CHARITABLE PURPOSES AND POLITICAL PURPOSES (OR VOLUNTARISM AND COERCION)

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Introduction

The rationale for the traditional exclusion of political purposes from the legal definition of a charitable purpose has generally not been well explained in the case law. There is a significant body of academic criticism of the exclusion[1] and, in Australia and New Zealand, some judicial doubt as to whether there is a 'blanket exclusion'[2] of political purposes. Nevertheless, this article will argue that, at least in relation to the enforceability of purpose trusts, there is a rational distinction to be made between charitable purposes and political purposes, and this distinction can explain the historical case law.

The operative distinction may be illustrated by a series of opposing examples. Private donors committing their resources to the provision of accommodation, meals and other forms of personal support can be distinguished from those who lobby the government to provide increased state funding for accommodation for

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1 See e.g. CEF Rickett, 'Charity and Politics' (1982) 10 New Zealand Universities Law Review 169, 176–177; S Bright, 'Charity and Trusts for the Public Benefit - Time for a Re-think' [1989] Conveyancer and Property Lawyer 28; M Chesterman, 'Foundations of Charity Law in the New Welfare State' (1999) 62 Modern Law Review 333, 347–349; N Silke, '"Please Sir, May I Have Some More?" Allowing New Zealand Charities a Political Voice' (2002) 8 Canterbury Law Review 345.

2 *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105, [2015] 1 NZLR 169, [69] (Elias CJ, McGrath and Glazebrook JJ). For Australia, see *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539, [39]–[45] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

the homeless or other social welfare provision. The private establishment of a 'pregnancy crisis' centre to provide counselling to women who are considering undergoing abortions can, even where the philosophy of the centre is anti-abortion, be distinguished from lobbying the government to maintain or increase restrictions upon abortion. A nature conservation group using the funds it has raised to purchase blocks of land in order to preserve the natural habitat thereon can be distinguished from a conservation lobby group seeking to persuade government to set more land aside as national park. An organisation which does historical research so as to assist indigenous traditional landowners to prepare and present land claims can be distinguished from an organisation which campaigns for changes to native title laws.[3] In each opposing pair, the former activity uses private and non-coercive means to fulfil a public need and the latter has the use of government power as its ultimate aim. The crucial distinction is between, on the one hand, the voluntary application of private resources to a publicly benevolent end and, on the other hand, enlisting the coercive or financial powers of government (i.e. public means) to adopt the private preferences of the settlor/donor as the community's collective project.[4]

Charitable trusts are correctly characterised as 'public' trusts in so far as these are trusts for purposes which are sufficiently beneficial to the public as to justify the involvement of the state as the enforcer of the trust. Nevertheless, the means of furthering such public purposes are private - that is, private resources are being applied directly to an activity which is of public benefit. As long as the ultimate aim of an activity is not to secure the state's adoption of a measure as law or public policy, the enforcement power of the state may be used in relation to diverse means of achieving beneficial purposes.

A purpose of lobbying the state to change the law or adopt particular policies is, by contrast, a 'zero-sum' game. The end which is sought is the implementation of particular public policy choices at the expense of public policy choices that are favoured by others. This is a distinction between the carrying out of a variety of activities, all of which contribute to the public benefit, and advancing the proposals of sectional interests which may only be implemented at the expense of opposing

3 See e.g. *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195, 207–208 [37].

4 The proposed distinction bears a superficial resemblance to Matthew Harding's distinction between the good of a community that might be pursued 'individually by persons making autonomous choices' and that which might be pursued 'collectively by the community as a whole via the deliberative and democratic processes of the state'. See M Harding, 'Distinguishing Government and Charity in Australian Law' (2009) 31 Sydney Law Review 559, 572. Harding was distinguishing charity from *government*. The distinction proposed here is a distinction between charity and private activity (i.e. by a non-state actor) which seeks to enlist the coercive powers of the state to implement the non-state actor's preferred public policy measures.

sectional interests. In characterising a purpose or activity as charitable, it is not a matter of indifference whether the end-point is producing a beneficial outcome by private philanthropy or procuring an exercise of state power.

The concept of charity performs multiple functions in the law. Most obviously, it determines whether trusts for purposes are legally enforceable and provides a basis for certain revenue law exemptions and concessions. There is no obvious reason why the justifications for revenue law exemptions and concessions should necessarily be tied to the justifications for enforcing purpose trusts. Whether the state chooses, for example, to give tax concessions to religious organisations is a matter of public policy which can be resolved independently of the question of whether trusts for the purposes of those organisations are enforceable as trusts. Indeed, there are reasons for thinking that they should be separate questions. The former is a question about whether an organisation ought to be exempt from a tax imposed upon others. The latter is a matter of whether it is appropriate for a public official (traditionally the Attorney-General) to lend the name of her or his office to what is really a private law court action (*parens patriae*). It is not argued here that the distinction between charitable purposes and political purposes is significant in relation to all of the matters in respect of which the concept of charity currently operates as gatekeeper. The argument is merely that that the voluntarism-coercion distinction provides an attractive explanation as to why the law concerning the enforceability of purpose trusts evolved in the way that it did.

The Rationale of Excluding Political Purposes

The enforceability of purpose trusts

Trusts must have objects. The opinion of Sir William Grant MR in *Morice v Bishop of Durham* contains the classic statement of the idea:[5]

> There can be no trust over the exercise of which this court will not assume a control: for an uncontrollable power of disposition would be ownership and not trust. If there be a clear trust but for uncertain objects, the property, that is the subject of the trust, is undisposed of and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner. ... There must be somebody in whose favour the court can decree performance.

The need for objects is ultimately concerned with a basic characteristic of legal obligation - that is, that a duty-ower is obligated in a particular way towards a

5 (1804) 9 Ves 399; (1804) 32 ER 656, 658.

right-holder. The duty must be *intelligible* as a matter of justice, the identity of the right-holder must be *ascertainable* and the right-holder must be able to *realise* her or his right. The realisability of a right is a matter of the extent to which the right-holder can enforce the right in the event that the duty-ower fails to perform the duty. Realisability depends upon the right-holder having access to a process whereby the claim to a right is adjudicated upon authoritatively and actualised by way of a remedy.[6] Where a trust is established for an abstract purpose - that is, a purpose which is not for the benefit of an ascertainable class of individuals - there is no person who can be identified as the right-holder and claimant to the performance of the trustee's duty. There can be no *legal* duty if there is no person who can claim a right to the performance of the trust and is able to realise that right in the public institutions which adjudicate upon and actualise those rights, namely the courts of law.

Trusts for charitable purposes do not suffer from this problem because carrying out such purposes is seen to be beneficial to the public and there is a person who can represent the public right to the performance of the trust:[7]

> Although the equitable duties of a trustee of a trust for a charitable purpose are not owed to any particular beneficiary, the trust is not one of imperfect obligation. The duties under a charitable trust are enforceable by, in general, the Attorney-General of the relevant State or Territory … An intended trust that is for a purpose that is not charitable and which no legislation has made enforceable is not enforceable by the Attorney-General.

If the recipient of a settlement for a non-charitable purpose fails to perform the 'trust', there is no possibility of legal enforcement of that 'trust'. In other words, there is no realisable right to the performance of the 'trust'. There may, in some cases, be classes of people, such as a testator's next-of-kin who would benefit in the event of intestacy, which have realisable rights that the 'trustee' desists from applying the property to the non-charitable purpose and, instead, applies the property for their benefit. The settlors or donors of the 'trust' property would have claims against the 'trustee' where it is not positively proved that they intended to give away what they settled or donated absolutely.[8] In these situations, whether the performance of the 'trust' is restrained is a matter of whether those

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6 See EJ Weinrib, 'Public Law and Private Right' (2011) 61 University of Toronto Law Journal 191, 195, where Weinrib argues that sophisticated legal systems consist of both 'private right' which is 'normatively intelligible even apart from the public institutions that made [it] effective' and 'public right' which is how 'public institutions actualize and guarantee these rights'.

7 HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters 2014) [5.070].

8 *Re Gillingham Bus Disaster Fund* [1958] 1 Ch 300.

claimants assert their private rights, which they - and only they - have standing to enforce.

The doubt as to whether a political purpose is a charitable purpose is directly related to the limitation upon the Attorney-General's standing to commence proceedings to enforce a trust. For the Attorney-General to have standing, the purpose for which the property is settled must be for the public benefit rather than for the private interests or preferences of one section of the community. In so far as political activity consists of advocating an opinion that the state should exercise its powers in accordance with the preferences of one section of the community and such an exercise of power would be opposed by another section of the community, the idea that political activity is a matter of *public* benefit is suspect.

Case law justifications

Perhaps the closest an English or Australian court has come to providing a coherent rationale for saying that political purposes are not charitable purposes was in the House of Lords' decision in *National Anti-Vivisection Society v Inland Revenue Commissioners*.[9] Following that decision, it was clear that attempting to change the law or to change government policy, so that it conformed to a particular set of views concerning a contentious matter, was outside of the range of purposes which might constitute the objects of a trust.[10] The *Anti-Vivisection Case* was a revenue law case rather than a case about the enforceability of trusts, but the reasons given for concluding that the purposes of the Society were not charitable reflect the role of the concept of charity as the gateway to the enforceability of a purpose trust.

While it is difficult to discern in the majority opinions a single line of argument towards that conclusion, the reasons given can be grouped according to three major themes. First, a court of law is not an appropriate forum for determining whether changing the law in a particular way would be beneficial to the public, yet that is what a court must do in order to recognise the purpose as a charitable purpose. Secondly, treating a purpose as charitable contemplates that the Attorney-General may have to intervene to ensure that the purpose is carried out, even though the policies of the government, of which the Attorney-General is a member, may be ambivalent or opposed to the change to the law desired by the settlor. Thirdly, the choice of legislation or other governmental action as the settlor/donor's ultimate objective distinguishes a political purpose from a charitable purpose.

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9 [1948] AC 31.

10 ibid 51–52 per Lord Wright.

Determining public benefit

A purpose cannot be charitable unless it is for the public benefit. This question is always present in matters involving charitable purposes, even if it is to be posed negatively - that is, is the purpose to be carried out for the benefit of a narrowly defined 'private' class of people?[11] This is the case where the purpose fits within the three categories in which charitableness has traditionally been presumed, i.e. relief of poverty, advancement of education and advancement of religion. A public benefit is to be distinguished from an individual or sectional interest. The fact that a large body of people sincerely believe that a particular legislative or regulatory measure or a particular allocation of public funds would be beneficial to the community as a whole is not taken to be conclusive of the matter of public benefit. When the settlor's purpose is to advance an argument on one side of a public debate about how government ought to exercise its powers, forming a conclusive view about the public benefit involves considering both the positive and negative effects of the proposal and deciding how much weight is to be placed on competing considerations. Legislatures are designed for this function. Law courts are not. Lord Wright said:[12]

> The whole complex of resulting circumstances of whatever kind must be foreseen or imagined in order to estimate whether the change advocated would or would not be beneficial to the community.

His Lordship went on to say that there was 'no general consensus of opinion or understanding against the practice of vivisection which has been permitted by Parliament'.[13] His Lordship recognised that the question of whether vivisection ought to be banned attracted a range of competing considerations. While the practice of vivisection might have involved inflicting pain upon animals, the practice may have produced scientific outcomes which helped to avert suffering to large numbers of human beings. The question involved 'balancing conflicting values'.[14] This was a task for members of Parliament rather than for judges.

Similarly, Lord Simonds (with whom Viscount Simon agreed) emphasised that an assessment of the public benefit of a purpose involved a consideration of the possible negative consequences of the proposal. His Lordship thought that it was 'a strange and bewildering idea' that the court must look no further than the Anti-Vivisection Society's self-understanding of its purpose as one to benefit animals.[15]

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11 *Oppenheim v Tobacco Securities Trust* [1951] AC 297, 303.

12 *National Anti-Vivisection Society* (n 9).

13 ibid.

14 ibid 49.

15 ibid 65.

The honest opinion of a settlor/donor that the proposal, if adopted, would be for the public benefit could not be taken to be conclusive.[16]

It is implicit in their Lordships' reasoning that the function of the courts is entirely different from that of the legislature. Unlike a legislature, a court cannot evaluate a policy proposal and make an 'all things considered' assessment of whether the proposal is for the public benefit. The very fact that a settlor or donor perceives the need to change the law or government policy and to mount arguments to convince others of that need points to a lack of consensus in favour of the settlor/donor's preferred public policy. A donor's choice to devote funds to convincing the community as a whole that, for example, it should adopt a forty letter phonetic alphabet and that those who will not do so voluntarily must be coerced to do so,[17] contemplates that there will be resistance to the adoption of the donor's preference. The end-point is to secure the implementation of a preferred set of measures, but the starting point is disagreement within the community about which measures are in the public interest. Proponents of changes to the law or government policy perceive the need to campaign because other sections of the community resist or are ambivalent to the proposed changes. A court of law is not competent to decide whether the change of law or government policy would be for the public benefit.

The Attorney-General

Charitable trusts, being trusts for public purposes, are not enforceable directly at the suit of individuals. The Attorney-General is the proper plaintiff in proceedings to enforce the trust in the event that a trustee of a charitable trust fails to perform its duty. In the *Anti-Vivisection* case, Lord Simonds described the peculiar circumstances surrounding the enforcement of charitable trusts in the following terms:[18]

> [I]t is the King as *parens patriae* who is the guardian of charity and ... it is the right and duty of his Attorney-General to intervene and inform the court, if the trustees of a charitable trust fall short of their duty. So too it is his duty to assist the court, if need be, in the formulation of a scheme for the execution of a charitable trust.

The creation of a trust to advocate the adoption of policies which are not currently the policies of the executive branch of government places the Attorney-General in

16 ibid 72.

17 See *Re Shaw's Will Trusts* [1957] 1 WLR 729.

18 *National Anti-Vivisection Society* (n 9) 62.

a difficult position.[19] The Attorney-General would be obliged to take steps to have a trust enforced, the purpose of which may be the adoption of policies and practices which the government does not presently advocate and may actively oppose:[20]

> [I]s it for a moment to be supposed that it is the function of the Attorney-General on behalf of the Crown to intervene and demand that a trust shall be established and administered by the court, the object of which is to alter the law in a manner highly prejudicial, as he and His Majesty's Government may think, to the welfare of the state?

The Attorney-General's monopoly as proper plaintiff stands in a broader context. The Attorney-General's role as plaintiff in a relator action - whether in relation to the enforcement of charitable trusts or otherwise - is that of enforcer of public rights. In *Attorney-General ex rel McWhirter v Independent Broadcasting Authority*, Lord Denning MR described the Attorney-General as having 'a special duty in regard to the enforcement of the law'.[21] An emphasis upon the enforcement of public rights was also evident in the opinion of Lord Wilberforce in *Gouriet v The Union of Postal Workers*:[22]

> In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown. And just as the Attorney-General has in general no power to

19 It might be observed that the enforcement of an educational or religious trust which involved racially discriminatory practices might also place the Attorney-General of a government which has a policy of opposing those practices in a difficult position. This raises a question as to the extent to which discriminatory trusts are 'charitable'. A key consideration is likely to be whether the discrimination has a rational relationship with the charitable purpose (e.g. assisting members of a racial group who are disadvantaged vis a vis other racial groups, funding a Roman Catholic seminary which would, being a seminary for those who are to be ordained as Roman Catholic priests, have only male students). For a broader discussion of this issue, see A Parachin, 'Public Benefit, Discrimination and the Definition of Charity' in K Barker and D Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge University Press 2013) 171, 174–94. In any event, governments do not oppose discrimination in the abstract. They have policies of opposing particular types of discrimination that are defined by legislation. In Australian anti-discrimination statutes, at least, there are typically exemptions which cover the two examples given above. See e.g. Anti-Discrimination Act 1977 (NSW), ss 21 (special needs of particular racial groups) and 56(b) (training of priests and ministers). In the UK, discrimination in the provision of benefits to persons who share a 'protected characteristic' is permitted 'for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic' (Equality Act 2010, s 193(2)(b)), but provision of benefits to a class defined by 'colour' is not permitted (Equality Act 2010, s 193(4)).

20 *National Anti-Vivisection Society* (n 9) 62–63.

21 [1973] 1 QB 629, 647.

22 [1978] AC 435, 477.

> interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights.

The crucial point to be gleaned from these observations is that the Attorney-General has no duty or power to undertake legal proceedings unless there is a public *right* at stake. That there is a public right to the enforcement of the criminal law, the proper administration of censorship laws and the enforcement of trusts for inter alia poverty relief and the advancement of education is not open to doubt. Whether there is a public benefit in advocacy for particular changes to the law or of particular government policies is a separate question. The advocacy of a *particular* position might be understood as the pursuit of a sectional interest and, as previously remarked, as a zero-sum game. The end-point contemplated by the advocate is the collective pursuit (i.e. by the state on behalf of the community as a whole) of the advocate's private preferences. The advocate seeks to procure the state's assistance for the promotion of the interests of one section of the community who would be advantaged by the policy at the expense of others.

The end-point

The Anti-Vivisection Society had a stated aim of securing a total legislative ban on the practice of vivisection. That this was the end-point to which all of the Society's efforts were directed was crucial for at least two of the Law Lords.[23] The matter is perhaps expressed most clearly in the opinion of Lord Normand:[24]

> Commonly they hope to make voluntary converts, and they also hope to educate public opinion and so to bring its influence to bear on those who offend against a humane code of conduct towards animals. But they seldom disclaim and frequently avow an intention of inducing Parliament to pass new legislation if a favourable opportunity should arise of furthering their purpose by that means.

His Lordship did not rule out that another society, for which a purpose of influencing law and government policy was less prominent in the objects of the society, might retain its charitable status.[25] For example, a religious organisation which professes a concern with the preservation of religious and political freedom and which from time to time enters the public forum to plead its cause would not lose its charitable character. The organisation's concern is a concern with the

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23 *National Anti-Vivisection Society* (n 9) 49 per Lord Wright, 77 per Lord Normand.

24 ibid 76.

25 ibid.

legal and political framework in which it carries out its charitable activities and is incidental to carrying out those activities.[26]

Equally, the activities of research organisations may generate ideas which touch and concern political matters, yet the activities of these organisations are not political activities. *Re Koeppler Will Trusts* involved a bequest by Sir Heinz Koeppler for the purposes of an institution known as Wilton Park.[27] Wilton Park's predominant activity was the holding of 10 to 12 conferences each year. The delegates were drawn from the various member states of the OECD and the staffs of various international organisations. The printed programmes for these conferences provided the following description of Wilton Park:[28]

> Wilton Park is a British contribution to the formation of an informed international public opinion. To promote greater cooperation in Europe and the West in general, it offers those influencing opinion in their own countries an opportunity of exchanging views on political, economic and social questions of common interest.

Sir Heinz had been the founder of Wilton Park and, at the time at which he made his will, the activities of Wilton Park had been carried on for a number of years.

The English Court of Appeal found that the purpose of Wilton Park was educational.[29] Slade LJ observed that some of the topics which are discussed at the Wilton Park conferences had a 'political flavour'.[30] Nevertheless, the fact that political topics were discussed did not render the purpose of Wilton Park political, and hence non-charitable:[31]

> [T]he activities of Wilton Park are not of a party political nature. Nor, so far as the evidence shows, are they designed to procure changes in the laws or governmental policy of this or any other country: even when they touch on political matters, they constitute, so far as I can see, no more than genuine attempts in an objective manner to ascertain and disseminate the truth.

This passage affirms the proposition that it is the nature of the concrete agenda for action rather than the subject-matter for discussion which is critical. The presence

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26 *Congregational Union of New South Wales v Thistlethwayte* (1952) 87 CLR 375.

27 [1986] 1 Ch 423.

28 Reproduced in ibid 431.

29 ibid 437 (Slade LJ; Robert Goff and O'Connor LJJ agreeing).

30 ibid.

31 ibid per Slade LJ.

of an agenda to argue for a particular change in the law or the adoption by government of a particular policy attracts the political characterisation. An intention merely to enquire into or discuss a matter which is actually or potentially the subject of political concern does not attract the same characterisation. The latter purpose may have the consequence of generating ideas for changes to the law or public policy but it does not envisage, as its logical and necessary end-point, the making of a decision by government which would be binding upon the community as a whole.

The decision of the High Court of Australia in *Royal North Shore Hospital of Sydney v Attorney-General (NSW)*[32] also emphasised that it is the goal of procuring the government's adoption of a particular measure that is the crucial matter. That case concerned a bequest of a sum of money to establish a biennial essay prize. Essays submitted for the prize had to 'popularize and promote' certain principles which the testator had advocated during his life. These principles were '[t]he adoption of measures to prevent the deaths of so many Australian infants', '[t]he improvement of the Australian national food habits' and '[t]he extension of the teaching of technical education in State schools'.[33] The High Court of Australia concluded that the establishment of the essay prize was a charitable purpose. Latham CJ said that the purpose was educational in character.[34]

It did not seem to matter that the issues with which the testator had been concerned could be matters on which governments, in the normal course of things, could have policies or which could become matters of political controversy. The determinative fact was not that the subject-matter of the testator's concerns was one with which government was or could be concerned. The crucial question was whether the purpose of the endowment was to agitate for a particular outcome in the political sphere - in other words, whether the testator contemplated that political *means* would be used to prevent infant deaths, improve Australian food habits and extend technical education in State schools. Latham CJ observed that the purpose was not 'to promote a particular object by political propaganda'.[35] Similarly, Starke J emphasised that it was not the purpose of the bequest to promote technical education 'by political means or activities'.[36] Dixon J observed that it was not the testator's purpose 'to establish a means of affecting or interfering with government administration'.[37] According to Dixon J, a purpose

32 (1938) 60 CLR 396.

33 ibid 413.

34 ibid.

35 ibid.

36 ibid 420.

37 ibid 427.

could be charitable even though the testator's purpose was 'to mould opinion or spread doctrine on the subject of technical education' or 'to propagate general views for the purpose of producing a widespread opinion coinciding with his own'.[38] In short, it was not essential to the achievement of the testator's purposes that the state use its coercive or financial powers in a particular way.

The argument before the High Court appeared to focus upon the third of the testator's concerns - namely the extension of technical education in State schools - so this matter will be used to illustrate the point. If the purpose of an endowment is to improve or extend the technical education to which the state school system is already committed - by, for example, providing financial assistance for the acquisition of new facilities - the endowment does not fall foul of the political purpose exclusion. It is no part of the purpose of the endowment to agitate for anything to be done *politically* - that is, through legislation or other forms of government decision-making. To the contrary, it involves the private pursuit of a publicly benevolent purpose. If, on the other hand, the government had decided that it would not provide technical education in State schools or would provide only a certain quantity or quality of technical education and the testator disagreed with that decision and, by means of the endowment, was determined to place pressure upon the government to change its mind, the purpose of the endowment would have been political. Generating interest in and enthusiasm for the extension of technical education in State schools by means of an essay competition does not seek directly to bring pressure upon government. An increased public enthusiasm for the cause of technical education may, in the long run, contribute to the emergence of political campaigns for increased government funding for technical education - although it might equally lead to the foundation of privately funded technical colleges. What the testator sought to do by establishing the essay competition was not, in itself, a political purpose. It was not, in itself, directed towards convincing the community (and the government, in particular) that the extension of technical education ought to be pursued through government as a whole-of-society solution.

The crucial matter in characterising a purpose as non-charitable is a goal of having the donor-settlor's policy preference adopted by the state as the community's collective project. That this is the crucial matter which underlies the charitable-political distinction may be demonstrated by examining how this consideration interacts with the other two considerations which were mentioned by the majority in the *Anti-Vivisection* case. Had the objects of the Anti-Vivisection Society been merely to document and publicise the cruel aspects of scientific research involving animals and perhaps to cooperate with scientific research organisations to improve existing practices, the element of enlisting the powers of the state would have been

38 ibid.

absent from the Society's objects. The achievement of those objects would not have involved a determination of whether those objects ought to be pursued by government on behalf of the community as a whole. Individuals and organisations could have chosen to cooperate (or not to cooperate) with the Society. Those who chose not to cooperate would be free to pursue other paths which they considered to be compatible with the public interest. The pursuit of a legislative ban on the practice of vivisection, on the other hand, contemplated that a single decision would be made on behalf of the entire community. That object, by its very nature, excluded the pursuit of other paths. If other paths are to be excluded on the basis that they are incompatible with the public interest, that is surely a matter to be determined by Parliament. It might be said that charity is open to a plurality of paths while politics is monistic. A purpose of changing the law can be for the public benefit only if the proposed measure (more than any competing measures) is for the public benefit. It is the presence of an intention to coerce people in a particular way which puts the assessment of whether the purpose is for the public benefit beyond the competence of the courts.

Similarly, it is the responsibility of the Attorney-General to take legal proceedings to enforce public rights. The state can give its support to a variety of philanthropic, humane, educational and religious purposes in this way. As long as none of these purposes seeks to enlist the coercive powers of the state to exclude other views about how the public benefit might be pursued, the Attorney-General is not placed in a position of having to pursue two incompatible goals. The conflict arises at the moment that the Attorney-General might be required to take action to enforce a trust for the purpose of securing a legislative or regulatory measure or the expenditure of public funds which the government had not been inclined to pursue. Pursuing a purpose of securing a legislative ban upon an activity is necessarily incompatible with the activity not being banned. Pursuing a purpose of securing a particular expenditure of public funds is necessarily incompatible with funds not being spent or being used for other purposes. Once the exercise of government power comes into the picture, the fulfilment of the purpose is necessarily incompatible with the fulfilment of a range of other purposes which might be perceived by many to be more beneficial.

Political Purposes Incidental to Charitable Purposes

A trust for the general purposes of an organisation will not fail simply by reason of the inclusion of a political purpose in the organisation's objects. If the political

purpose is merely incidental to the predominantly charitable purposes of the organisation, the trust is enforceable.[39]

Cases in which a political purpose has been found to be incidental to a charitable purpose - and, accordingly, a legitimate object for a charitable trust - have been cases in which the purpose was associated with protecting an organisation's freedom and opportunity to pursue a program of activities organised along voluntarist lines. *Congregational Union of New South Wales v Thistlethwayte*[40] concerned a bequest to a religious organisation whose objects included 'the preservation of civil and religious liberty'. The majority opinion of the High Court contained the following analysis:[41]

> Such a body is a charity even if some of its incidental and ancillary objects, considered independently, are non-charitable. The main object of the Union is predominantly the advancement of religion. It is a religious institution composed of ministers and members of Congregational churches combining for certain religious purposes of common interest and a bequest to a religious institution is prima facie a bequest for a charitable purpose … The fundamental purpose of the Union is the advancement of religion. It can create, maintain and improve educational, religious and philanthropic agencies only to the extent to which such agencies are conducive to the achievement of this purpose. The same may be said, mutatis mutandis, of the other object, the preservation of civil and religious liberty. The object is to preserve civil liberty so that Congregationalists may worship according to their religious beliefs.

It is clear, in this context, that to say that a purpose is incidental to a predominant charitable purpose connotes that the purpose is something with which the organisation must be concerned in order to carry out its predominant purpose. For Congregationalists, being the heirs of the tradition of the English Puritans or dissenters - those who left the Church of England seeking a purer and more thorough Reformation and who, consequently, were subject to persecution and marginalisation in English society - the preservation of civil and religious liberty carried a particular resonance. They were concerned with the continuation of the

39 *Congregational Union* (n 26) 442. See also *Keren Kayemeth Le Jisroel Limited v Inland Revenue Commissioners* [1932] AC 650, 658 (per Lord Tomlin); *Stratton v Simpson* (1970) 125 CLR 138, 150–151 per Windeyer J.

40 *Congregational Union* (n 26).

41 ibid 442 per Dixon CJ, McTiernan, Williams and Fullagar JJ.

possibility that they might voluntarily associate for the purposes of what they considered to be the correct form of belief and worship.[42]

More generally, it might be said that a concern with the state of the law and of public policy is incidental to a charitable purpose to the extent that law or public policy facilitates or impedes the pursuit of the charitable purpose (understood as the voluntary pursuit of a publicly beneficial purpose). So, for example, charitable organisations are rightly concerned with the legal regulation of their activities in so far as it affects their ability to carry out their charitable missions. Opinions and concerns about that regulation may be expressed without fear of a loss of charitable standing. To do so is incidental to the organisation's private pursuit of publicly beneficial activity. On the other hand, lobbying the government to achieve what the charitable organisation considers to be a benevolent object - such as more generous social welfare provision - constitutes a departure from the organisation's charitable mission. The end-point contemplated is the collective and public pursuit of the organisation's private preferences. Lobbying the government to secure more generous social welfare provision is, from this perspective, no more charitable than lobbying the government to enforce uniformity of religion.

Criticism of the Political Purpose Exclusion (and Rejoinder)

Many of the criticisms of the charitable-political distinction focus upon how it may be publicly beneficial for charitable organisations to participate in public debate and that the charitable-political distinction prevents charitable organisations from doing so. Nicola Silke, for example, has suggested that the distinction between what is excluded and what is permitted as incidental or 'ancillary' is 'extremely fine'[43] and that charities 'are unable to partake fully in the democratic process, and cannot secure their charitable objectives in the most effective way possible: by dealing with the source rather than the symptoms of their targeted problems'.[44] The latter comment appears to have been focused upon social welfare charities.

There are two responses which may be made to this line of argument. First, as explained previously, communications by charitable organisations about the regulatory framework in which they carry out their charitable work will be regarded as being incidental to the pursuit of their charitable purposes, so such

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42 See also *Re Delmar Charitable Trust* [1897] 2 Ch 163, which concerned a testamentary gift of income to the 'Protestant Alliance' or other organisations whose objects included 'the maintenance and defence of the doctrines of the Reformation and the principles of civil and religious liberty against the advance of Popery': 164.

43 Silke (n 1) 345.

44 ibid 346.

political activity will not deprive such organisations of their charitable status. The distinction between such incidental political activity and lobbying the government to adopt particular measures to relieve poverty or advance education may be 'fine', but it has a stable conceptual basis. Secondly, Silke's argument that the political purpose exclusion prevents charitable bodies from achieving their charitable purposes in the most effective way possible is based on the fallacy that a charitable purpose can be pursued either coercively (by the state adopting the organisation's policy preferences) or through voluntarist activity. It fails to appreciate that charity and the welfare state are two distinct means of addressing social problems. As much as the modern welfare state may be concerned with relieving poverty, caring for the sick and advancing education, it is not charitable in the relevant sense. It lacks the element of voluntarism - that is, the application of *private resources* to a publicly benevolent purpose.

Another line of criticism has been to describe the purpose of an organisation such as the Anti-Vivisection Society as a purpose to change the law is to mischaracterise it. Michael Chesterman has suggested that trusts for the purposes of such organisations are 'no more than trusts to communicate to relevant government authorities, and to the electorate, arguments in favour of changing the law – i.e. to convey information to government and to the public concerning, and engage in public discussion of, this issue of public interest'.[45]

A distinction between encouraging discussion of matters of public interest and changing the law was central to the majority reasoning in *Aid/Watch Incorporated v Commissioner of Taxation*.[46] In that case, the High Court of Australia had to consider whether the appellant organisation was a charitable institution, so as to be exempt from liability for income tax. The appellant was described as 'an organisation concerned with promoting the effectiveness of Australian and multinational aid provided in foreign countries'.[47] The particular means which the appellant adopted included performing research, preparing reports based upon this research and campaigning for changes to the way in which aid was delivered.[48] Influencing government policy on foreign aid and the practices of other agencies engaged in the provision of foreign aid appeared to make up a significant part of the appellant's activities. Accordingly, an important question for the Court was whether the appellant's purposes were primarily political and, therefore, not charitable.

45 Chesterman (n 1) 348.

46 *Aid/Watch* (n 2).

47 ibid [5].

48 ibid.

A majority of the High Court concluded that the appellant's activities directed at influencing the way that foreign aid was delivered did not deprive it of charitable status. The stimulation of discussion of matters of public importance was, rather, for the public benefit:[49]

> The system of law which applies in Australia ... postulates for its operation the very 'agitation' for legislative and political changes of which Dixon J spoke in *Royal North Shore Hospital* … [I]t is the operation of these constitutional processes which contributes to the public welfare. A court administering a charitable trust for that purpose is not called upon to adjudicate the merits of any particular course of legislative or executive action or inaction which is the subject of advocacy or disputation within those processes.

It is on this very point that the dissenting opinions of Heydon and Kiefel JJ differed from the majority opinion. Heydon J referred to the evidence given by an officer of the appellant that the appellant was 'seeking to push the Australian Government to promote a holistic approach' and 'to *ensure that they do in fact promote* the holistic approach which they say they're committed to'.[50] Heydon J commented as follows:[51]

> [The evidence does] not support the proposition that the appellant was simply concerned with generating debate or presenting arguments for their own sake. That characterisation is inconsistent with the appellant's 'campaigning' and its 'targeting'. It is inconsistent with its desire to 'expose' evils, its tendency to 'demand', to oppose, to criticise, to protest, and to be 'activist'. Above all, it is inconsistent with its concern for results, to be achieved with whatever amount of rancour and asperity was needed.

Kiefel J commented, in a similar vein to Heydon J, as follows:[52]

> The submission by the appellant, that its purposes are for the public benefit because it generates public debate, cannot be accepted at a number of levels. Its assertion of its view cannot, without more, be assumed to have that effect. Its activities are not directed to that end. If they were directed to the generation of a public debate about the provision of aid, rather than to the acceptance by the Government and its agencies of its views on the

49 ibid [45] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

50 ibid [59].

51 ibid.

52 ibid [86].

> matter, the appellant might be said to be promoting education in that area. But it is not.

Heydon and Kiefel JJ were clearly reluctant to accept lightly the notion that organisations such as the appellant seek to do nothing more than stimulate public debate. Stimulating public debate is rarely an end in itself. Those who wish to stimulate public debate generally wish to do so in order to move the law and public policy in the direction in which they would like to see it moved. They wish to overcome opposition to the changes which they want to implement (or, more accurately, encourage the government to implement). The purpose which must be assessed as being for the public benefit is the outcome which the individual or organisation in question hopes to secure by means of a public debate. Organisations such as Aid/Watch and the Anti-Vivisection Society may not unilaterally be able to change the law, but the end-point which they envisage is the use by government of its coercive powers to implement a set of measures which the organisation prefers.[53] The pursuit of such an end-point involves an implicit denial that a legal or policy regime other than the one which the organisation proposes would benefit the public to the same or a greater extent. The realisation of that end-point is necessarily inconsistent with the realisation of other proposals as to what the law ought to be - or, for that matter, privately-resourced philanthropic projects which depend upon the law remaining as it is. A political purpose is a zero-sum game. Its achievement will produce winners and losers.

Another criticism of the charitable-political distinction is that it has the effect of limiting freedom of political speech. Chesterman, for example, analogised with defamation law.[54] It is true that a court hearing a defamation case may have to decide the question whether the publication of a particular matter was in the public interest in order to determine whether the publication attracts the defence of qualified privilege, but the purpose for doing so is to determine whether a publication amounts to a breach of duty which attracts civil liability. Here, the role of the concept of public interest is to protect a negative liberty - that is, the

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53 Joyce Chia, Matthew Harding and Ann O'Connell criticised the distinction drawn by Heydon J in the *Aid/Watch* case on the basis that it suggested that there is 'more value' in an organisation 'that subscribes to no position' than in an organisation 'that stands for something and seeks to convince others of it': J Chia, M Harding and A O'Connell, 'Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*' (2011) 35 Melbourne University Law Review 353, 376. To be clear, the argument that organisations such as Aid/Watch are not engaged in charitable purposes is that standing for a proposal and attempting to convince the government that that proposal should be adopted as a whole-of-society solution involves an implicit denial that other proposals or doing nothing would be as publicly beneficial as the proposal advocated. The fact that the desired end-point is the government's adoption of a particular proposal makes the thing to be achieved a matter of sectional interest rather than public interest.

54 Chesterman (n 1) 348.

freedom of a person to publish information on matters of public interest. If the matter were not a matter of public interest, the plaintiff would have a right that the defendant refrains from publishing the defamatory matter. Whether the publication of defamatory matter is excused is a matter which is determinative of private rights and the state is involved merely as an adjudicator of those rights. The concept of public benefit plays quite a different role in the law of trusts. It justifies state action, through the Attorney-General's consent to a *relator* action, to facilitate the achievement of the settlor's purpose. This is not a matter relating to a person's negative liberty. It is a matter of whether there is a *public* right to positive action by a state official to provide support to a legal action. Therefore, contrary to Chesterman's suggestion, it is not 'wholly contradictory'[55] for courts to decide a matter of public interest in the context of defamation law but not to decide a matter of public benefit in the context of charity law.

Legislative Reform?

The argument so far has been that there is a stable and rational distinction to be drawn between the private pursuit of a public purpose (voluntarism) and attempts to convince the government to adopt a particular means to advance the public welfare (coercion). The former is open to a plurality of projects, while the latter contemplates an end-point whereby one project is to be imposed on the community as a whole. Nevertheless, the rationality of the distinction is a rationality which is closely linked to the place that the concept of charity plays in determining whether officials of the state may be involved in the enforcement of purpose trusts. The concept of charity has been pressed into service in other areas of the law, notably in relation to the availability of revenue law exemptions and concessions. It is legitimate to ask whether the distinction which distinguishes political purposes from charitable purposes is relevant to these other areas of law. As previously remarked, there would not seem to be any compelling reason for the question of the availability of revenue law exemptions and concessions to be permanently tied to the question of what purpose trusts may be enforced in the name of a public official.

In Australia, the Charities Act 2013 (Cth), whether or not it has the effect of allowing some 'political' purposes to be charitable purposes for the purposes of any Commonwealth legislation concerning charities, has brought about a separation of the meaning of charitable for those purposes from its meaning in relation to the enforceability of trusts, which is a matter of state law. This is an accident of the Australian federal constitutional system and the Commonwealth's

55 ibid.

monopoly on the levying of income tax but lack of power (and political interest) in relation to trusts law. It is not the product of a deliberate policy to sever the link between the two major functions of the concept of charity. Whatever reasons might justify a policy of severance, the argument herein is an argument concerning the enforceability of trusts.

Moreover, the argument has been merely an argument about the rationality of the distinction and its capacity to explain the historical *case law* concerning the enforceability of purpose trusts. The argument has been made in response to suggestions that the distinction is irrational and should be abandoned as an interpretation of the case law. The argument does not hold against legislative amendment of the definition of charity in relation to the enforceability of purpose trusts, if such amendment were considered to be good public policy.

One common law jurisdiction which has recently enacted a statutory definition of 'charitable' which governs the enforceability of trusts is the South Pacific nation of Samoa. In Samoa, charitable purposes include 'the advancement of human rights and fundamental freedom'.[56] Such a purpose might inevitably be political in character in so far as it is concerned with state activity - either with what the state is not allowed to do or what the state must do in order to protect the rights and freedoms of individuals. It is notable that the Samoan definition retains a public benefit requirement, in particular that 'the fulfilment of any of the purposes is for the benefit of the community of a substantial section of the community'.[57] Arguably, the Samoan provision contemplates that a trust to advance human rights and fundamental freedoms would not be charitable to the extent that the purpose is to advance a conception of human rights which is in any way controversial - that is, it is favoured by one section of the community but opposed by another section of the community. To be clear, while Samoa may be a party to certain treaties and international conventions concerning human rights and freedoms and is obliged under international law to implement the terms of those treaties and conventions, the precise way in which those rights and freedoms are incorporated into domestic law may be politically controversial within Samoa. Different sections of the Samoan community may have interests in seeing those controversies resolved in different ways. Such a purpose might still fail to be charitable on the basis that it involves advancing human rights and fundamental freedoms in a way which benefits one section of the community at the expense of another - that is, it involves a zero-sum game.

The Samoan legislation enables the settlor of any such trust to sidestep the question of whether the trust is charitable by its introduction of a more liberal regime in

56 Trusts Act 2014 (Samoa), s 65(1)(e). See also the Charities Act 2011 (UK), s 3(1)(h).

57 Trusts Act (n 56), s 65(1).

relation to purpose trusts. In Samoa, trusts 'may be created or established ... for any particular purpose, whether charitable or not' as long as 'the purpose is possible and sufficiently certain to allow the trust to be carried out' and 'the purpose is not contrary to public policy or contrary to the Law'.[58] Such trusts are enforceable as long as an 'enforcer' has been appointed. An enforcer has 'the same rights as a person with a beneficial interest under an ordinary trust to take administrative actions and other actions' and 'the same personal and proprietary remedies for breach of trust ... as a beneficiary of an ordinary trust'.[59] The legislation contemplates that non-charitable purpose trusts, unlike charitable trusts, will not be of indefinite duration. The instrument that creates such a trust may 'specify an event or date upon the occurrence of which the trust ceases to be a purpose trust'[60] and 'provide for the disposition of the property of the trust when the trust ceases to be a purpose trust'.[61]

The Samoan legislation is mentioned here as an example of provision for the creation and enforcement of non-charitable purpose trusts without the involvement of the state as *parens patriae*. Thus, it avoids the central difficulty of redefining charitable purposes so as to include political purposes, namely the difficulty of making a state official the enforcer of a trust which seeks, as its end-point, a change in the law or of government policy in a way which is desired by some in the community but opposed by others.

Conclusion

According to the internal logic of the law of trusts, the character of an endowment as a choice by a settlor/donor to commit her or his *own* resources directly to the pursuit of a publicly beneficial end justifies giving a state official standing to enforce the trust. Where the object of the settlor/donor is to seek to persuade the government to change the law or its policies in a way which the settlor/donor considers to be beneficial, but many others do not, enforcement by a state official is not appropriate. The longstanding distinction between charitable purposes and political purposes is rational to the extent that it is concerned with the enforcement of purpose trusts at the suit of the Attorney-General. A judicial abandonment of the political purpose exclusion is not justified on the basis of any alleged incoherence of the exclusion. On the other hand, the voluntarism-coercion distinction does not, of itself, provide a reason for opposing legislative reform

58 ibid s 66.

59 ibid s 22.

60 ibid s 66(4)(a).

61 ibid s 66(4)(b).

which extends the revenue law benefits of charitable status to organisations with political aims or which creates mechanisms for the enforcement of purpose trusts other than as charitable trusts.