

CHAPTER 15: LORD MACNAGHTEN'S HEADS OF CHARITY

The Committee considers that Lord Macnaghten's four heads of charity can be enhanced to make them more relevant for modern charities.

Current approach

As discussed in Chapter 2, Lord Macnaghten classified charitable trusts into four 'heads':

- the relief of poverty;
- the advancement of education;
- the advancement of religion; and
- other purposes beneficial to the community.¹

While it is a classification, not a definition, the four heads have been used since then by the courts in Australia and other common law countries as guidance on what is a charitable purpose. Picarda comments that:

The very language used by Macnaghten indicates that he was not treating his classification as a 'be all and end all'. He segregated four principal divisions and said that charity in its legal sense comprised those divisions. It is possible to identify further categories of charitable purposes from the decided cases.²

The Australian Taxation Office (ATO) notes the following categories of charitable purpose:

There are five main groupings of benefit or value that the courts have recognised as capable of being charitable. They are purposes for the relief of poverty, the relief of the needs of the aged, the relief of sickness or distress, the advancement of religion, and the advancement of education.

¹ *Income Tax Special Purposes Commissioners v Pemsel* [1891] All ER Rep 28; [1891] AC 531.

² Picarda, H 1999, *The Law and Practice Relating to Charities*, 3rd edition, Butterworths, London, p 13.

There are also many other charitable purposes, commonly referred to as 'other purposes beneficial to the community'.³

This listing is notable in that in addition to Macnaghten's four heads it lists 'the relief of the needs of the aged' and 'the relief of sickness or distress' as categories. Plainly these are charitable but more conventionally they would have been regarded as falling directly within the terms of the Preamble to the Statute of Elizabeth or under the fourth head of Lord Macnaghten's classification.

The relief of poverty

The popular notion of charity involves the relief of the poor. The basis of modern charity law, the Statute of Elizabeth, had its origins in the Parliament's concerns for the poor. It was introduced, against a background of considerable hardship, to ensure that 'charitable funds held for the relief of poverty were not diverted'.⁴

Picarda notes that:

The relief of the poor is expressly mentioned in the preamble to the Charitable Uses Act 1601 but the theme of relieving poverty runs through many of the other purposes enumerated in the preamble; as, for example: education and preferment of orphans, marriages of poor maids, aid of young tradesmen, handicraftsmen and persons decayed, and aid of poor inhabitants concerning taxes.⁵

The relief of poverty was prominent in Lord Macnaghten's fourfold classification, although 'Pensel's case reinforced the view that the legal definition of charity was not confined to redistributing wealth to the poor or to the community'.⁶

For the purposes of charity law, poverty is not to be equated with destitution but rather with an inability to obtain all that is necessary for a modest standard of living. Poverty refers to financial need, but the courts have not adopted financial criteria to determine poverty, preferring to characterise it as a relative term. The intention to relieve poverty need not be explicit but may be indicated by purposes for which a gift is expressed. For example, gifts to provide

3 Australian Taxation Office (ATO) 1999, *Draft Taxation Ruling, Income tax and fringe benefits tax: charities*, TR 1999/D21, para 35.

4 Bradshaw, FM 1983, *The Law of Charitable Trusts in Australia*, Butterworths, Sydney, p 1.

5 Picarda, p 35.

6 Dal Pont, G 2000, *Charity Law in Australia and New Zealand*, Oxford University Press, Melbourne, p 51.

financial support to boys leaving a school that mainly admitted orphans have been held to be for the purpose of relieving poverty.⁷

There are many methods of relieving poverty. Some methods are direct, for example, giving money or other gifts to the poor, providing food and clothing, and operating orphanages. Some are indirect, for example, provision of accommodation for relatives who come from a distance to visit critically ill hospital patients.⁸

As discussed in Chapter 12, the courts have held that the public benefit requirement can be relaxed for charities under this first head, so that a relationship between the benefactor and the beneficiary (such as a familial or employment relationship) does not deny charitable status.

The Preamble to the Statute of Elizabeth grouped three elements together in the phrase 'relief of aged, impotent and poor people'. Courts have held that this phrase is to be read disjunctively, so that the relief of the aged or impotent may be a charitable purpose independently of poverty.⁹

The advancement of education

Education has long been accepted as a valid charitable purpose. The references in the Preamble to the Statute of Elizabeth to 'schools of free learning, free scholars, and scholars in universities' and to 'the education and preferment of orphans' provide a clear basis for this. The inclusion of 'the advancement of education' in Lord Macnaghten's classification has served to entrench education as a charitable purpose.

The courts have taken a wide view of the meaning of education. They have construed the term to extend to 'the improvement of a useful branch of human knowledge and public dissemination'.¹⁰ It denotes a balanced and systematic process of instruction, training and practices containing spiritual, moral, mental or physical elements. It is not limited to the young. Nor is it confined to formal education of a type supplied by schools or universities. It can extend to 'more informal training initiatives, aimed at teaching necessary life skills or providing information toward a practical end'.¹¹

The courts have also noted that education is not a static concept. Lord Hailsham LC in the House of Lords observed that both the legal conception of

7 Dal Pont, pp 112-113.

8 Picarda, pp 38-40.

9 Dal Pont, p 111.

10 Dal Pont, p 132.

11 Dal Pont, p 132.

charity, and within it the educated person's ideas about education, are not static, but moving and changing.

Both change with changes in ideas about social values. Both have evolved with the years. In particular in applying the law to contemporary circumstances it is extremely dangerous to forget that thoughts concerning the scope and width of education differed in the past greatly from those which are now generally accepted.¹²

Through the development of the common law, a number of purposes have come to be recognised as charitable through being construed as contributing to the advancement of education. The public appreciation of art, music and literature is taken to be a charitable object, based on the view that such appreciation is a hallmark of an educated and civilised person, which represents a public benefit.¹³ Gifts to establish competitions and prizes in the arts have also been upheld as charitable. Research purposes are generally regarded as charitable, on the basis that research is one of the most efficient means of adding to the knowledge of mankind, given the inherent culture of research which actively fosters the public dissemination of research results.¹⁴ The existence of some link to an educational purpose has often been used to argue for the charitable status of a wide range of objects and organisations, for example, youth clubs, student unions and the provision of sporting facilities for schools and universities.¹⁵

The advancement of religion

According to Dal Pont 'religion's charitable status stems from the fact that, in English society, the concept of charity was essentially religious in origin'.¹⁶

When considering whether a purpose is for the advancement of religion there must be a religion in existence that is being advanced. According to Dal Pont:

In order to be charitable, a gift or association must be directed towards, not religion *per se*, but to the *advancement* of religion. To advance religion means to promote spiritual teaching in a wide sense, to spread its message, or to take positive steps to sustain and increase religious beliefs, in ways that are pastoral or missionary. (Author's emphasis)¹⁷

12 *Inland Revenue Commissioners v McMullen* [1981] AC 1 at 15.

13 Dal Pont, p 134.

14 Picarda, p 56.

15 Picarda, pp 63-67.

16 Dal Pont, p 147.

17 Dal Pont, p 164.

In this way:

An organisation, though meeting the legal definition of 'religion', that does not conduct religious instruction, religious services, programs for the persuasion of unbelievers or religious supervision to ensure that members remain active, does not exist for the advancement of religion.¹⁸

Bradshaw notes that 'under the classification of the advancement of religion there is embraced the maintenance and spread of religious doctrine, the provision of facilities for worship, and the support of persons who conduct worship or propagate religious teaching'.¹⁹

The common law is also clear that charities having the purpose of the advancement of religion must satisfy the public benefit test.²⁰

The ATO's *CharityPack* states that 'non-profit entities that operate for the public benefit to advance religion in a direct and immediate sense are charities'.²¹ *CharityPack* gives some examples of charities for the advancement of religion including: bible colleges and bible societies distributing religious literature; building funds for the construction, maintenance or furnishing of church buildings, mosques, synagogues etc; church choirs; clergy funds to maintain priests, pastors, ministers of religion, and students for the ministry; seminaries; and Sunday school associations.

Other purposes beneficial to the community

The fourth head 'other purposes beneficial to the community' includes charitable purposes that cannot be included under one of the other heads of charity. However, it does not include all purposes that have benefit for the public. To be charitable under this head, a purpose must be both of benefit to the public and within the spirit and intendment of the Preamble to the Statute of Elizabeth.

Four centuries of court decisions that various purposes are within the spirit and intendment of the Preamble to the Statute of Elizabeth, or are analogous to purposes which have been held to be charitable purposes, have led to a large and diverse body of charitable purposes grouped under the fourth head. This in turn has led to a number of attempts to classify further charitable purposes falling under the fourth head.

18 Dal Pont, p 165.

19 Bradshaw, p 22.

20 Dal Pont, p 147.

21 ATO 2000, *CharityPack*, p 56.

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Tudor divided them into two:

- trusts for purposes of 'general public utility'; and
- trusts for certain purposes tending to promote mental or moral improvement.²²

Others have suggested longer and varied lists, including:

- the benefit of the whole community;
- the benefit of a particular locality;
- the welfare of animals;
- public works;
- protection of human life and property;
- uplifting the moral tone of the community;
- the relief of taxes;
- distress resulting from air raids, disasters etc;
- the improvement of agriculture and industry;
- the relief of the aged;
- the relief of human suffering and distress;
- the promotion of the safety and protection of the community;
- the promotion of the useful arts;
- the dissemination of teachings;

²² Tudor, *Charities*, 6th edition, pp 84-85, cited in Ford, HAJ and Lee, WA 1990, *Principles of the Law of Trusts*, 2nd edition, The Law Book Company, Sydney, pp 858-859.

- recreational facilities; and
- social rehabilitation.²³

There is clearly the potential for overlap of some of these purposes and other heads of charity. For example, Picarda notes that 'where the promotion of health cannot be subsumed under the heads of relief of poverty or advancement of education or religion, a trust for such an object will fall within the fourth residual category'.²⁴

Views on the current approach

The Catholic Church in Australia supported the continuation of the common law approach including 'the four purposes set out in the Pemsel test'.

These purposes retain their relevance. The purposes in common law conform closely to the definition of charity, described in this submission, which identifies charity as necessarily involving the provision of basic human goods to others so that they may flourish.

Anglicare Australia also stated that 'the four heads of charity...continue to have relevance today', but it also argued that 'the definition of charity needs to be updated to encompass a broader range of appropriate ways to overcome poverty and benefit the community'. It suggested that the four heads be retained but with some change in the terminology for the first head to 'the relief and reduction of poverty and distress' and for the fourth head to 'other community service purposes where these purposes are altruistic'.

ACOSS devoted a considerable part of its submission to a discussion of the four heads, arguing that they should be reviewed to provide a more contemporary meaning and scope. ACOSS stated that:

While this classification structure [that is, the one drawn from Pemsel's case in the late 19th century] is 300 years younger than the Elizabethan Statute of Charitable Uses, it is still over 100 years old. As such the 'four heads of charity' (as distinct from the basic idea of 'charity') has become out-dated as a framework for categorising charitable purposes in contemporary societies.

²³ Bradshaw, pp 27-35; Chesterman, M 1979, *Charities, Trusts and Social Welfare*, Weidenfeld and Nicholson, London, pp 163-171; Dal Pont, pp 178-199; Ford and Lee, pp 858-866; Picarda, pp 117-166.

²⁴ Picarda, p 117.

ACOSS suggested that there are two problems with the four heads of charity: the first three heads are 'outmoded, imprecise, and too narrow'; while the fourth head is 'too vague and general'. It added that:

In the absence of a contemporary classification structure for charities, two problems emerge. First, newly-emerging 'public good' organisations that are charitable in nature are denied charitable status, creating a need for separate categories of community organisation for taxation and other purposes...Second, organisations that were once considered charitable but are no longer so in the present-day context are likely to remain on the register.

The Caroline Chisholm Centre for Health Ethics argued that charitable purposes should be:

...for the benefit of the needy in the community...the advancement of education, including moral education...the advancement of religion as a stabilising and cohesive social element...(and)other altruistic activities which are deemed to be of significant benefit to the community.

The Royal Life Saving Society Australia and others suggested a 'hierarchy of charitable purpose' ordered from essential life functions through to desirable social activities. The hierarchy was ranked as follows: safety, security and protection; physical wellbeing; religious and spiritual beliefs; social objectives; and co-operative/community interests.²⁵

PeakCare Queensland recommended that 'a new classification structure for charitable institutions be developed that reflects the contemporary scope of human services and includes neighbourhood centres, child care, public advocacy and self help services'.

The RSPCA's submission stated that 'the existing definition of charity needs to be elaborated to specifically stipulate animal welfare as a specific purpose'.

The relief of poverty

Anglicare Australia argued that:

Charities today seek to reduce poverty and to eradicate the causes of poverty rather than simply seeking to provide relief of poverty. The traditional concept of 'relief of poverty' is too passive, and a more

25 Joint submission from the Royal Life Saving Society Australia, St John's Ambulance Australia and Surf Life Saving Australia.

participatory process is needed to achieve sustainable poverty reduction. Eradicating poverty and breaking the cycle of dependence requires action in fields such as advocacy, community development, community motivation, service coordination and support.

ACOSS draws attention to the fact that the courts have interpreted the 'poverty' head of charity 'as inclusive of assistance for people with an illness...[and] assistance for people with a disability, as well as many other social welfare (and social housing) services'. ACOSS claims that this is 'much broader than the contemporary popular meaning of poverty, which connotes financial hardship or social disadvantage rather than illness or incapacity'. At the same time 'the poverty head is probably too narrow to embrace the full range of social welfare services such as counselling services, neighbourhood centres, and social policy organisations'.

The advancement of education

A small number of submissions questioned the continued relevance of education as a charitable purpose. For example, the Australian Council of State School Organisations argued that the recognition of education as a charitable purpose is now totally outdated, largely because of the development of the concept and practice of compulsory education, which is generally recognised as a responsibility of government.

Other submissions argued that the public benefit provided by education is much broader than the imparting of knowledge. The Australian Vice-Chancellors' Committee argued that education provides the basis not only for future employment but also for social participation and contribution to the community by individuals. The Australian Vice-Chancellors' Committee pointed to recent research which demonstrates that while the completion of a higher education degree provides both public and private benefits, the public benefits outweigh the extent of private advantage.²⁶

The National Council of Independent Schools Associations argued that wider public benefits arise from the role played by schooling in providing foundation skills, knowledge and experience which help to develop within children the capacity for a productive and fulfilling life and for constructive participation in society.

26 Borland, J, Dawkins, P, Johnson, D and Williams, R 2000, *Returns to Investment in Higher Education*, Melbourne Economics of Higher Education Research Program, Report No 1.

The advancement of religion

A number of submissions argued that the advancement of religion should continue to be part of the definition of charity. The Uniting Church in Australia National Assembly stated that the definition of charity must continue to include the advancement of religion because 'religion is basic to human life and therefore a worthwhile and charitable end in itself'.

Others, such as the Haemophilia Foundation Australia, argued that the concept of a head of charity for the advancement of religion is out of date. Some considered that the advancement of religion should not be supported by the government. Purple Economy Watch stated that 'it is not the role of the secular Commonwealth of Australia to advance religion'. On the other hand the Anglican Church of Australia argued that 'the historical position of religion in Australian society, and of religious organisations, is not fundamentally challenged by recent social changes'.

Dal Pont notes an observation that '[the fact that] the church is no longer the principal agent for, or motivator of, charity has led some to question whether religion in modern times deserves charitable status'.²⁷

There were a number of submissions that questioned the validity of allowing religious organisations to carry on 'non-religious' activities under the guise of religion. According to the Humanist Society of Queensland 'if religions engage in charitable work and derive benefits from public funds then their charitable arm should be separated from the religious arm'. The Tandara Lodge Nursing Home argued that:

Whilst religious organisations are often associated with charity, any definition has to look beyond this, to the deeds and purposes of a charity and any future definition should not use or include the word religious as part of the necessary definition of charity.

On the other hand, K. J. Patterson submitted that '[the fact that] others may describe a particular service as charitable but not religious is no criteria for dismissing that a religious organisation may see it as a religious service'.

According to Anglicare Australia, their agencies 'regard themselves as both charitable organisations and religious organisations...the provision of caring services and advocacy are regarded as being core religious activities'. The Australian Evangelical Alliance explained that 'it is of the essence of virtually

²⁷ Dal Pont, p 147, from 'Case Comment: Charitable Trusts' (1985) 5 *Auckland University Law Review* 244 at 248.

all Christian religious organisations that their religious and charitable purposes and indeed activities are so integrated as to be indivisible'. The Anglican Church Diocese of Newcastle expressed the opinion that 'belief and behaviours are inseparable in the context of a religious organisation'. The Uniting HealthCare Group stated that it is advancing the mission of the Uniting Church 'to provide a healing ministry in a Christian environment'. The Salvation Army declared that its foundation and its current ethos 'affirm its religious commitment and its social commitment as equal and indivisible'. The Salvation Army described this as a 'holistic mission'.

The Caroline Chisholm Centre for Health Ethics argued that the advancement of religion has implicit in it a number of benefits for the community, including the fact that religion 'helps to build up social cohesion with emphasis on the duty to respect the rights of all and encourages service for the needy in the community'. The Australian Pentecostal Ministers Fellowship argued that religion 'brings value to the community in a variety of ways but specifically in terms of providing a spiritual and moral context for the community and in caring for the aged, sick, unemployed and disadvantaged'.

Other purposes beneficial to the community

While not advocating a change to the four heads, the Catholic Church in Australia nevertheless suggested that a broader interpretation be developed of what constitutes a charitable purpose under the head of 'other purposes beneficial to the community'.

With changing community perspectives, there may be some social benefit from encouraging policy makers to recognise a greater range of organisations as charitable, such as those which promote care for the environment or advocate for policy change for the benefit of the disadvantaged.

ACOSS remarked that, unless its meaning is limited by reference to the other three heads, the fourth head of charity could include 'virtually any form of altruistic activity and would be so vague and general as to be useless for classifying an organisation as a charity'.

The RSPCA considered that the current four heads of charity should be expanded and elaborated. It stated that the fourth head should be renamed 'other beneficial purposes' and that there should be a specific purpose for the prevention of cruelty to, or the promotion of the welfare of, animals.

Committee's conclusions

The value of the guidance provided by Lord Macnaghten's categories cannot be overstated. Notwithstanding the very general words of the fourth category upon which the great majority of disputes have centred, the four heads have given the law a degree of certainty and predictability that it may not otherwise have had. At the same time, they have provided a degree of flexibility that has allowed the meaning of charity to adapt to changing needs and expectations of the community.

Nevertheless, the Committee is of the view that Lord Macnaghten's approach has some shortcomings. The four heads provide little effective guidance to the charitable sector and the wider public about what is a charitable purpose. That is because they do not provide an adequate indication of the scope of charitable purposes. Charitable purposes extend far beyond education, religion and relief of the poor or destitute which may be inferred from an uninformed examination of the four heads. For the vast majority of organisations that fall outside these three purposes, the four heads provide no guidance as to whether they are in or out of the scope of charity. For example, it is not clear that charities for the disabled, or cultural charities, fit within the scope of charity without some knowledge of the judicial decisions that underpin the four heads.

There is also confusion about under which head some purposes should be classified. The four heads are not mutually exclusive, that is, a purpose may fit into more than one category. For example, some charities providing health services could be classified under 'the relief of poverty', those undertaking related health research may be classified under 'the advancement of education', yet others may be in 'other purposes beneficial to the community'.

These various considerations persuade us that it is not sufficient to leave Lord Macnaghten's four heads of charity as the only comprehensive statement providing guidance to the community generally and to the charitable sector in particular as to the nature of charitable purposes. As we have seen, they are not themselves comprehensive. In any event, particularly because of the generality of the fourth head, they conceal too much. They lack transparency. And, as has been remarked, they themselves are over 100 years old. The last century or so has seen significant changes in the way the sector operates. There have been a multitude of judicial decisions both here and overseas which on a case-by-case basis, have endeavoured to be responsive to the changes in and the growth of the sector. But judges can only do so much. And even the most forward thinking tend to be boxed in by the past.

In our opinion that will not change significantly even if the Preamble to the State of Elizabeth ceases to apply. As we have seen, the trend of English, although not Australian, authority in more recent years has been to give the Preamble a much reduced significance in the determination of whether or not a purpose is charitable. It seems to us that the removal of the Preamble from the scene will have a beneficial affect. But it is unlikely that its departure will obviate the need for those in the sector and for administrators considering their purposes and activities to continue to have a close working knowledge of the morass of case law developed over many centuries but particularly in the last century. It is unlikely that anyone other than a lawyer, whether practitioner or judge, steeped in the intricacies of charity law, could confidently express a view about whether or not in a borderline a case, a purpose was charitable.

Of course it is unlikely that many of the long established large charitable entities, including the larger and more traditional charities, have significant problems with the law. They follow well-trodden paths. The problem is more likely to touch newly established entities, some of which may be large but many of which will be small. It is plain from the submissions of these entities that they believe that the barrier to entry into the field is high and for some, insurmountable. We cannot reach a conclusion about the rights and wrongs of this but it seems clear that, particularly to more recently formed entities, there is a mystique about the nature of charity.

This, in the light of what has been said in this and earlier chapters, is not surprising. Accordingly, we are strongly of the view that it would not be right to leave the law to continue to develop as it has. That is the Committee's view, whether or not the Preamble to the Statute of Elizabeth stays or goes. But we acknowledge that charity itself, using the expression very widely, is a complex subject. It is so wide ranging that the law's response to it in times of dispute will reflect that complexity. Lest there be disappointment, it should be understood that charity and the law concerning it are likely to remain complex. It is our hope, however, that such complexity may be reduced as a consequence of what we recommend.

