The Charity Law & Practice Review

REDEFINING "CHARITY" IN ENGLAND AND WALES, EIRE AND AUSTRALIA

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Introduction

As has been noted elsewhere, the new Millennium has witnessed several attempts to seek a new redefinition of what in law is a charity. This has been seen as part of a perceived and recited need to redefine charity and so to align the definition of charity in law with conditions in the twenty-first century, rather than those which underlay the famous Preamble to the Statute of Elizabeth in 1601 but which have been developed in an incremental way by four centuries of case law yielding what is in effect a common law definition.

In July 2002 the Law Reform Committee of the Law Society of Ireland, a body set up in Eire in November 1997, produced a report entitled *Charity Law: The case for reform.* The Department of Social Community and Family Affairs is currently working on a consultation paper on the issue of reform of charity law and fundraising which it can be expected will be published and circulated in the coming months.

Following the publication by the Australian Government in 2001 of the *Charities Definition Inquiry* ("CDI"), the Australian Government has now published its response to the recommendations of the CDI in the shape of a new statutory definition, details of which appear in a Press Release of 29th August 2002.

Hot on the heels of the Australian response comes the long awaited Strategy Unit Report *Private Action Public benefit A Review of Charities and the Wider Not for Profit Sector* published in September 2002. The report is a consultation paper

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with a deadline for submissions on 31st December 2002. It is not restricted simply to the issue of redefinition but covers many other areas of the legal framework of charities and their regulation to encourage development of the sector.

The purpose of this article is to give what must necessarily be a preliminary overview of each of these initiatives in the chronological order in which they appeared. Particular emphasis will be given of course to the Strategy Unit Report which although mentioned first in the title of this article will be dealt with last.

Redefinition in Eire

At the start of the Law Society of Ireland Law Reform Committee's report Charity Law: the case for reform, there appears a list of five main recommendations and this is followed by a summary of recommendations.

Main recommendations

A more modern definition of the term "relief of poverty" is recommended. Such an improved modern definition should make clear that it covers direct and indirect aid and that relief of poverty extends beyond social deprivation and covers activities such as social inclusion and community welfare.

The basic proposal put forward by the Charities Definitional Inquiry in Australia should be considered in Eire as a good basis from which to adapt a new definition of charity specific to the needs of the Irish jurisdiction. This would involve hiving off well-established fourth head purposes, such as advancement of health, advancement of culture or protection of the natural environment. This would free up the fourth heading to act more so as a flexible category dealing with new and novel purposes as they arise. The Australian definition is set out below.

The current absolute prohibition on political advocacy should be reviewed.

The concept of public benefit should be redefined so as to include express reference to the concept of altruism as recommended in Australia. It should, however, be noted that in neither Eire nor Australia is it specifically recommended that the presumption of public benefit should be statutorily reversed in the case of education and religion, though the hiving-off of advancement of culture into a separate category would be subject to the public benefit criterion required under the fourth head (i.e. demonstrating the practical

utility of the project in question). The case law on public benefit is to be preserved subject to fulfilment of the altruism concept which would strike at the poor relations or poor employees anomaly. But it is to be noted that in Eire the conclusive statutory presumption in relations to gifts for the advancement of religion is preserved.

Lastly, tax relief should continue to be an automatic consequence of obtaining charitable status subject to the Revenue Commissioner's right of appeal to the High Court.

Summary of recommendations

Apart from the main recommendations about definition mentioned above, several other recommendations merit mention.

While not recommending that sport *per se* should be charitable, where the purpose of the sport is to further any existing charitable purpose including health and fitness, it too should be viewed as charitable. Sport as part of education is charitable in its own right and requires no legislative underpinning.

Recreation (within which definition is to be included sport) pursued in the advancement of health or fitness is (it is recommended) to be deemed charitable so long as other normal criteria, such as public benefit or utility, are satisfied.

The recommendation about clarifying what is meant by advancement of religion and the constituent elements of worship and whether the legal definition of religion extends beyond Supreme beings (i.e. the theistic approach) to embrace supernatural things or principles (i.e. a non-theistic approach), is left open in accordance with a split in opinion on the Committee.

Guidelines in a statutory form but not necessarily constituting a statutory definition will be available to the courts, the Revenue Commissioners or the ultimate regulatory body to enable a proper exercise of the relevant discretion in deciding whether an organisation is a charity.

Direct support for a political party or person should remain outside the realm of charity. However, the Committee recommends that, in terms of permissible activities for charities particularly in the context of lobbying or advocacy, the main factor should be that the advocacy is directed at the attainment or furtherance of a charitable purpose and to this extent it would be ancillary to that purpose.

It is recommended that the proposed regulatory body should draw up guidelines to assist charities in differentiating between subordinate political activities which further the predominant charitable purpose and party political or propaganda activities which are not ancillary to charitable purposes.

In the case of advocacy, by charities a charity should be able to advocate a change in the law or public policy which can reasonably be expected to help it to achieve its charitable purposes and be allowed to oppose a change in the law which can be reasonably expected to hinder its ability to do so. The statutory regulator may decide that both qualitative and quantitative thresholds are necessary. The Committee therefore recommended that the guiding criteria should be *qualitative* but that such criteria may include a reference to an *optional quantitative* threshold against which charities may be asked to justify expenditure over a certain threshold, where it is to such a degree that it casts doubt on the ancillary or incidental nature of the political activity to the charity in question. In setting the quantitative threshold the recommendation of the Committee was that further consideration should be given to how these thresholds have operated both in Canada and in the United States (the latter being viewed in Canada as a better role model in terms of this requirement).

Australian Government Response to the Charities Definition Inquiry

The Australian Government has decided to enact a legislative definition of charity for the purpose of the administration of Commonwealth laws and to adopt a majority of the Inquiry's recommendations for the definition. While the Commonwealth's predominant requirement for a definition of a charity is for the purpose of deciding which organisations are eligible for tax relief, the definition will apply for all Commonwealth legislation. Accordingly, the Commonwealth Treasurer (the Hon Peter Costello MP) will be writing to each of the State and Territory Treasurers to gauge their interest in achieving a harmonisation of laws defining charity.

The proposed legislative definition of a charity will closely follow the definition that has been determined by over four centuries of common law, but will provide greater clarity and transparency for charities. The definition will explicitly allow not-for-profit child care available to the public, self-help bodies that have open and non-discriminatory membership and closed or contemplative religious orders that offer prayerful intervention for the public to be charities. The aim is to provide certainty to those organisations operating in the sector while still providing the flexibility required to ensure that the definition can adapt to the changing needs of society.

The Board of Taxation has been directed to consult widely with the charitable sector on an exposure draft of the legislation. The relevant legislation is expected to begin on 1st July 2004. The Australian Government has decided that from 1st July 2004 charities, public benevolent institutions and help promotion charities will be required to be endorsed by the Australian Taxation Office in order to access all relevant taxation concessions.

Elements of the Definition of Charity

According to the definition, a charity is an entity (other than an expressly excluded entity) that is not for profit and has a dominant purpose or purposes that are charitable and, subject to express exceptions, for the public benefit.

Not for Profit

An entity is taken to be "not-for-profit" if and only if: (a) it is not carried on for the profit or gain of particular persons; and (b) it is prevented, either by its constituent documents or by operation of law, from distributing its assets for the benefit of particular persons either while it is operating or upon winding up.

Dominant Purposes

Where the entity has other purposes, those purposes must further, or be in aid of, the dominant purpose or purposes, or be ancillary or incidental to the purpose or purposes; and (a) the entity must have activities that further, or be in aid of, charitable purpose or purposes; and (b) the entity must not have purposes which are illegal, or engage in activities that are illegal; and (c) the entity must not have a dominant purpose that is: (i) advocating a political party or cause; or (ii) supporting a candidate for political office; or (iii) attempting to change the law or government policy.

Charitable Purposes

The charitable purposes listed in the proposed statutory definition (which are purposes that have already been treated as a convenient reference point for the definition of charity in Eire) are as follows:

(a) the advancement of health;

(b) the advancement of education;

(c) the advancement of social and community welfare, including without limitation, the care, support and protection of children and young people, including the provision of childcare services;

(d) the advancement of religion;

(e) the advancement of culture;

(f) the advancement of the natural environment;

(g) other purposes beneficial to the community.

Advancement

The term "Advancement" in the foregoing list of charitable purposes is given statutory explanation. It is taken to include protection, maintenance, support, research, improvement or enhancement. Further, in determining whether an entity has the purpose of the advancement of religion, regard is to be had to the principle established by the High Court in *Church of New Faith v Commissioner of Pay-Roll Tax* (1983) 15 CLR 120.

Public Benefit

To be for the public benefit, a purpose must:

(a) be aimed at achieving a universal or common good; and

(b) have practical utility; and

(c) be directed to the benefit of the general community or sufficient section of the community.

Entities that do not have to have a dominant purpose or purposes that are for the public benefit

The following entities do not need to have a dominant purpose or purposes that are for the public benefit:

(a) open and non-discriminatory self-help groups that have open and non-discriminatory membership;

(b) closed or contemplated religious orders that regularly undertake prayerful intervention at the request of the public.

An "open and non-discriminatory self-help group" is defined as a group of individuals where:

(a) the group is established for the purpose of assisting individuals affected by a particular disadvantage, discrimination or need that is not being met; and

(b) the group is made up of, and controlled by, individuals affected by the particular disadvantage, discrimination or need that is not being met; and

(c) any membership criteria relate to the purpose of the group; and

(d) membership of the group is open to any individual who satisfies criteria referred to in paragraph (c).

Entities excluded from being charities

The term "entity" includes a body corporate, a sole corporation, any association or body of persons whether incorporated or not, and a trust. The following entities are, however, excluded from being charities:

(a) an individual;

(b) a partnership;

(c) a political party;

(d) a superannuation fund;

(e) the Commonwealth, a State or Territory or a body controlled by the Commonwealth or a State or Territory;

(f) a foreign government or a body controlled by a foreign government.

Redefining "Charity" in England and Wales: The Strategy Unit Report

Overview: new heads of charity and "strengthened" public benefit test

The interest of the Strategy Unit Report resides not only in its echoing of many of the themes set out in the Law Society of Ireland Law Reform Report and the Australian Government Response to the Charity Definition Inquiry, but in its compilation of a list of ten purposes of charity and its muted revision of the concept of public benefit in the law of charities by "strengthening" as it is described the criterion of public benefit. In this last mentioned respect, the reforms go way beyond what has been perceived as necessary elsewhere and merit searching analysis not possible in an introductory article of the kind here undertaken.

It is proposed that the advancement of amateur sport, the promotion of human rights, conflict resolution and reconciliation and the prevention of poverty (as well as its relief) will become explicitly charitable for the first time.

In the future, all charities will have to demonstrate public benefit. Currently some purposes are presumed to be for the public benefit and the purpose of the legislation that is to be introduced is (as presently proposed) to reverse this presumption and subject all charitable purposes to an obligation to demonstrate direct public benefit. n connection with this move, the Charity Commission will be charged with undertaking an ongoing review to check the public character of charities which "charge fees that tend to exclude large sections of the public". But the implications of this reversal of the presumptions requires careful analysis as does the need for, and assumptions and any other relevant agenda underlying, the novel call for proof of demonstrable public benefit when fees are being charged for services, especially when the requisite benefit is alleged to be only admissible if "direct".

The Report acknowledges the valuable role that charities perform in campaigning for social change. It is therefore proposed that the Charity Commission should revise its guidelines on campaigning between legal requirements, which are very general, and more detailed good practice advice.

The new definition: ten heads not four

The expanded list of purposes is based on a number of premises. First it is asserted that the law is confusing and unclear and the four categories or heads crystallised in Pemsel's case do not accurately reflect the range of organisations which are or should be charitable today. In particular, amateur sport and the promotion of human rights conflict resolution and reconciliation (whose claims to charitable status were at best not clear or were borderline or at worst were denied charitable status) are singled out as new objects, and relief of poverty is expanded to include the prevention of poverty. The objective was so far as was necessary to change the parameters of charitable status. All the other objects derive from existing purposes and case law.

Let us start with the statutory list encompassed by the proposed new definition. This envisages both an overriding public benefit factor and the possibility that a particular organisation may satisfy more than one purpose. In other words, there is always the possibility that a would-be charitable organisation can fall under more than one head at the same time. This definition runs as follows:

> "A charity should be defined as an organisation which provides public benefit and which has one or more of the following purposes:
>
> 1. The prevention and relief of poverty.
>
> 2. The advancement of education.
>
> 3. The advancement of religion.
>
> 4. The advancement of health (including the prevention and relief of sickness ,disease or human suffering).

5. Social and community advancement (including the care, support and protection of the aged, people with a disability, children and young people).

6. The advancement of culture arts and heritage.

7. The advancement of amateur sport.

8. The promotion of human rights, conflict resolution and reconciliation.

9. The advancement of environmental protection and improvement.

10 Other purposes beneficial to the community.

The above ten heads, are with the exception of heads 7 and 8, very similar to the seven heads in the Australian Government response to the CDI in the direction of which the The Law Reform Committee of the Law Society of Ireland in its report *Charity Law: the case for reform* gave a genial nod of approval.

Retaining the centrality of public benefit and ensuring its provision

The Strategy Unit Report interestingly asserts that there is a common understanding that there is a presumption of public benefit in the case of trusts for the relief of poverty, for the advancement of education and for the advancement of religion, but adds that the presumption is of limited practical significance. The Report argues (see para 4.6) that "it is not the case that the presumption means that some charities are wholly exonerated from the public benefit requirement. All institutions must in order to be charitable be demonstrably established for the public benefit". The proposition in the very last sentence just quoted implies that there is authority to that effect and that direct benefit must be shown. But it is precisely because there is at present no such overriding criterion that it is provided that a public benefit criterion along the lines of the Charity Commission's leaflet RR8 *The Public Character of Charity* is now to be strengthened by legislation.

It is worth reminding oneself that an earlier mooted reform recommended by the Tenth Report of the House of Commons Expenditure Committee was that

charities formerly admitted under the heading of education should continue to qualify only if they met the "overriding criterion" of "purposes beneficial to the community". For "purposes beneficial to the community" read or substitute "beneficial to the public", or "for the public benefit" and you get the picture and the drift. Arguments along these lines were out in the open from 1968 to 1994 as Debra Morris recounts in her *Schools: An Education in Charity Law* (1996) 24-29.

Case law, the Strategy Unit Report comments in para 4.18, provides a number of principles of what counts as public benefit. "However" it continues without further particularisation "there is a *need* to apply the public benefit test more consistently". (Emphasis added). Presumably the relevant need was that dealt with very shortly in Proposal 5 in the NCVO consultation document *For the Public Benefit (2001)* which identifies as anomalies in charity law created by the "advantageous treatment" (amounting to a thorn in the law's side) accorded to some kinds of organisation arising from the presumption of public benefit. Examples are given of educational and religious organisations facing a different (and allegedly anomalous) burden of proof from that faced by fourth head charities. Such are independent schools charging fees which the average person cannot afford, private hospitals and churches which do not undertake social activities of benefit to the wider community or whose premises are of no architectural or historic interest.

There is also, it is asserted, a "need" for a more systematic programme to check the public character of charities, given that it is currently only considered on registration of charities. The proposed solution, the undertaking of a rolling programme which reviews public character as explained in a later section of the report, is too costly and uncertain in outcome to be left to the court. Unless a statutory definition or test of how public benefit is to be demonstrated is enacted, an option which the Government leaves open for further discussion, the preferred option is to leave it to the Commission to position the goal posts under its rolling review. The replacement of the courts by the Commission in all but appellate cases, which may continue to be rare birds, will leave the Commission in a key role. It will be the Commission predominantly which will apply the new restraints of the "strengthened" public benefit test which as whatever programme of ever moving guidelines goes on rolling like the Mississippi and may bear many of the case law sons on indirect benefit away. Indeed it probably means that any notion of indirect public benefit, at any rate in the field of education, will fly forgotten as a dream flies at the opening day.

Public character of charities

The section of the Report which deals with public character of charities is somewhat Delphic in its expression. Its main thrust is a concern about charities which charge fees for the provision of their services. It will come as no surprise to those who have remembered the history of the various critical assaults made on the position of the independent schools that in the forefront of this discussion is the concern about schools which charge high fees.

The Report at this juncture concedes that charging fees that are affordable to large sections of the population will not affect the public character of the charity, and here the position is not limited to schools. But charities, it is said, that charge have nevertheless to ensure that they have a public character. Public character in this context means providing access for those who would be excluded because of the fees. This is a new approach which merits further analysis in due course, both because of its impact on independent schools and on private (i.e. non-National Health) hospitals.

Although this section of the Report is expressed in terms of generalities, independent schools gets one specific exemplificatory mention. This is to be found in the proposition that, in order to maintain their charitable status, independent schools which charge high fees have to make significant provision for those who cannot pay full fees. It is mooted that the majority probably do so already.

The proposal is that the Charity Commission would identify charities likely to charge high fees and undertake a rolling programme to check that provision was made for wider access. The concept of wider access is one which will need to be watched. The programme will avowedly be designed to minimise red tape, though political statements of this kind are often self-delusory. Returns, questionnaires and replies to other inquisitorial requests are usually time consuming and prone to elongation. The Roman satirist Juvenal reminds us "*Sed quis custodiet ipsos custodes*" (but who is to guard the guards themselves?). Will red tape really be minimised, and how? This is not assuredly a matter for appeal to the courts.

The rolling programme will not avowedly focus on any particular sector. But in the nature of things it is likely to focus on the provision of independent health and the provision of independent education. It is hardly likely to focus on any

other sector. For example, the religious sector is not in the business of high fees.

The programme "will only affect those small numbers of charities which charge fees which exclude large sections of the public". This again is a key sentence in the section. Attention will need to be focussed on the concept of "fees which serve to exclude large sections of the public". Those advising charities will need to ask: "What large sections of the public are excluded? How are they excluded? In what way do the fees serve to exclude?" The technique to be used for identifying the apparently modest number of charities which charge identifiably exclusionary fees is, or will be, the issue of short returns which ask charities what they do in terms of widening access, such as making provision for sharing facilities and making provision for financial support of pupils whose parents are unable to pay the fees. It is envisaged that for the majority of cases no further enquiry will be necessary beyond the initial return.

The review is to be based on the Charity Commission's existing criteria and the case law concerning access. One of the criteria in the Charity Commission guidance RR8 *The Public Character of Charity* is that "charges should be reasonable and should not exclude a substantial proportion of the beneficiary class". Another of the criteria is that the service provided "should not cater only for the financially well off; it should in principle be open to *all* potential beneficiaries" (emphasis added). A further proposal is that "the Commission", in consultation with charities likely to be affected and their umbrella bodies, will issue guidelines as to the level of access appropriate in particular circumstances". The future and estimated lifetime of this proposal, given the words with which it is introduced ("It is proposed that...") and being part of a rolling programme remain to be seen. Will consultation with the possible victims continue and will the latter continue to make input into the guidelines? Or will the framing of an initial set of guidelines in that way be a one-off?

In cases where access is considered inadequate, the programme would be run in such a way as to allow what are perceived by the Commission to be "under-performing" organisations to develop their provision of public benefit rather than immediately losing charitable status. Here the under-performance will judged by the Commission. But the loss of charitable status will still hang like the sword of Damocles over "under-performing" institutions.

A consolation is to be found in the right to appeal against the decision of the Commission.

Interpretation

There are some comforting intimations as to how the Commissioners are going to interpret the demonstration of public benefit in relation to the advancement of religion. The aim of the removal of the presumption of public benefit is "not to force churches to undertake community activities such as social services for older people or the sick", though many already do so. Nor are established religions or their publicly celebrated rites at risk. Contrariwise new religions once the presumption is gone will continue to have to demonstrate public benefit which will exclude harmful organisations.

Faiths that are multi-deity such as Hinduism and some types of Buddhism which are non-deity will have their position clarified.

Effective advocacy

The section of the report dedicated to proposed changes so as to remove restriction on campaigning activities follows the Government's *Compact on Relations between Government and the Voluntary and Community Sector*. Part of this Compact was an undertaking by the Government to support the sector's right to campaign and comment on government policy irrespective of any funding arrangements that may exist.

The cautionary style of the existing guidelines of the Commissioners on campaigning were recognised as possibly overplaying the potential difficulties of campaigning work. The recommendation therefore is that the tone should be made less cautionary and put greater emphasis on the campaigning work that charities can undertake. The legal position is reaffirmed. The legal position will therefore continue to be that charities can campaign provided that (1) a charity's activities are a means to fulfilling its charitable purpose, (2) there is a reasonable expectation that the activities will further the purposes of the charity and benefit its beneficiaries to an extent justified by the resources devoted to those activities, (3) its activities are based on reasoned argument, and (4) its activities are not illegal.

The gloss which the Report puts on this reaffirmation of the legal position is the recommendation that the Charity Commission should distinguish between this position, which is a statement of legal and regulatory requirements, and good practice. It may wish to publish advice on good practice, but in doing so should

emphasise that trustees have the freedom to pursue whatever activities they judge to be in the best interests of the charity. How far this freedom should be pressed is another matter.

The recent criticism of very substantial expenditure on political and campaigning activities by the RSPCA must be judged against the implications of these recommendations. And it will be interesting to see how far the judgement of what is in the best interests of the charity is to be tested by reference to a subjective, as opposed to an objective, standard.