outside the remit of government. This doctrine has long operated as a brake on undue government intervention in many spheres of activity and, together with its political strategy of support for the social partnership, explains prolonged government preference for promoting self-regulation in the sector. As the Minister responsible for the reform process stated:[26] "regulatory requirements should be proportionate; in parallel with the statutory framework, self-regulatory initiatives such as agreed codes of conduct should be encouraged." It seems likely that the relatively light regulatory regime embodied in the new legislation is due in part to the influence of this doctrine.

However, in its White Paper *Regulating Better*,[27] the government acknowledged the need for better regulation and laid down some key guiding principles and an action programme for developing effective regulatory systems.

---

26 See Noel Ahern, T.D., Minister of State, public announcement at the Department of Community, Rural and Gaeltacht Affairs, on securing government approval on 7th March 2006 for the General Scheme for the Charities Regulation Bill 2006.

27 Department of the Taoiseach, White Paper *Better Regulation*, Government Publications Office, Molesworth Street, Dublin 2, January 2004. The paper emphasized the six governing principles of: Necessity, Effectiveness, Proportionality, Transparency, Accountability and Consistency.

3.5 The Disparate Nature of Existing Regulatory Mechanisms

A primary reason for reform was also a considerable barrier to achieving it. A range of government bodies and a number of different government departments held some form of brief for the affairs of charities and their activities. Mostly, the bodies were those traditionally associated with charities and had roles and responsibilities that were no longer as important as formerly; these included the High Court, the office of Attorney General and Customs and Excise. Others such as the Probate Office, the Director of Corporate Enforcement, the Companies Registry Office and the Gárda Síochána (the national police force) also maintained their traditional if somewhat marginal regulatory roles. The body most strongly associated with charities was the Commissioners for Charitable Donations and Bequests which exercised certain statutory powers but very little regulatory control. Charities that engaged in fundraising were subject to a degree of police supervision, those with premises had to seek rates relief from the Valuation Office while all were obliged to seek confirmation of their charitable status and pursue claims for tax relief from the Revenue Commissioners. The different areas of responsibility were distributed across different sets of statutes while government responsibility was diffused and alternated between a number of departments. Prior to 1998 responsibility for charity law matters rested with the Department of Justice, it then passed to the reconstituted Department of Justice, Equality and Law Reform before being transferred in 2001 to the Dept of Social, Community and Family Affairs and in 2003 it passed to the Department of Community, Rural and Gaeltacht Affairs. Although, thereafter, the latter Department carried lead responsibility for the review, some aspects of charity law remained outside its remit, in particular responsibility for fundraising legislation continued to rest with the Department of Justice.

Unquestionably, having to co-ordinate the many different bodies, statutes and government departments was itself a considerable obstacle to progressing charity law reform in Ireland.

3.6 Achieving a Coherent Body of Law

Charity law is not a stand-alone piece of legislation. A major obstacle to finalising new charity legislation has been the issue of how the latter would relate to, or incorporate, legislative provisions governing matters which directly impact upon charities and their activities.

Most obviously, this issue arose in regard to fundraising and to a large extent was dealt with by leaving regulatory requirements to existing legislation, a permit system run by the Garda Síochána and to voluntary codes of practice as formulated and administered by the sector.[28] It also arose in respect of the responsibilities of

28 See, Irish Charities Tax Research, *General Statement of Guiding Principles for Fundraising* (Dublin: ICTR, May 2008) and *Final Feasibility Report: Regulation of fundraising by charities through legislation and codes of practice* (Dublin: ICTR, May 2008) at www.ictr.ie

trustees. At first it was considered necessary to update and incorporate provisions of the Trustee Act 1893 into the charities legislation but this was subsequently abandoned[29] and the matter left to be addressed separately at a later date. Similarly, matters of rateable valuation[30] and the interface with company law[31] and anti-terrorism legislation[32] have largely been left unaddressed. Given that company law is currently in the process of major revision, and trustee law will have to follow, this means that the new charity legislation will, in the near future, undoubtedly require amending to take account of matters impacting upon charities. An opportunity to further the consolidation of charity law has been lost.

Charities themselves are not stand-alone legal entities. They share space in the community and voluntary sector with an array of other not-for-profit entities. An issue that may have delayed charity law reform in Ireland is the extent to which the proposed legislation should address the boundaries between charities and other non-government organizations. This was a matter that had attracted attention more widely in the EC where 'charity', as known to the common law, was merely a species of NGO and as such would need to conform to the Council of Europe's *Fundamental Principles on the Status of non-governmental Organisations in Europe.*[33] Again, this issue has been sidestepped. The new legislation did not bring together the main areas of law that impact upon charities in one holistic statute, but consideration of the feasibility of doing so undoubtedly presented a barrier to early completion.

3.7 Moving Away From a Tax Driven Model

In Ireland, applications for tax exemption on the grounds of being a charity have always been determined by the Revenue Commissioners.[34] As has been said:[35]

> *"Revenue's involvement with Charities is as old as the State itself and owes its origins to the long standing tax exemption provision in the Tax Code since 1853 when income tax was first imposed in Ireland*."

---

29 See, the difference between the Charities General Scheme of Bill 2006 and Charities Act 2009.

30 As governed by the Valuation (Ireland) Acts, 1852 and 1854 and the Valuation Act 2001.

31 As governed by the Companies Acts 1963 and 1990.

32 As governed by the Criminal Justice (Terrorist Offences) Act 2005.

33 See, the Secretariat Directorate General of Legal Affairs, Strasbourg, April 2002.

34 Applying the Taxes Consolidation Act 1997, as amended.

35 Harrahill, G., Collector General, 'Charities and Taxation - Service and Compliance', paper presented at ICTRG Conference *Charities Towards 2012,* (8th November 2007) at p. 1).

The Commissioners have had the duty to both interpret the legal definition of charitable purpose in respect of an applicant's objects and activities and, having confirmed charitable status, it then provided the associated tax relief, as, in the words of Cross LJ, "the concepts of fiscal immunity and charitable status continue to march hand in hand."[36] The Commissioners also applied the same degree of supervision and inspection to that entity as it applied to all organizations with a tax liability. There was some logic and simplicity in the Commissioners providing a single gateway for the determination of both matters. For so long as government prioritized the protection of its tax revenue base over promoting charities and their activities, this arrangement made sense.

Decoupling the determination of charitable status from the regulatory regime applicable to all taxable entities, and vesting statutory responsibility for the former in a new government body,[37] was a strategic move designed to operationalise a government policy giving priority to promoting the growth of charities rather than to policing their eligibility for tax exemption. However, the extent to which this arrangement would in practice facilitate charities depended entirely upon the authority vested in that new body relative to that retained by the Commissioners. This issue was of fundamental significance to the reform process in Ireland, as in other jurisdictions, and is likely to have been highly contentious (see, further, below).

4. Outcomes of the Charity Law Reform Process

The main outcomes achieved by the Irish charity law reform process, as evidenced in the new charity legislation, are the statutory introduction of: new definitions of core common law concepts and an extension of charitable purposes; a new independent Charities Regulatory Authority (CRA); a Charity Appeals Tribunal; a Register of Charities; and an updating of the law relating to fundraising. Also, although perhaps it's early days to make such a judgment, an incidental but significant outcome of this process would seem to have been a further consolidation of the relationship between government and the sector within the social partnership model.

The prospective outcomes shrank as the process continued. Whereas the 2006 Bill comprised 148 heads in 11 parts, the 2009 Act saw these reduced to 99 sections in 7 parts. The scaling back of the legislation, the nature of the omissions and the changes made to those provisions that finally made it onto the statute book, provide a clear record of areas of contention.

---

36 *Dingle v Turner* [1972] AC 601, *per* Cross L.J.

37 This body, to known as the Charities Regulatory Authority, will replace the Commissioners for Charitable Donations and Bequests and assume its powers under the Charities Act 2009, ss. 81 - 87.

4.1 Extension of Charitable Purposes

"Charitable purposes", under the new legislation, retains but extends the common law definition given to it in *Pemsel*[38] and subsequently interpreted by the judiciary over many years and jurisdictions. Under s. 3(1) charitable purposes are now defined as:

(a) the prevention or relief of poverty or economic hardship;

(b) the advancement of education;

(c) the advancement of religion; and

(d) any other purpose that is of benefit to the community.

In addition to enlarging the first head to allow for the prevention as well as the relief of poverty, s. (3)(1)(d) re-states the fourth head but adds, under s. 3(11) that this "includes" the following 12 specific new charitable purposes:

(a) the advancement of community welfare including the relief of those in need by reason of youth, age, ill-health, or disability,

(b) the advancement of community development, including rural or urban regeneration,

(c) the promotion of civic responsibility or voluntary work,

(d) the promotion of health, including the prevention or relief of sickness, disease or human suffering,

(e) the advancement of conflict resolution or reconciliation,

(f) the promotion of religious or racial harmony and harmonious community relations,

(g) the protection of the natural environment,

(h) the advancement of environmental sustainability,

(i) the advancement of the efficient and effective use of the property of charitable organisations,

(j) the prevention or relief of suffering of animals,

38 *Special Commissioners for Income Tax v. Pemsel* [1891] AC 531.

(k) the advancement of the arts, culture, heritage or sciences, and

(l) the integration of those who are disadvantaged, and the promotion of their full participation, in society.

The legislation omits any reference to amateur sport[39] or to human rights[40] in its definition of "charitable purpose" and virtually reinstates the traditional bar against political activity by charities (see, further, below).

While on the one hand the Irish legislation extends the common law definition of charitable purposes, on the other it would seem to abandon the common law 'spirit and intendment' rule as the terminology employed in s. 3 - "1)(d) any other purpose that is of benefit to the community" and "(11) 'purpose that is of benefit to the community' includes" – deliberately avoids any reference to it. If this interpretation is correct, then Irish charity law has been diminished as in the past the rule has proved an invaluable means of broadening the interpretation of purpose to better meet contemporary manifestations of social need.[41]

4.2 Statutory Definitions for Core Common Law Concepts

It has long been established that to be a charity an entity must be confined exclusively to charitable purposes, be for the public benefit, independent, non-profit distributing and non-political. These common law characteristics have now, for the most part, been statutorily fixed in place, and to some extent have been statutorily defined.[42]

For the first time, there are now statutory definitions of key concepts such as 'charitable gift', 'charitable organisation', 'charitable purpose' and 'public benefit'.[43] A 'charitable organisation' is defined to mean a body that promotes a charitable purpose only and applies all of its property (except as may be required for

---

39 There has never been any Irish equivalent to the English Recreational Charities Act 1958.

40 The reference to human rights in the General Scheme of Bill, Charities Bill 2006 (Head 3(1)(d)(v) "the advancement of human rights, social justice, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity") was omitted from the equivalent provision in the Charities Act 2009.

41 As Breen points out: "The only reference to the non-exhaustive nature of the statutory definition of charity is the drafter's use of the word 'includes' in s. 3(11) to the effect that elaboration upon 'other purposes beneficial to the community' includes the categories of activity listed there but presumably is not limited to these." See, Breen, O., 'Neighbouring perspectives: legal and practical implications of charity regulatory reform in Ireland and Northern Ireland', *NILQ* (2008) 59(2): 223–43, at p. 229.

42 See, the Charities Act 2009, s. 2(1)(i), s. 2(1)(iii)(a) and s. 3.

43 *Ibid.*

the operation and maintenance of the organisation) to the furtherance of such purpose; property cannot be returned to the members of the organisation as would be the normal case for organisations and companies that are established to make a profit. Provided that an organisation does not fall within the definition of 'excluded body' (which includes political parties, trade unions and bodies that promote unlawful ends),[44] there is a twofold test that an organisation must satisfy before charitable status will be conferred upon it. First, it must show that it can bring itself within the definition of 'charitable purpose' and, second, such purpose must be of 'public benefit.'

4.3 Re-Framing the Public Benefit Test

The concept of 'public benefit' has always been of fundamental importance to charity law in a common law context. Its uneven application across the four *Pemsel* heads has, however, been contentious: the Law Society, for example, drew attention to the problem - "we recommend consideration of the strong arguments for applying the public benefit criteria consistently across the heads of charity".[45]

Irish legislation now requires proof of public benefit before a purpose can be declared charitable. The new statutory test, applicable to all non-religious purposes, requires proof of three facts: a) that the purpose in question is intended to benefit the public or section thereof; b) that any private benefit flowing from the purpose is reasonable, and is ancillary and necessary for the achievement of the primary charitable purpose; and c) that any donor-imposed limitations on the class entitled to benefit or any charges imposed in the provision of the charitable purpose are justified and reasonable and will not limit unduly the number of persons or classes of person who will benefit.[46] Unlike its predecessor, the 2009 Act does not require the purpose to be affirmed by appropriate activity: the supplementary 'activities test', which judges a charity not just by its statement of purpose but also takes into account whether this purpose is corroborated by the charity's activities, is customary among other developed common law nations but is missing from the Irish legislation (though charities are now required to address 'activities' in their annual report to the CRA[47]). The public benefit test places greater weight on the meaning of "public" than on the meaning of "benefit". There are no criteria defining what is meant by "benefit" in s. 3. One effect of the test as now worded is to abolish the common law's historical, if anomalous, exceptions for "poor relations" and "poor employees"

---

44 *Ibid*, s. 2(1).

45 See, *Charity Law: the Case for Reform*, the Law Society's Law Reform Committee, Dublin, July 2002, p. 57.

46 Charities Act 2009, s. 3.

47 *Ibid*, s. 52(1).

by requiring that the public nature of any such gift cannot be assumed but must be proved if the charity test is to be satisfied.[48]

In Ireland, unlike the UK jurisdictions, the public benefit test will not have an unequivocal mandatory application in respect of all charitable purposes. The most obvious, if unsurprising, aspect of the Irish public benefit test is that it is to have no bearing on religious organizations or, more broadly, on gifts for the advancement of religion. Less obvious but more surprising is the statutory continuation of the rule that the test is to be applied subjectively to determine donor intention (see, further, 5.1.3. below).

4.4 Decoupling Charitable Tax Exemption from Charitable Status

This legislation makes the CRA responsible for registering and regulating charities and leaves the Revenue Commissioners to determine whether a registered charity will be entitled to tax relief.[49] While the Law Reform Committee recommended that tax relief should continue to be an automatic consequence of charitable status,[50] the Charities Act 2009 has drawn a line between the two and left tax exemption to be determined by the Revenue Commissioners. It is expected that a good working relationship will exist between both bodies,[51] but the latter is not statutorily required to follow the lead given by the CRA: registration by the CRA need not be automatically followed with tax exemption by the Commissioners. As the government subsequently explained:[52]

> "*The intention is that there will not be shared responsibility in relation to decisions on tax exemptions. The Charities Regulator will determine whether or not an organisation is a charitable organisation, but it will be a matter solely for the Revenue Commissioners to determine whether or not any funds applied by such an organisation for charitable purposes should be granted entitlement to tax exemption*."

The fact that "the Revenue Commissioners shall not be bound by a determination of the Authority as to whether a purpose is of public benefit or not in the performance

---

48 *Ibid*, at s. 3(7).

49 Section 7(1) of the Charities Act 2009 provides that nothing in the statute "shall operate to affect the law in relation to the levying or collection of any tax or the determination of eligibility for exemption from liability to pay any tax".

50 See, Law Reform Committee of the Law Society, *Charity Law: The Case for Reform*, July 2002 at p. 94.

51 See, s. 33 of the Charities Act 2009, which provides for administrative cooperation between the CRA and other relevant regulators.

52 See, Department of Community, Rural and Gaeltacht Affairs, *Principal Features of the Charities Act 2009*, Dublin, March 2009, at p. 4.

by them of any function"[53] could give rise to future difficulties. The Commissioners determine tax exemption eligibility in relation to income tax, corporation tax, capital gains tax, deposit interest retention tax, stamp duty, capital acquisitions tax, probate tax and sundry lesser liabilities.[54] Further, and again demonstrating the conditional nature of the de-coupling, the CRA may establish the register of charities only "after consultation with the Revenue Commissioners".[55]

The decoupling frees the Commissioners from its obligation to interpret charitable purpose and determine whether or not an organisation's objects and activities can be construed as charitable. This necessarily placed the Commissioners in a defensive position regarding claims of charitable status from organizations the activities of which might broaden established interpretations but at the expense of further eroding its tax revenue base. Instead, the CRA, armed with an extended definition of 'charitable purpose', is now positioned to adopt a more positive approach.

4.5 Establishing a New Lead Regulatory Body

The issue as to which agency in the regulatory framework bears responsibility for applying the public benefit test is of crucial importance to charities and for the development of the charitable sector. In Ireland, the new legislation has ensured that that responsibility is transferred from the Revenue Commissioners to An tÚdarás Rialála Carthanas, or the Charities Regulatory Authority (CRA). To be registered as a charity, an organisation will now need to satisfy the CRA that it is both engaged in a charitable purpose and is acting for the public benefit.

The CRA, replacing the Commissioners for Charitable Donations and Bequests,[56] will be responsible for the establishment and maintenance of a register of charities and will oversee the reporting regimes applicable to registered charities. For the first time, Ireland will have an agency with a specific brief to regulate charities, monitor their activities, protect their assets and ensure compliance with statutorily stated

53 The Charities Act 2009, s. 7(2).

54 See, the Taxes Consolidation Act 1997, s. 207(1) and (2) and s. 208, which allows certain exemptions from income tax under Schedules C, D, and F. Section 76(7) provides for the carrying over of any exemptions which would apply under income tax provisions to corporation tax. The Capital Acquisitions Consolidation Tax Act 2003, s. 76(2), provides that a gift or inheritance taken for public or charitable purposes will be exempt from capital acquisitions tax provided that the Revenue Commissioners are satisfied that it has been or will be applied to such purposes. Also, s. 848A of the 1997 Act, inserted by s. 45 of the Finance Act 2001, provides that charities or the individuals making donations can now reclaim the tax paid on such donations.

55 See, Charities Act 2009, s. 39 (1).

56 *Ibid*, Part 6, ss. 81 – 88, which provides for the dissolution of the Commissioners of Charitable Donations and Bequests for Ireland.

standards of practice. However, the fact that its powers are relatively weak will hinder the capacity of this body to act as a counterweight to the Revenue Commissioners, develop a strong independent base and provide leadership to the sector. The statutory functions of the CRA, as stated in s. 14 of the 2009 Act, are:

(a) increase public trust and confidence in the management and administration of charitable trusts and charitable organisations,

(b) promote compliance by charity trustees with their duties in the control and management of charitable trusts and charitable organisations,

(c) promote the effective use of the property of charitable trusts or charitable organisations,

(d) ensure the accountability of charitable organisations to donors and beneficiaries of charitable gifts, and the public,

(e) promote understanding of the requirement that charitable purposes confer a public benefit,

(f) establish and maintain a register of charitable organisations,

(g) ensure and monitor compliance by charitable organisations with this Act,

(h) carry out investigations in accordance with this Act,

(i) encourage and facilitate the better administration and management of charitable organisations by the provision of information or advice, including in particular by way of issuing (or, as it considers appropriate, approving) guidelines, codes of conduct, and model constitutional documents,

(j) carry on such activities or publish such information (including statistical information) concerning charitable organisations and charitable trusts as it considers appropriate,

(k) provide information (including statistical information) or advice, or make proposals, to the Minister on matters relating to the functions of the Authority.

While it is empowered to appoint inspectors to carry out investigations into a charity's affairs and demand the production of documents,[57] any further action that

57 *Ibid*, ss. 64 and 65.

the CRA wishes to take on foot of such an investigation, unless classed as an intermediate sanction,[58] will require prior High Court approval.

4.5.1 Limited Powers of new Regulatory Body

Although, under s. 13(2), the CRA is to "have all such powers as are necessary or expedient for the performance of its functions", it is evident that in practice these are quite limited (certainly so relative to those available to its counterpart in any of the UK jurisdictions).

There is no equivalent to the powers of similar UK regulatory bodies to suspend or remove trustees, to remove a charity from the register, to freeze charitable assets or to issue directions to a charity to take a particular course of action. The limited powers of this body to act independently may be considered to have been strengthened by the decision to divest the Irish Attorney General of both his statutory and traditional *parens patriae* responsibilities in respect of charities and vest these in the CRA.[59] But, given the proven ineffectiveness of the AG's role in this context, it is unlikely that the transfer of powers will significantly reinforce the standing of the CRA. Little remains of the indication given in the 2006 Bill that this new body would be granted a wide ambit of discretionary power.[60]

Lacking the powers of the High Court, and in the absence of the 'spirit and intendment' rule, it remains an open question as to whether the CRA will ever be in a position to further develop the fit between the legal definition of charitable purpose and future manifestations of social need. Moreover, the existing statutory provisions potentially allow for some dual reporting to both the new CRA and to the Companies Registration Office (CRO); the 2009 Act provides that the Companies Acts will continue to apply to charities that are registered as companies insofar as accounting requirements are concerned. There is some way to go before it becomes clear just exactly how the CRA will relate to the other bodies with responsibility for charity matters.

---

58 *Ibid*, s. 73 empowers the CRA to deal with breaches of certain accounting and reporting duties imposed by the Act. An "intermediate sanction" is defined in s.73(5) as removal of the charity from the register for such period as the CRA shall determine or publication on the CRA's website of particulars of the contravention concerned.

59 *Ibid*, s. 38. It is noteworthy that whereas under Head 45 of the 2006 Bill the powers of the AG (as outlined in sections 23 and 51 of the Charities Act 1961) had been restated and extended, in s. 38 of the 2009 Act they are entirely removed.

60 The explanatory note accompanying Head 4 of the Charities Regulation Bill 2006 stated that "this Head seeks to establish the broad principles of a public benefit test, as legislative markers for the exercise of discretion by the Regulatory Authority".

The CRA is to be supported by a consultative panel or panels, established to assist it in its work and to ensure effective consultation with stakeholders.[61] This provision should provide a formal link between the CRA and the sector, enabling the latter to keep the former briefed on emerging issues affecting its interests. There is no indication that any such panel will have specific powers nor that the CRA will be required to respond to any issues raised.

If nothing else, however, the dissolution of the Commissioners for Charitable Donations and Bequests, the transfer of the Attorney General's responsibilities for charities to the CRA, and the express limitation of the Revenue's role in relation to charities to that of tax liability assessment only, does leave the CRA with a relatively clearly defined space in which to establish itself.

4.6 Registration

A charitable organization, operating or intending to operate in Ireland, will be required to register with the CRA. The requirement to register will apply whether a charity is established within the State where it has its administrative centre, or whether it is a foreign charity with a presence in the State but is established in another jurisdiction and has its administrative centre there. Such an organisation must prove that it is established for charitable purposes and that it satisfies the public benefit test.[62] All bodies currently granted charitable exemption by the Revenue Commission will be recognized as charities by the CRA and will be given six months to register when they will be required to submit a three years set of accounts. It must also provide the CRA with copies of its governing instrument, details of its trustees and place of business. If the CRA refuses registration, an appeal can be made to the new Charity Appeals Tribunal. Registration will entitle an organisation to hold itself out as being a "charity" a "charitable body", a "registered charity" or a "charity registered in Ireland"; charitable status will be dependent upon registration. All registered Irish charities will be required to submit an annual report to the CRA.[63] Since it will be an offence for a registered charity not to comply with the reporting requirements,[64] foreign charities that register with the CRA will also be required to file reports.

Certain types of organisations are excluded from charitable status and thus from registration: a political party, or a body, the principal object of which is, to promote a political party, candidate or cause; a trade union or a representative body of employers; a chamber of commerce; a body that promotes purposes that are

61 *Ibid*, ss. 35 and 36.

62 *Ibid*, s. 3.

63 *Ibid*, s. 48.

64 *Ibid*, s. 48(4).

unlawful, contrary to public morality, in support of terrorism or terrorist activities, or for the benefit of an organisation, membership of which is unlawful.[65] Sporting bodies, as defined under the Taxes Consolidation Act 1997, are also being excluded as they are the subject of a separate tax exemption regime operated by the Revenue Commissioners[66].

4.6.1 Annual Accounts and Reports

Mandatory registration is accompanied by a requirement to furnish annual activity reports to the CRA. In that context, a key principle of the new legislation is proportionality (i.e. reporting and audit requirements vary depending on whether a charity's income or expenditure is above or below a level to be prescribed by the Minister, that level not to be more than €500,000), The Act should minimise the potential for dual filing by charitable organisations that are incorporated, in that the same documentation will not have to be filed separately with both the CRO and the CRA. The CRO will pass on financial information it receives under the Companies Acts to the new CRA. Also, the Act provides that educational bodies are exempt from the accounting and audit provisions of the Act, as those bodies are already subject to separate scrutiny.

The introduction of a register of charities, coupled with mandatory registration and reporting requirements, means that for the first time in Ireland there will now be reliable information as to how many charities exist, where they are located, their size, wealth and type. It provides an essential basis for an efficient regulatory system. The fact that it is accessible to the public will promote transparency.

4.7 Establishing a Charity Appeals Tribunal

The legislative intent was that the creation of a Charity Appeals Tribunal would provide an alternative to the courts system for the review of regulatory decisions; rather than incur the prohibitive costs and endure the delays of High court proceedings, charities could instead appeal CRA decisions to a specialist Tribunal. Given that the adjustment of charitable purposes to meet contemporary social need was for centuries dependent upon High Court rulings and some keystone judicial precedents regarding matters that could or could not be construed as 'charitable', a role greatly diminished in recent years, the vesting of such powers in a Tribunal seemed to offer the possibility of reviving and continuing this vital creative forum. However, in practice the power of the Charity Appeals Tribunal is limited to

65 *Ibid*, s. 2(1).

66 See ss 235 and 847A Taxes Consolidation Act 1997.

reviewing decisions to register or refuse to register a charity.[67] This, in conjunction with the removal of the 'spirit and intendment' rule, arguably fences in Irish charity law to the parameters established by the new definition of 'charitable purpose' and leaves this jurisdiction without a forum capable of further developing those purposes.

4.8 Modernising Aspects of Fundraising

This legislation incorporates provisions designed to update the Street and House to House Collections Act 1962 to take account of developments in fund-raising activities, reflect changes in collection methods and improve techniques for safeguarding the public interest. It redefines the meaning of 'collection' and introduces a permit regime for direct debits or other 'promises of money'.[68] Moreover, the CRA now has the power to require charities to provide information concerning their fund-raising activities, e.g. in their applications for registration, as well as in their annual accounts and annual returns.

During 2007-08, the government was working in partnership with the sector, through Irish Charities Tax Research Ltd., to establish the feasibility of having non-statutory codes of practice to regulate the operational aspects of charitable fundraising. It is anticipated that these will be developed to govern practices and procedures relating to fundraising activities, though authority is granted to the Minister for the issue of regulations relating to the manner and conduct of fund-raising.[69] It is testimony to the strength of the negotiating position of the sector within the social partnership that the government has chosen to leave the policing of standards of practice to self-regulation by the sector, at least in the first instance.

4.9 Sector Involvement

As in the UK jurisdictions, Irish charity law reform - the process and its outcomes - were very much a product of the partnership arrangement between government and the sector. Unlike any of its neighbours, however, a significant outcome of that process in Ireland was the incorporation of measures allowing for sector input.

The Charities Act 2009 has in-built provisions[70] for ongoing contribution from the sector though a representative panel or panels which will make observations or

---

67 See, Charities Act 2009, s. 45. Note the ruling of the European Court in *Koretskyy and Others v. Ukraine* No 40269/02 (3 April 2008) which emphasises the importance of a judicial review procedure to prevent arbitrary refusals of registration.

68 See, Charities Act 2009, ss. 93-97.

69 *Ibid*, s. 97. See, the Charity Regulation Study Group 'Regulation of Fundraising by Charities through Legislation and Codes of Practice', Dublin, May 2008.

70 The Charities Act 2009, s. 36.

proposals concerning: performance of the new regulatory body; any developments within the European Union or internationally that have implications for that body; initiatives which that body could usefully take with related costings; any policy or document, or guidelines, or code of conduct, issued or proposed to be issued by that body; the performance of the charities sector in any particular area or respect; and an assessment of the effectiveness of the regulation of the administration and operation of charitable fund-raising through codes of conduct. It is indicative of the formal social partnership model in Ireland, forged to ensure the contractual and collective engagement of all partners in dealing with matters of socio-economic policy, that this should be recognized and embedded in actual legal provisions. Arguably, the sector can have greater confidence that its distinctive voice will be heard and its views taken into account when provision for this is specifically written into the legislation; though whether in practice it will be able to exercise more influence in effecting change in the regulatory regime remains to be seen.

5. Some Unresolved Issues and Future Challenges

Some important matters, expected to be among the outcomes and be evident in the new legislative provisions but are not, include: new legal structures for charities; a thorough and comprehensive re-appraisal of the role and responsibilities of trustees; the advocacy rights of charities; an integrated regime for charitable fundraising; the use of *cy-près* schemes; minimal dual reporting requirements; and the promotion of human rights as a charitable purpose. Other matters that were addressed but may nonetheless give rise to future difficulties, include: the exemption of religious bodies and their activities from the public benefit test; the subjective application of the test to determine donor intent; the restraint on the political activities of charities; the range of *Pemsel* plus charitable purposes; some aspects of reforms to the regulatory machinery etc. Then there are also matters which do not seem to have arisen for consideration, including: sport and recreation; and the boundaries between charities and other non-profits. Together these constitute a considerable body of loose ends that will impair the capacity of this statute to provide a new and coherent legislative platform. Some are particularly significant.

5.1 Public Benefit Matters

There are some traditional aspects of the public benefit test, previously contentious and now reaffirmed in new legislative provisions, that will undoubtedly continue to give rise to debate.

5.1.1 Scope of the public benefit test

The transition from the Charities Bill 2006 to the 2009 Act version saw the scope of the public benefit test reduced considerably. The earlier requirement that the test should take account of "the extent to which the gift may relieve or alleviate the

condition giving rise to the charitable purpose",[70] carrying with it an inference that a preventative element (additional to the common law emphasis on effect rather than cause) would be charitable, did not appear in the 2009 Act. Excised also was the explicit prohibition on any fee charges that would "exclude a significant proportion of the beneficiary class or limit beneficiaries to the well off"; further, due regard was to be given to the extent to which charges restrict access to the purpose and the public benefit consequence thereof.[71] Instead, s. 3(7) of the 2009 Act, imposes the less onerous requirement that "account shall be taken of: (a) any limitation imposed by the donor of the gift on the class of persons who may benefit from the gift and whether or not such limitation is justified and reasonable, having regard to the nature of the purpose of the gift, and; (b) the amount of any charge payable for any service provided in furtherance of the purpose for which the gift is given and whether it is likely to limit the number of persons or classes of person who will benefit from the gift". This dilution of the initial legislative intent would seem certain to leave open the door for future controversy regarding breadth of social access to charitable health and education facilities that are in practice operated for the benefit of a fee-paying minority.

5.1.2 The legal presumption favouring religion

The new legislation maintains the close relationship between charity and religion in Ireland characterised by a longstanding reliance on religious organisations as the primary delivery vehicle for charitable activity. The well-established legal presumption that a gift made for the advancement of religion is *ipso facto* for the public benefit has been retained;[72] though a gift for the purposes of religion is not to be considered of public benefit if the organisation in question operates on a profit-driven basis, or if it employs oppressive psychological manipulation of its followers or potential followers. Retained with it will be the associated idiosyncrasies that have always distinguished the treatment of religious organizations in Irish charity law. For example, gifts for the saying of masses for the dead[73] and for the upkeep of graves have always been regarded as charitable but this is not necessarily the case elsewhere (masses for the dead being viewed for centuries as 'superstitious uses' in

70 See, the Charities Bill 2006, Head 4(2)(a).

71 *Ibid*, Head 4(5).

72 See, the Charities Act 1961, s. 45, which states that "in determining whether or not a gift for the purpose of the advancement of religion is a valid charitable gift it shall be conclusively presumed that the purpose includes and will occasion public benefit." Note that, under the 2009 Act, the presumption is now rebuttable rather than conclusive. This presumption is extended by s. 50 of the 1961 Act to favour gifts for the upkeep of graves and burial vaults etc. Note, also, the late intervention by the Government amending the Bill in the Seanad making it a criminal offence to sell bogus Mass cards where the signature of the priest was not genuine and no Mass is actually said.See, further, Carol Coulter 'Mass card section of Charities Bill could be unconstitutional' Irish Times, Thursday, February 26, 2009.

73 See, *Re Howley's Estate* [1940] IR 109; 74 ILTR 197.

England & Wales and are currently so regarded in Singapore). In the UK the decision in *Gilmour v.* Coats[74] denying charitable status to a closed religious order has been followed in Canada and Northern Ireland, but not in Ireland where the opposite view of the Court of Appeal in *O'Hanlon v.* Logue[75] has since prevailed and no longer in Australia where the 2004 Act[76] now provides that such activities are charitable. The presumption and the precedents accompanying it will continue to distance Irish charity law from other common law jurisdictions.

This legal privilege extends not just to the assumption that religious organizations are deemed to be registered as charities, but reinforces their exclusion from routine procedures for promoting transparency and accountability. As Breen has pointed out:[77]

> "*Incorporated religious charities are exempt from filing returns under Irish company law*[78] *because the nature of their activities is sufficiently outside normal commercial activity to justify their exclusion.*[79]"

Moreover, under s. 1 of the 2009 Act, of all entities that may meet the definition of "charitable organisation" only a religious organisation or community is specifically exempted from the obligation to apply all of its property (both real and personal) in furtherance of its charitable purpose; an exemption restricted to the (very considerable) costs expended on the accommodation and care of its members.

Curiously, the CRA is prevented from ruling that a gift for the advancement of religion is not of public benefit without the consent of the Attorney General.[80] The privileged exemption of religious organizations from the rigours of the public benefit test is further complicated by the absence of any definition of 'religion', although Irish case law has explicitly extended the constitutional guarantee of

---

74 *Gilmour v. Coats et al*, [1949] 1 All E.R. 848 which followed *Cocks v. Manners* (1871) L.R. 12 Eq. 574.

75 [1906] 1 I.R. 247.

76 Extension of Charitable Purpose Act 2004, s.5.

77 See, Breen, O., 'Neighbouring perspectives: legal and practical implications of charity regulatory reform in Ireland and Northern Ireland', *NILQ* (2008) 59(2): 223–43, at p. 239.

78 See, Companies (Amendment) Act 1986, s. 2.

79 113 Seanad Eireann Debates, col. 1335, Companies (Amendment) Bill, 1985: committee stage (25 June 1986).

80 Charities Act, 2009, s. 3(5); curious because the *parens patriae* powers of the AG, in respect of charities, are transferred to the CRA under s. 38. A referral to the Charities Appeal Tribunal might have been more appropriate.

freedom of religion beyond monotheistic Christian religions[81] and a late amendment has sought to exclude cults from passing themselves off as religious organizations.[82]

On an island where religion promotes the 'bonding' form of social capital[83] at the expense of the 'bridging' form, to the detriment of civil society, the statutory presumption perpetuating the common law preferential treatment of religious organizations in this jurisdiction is likely to be contentious. Given the record of abuse perpetrated by some religious organizations in this as in other jurisdictions, it is open to question whether their traditional favoured position should be maintained and the public prevented from having the added reassurance that mandatory compliance with the public benefit test would bring in relation to their activities.

5.1.3 The legal presumption favouring the donor's intent

One of the singular characteristics of Irish charity law, the subjective test[84] for determining whether or not a gift satisfies the public benefit test,[85] has been retained in the new legislation. Section 3(3) which states that a gift is not to be regarded being of public benefit unless "(a) it is intended to benefit the public or a section of the public" clearly re-affirms that donor intention to benefit the public is to be regarded as determinative. As mentioned above, this has not been balanced with any provisions defining 'benefit'. It is therefore difficult to square this provision with the direction in s. 3(2) that "a purpose shall not be regarded as a charitable purpose for the purposes of this Act unless it is of public benefit". Arguably the strategic re-aligning of the test across all charitable purposes (except the advancement of religion) is capable of being undermined: a gift may be charitable if, in the donor's

---

81 See *Corway v. Independent Newspapers (Ireland) Ltd* [1999] 4 IR 484, at 502 (SC), Barrington J commenting on the standing of the Muslim, Hindu and Jewish religions under Art.44 of the Constitution to the effect that Art.44:

> "is an express recognition of the separate co-existence of the religious denominations, named and unnamed. It does not prefer one to the other and it does not confer any privilege or impose any disability or diminution of status upon any religious denomination, and it does not permit the State to do so."

Cited by Breen, O., *op cit* at p. 230.

82 Charities Act, 2009, s. 3(10).

83 The concept of 'social capital' has been coined to explain the motivation of individuals to engage in collective activity for altruistic purposes and refers also to the environment of mutual trust which is then necessary if that engagement is to be conducive to building the components of civil society. See, further, Putnam, R., *Bowling Alone*, Simon and Schuster, New York, 2000 at p. 19.

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

85 As explained by Keane J in *In re the Worth Library* [1994] 1 ILRM 161:

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

view, however misguided, it will be of 'benefit' to the intended recipient/s. Judicial application of the subjective test has in the past allowed gifts to acquire charitable status and be directed towards such marginal if not questionable areas of need as "the Dublin Home for Starving and Forsaken Cats".[86] Its retention does set Irish law, in that respect, on a divergent track from that of its UK neighbours.

5.1.4 Non-governmental

The distinction between the public benefit activities of government and charity has never been particularly clear. In recent years it has been further blurred by the government presumption that both parties would, within the social partnership model, jointly address related social policy issues. In keeping with this approach, the Charities Act 2009 has laid the foundations for further charity encroachment into the heartland of government public service provision. By identifying as charitable purposes, a range of what would otherwise be assumed to be government responsibilities, doors have been opened for more extensive partnership arrangements with charity. While it is, therefore, unsurprising that the government has not seized the opportunity to define and embed the principle of 'independence' as a mandatory statutory benchmark for practice in the charitable sector, it is also probable that the absence of any statutory safeguards to protect the independence of charity will lead to future tensions between the parties as they work out how to share responsibility for different areas of public benefit service provision.

5.2 The *Pemsel* Plus Definitions

The fact that the *Pemsel* classification of charitable purposes no longer appropriately and sufficiently reflected contemporary social policy concerns, nor served as an adequate basis for a modern partnership between government and charity, had long been acknowledged in Ireland as in other common law jurisdictions. The various charity law reform processes were primarily undertaken in order to update the *Pemsel* charitable purposes to meet the demands presented by the social policy agendas of the developed common law nations. In Ireland, the reformulation took much the same shape as elsewhere.

The final statutory framing of the additions to the *Pemsel* heads of charity differs considerably from earlier versions. Both the 2006 Bill and the 2009 Act restate the first three heads, together with a preventative component in respect of poverty,[87] but while the fourth head in the 2006 Bill lists an additional 10 separate charitable purposes and refers to the 'spirit and intendment' rule as the 11th, the 2009 Act lists 12 purposes and excludes the rule. Again, while both prefix many of the identified charitable purposes with the customary 'advancement' only the 2006 Bill adds that

86 See, *Swifte v. Att-Gen for Ireland (No. 2)* [1912] 1 IR 133.

87 The 2009 Act goes further by adding 'economic hardship' to 'the prevention or relief of poverty'.

this is to be interpreted to include "protection, maintenance, support, research, improvement or enhancement".[88] The two charitable purposes listed in the Act but unmentioned in the Bill, are: the advancement of environmental sustainability and; the integration of those who are disadvantaged and the promotion of their full participation in society. More important, however, are those listed in the Bill that are now missing from the Act, in particular: the advancement of human rights, social justice or the promotion of equality and diversity;[89] and the promotion of peace. It's difficult to understand why this has occurred. In the aftermath of three decades of social turmoil on this island, it might be reasonable to conclude that these are precisely the type of charitable purpose needed to alleviate social tensions and forestall a possible relapse into conflict. In addition, the advancement of the effectiveness or efficiency of charities[90] has been reduced to a focus on the 'use of the property of charitable organisations'. Given the pronounced tailoring of new political purposes to suit the current and projected government agenda relating to shared responsibility for public benefit service provision, it may be that the changes were made because the purposes concerned were simply viewed as having potential to threaten a partnership approach to that agenda. In any event, as the UK jurisdictions have designated such matters as charitable purposes in their new charity statutes, this will again serve to distance Irish charity law from equivalent developments in the mainstream common law jurisdictions.[91]

The new statutory, *Pemsel* plus, purposes provide hard evidence of the basis on which government intends to share with charity its responsibility for public benefit activity. In Ireland, as in the UK and other common law jurisdictions, the clusters of purposes which cohere around certain new social policy themes, clearly reveal the matters central to government's intended partnership.

---

88 See, Head 2(1).

89 The wording in the Charities Act 2009, s. 3(11):
(e) the advancement of conflict resolution or reconciliation; and
(f) the promotion of religious or racial harmony and harmonious community relations.
The corresponding wording in the Charities Bill 2006, s. 3(1)(d):
v) the advancement of human rights, social justice, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity.

90 The latter having been translated, in the 2009 Act, s. 3(11)(i), into "the advancement of the efficient and effective use of the property of charitable organizations."

91 The form of words used in the English Charity Act 2006, s. 2(2)(h) "the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity" is exactly replicated in: the Charities and Trustee Investment (Scotland) Act 2005, s. 7(2)(j)(k) and (l); and in the Charities (Northern Ireland) Order 2008, s. 2(2)(h).

5.2.1 Health and social care service provision

Providing succour to those in need of basic care has always been the bedrock of charity within the common law as in any other context. However, it is clear from the nature of the groups specified in the new charitable purposes that they have been identified because they often require intense and long-term service provision.[92] It is just such forms of public services that governments are now keen to share with or transfer to charities. The traditional emphasis on dealing exclusively with effects rather than also with the causes is very evident in the statutory framing of new statutory purposes. In this context the wording usually relied upon stresses 'relief' of need.[93] Government concessions, indicating that new statutory purposes could permit charities to engage in 'prevention' as well as 'relief',[94] are rare.

5.2.2 Efficiency of charities

Under s. 3(11)(i) of the 2009 Act "the advancement of the efficient and effective use of the property of charitable organizations" is declared a new charitable purpose. The legislative intent plainly being that if partnership is to work, with the sector able to carry a growing share of public benefit service provision, then the sector has to be strengthened. In addition to the direct funding of charities and contracting for their delivery of public benefit services, government will now encourage their capacity building by granting tax exemption to organizations established solely to provide management or consultancy advice in respect of charitable property. In many Irish cities and towns, the contraction of religious bodies is leaving a residue of valuable property to the vagaries of commercial property developers. It may be that this phenomenon accounts for the pointed legislative focus on greater efficiency and effectiveness in the use of 'property' rather than more broadly on charities *per se*.

5.2.3 Civil society consolidation

Again, the constellation of specified components held to constitute or illustrate this charitable purpose leave no doubt as to its central importance to government plans for creating a binding partnership with charity. The particular references in the 2009 Act to 'civic responsibility',[95] 'voluntary work',[96] 'conflict resolution or

---

92 See, Charities Act 2009, s. 3(11): (a) "youth, age, ill-health, or disability"; (d) "sickness, disease or human suffering"; and; (l) "those who are disadvantaged".

93 *Ibid*. See: s. 3(1)(a) the "relief of poverty"; s. 3(11)(a) the "relief of those in need"; (d) the "relief of sickness" and; (j) the "relief of suffering".

94 See, the Charities Act 2009, s. 3(1)(a) "the prevention or relief of poverty or economic hardship", s. 3(11)(d) "the prevention or relief of sickness, disease or human suffering" and (j) "the prevention or relief of suffering of animals".

95 *Ibid*, s. 3(11)(c).

reconciliation',[97] 'religious or racial harmony and harmonious community relations'[98] and 'full participation, in society'[99] provide evidence of the importance of civil society consolidation to the Irish government. It is very much in government's interest to promote civic engagement as a means of consolidating civil society; prompting the sector to develop in certain areas (e.g. generate more volunteering) is viewed as a means to that end. As noted at the Warsaw Summit of the Council of Europe 2005, "democracy and good governance can only be achieved through the active involvement of citizens and civil society"[100]. Given the prolonged exposure to civil unrest in the adjoining jurisdiction, this new charitable purpose was a wholly appropriate component to the charity law reform process in Ireland.

5.3 Developing Charitable Purposes

It is in the exercise of its registration function that the CRA is theoretically empowered to broaden the interpretation of charitable purposes. In accordance with a contemporary interpretation of the public benefit test, the CRA should be able to respond flexibly and reasonably promptly to changing definitions of social need. Although far from having a free rein in such matters, as its discretion would in any event remain confined by the straightjacket of established precedent and by the rule that new charitable purposes must still be analogous to those already recognised by the law, the CRA in theory should be in a position to follow the leadership role of the Charity Commission in developing charitable purposes.

In practice, however, this seems most unlikely. The CRA is simply not an Irish equivalent to the Charity Commission. It is severely constrained by the removal of the 'spirit and intendment' rule, by the lack of a concurrent High Court jurisdiction and by the actual statutory division of responsibilities between it and the Revenue Commission. It would seem improbable that the new regulatory body in Ireland, equipped with powers so dissimilar to those of the Charity Commission, will ever be able to extend the interpretation of charitable purposes beyond their existing statutory definition.

---

96 *Ibid*.

97 *Ibid*, s. 3(11)(e).

98 *Ibid*, s. 3(11)(f).

99 *Ibid*, s. 3(11)(l).

100 See, Warsaw Declaration, para 2, at http://www.warsawsummit.pl/finalna

5.4 Advocacy Rights

The new legislation denies charitable status to:[101]

> "(a) a political party, or a body that promotes a political party or candidate,
>
> (b) a body that promotes a political cause, unless the promotion of that cause relates directly to the advancement of the charitable purposes of the body."

This would seem to come close to the form of words previously used by the judiciary to prohibit activity by charities intended to achieve political ends. As O'Sullivan J explained in *Colgan v. Independent Radio and Television Commission, Ireland and the Attorney* General[102] the phrase 'political end' would include activity which:[103]

> " … *is directed towards furthering the interests of a particular political party or towards procuring changes in the laws of this country, or countering suggested changes in those laws, or towards procuring changes in the laws of a foreign country or countering suggested changes in those laws, or procuring a reversal of government policy or of particular decisions of governmental authorities in this country, or countering suggested reversals thereof, or procuring a reversal of governmental policy, or of particular decisions of governmental authorities in a foreign country, or countering suggested reversals thereof.*"

The crucial issue, as before, rests on whether an organization intends to pursue political activity as its principal objective or whether it is merely pursued ancillary to and in support of a main objective which is not itself political: the former being definitely incompatible with charitable status. However, the extent to which any political activity may be safely undertaken by a charity has long been fraught with uncertainty and submissions had been made to the government during the consultation phase of the reform process suggesting that the opportunity be taken to at least clarify, if not totally remove, the legal constraints on political activity by charities. The government chose to do neither and therefore:[104]

---

101 Charities Act 2009, s. 2, definition of excluded body.

102 [1999] 1 ILRM 22.

103 *Ibid*, pp. 24 – 25.

104 See, Breen, O., 'Neighbouring perspectives: legal and practical implications of charity regulatory reform in Ireland and Northern Ireland', *NILQ*, (2008) 59(2): 223–43 at p. 229.

> "*The practical outcome is that there is now no guidance … on the issue of advocacy, no power for the proposed Regulator to issue guidance on the matter, no case law in Ireland that deals directly with this issue and, therefore, no clarity in the Republic as to what political activities a charity may lawfully engage in without placing its charitable status at risk*."

This leaves the law in as an unsatisfactory state after as before the latest statute. An organisation intending to campaign for a change in the law, as its sole or main objective, will still have to forego charitable status.[105]That the government has not introduced provisions to clarify the law relating to the political activities of charities, nor made clear statements regarding the permissibility of charities advocating and mediating on behalf of the socially disadvantaged, leaves the law to continue its inhibiting effect on advocacy activity and to generate yet more contention in the future.[106]

5.5 Sport and Recreation

The omission of sport and recreation from the *Pemsel* plus list of statutory charitable purposes is perhaps unsurprising. Although, in England & Wales, the extension of charitable status to recreational activity was granted under the Recreational Charities Act 1958, and later replicated in other common law jurisdictions under similar legislation, this initiative never found favour in Ireland. The inclusion, in the English Charities Act 2006, of amateur sport as a charitable purpose in its own right rather than as a means of advancing other existing charitable purposes,[107] has also been

---

105 There is no doubt that a non-charitable body may be legitimately established to pursue a change in the law, so long as it does so by lawful means. See, *X v. United Kingdom* Appl No 7525/76, 11 DR 117 (1978) where the court held that advocacy for the reform of the criminal law governing homosexual relations was itself permissible notwithstanding the scope of certain offences specified by that law. Moreover, the fact that the objectives of such a body might be seen as "political" should not place it in the position of having to seek the status of a political party. Thus, in *Zhechev v. Bulgaria* No 57045/00, (21 June 2007) the European Court found a violation of Article 11 of the European Convention where an ngo was refused registration because some of its aims were "political goals". However, the vigilance of the court in policing the line between advocating a change in the law and promoting a breach of it was demonstrated in Appl No 26712/95, *Larmela v. Finland*, 89 DR 64 (1997). In that case the objectives of an NGO in promoting the use of cannabis in Finland, where such use was at the time a crime, were held to go well beyond merely advocating for a change in the law.

106 Note that the following rather fuller consideration given to this matter in s 3(4) of the 2006 Bill did not transfer to the Act: "advocacy, campaigning or lobbying may be designated by order of the Regulatory Authority as approved ancillary activities where it can be demonstrated to the satisfaction of the Regulatory Authority that such activities are undertaken solely in furtherance of the charitable purposes of the institution concerned, and notwithstanding the fact that such activities may, as the case may be, relate to issues which might be considered otherwise to be political."

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

clearly rejected as inappropriate for Ireland. Again, this point of jurisdictional difference will serve to distance Irish charity law from mainstream common law developments.

5.6 Charitable Fundraising

Given that the launching of the entire charity law reform process was precipitated by concerns regarding fundraising abuse, it is somewhat surprising that the outcome deals with it as a matter of marginal importance. Whereas, Part VI of the 2006 Bill (ss. 89-104) was devoted to fundraising, this was compressed to ss. 94-97 and consigned to 'Miscellaneous' in the 2009 Act. Regulating charitable fundraising will require more than the present adjustments to the public collections permit system run by the Garda Síochána. While voluntary codes of practice may prove a sufficient first step, there remains unfinished business for the legislators in relation to replacing the 1962 Act, differentiating between fundraising for charitable as opposed to other purposes and ensuring that procedures exist to place the responsibility for supervision and control of this essential component of charitable activity in the hands of the CRA.

5.7 New Legal Structures

Legal structures for charitable activity are necessary.[108] The need for new legal structures, designed to meet the particular requirements of charities, was noted during the course of the reform process.[109] The Law Reform Commission, for example, had published a report in late 2006 entitled *Consultation Paper on Legal Structures for Charities* which included a proposal for a new legal structure - a Charitable Incorporated Organisation (CIO). In due course the Dept of Enterprise, Trade and Employment was engaged to create a 'charitable designated activity company' (CDAC), intended specifically and exclusively for charities, to which existing charities could opt to convert. Despite every indication that there would be provisions in new legislation to address this matter, in the event the statute remained silent on new legal structures…. perhaps choosing to defer the issue for further consideration in the context of company law reform. However, in subsequent guidance notes the government would seem to be turning away from the prospect of introducing new structures:[110]

---

108 See, for example, the ruling of the European Court in Appl No 8317/78, *McFeeley v. United Kingdom*, 20 DR 44 (1980) where it was held that a NGO, that is membership-based, must not simply be a gathering formed with the object of pursuing certain aims but must also have a degree of stability as regards its existence and thus have some kind of institutional structure to which the persons comprising it can really be regarded as belonging.

109 See, the Department of Community, Rural and Gaeltacht Affairs, Consultation Paper - *Establishing a Modern Framework for Charities*, Dublin, 2003.

110 See, Department of Community, Rural and Gaeltacht Affairs, *Principal Features of the Charities Act 2009*, Dublin, March 2009, at p. 9.

> "*Charities have the choice of a number of different legal forms, e.g. unincorporated, such as a trust or an unincorporated association, or incorporated, such as a company (usually limited by guarantee, rather than shares). The Act is not prescriptive as regards the legal form that charitable organisations should take. It is felt that this should be a matter for the organisation itself to decide*."

If and when the CIO eventually becomes available, an organisation that registers as a charity will be able to become incorporated without having to also register as a company, if the trustees choose to do so, and a charity that is already a company may instead opt to become a CIO. Should the CIO eventually become the standard legal vehicle, this will permit a consolidation of the principles, models of governance and regulatory mechanisms relating to charities and their activities.

5.8 Governance Structures, Trustees etc

One disadvantage resulting from the existing range of legal structures has long been that charities are subject to differing standards according to the legal vehicle chosen to give effect to their activities. This has been generally evident in the distinction between companies and trusts but in Ireland there have also been particular difficulties arising from the archaic legislation governing trusts.

Charitable activity is now housed in a range of different structures. Government agencies, religious organisations and foundations as well as the more traditional trusts, incorporated and unincorporated associations, Royal charters, other bodies and eleemosynary corporations are now all likely to be claiming tax exemption on the grounds of their charitable activities. Industrial and Provident Societies, Friendly Societies and corporations may also, though infrequently, provide structures for charitable activity. The principles and models of governance for a charity vary accordingly. In Ireland the charitable trust, traditionally the preferred legal structure for charity, is steadily giving way to corporate forms with resulting complications in terms of governing principles, reporting obligations etc.

The Charities Act, 2009, s. 2(1), recognises the difficulty and seeks to address it:
"charity trustee" includes—

(a) in the case of a charitable organisation that is a company, the directors and other officers of the company, and

(b) in the case of a charitable organisation that is a body corporate (other than a company) or an unincorporated body of persons, any officer of the body or any person for the time being performing the functions of an officer of the body,

However, until both sets of statutes governing companies and trustees are revised to take into account the above merger of roles, there will continue to be a need to harmonise the principles of governance applicable to trusts with company law regulations. As the Law Society has pointed out,[111] the obligations of all charity executive officers are essentially the same and this should be given explicit statutory recognition regardless of the type of legal vehicle or form of governing instrument employed to give effect to a charity. It had been proposed to update and codify existing legislative provisions to ascribe a uniform role, duty of care, range of responsibilities and duties to all trustees/officers/directors of charities regardless of the legal structure or type of governing instrument used. This proposal did not translate into provisions in the 2009 Act.

The Act also failed to address the unsatisfactory state of the law governing the role and responsibilities of trustees. It does, however, make some limited adjustments: it will now be an offence to act, or purport to act, as a charity trustee while not qualified to do so; it will also be an offence for a trustee or member of staff of a charity to comply with a direction of another trustee, if he or she knew, or had reasonable grounds for knowing, that the other trustee was disqualified; while persons such as trustees, auditors, investment business firms, etc will be obliged to report possible offences under the Criminal Justice (Theft and Fraud Offences) Act 2001 to the CRA.[112] Moreover, a register of disqualified persons will be kept by the CRA.

It may at one time have been possible to confidently assert that "the independence of the sector is virtually enshrined in the fact that voluntary and charitable organisations should be governed by independent, unpaid boards of trustees."[113] However, the Trustee Act 1893 no longer provides an appropriate or sufficient legal framework for trustees to effectively manage the affairs of contemporary Irish charities. The fact that the extensive provisions dealing with trustees in the 2006 Bill failed to transfer to the final statute leaves a considerable hole in the modernising of Irish charity law.

5.9 Anti-terrorism Measures

While the legislation omits any reference to such matters, there can be little doubt that the section of the 2009 Act entitled 'Protection of Charities' was formulated with an eye on the need to check for any possible contagion of charities, their funds and activities, by terrorist elements. This part (ss. 64-74) deals exclusively with the powers available to inspect charities, their premises, files, accounts etc, the

111 See, *Charity Law: the Case for Reform*, the Law Society's Law Reform Committee, Dublin, July 2002, p. 230.

112 See, Charities Act 2009, ss. 55-59; also, s. 89.

113 Seddon, N., *Who Cares?* Civitas, London, 2007, at p. 149.

corresponding duties placed on charities to facilitate any such search and the resulting sanctions. There is also provision for administrative co-operation with foreign statutory bodies on law enforcement matters. It is a legislative concern evident across the common law jurisdictions as charity law reform processes, initiated to liberalise charities, relapsed into the traditional focus on strengthening powers for their inspection and supervision. In Ireland at the beginning of the 21st century, recovering from the overspill of 30 years of violent social unrest that afflicted the adjoining jurisdiction, the concern to ensure that charities do not become the weak link in government's fight against terrorism, is perhaps only to be expected.

5.10 *Cy-près*

In Ireland, the power to make *cy-près* schemes is important: the last two major charity law cases[114] both concerned *cy-près* issues. This mechanism offers a means for applying the assets of a defunct charity, such as the many city zoned and very valuable property sites of declining religious organisations, to address contemporary manifestations of social need (within the parameters imposed by the relevant charitable purpose). The flexibility and ambit of discretion provided by *cy-près* will undoubtedly be valued by the CRA but, as the legislation omits any reference to it,[115] there is now some uncertainty as to the extent to which that body will be vested with this power.

5.11 Donation Incentives

Any serious initiative to modernise the law governing charity cannot stop at a reform of the regulatory mechanics and a statutory redefinition of common law concepts but must embrace a broad review of policy strategies to encourage philanthropy. One aspect of such a strategy would be a review of the philanthropic inducements to individuals and corporations used in Ireland. This necessarily involves consideration of tax incentives calculated to increase the level of donor contribution to charitable causes. There is no indication that negotiations are underway with the Revenue Commissioners to strategically adjust the present scheme of donation incentives.

The current tax environment for charities is subject to the Finance Act 2001 which introduced a uniform scheme of tax relief for donations to approved bodies, including a body of persons or trust established for charitable purposes where the income is applied for charitable purposes only. The charity must have held tax exempt status from the Revenue Commissioners under the Taxes Consolidation Act

114 See, *Re Royal Kilmainham Hospital* [1966] IR 451 and *Re The Worth Library* [1995] 2 IR 301.

115 Part 5 of the 2006 Bill, dealing with the powers of the CRA to frame schemes for applying property *cy-près*, is entirely missing from the 2009 Act.

1997 for not less than three years prior to the date of its application. No general ceiling is imposed on the amount qualifying for a deduction[116] and no differentiation is made between charities. This tax scheme now needs to be re-calibrated and donation incentives aligned with the outcomes embodied in the new charity legislation.

5.12 Charities and other Not-for-Profits

Charities remain a relatively small subcategory of NGO, uniquely tax privileged, among the myriad forms of not-for-profit organisations that constitute the community and voluntary sector in Ireland. While it is certainly important to modernise the law relating to charities, it is also important to do so in a manner that takes account of the boundaries between charities and the rest of the not-for-profit world. The Council of Europe has issued a declaration of fundamental principles that should govern all NGOs, including charities.[117] This legislation makes no reference to those principles nor does it attempt to deal with any such linkages.

Inescapably, though, the world of charities is being increasingly compromised by newly emergent and hybrid forces from both public and private sectors. Consequently, some have suggested, nonprofit regulation can now be conceptualised as a series of patrols on the borders of market and government.[118] The latter may, perhaps, be accused of a possible disproportionate use of power in its creation of 'captive' nonprofits, often charities, to deliver public benefit services that citizens once enjoyed as of right while simultaneously encouraging for-profit business into artificially created markets to compete with traditional nonprofit providers. The market, meanwhile, has been spawning public/private finance initiatives, transforming business entrepreneurs into philanthropists, charities into commercial entities and involving hedge funds in charitable foundations. The borders are being assailed by a raft of hybrid organisations that span the sectors such as 'for profit' foundations, new asset lock vehicles, joint ventures and conversions.

Into this mix we must now make room for the flowering of what are best termed 'civil society organisations' i.e. those charities and other NGOs that have as their *raison d'etre* the building of a greater sense of civic responsibility and engagement

---

116 However, Section 485C Finance Act 2006 placed a restriction on the use of certain tax reliefs, including reliefs for donations to eligible charities, by taxpayers with annual taxable income exceeding EUR 250,000. Such high income individuals are limited in the amount of the designated tax reliefs that they can claim to 50% of their gross income in any one tax year.

117 See, Council of Europe, *Fundamental Principles on the Status of non-governmental Organisations in Europe*, the Secretariat Directorate General of Legal Affairs, Strasbourg, April 2002.

118 See, further, Simon, J.G., Chisolm, L.B., and Dale, H.P., 'The Federal Tax Treatment of Charitable Organizations', in Powell, W.W., and Steinberg, R., eds., *The Non-Profit Sector: A Research Handbook*, Yale University Press, (2006).

of citizens in public benefit activity on a local, national and international basis. Whether or not there are obverse links between this phenomenon and the more overt government preoccupations with anti-terrorism measures, there is no doubting the recent and widespread rise of such NGOs in all developed nations. Arguably, these organizations are slowly occupying a new middle ground between government and citizen and one that is destined to grow.

In this new world, the law and regulatory machinery governing charities needs to be reconfigured. Whereas formerly charities could be viewed as a 'stand alone' species of NGO, with a self-contained body of law and institutional infrastructure, they must now be regulated in a manner that allows for increased inter-sectoral activity. Ireland, together with all other developed common law nations, needs a jurisprudence that extends beyond the narrow, technical definition of 'charitable purpose', which includes all civil society organisations, accommodates hybrid entrepreneurial legal structures and bridges the divides between government/market and government/citizen. This legislation cannot realistically be seen as a step in that direction. A further legislative initiative is needed to construct a web of legislative provisions that differentiates between and governs in a coherent fashion all not-for-profit bodies, not just NGOs and not just charities, while also being compliant with the Council of Europe's agreed framework of principles.

6. Conclusion

It was hoped that this legislation would put in place a regulatory framework headed by an independent regulator, equipped with real statutory powers, using regulatory strategies devised from an understanding of the behaviours of the charitable sector, armed with sufficient resources and carrying a specific brief for charities. Ideally that regulator would have responsibility to determine charitable status and related tax exemption privileges, coordinate the roles of all other relevant regulators, have the capacity to monitor and intervene as appropriate in the affairs of charities, with some discretion to interpret and develop the *Pemsel* plus charitable purposes, and with the duty to maintain an overview of the sector and assist it in capacity building. All other relevant agencies, public and private, would then fall in behind the lead given by the regulator as, guided by the principle of 'public benefit', it gives effect to the new body of legislative provisions and begins the task of supporting and policing charitable activity. The outcome, as noted above, has been somewhat different.

Nonetheless, the Charities Act 2009 as signed into law by President Mary McAleese on 28th February 2009, is very much to be welcomed. Many important changes to the law have been made and a new baseline established. This statute, together with those sections of the Charities Act 1961 that are not repealed by the 2009 Act, the Charities Act 1973, and the Street and House to House Collections Act 1962 (as

amended by the 2009 Act), now provide a modern regulatory framework for charities in Ireland.