

# CHAPTER 14: THE PREAMBLE TO THE STATUTE OF ELIZABETH

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## Current approach

The *Charitable Uses Act 1601*, referred to as the Statute of Elizabeth, was enacted to address abuses of trusts established for charitable purposes. The Preamble to the Statute set out a list of charitable purposes that were to be covered by its provisions. (See Chapter 2 for a discussion of the role of the Act in the development of charity law. Reference may also be made to *Chesterman*.<sup>1</sup>)

While the Statute has been repealed, the Preamble has retained a place in the determination of charitable purposes. Charitable purposes are those that are within the spirit and intendment of the Statute of Elizabeth, or those analogous to purposes that have been judged to be charitable within the Preamble. Ford and Lee note that the courts:

reason by analogy from case to case, holding to be charitable trusts which may not come directly within the statute or even its spirit and intendment, but which are comparable to cases which have been held to be charitable.<sup>2</sup>

**Do purposes of liberality and benevolence mean the same as objects of charity? That word in its widest sense denotes all the good affections men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in this court. Here its significance is derived chiefly from the *Statute of Elizabeth Stat. 43 Eliz., c. 4* [relating to charitable gifts]. Those purposes are considered charitable, which that Statute enumerates, or which by analogies are deemed within its spirit and intendment; and to some such purpose every bequest to charity generally shall be applied.**

*(Morice v Bishop of Durham<sup>3</sup>)*

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- 1 *Chesterman*, M 1979, *Charities, Trusts and Social Welfare*, Weidenfeld and Nicolson, London, Part 1.
  - 2 Ford, HAJ and Lee, WA 1990, *Principles of the Law of Trusts*, The Law Book Company, Sydney, p 822.
  - 3 [1803-1813] All ER Rep 451 at 454; (1804) 9 Ves 399; 32 E.R. 656 .

In the UK it has been held that a purpose will be charitable if it has proved to be of general public utility or beneficial to the community unless there is some reason for holding it to be not within the spirit and intendment of the Preamble.<sup>4</sup> The courts have 'left open a line of retreat based on the equity of the Statute in case they are faced with a purpose (eg a political purpose) which could not have been within the contemplation of the Statute'.<sup>5</sup>

The High Court specifically rejected this approach, when they denied charitable status to a bequest for the breeding of homer pigeons, commenting that to adopt it 'would certainly go beyond any decision of the House of Lords or of this Court'.<sup>6</sup> The Court went on to express some sympathy for change.

It is our opinion that here the Court should not go beyond the decisions of the House of Lords and of this Court to which reference has been made, notwithstanding our sympathetic understanding of any lack of enthusiasm that there may be for what now appears as an unnecessary restriction imposed by law upon the capacity of a testator to support with his bounty purposes which seem good to him and do not offend against the law. *That the next of kin whom the testator chose not to make the objects of his bounty should benefit at the expense of an activity which he enjoyed and wished to prosper may well be thought out of keeping with sentiments prevailing in the days of the second Elizabeth. Perhaps the law is in need of reform [in this respect].*<sup>7</sup> (emphasis added)

The Australian Taxation Office states that for a purpose to fall within the technical legal meaning of charitable it must be beneficial to the community and within the spirit and intendment of the Statute of Elizabeth. To be within the spirit and intendment 'it must be within or analogous to purposes set out in the preamble to that Statute, or purposes that the courts have found to be charitable and within the technical legal meaning'.<sup>8</sup>

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4 Picarda, H 1999, *The Law and Practice Relating to Charities*, 3<sup>rd</sup> edition, Butterworths, London, p 1.

5 *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1971] Ch 626; affd [1972] Ch 73 CA, quoted in Picarda, p 11.

6 *Royal National Agricultural and Industrial Association v Chester* [1974] ALJR 304.

7 [1974] ALJR 304 at 306.

8 Australian Taxation Office (ATO) 1999, *Draft Taxation Ruling, Income tax and fringe benefits tax: charities*, TR 1999/D21, para 10.

## Comments on the current approach

Hemphill has argued that ‘the time has come to see that “there must be, and is, some general conception” of purposes permissible for a valid charitable trust, of which the particular cases found in the books are but instances’.<sup>9</sup> He proposes that a trust whose purpose is beneficial to the community is prima facie a charitable trust ‘unless for some reason of public policy it should be held to be invalid’.<sup>10</sup>

**The claim that the courts do not decide these cases on the basis of public policy and the charade of pretending to find a body of law in the interpretation by analogy on analogy of a long-since repealed preamble to a statute of 1601 form, in the writer’s opinion, a blot on our jurisprudence.**

**(Hemphill<sup>11</sup>)**

Very few submissions commented in any substantive way on the continued reliance on the Preamble to determine charitable purpose. Those submissions that addressed the issue considered the continued reference to the Preamble to be largely irrelevant to the concerns of modern charities. Jobs Australia commented that a definitional framework based on a 400 year old statute and the related case law ‘cannot possibly comprehend or take proper account of the vastly different circumstances in which charities and related bodies now operate’.

**The Elizabethan Statute of Charitable Uses first classified charitable purposes 400 years ago. This classification structure is of little use today, even though the courts continue to use it as a reference point.**

**(ACOSS)**

Mallesons Stephen Jaques envisaged that the Committee’s report could serve as a catalyst for judicial revision of the authorities relating to charities and public benevolent institutions ‘in light of the views of the Australian community of the 21<sup>st</sup> century, rather than the views of the communities in the

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9 Hemphill, PC July 1990, ‘The Civil-law Foundation as a Model for the Reform of Charitable Trusts Law’ in *The Australian Law Journal*, Vol 64, p 409.

10 Hemphill, p 409.

11 Hemphill, p 409.

United Kingdom and Australia of the 19<sup>th</sup> and 20<sup>th</sup> centuries as expressed in the existing law’.

Professor Parkinson criticised the continued reliance on the use of analogy arguing that it ‘ought not to form the basis of public policy’. He referred to the example of *Scottish Burial Reform and Cremation Society v Glasgow Corporation*<sup>12</sup> where the line of analogy was said to be that the maintenance of burial grounds was analogous to the repair of churches (a purpose included in the Preamble), which in turn was analogous to a charitable cemetery run by the local authority, which was held to be analogous to a society which advocated cremation and provided cremation services. He commented that ‘cremation societies may be a very good thing-but not for these reasons’.

The Nathan Report recommended that the reference to the Preamble to the Statute of Elizabeth be replaced with a ‘definition’ based on Lord Macnaghten’s four heads, but preserving the case law as it stands.<sup>13</sup> The Goodman Report found that the Statute of Elizabeth uses language that is inappropriate to contemporary concepts and requires the courts to engage in ‘mental gymnastics’ in order to include some purposes as charitable.<sup>14</sup>

**We do not suggest that the replacement of the language of the Elizabethan Statute by a more modern classification would make unnecessary recourse to the Courts for decisions on borderline cases or interpretation of obscure language; but we should hope that it might give somewhat more freedom to the judiciary in applying the well established principles of the existing law to the problems of an age of rapid and continuous change.**

**(Nathan Report)**

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12 [1968] AC 138.

13 *Report of the Committee on the Law and Practice Relating to Charitable Trusts* 1952, HMSO, London, Cmd 8710, (Nathan Report), p 36.

14 National Council of Social Service 1976, *Charity Law and Voluntary Organisations*, Report of an independent committee of inquiry (Lord Goodman, Chairman) to examine the effect of charity law and practice on voluntary organisations, Bedford Square Press, London, (Goodman Report), p 15.

## Committee's conclusions

The issue before the Committee is whether clarity and consistency would be enhanced by replacing reference to the Preamble to the Statute of Elizabeth with an alternative mechanism for defining charitable purpose.

The continued reference to the spirit and intendment of the Preamble to the Statute of Elizabeth has, by and large, provided considerable flexibility. Charitable purposes have been found in objects far removed in form from those set out in the Preamble in line with changes in the community's needs and in the way those needs are addressed. The process of determining charitable purposes by analogy has led to the inclusion of many purposes not considered charitable in 1601.

However, the Committee considers that this process is ambiguous and could lead to inconsistencies. Guidance on what is charitable and what is not can be made considerably clearer by means other than referring to the spirit and intendment of the Preamble to the Statute of Elizabeth. In Chapter 16 a number of options for defining charitable purpose are discussed, including providing a comprehensive, but not exhaustive, list of charitable purposes.

Another issue of concern to the Committee is whether continued reference to the Preamble carries with it the potential to exclude from charity objects that are for the public benefit but that were not conceived of in 1601. For example, submissions have been made to the Committee that child care should be considered a charitable purpose. In 1601 the only children perceived as in need were those who were helpless or vulnerable, in those days usually orphans. (See the further discussion of this in Chapter 25.) However, providing adequate care for children whose parents are at work or ill or disabled is now an issue for the community to address. Similarly, while political purposes are considered to be outside the spirit and intendment of the Preamble, governments now encourage charities to represent their views and those of the people they assist; this is one way that charities contribute to the development of public policy.

Many of the purposes thought charitable 400 years ago are either no longer so or are irrelevant to today's social needs. Some retain their place. But, on the other hand, the community and the judges are left with the uncertainty brought about by attempts, sometimes artificial, to say that a new purpose is somehow analogous to one of the purposes in the Statute or is within its spirit and intendment. It seems to us that the Preamble, valuable though it has been, has outlived its usefulness. It is time to move on. We need to ensure that those things relevant and beneficial to today's circumstances are retained, but they

need to find their place in a more modern statute enacted for our time. Accordingly, the Committee recommends that there be no requirement for a purpose to fall within the 'spirit and intendment' of the Preamble to the Statute of Elizabeth in order to be charitable.

The reference in Chapter 4 to the significance of the division of Commonwealth and State legislative power for this Inquiry is relevant here. Unless the States decide to change their own laws, this recommendation, if adopted, will have no effect outside the area of Commonwealth statutory law.

***Recommendation 11***

*That there be no requirement that charitable purposes fall either within the spirit and intendment of the Preamble to the Statute of Elizabeth or be analogous to one or more of its purposes.*