

## CHAPTER 16: OPTIONS FOR CHARITABLE PURPOSE

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*This Chapter presents a number of options for determining charitable purpose. While the Committee concludes that three of the options are feasible and practical, it prefers Option 5 which sets out general categories of charitable purpose with more detailed guidance provided under each category.*

As discussed earlier in the Report, an entity's purpose is currently determined to be a charitable purpose if it is for the public benefit and within the spirit and intendment of the Preamble to the Statute of Elizabeth. Charitable purposes can also be classified according to Lord Macnaghten's four heads of charity of the relief of poverty, the advancement of education, the advancement of religion and other purposes beneficial to the community.

The Committee recommended in Chapter 14 that the principles used to determine charity should no longer make reference to the Preamble to the Statute of Elizabeth. We also discussed in Chapter 15 a number of shortcomings with Lord Macnaghten's four heads of charity. This chapter presents a number of options for providing guidance on what is a charitable purpose.

A course that could be taken would be to give charitable purpose a meaning similar to the 'popular' meaning of charity. As discussed in Chapter 2, the popular meaning of charity differs from the legal meaning. The popular meaning is the provision of relief for the poor or for those who for various reasons are destitute or in need. Adopting this definition of charitable purposes would result in a significant narrowing of the current range of purposes held to be charitable. For example, education would be a charitable purpose only when it was for the poor. It is doubtful whether religion would remain. Purposes that benefited all members of the community, whatever the state of their finances, would no longer be charitable purposes. The protection of the environment and heritage would no longer be charitable nor would purposes intended to promote the arts and culture.

While these examples would be excluded from charity if it were given its popular meaning, they are purposes that are regarded by the community as providing a public benefit. People have come to understand them as being charitable. The legal meaning of charity has moved too far from the popular meaning to seek to realign them now. To exclude such purposes from charity, by narrowing the legal meaning of charity so that it accords with its popular meaning, is in our view an impractical and unrealistic option and it is not included as an option in the following discussion.

Before setting out the options, we need to stress one matter. That is, that whatever option is adopted for determining whether a purpose is a charitable purpose, there needs clearly to be spelt out a number of additional characteristics or conditions which must be present before an entity is to be regarded as charitable. These characteristics have been enunciated in earlier chapters of this Report. If they are not all present, the entity will not have charitable status.

Thus, a charitable entity must be not-for-profit. Its essential or dominant purpose or purposes must be altruistic and for the public benefit, that is, they must be aimed at achieving a universal or common good, they must have practical utility and they must be for the benefit of the general community or a sufficient section of it. An entity's activities must support its dominant purpose or purposes, and the purposes and the activities of an entity must not be unlawful or contrary to public policy, nor promote a political party or a candidate for political office.

The totality of these various matters will operate together to help ensure that charitable entities are in truth what they purport to be. They do not of themselves amount to a definition but they do serve to peg the boundaries of what will be regarded as charitable purposes. That would be so even if none of the options presented here for enhancing the clarity of charitable purposes was adopted.

We have considered five options. Options 1 and 2 do not comply with the requirements of paragraph 4 of the Inquiry's terms of reference because they do not enhance the clarity of what we now have. For reasons we give, we do not recommend them. We believe Options 3, 4 and 5 are each viable. Each is an attempt to enhance the clarity of what now exists. For reasons given later, we recommend Option 5.

In summary the options are:

Option 1

**To leave the determination of charitable purpose to the courts, relying on guidance provided by Lord Macnaghten's four heads of charity.**

This is substantially similar to the status quo, except, as discussed in Chapter 14, there would no longer be a requirement that charitable purposes be within the spirit and intendment of the Preamble to the Statute of Elizabeth.

Option 2

**To define charitable purpose as any purpose beneficial to the community.**

As with Option 1, this would not limit charitable purposes to those that are within the spirit and intendment of the Preamble to the Statute of Elizabeth.

Option 3

**To enact in legislation a list of charitable purposes that fall, or in the Committee's view should fall, within charity.**

Option 3 provides what may be described as a guideline definition. This could be along the lines of the list of charitable purposes recommended by the Goodman Report and adopted in Barbados.<sup>1</sup> (These lists are reproduced at Appendices E and F.)

This option endeavours to identify many of the purposes that now either fall, or in the Committee's view should fall, within Lord Macnaghten's categories, including the fourth category of 'other purposes beneficial to the community'. Additionally it would pick up from the Statute of Elizabeth many of the purposes we think should be preserved, for example the care of the aged and infirm. A suggested guideline definition is as follows:

'A purpose will be charitable if it is for:

- (a) the prevention and relief of poverty, distress or disadvantage of individuals or families;
- (b) the prevention and relief of sickness, disease or human suffering;
- (c) the care, support and protection of the aged and people with a disability;
- (d) the care, support and protection of children and young people;
- (e) the care and support of members or former members of the armed forces and the civil defence forces and their families;
- (f) the advancement of education;

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1 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); *The Laws of Barbados*, Vol VIII, Title XVIII, Chapter 243, Charities, L.R.O. 1989.

- (g) the advancement of religion;
- (h) the promotion and fostering of culture;
- (i) the promotion of community development to enhance social and economic participation;
- (j) the care, preservation and protection of the natural environment;
- (k) the care, preservation and protection of the Australian heritage;
- (l) the prevention and relief of suffering of animals;
- (m) the encouragement of sport and recreation to meet one of the abovementioned purposes; and
- (n) other purposes beneficial to the community.'

#### Option 4

#### **To enact in legislation a list of broad categories of charitable purpose.**

Option 4 encapsulates the matters listed in Option 3 by formulating general rather than specific categories that pick up the purposes listed in Option 3 but are broader. As with Option 3, this option also concludes with a general category in line with Lord Macnaghten's fourth head of 'other purposes beneficial to the community'. Option 4 is as follows:

'A purpose will be charitable if it is for:

- (a) the advancement of health;
- (b) the advancement of education;
- (c) the advancement of social and community welfare;
- (d) the advancement of religion;
- (e) the advancement of culture;
- (f) the advancement of the natural environment; and
- (g) other purposes beneficial to the community.

We have used the word 'advancement' to introduce each of the categories except the last. We have defined 'advancement' to include protection,

maintenance, support, research, improvement or enhancement. The scope of each of these categories is discussed in Chapters 17 to 23.

Option 5

**To enact a statutory definition of charitable purpose which includes the purposes listed in Option 3, as appropriate, under the purpose categories of Option 4.**

## Views on the Options

The five options have been developed by the Committee in the course of its consideration of the issues before it. The Committee has not specifically sought the views of the charitable and related sector or other interested parties on these options. However, a number of submissions raised issues that are relevant to a consideration of the options.

Options similar to those presented here have been considered, and in some cases recommended, by previous reviews of the definition of charity.

The Nathan Report, for example, recommended that the definition of charity by reference to the Preamble to the Statute of Elizabeth be replaced by a definition based on Lord Macnaghten's classification and that it should continue to be judge-made, in order to secure the 'primary object' that the content of charity should remain flexible.<sup>2</sup> This recommendation is similar to Option 1.

The UK Government in its 1989 White Paper noted that it had been proposed from time to time that a definition of charity should be formulated and given statutory effect:

- (1) by listing the purposes to be deemed to be charitable;
- (2) by enacting a definition of charity based on Lord Macnaghten's classification; or

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<sup>2</sup> *Report of the Committee on the Law and Practice relating to Charitable Trusts*, December 1952, HMSO, London, Cmd 8710 (Nathan Report), p 35.

(3) by defining 'charitable purposes' as 'purposes beneficial to the community'.<sup>3</sup>

It can be noted that proposals (1) and (3) above accord with the Committee's Options 3 and 2 respectively.

However, the view expressed in the White Paper was that an attempt to define charity by these means would be fraught with difficulty, and might 'put at risk the flexibility of the present law which was its greatest strength and its most valuable feature'. Furthermore, it was considered that there would be great dangers in attempting to specify in statute the objects to be regarded as charitable.<sup>4</sup>

The Ontario Law Reform Commission also argued that the common law has provided flexibility and a statutory definition would just as likely hinder judicial decision making as help it.<sup>5</sup> The Victorian Legal and Constitutional Committee also recommended that no statutory definition of charitable be introduced noting the arguments that it could become too confining.<sup>6</sup>

On the other hand, the Goodman Committee took a different view. It recommended a list of charitable purposes (included at Appendix F). The following statement introduces the list:

The following guidelines are intended to be in substitution for the guidelines contained in the preamble to the Statute of Charitable Uses 1601 and the classification of charities contained in the speech of Lord Macnaghten in Pemsel's case. They do not obviate the need for compliance with other criteria such as benefit to a sufficient section of the community and exclusion generally of private profit. The categories of charity contained in the guidelines are not intended to be either exhaustive or immutable but only to be a statement of the types of activity, which at the present time should come properly, and eminently within the scope of charitable purposes. Any of the said purposes shall be in principle charitable if carried out by UK charities operating abroad.<sup>7</sup>

The recommended guidelines provided by the Goodman Committee are most comprehensive. However, they do not include Lord Macnaghten's fourth head

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3 *Charities: A Framework for the Future* May 1989, White Paper prepared by the Secretary of State for the Home Department, Cmd 694 (UK White Paper), p 6.

4 UK White Paper, p 6.

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

6 Legal and Constitutional Committee, Victoria, May 1989, *Report to the Parliament on the Law Relating to Charitable Trusts*.

7 Goodman report, p 123.

of 'other purposes beneficial to the community' which we have included in both Options 3 and 4.

In 1999 South Africa reviewed the existing fiscal legislation affecting non-profit organisations. It found that the terminology of the Statute of Elizabeth no longer reflected a contemporary understanding of development, altruism and public benefit. The review therefore recommended that the reference to 'religious, charitable and educational institutions of a public character' in the Income Tax legislation be replaced by a simple generic term 'exempt public benefit organisation'.<sup>8</sup>

This recommendation was enacted in 2000 as an amendment to the *Income Tax Act 1962*. The Act defines a 'public benefit organisation' as any organisation of a public character the sole object of which is to carry on one or more 'public benefit activities' in a non-profit manner. Public benefit activities are defined by reference to a formal determination made by the relevant Minister 'having regard to the needs, interests and wellbeing of the general public'.<sup>9</sup>

The New Zealand Government in June 2001 released a discussion document as part of its review of the tax treatment of charities.<sup>10</sup> The Government suggested two options for changing the definition of 'charitable purpose' as it is applied in the taxation area, namely:

- to maintain the existing definition but introduce administrative safeguards to ensure the ongoing compliance of charities with the definition; or
- to adopt a broad generalised definition of charitable purpose, accompanied by a formal set of detailed guidelines on how the definition should be applied by administrators. An explicit intention in this option is that the current common law should no longer apply.

The Government expressly rejected the option of limiting the definition of charitable purpose to its popular meaning of 'the relief of poverty, illness, distress or other suffering'.

A number of submissions to the Inquiry commented on whether the definition of charitable and related organisations should be left to the courts or enacted in legislation. The Catholic Church in Australia considered that the common law

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8 Ninth Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa (MM Katz: Chairman) 1999, *Fiscal Issues Affecting Non-Profit Organisations*, Johannesburg.

9 A draft list of public benefit activities for income tax exemption and gift deductibility purposes is included in Attachment E.4 of Appendix E.

10 Inland Revenue Department, New Zealand June 2001, *Tax and charities*.

'has proven to be remarkably adaptable over many years', allowing charities the flexibility to innovate in response to changing needs and expectations and to allow new kinds of activities and organisations to be recognised. Philanthropy Australia considered that any definition 'introduced in 2001 would probably appear out-dated in 2010'. The Order of Australia Association considered legislated definitions would be 'unduly limiting'.

**We have been urged on the one hand to devise language which will be 'flexible' and will accord with modern social and economic conditions and on the other to introduce a greater element of precision and certainty and thereby reduce the risk of litigation and of the founder's wishes being defeated. In not a few cases the same witnesses urged both points of view simultaneously without apparently realising that they are largely incompatible.**

**(Nathan Report)**

Concerns were also raised about the loss of the large body of case law and the emergence of more, not less, litigation. The National Council of Independent Schools Associations argued that the effect of codification 'would be to lose the wealth of guidance provided by current case law'. The Catholic Church considered a statutory definition 'may prove far more litigious and give rise to a greater number of disputes, not less'.

On the other hand, a number submissions put forward arguments in favour of a legislative approach. The Institute of Public Affairs argued that 'there seems little alternative to a new statutory definition' if there are to be 'modifications of the definitions from their present courts-based and rather confused state'. Animal Welfare Cairns Inc argued that definitions should be enacted in legislation 'so as to give the organisations the security needed to carry on their work'. The RSPCA argued that 'the degree of uncertainty in the outcome of any legal cases' meant the 'resolution of the issues cannot and should not be left to the courts.'

The Australian Bush Heritage Fund considered that legislation would provide clarity and enable them 'to continue with our forward planning which is essential to an organisation such as ours', but that the disadvantage would be the legislation 'would not be broad enough, would create confusion and uncertainty, and may be challenged in the courts'.

A legislative approach was also seen as enhancing clarity by providing a definition that could be applied across jurisdictions. For example, the WA Cancer Council argued that it could provide 'clarity and consistency across

Australia' while Nulsen Haven Association considered it a way to confirm 'boda fide charitable or PBI status for a diverse range of reasons, taxation exemptions, fundraising programs, community support and education'. The Asthma Foundation of Queensland considered 'a common definition enacted in legislation' as the best method of ensuring an identical definition across jurisdictions, but acknowledged that 'the State and Federal governments would need to agree on a single definition'.

The Activ Foundation argued that an advantage of a legislated definition 'is that members of the community would have the opportunity to comment on the proposed legislation.'

A theme running through a number of submissions was one of dissatisfaction with the need inherent in the current approach to take cases to court to get an authoritative decision. The RSPCA referred to the definitional issues being 'weighed down in legalism' and the Physical Disability Council of Australia considered there were 'implications that the loudest and wealthiest organisations would have sufficient resources to access the courts and suitable representation, whereas small organisations would not have these advantages'.

**Charities law is one of the very few today which is based almost totally on case law, and every case in the books represents a challenge by an organisation or donor to an adverse decision by the taxing authority. We would expect the vast majority of aggrieved organisations and individuals do not take the matter to court.**

**(Anglican Church Diocese of Sydney)**

A number of submissions included suggested approaches to defining charity and related entities. A selection of these suggestions is at Appendix H.

A number put forward approaches similar to Option 2. For example, Dr Richard Letts, AM argued that all existing categories of charitable and related organisations be collapsed into a single concept, renamed 'beneficial institution' or 'institution for the public benefit'. This would be a not-for-profit body whose purpose is to provide a public benefit or support organisations which provide a public benefit-that would probably not be available to the public if the provision of it were totally dependent on market forces.

The Australian Bush Heritage Fund argued that the terms 'charity', 'public benevolent institution', 'religious organisation' and 'community service not-for-profit organisation' are cumbersome and confusing, and should be replaced by a single concept 'public benefit organisation' for which the test

would simply be that it be not-for-profit and have a dominant purpose which is for the public benefit.

Hemphill has argued for a 'general principle' that ' a trust whose purpose is beneficial to the community is prima facie a valid charitable trust, unless for some reason of public policy it should be held to be invalid. In other words, benefit to the community should, with the exception to which I have just referred, be both a necessary and a sufficient requirement for a valid charitable trust.'<sup>11</sup>

ACOSS suggested that 'the Inquiry should publish a contemporary interpretation of the meaning and scope of the four heads of charity that forms the basis for the classification of charitable purposes at common law...with particular emphasis on 'the relief of poverty' and 'other purposes beneficial to the community'. It suggested that a new scheme of charitable purposes:

- be simple, internally consistent and sufficiently flexible to embrace emerging social trends and priorities;
- be based on categories that refer to the *broad purposes* of charity (such as improving public health) rather than specific target groups or activities (such as people with disabilities or acute health care services);
- place *human services* (that is, the promotion and improvement of health, education, social welfare and adequate housing) at the core of charitable purposes, along with the promotion and improvement of spiritual well being, the natural environment, and culture;
- regarding the relief of poverty, emphasise 'the special importance of purposes that promote social inclusion, recognise social diversity, and assist people to overcome hardship and disadvantage whether through direct assistance or by contributing to the development of public policy in this area'; and
- review the contemporary relevance of other purposes that have been accepted as charitable in the past, including the promotion of industry, defence, and public works.

Some of these principles are reflected in the approach set out in Option 4.

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

## Committee's conclusions

In the Committee's view, **Option 1** should not be adopted. To do so would leave untouched the uncertain state of affairs that we now have, leaving the courts, administrators and officers of charitable entities to attempt to grapple with the question whether or not a particular purpose is charitable. We refer to our discussion in Chapter 15. Even if the most that can be done is to identify more precisely than did Lord Macnaghten in *Pemsel's* case what the principal purposes are, that would be preferable to doing nothing.

The Committee favours a statutory definition. We agree that flexibility should remain, but we consider that the retention of a category of 'other purposes beneficial to the community', in the context of a much more particular list of purposes than is presently the case, would meet the need for flexibility. Accordingly, despite the support to be found in some submissions for Option 1, the Committee would not recommend it.

### *Recommendation 12*

*That the principles enabling charitable purposes to be identified be set out in legislation.*

There was some support in the submissions for **Option 2** or something like it, but it was not extensive (see Appendix H). In substance Option 2 takes Lord Macnaghten's fourth category 'other purposes beneficial to the community' and makes it the basis for judging what is, and what is not, a charitable purpose.

There would be a risk that administrators and courts would see the significant change in the way the law would be expressed, implied by Option 2, as requiring them to consider afresh what are and what are not charitable purposes. It may also lead to unrealistic expectations amongst entities that have purposes seemingly beneficial to the community that they may be entitled to charitable status. The existing system, despite its imperfections, has a degree of certainty that ought not be lost. For these reasons, we do not recommend Option 2.

**Option 3** proposes a list of charitable purposes. It will enhance the guidance on whether a purpose is charitable compared to what is there now and will provide certainty to those purposes listed.

However, there is a danger in lists. The drafter of a list knows that there is always the risk of unintended inclusions and omissions. These can arise either through oversight or in the form of expression that is used. The Committee is

aware that the list in Option 3 is not exhaustive. Because of the wide interpretation given to Lord Macnaghten's fourth head of 'other purposes beneficial to the community' many purposes have been held to be charitable that fall outside the list included here. The purposes that have been held to be charitable under this category were considered in Chapter 15.

Lists can also be controversial. In the case of a list of charitable purposes, comparisons will be drawn between those purposes included in the list and omitted purposes that are considered to be equally worthy. We have concluded, however, that it would be unwise to add further purposes to the list to ensure that it does not become undesirably long and unwieldy.

We have included at the end of the list 'other purposes beneficial to the community'. Subject to the removal of the requirement that charitable purposes must be within the spirit and intendment of the Preamble to the Statute of Elizabeth, we do not intend its meaning and effect to differ from the meaning and effect of Lord Macnaghten's fourth head. The removal of the requirement that a charitable purpose be within the spirit and intendment of the Statute of Elizabeth is likely to widen, not narrow, its operation.

We conclude that Option 3 is a viable option. But there is a question whether it is the preferable option. We shall come to that question after we have discussed Options 4 and 5.

**Option 4**, in the Committee's view, has features which make it a much neater approach than Option 3. It has a claim to being more principled, by listing general categories of purpose rather than specific purposes. The categories do not refer to specific target populations or to methods of delivery, and cover all charitable purposes with a small number of categories. By incorporating general categories, rather than specific categories, it retains the desirable quality of pragmatism on which so much of the law relating to charity has been built.

The last category, 'other purposes beneficial to the community' is intended to carry with it the meaning attributed to it by the courts since it was formulated by Lord Macnaghten in 1891, subject to the fact that there will no longer be a requirement that charitable purposes must fall within the spirit and intendment of the Statute of Elizabeth. As discussed above, this is likely to widen, rather than narrow, its interpretation.

We could leave the matter as a choice between Options 3 and 4. But a better solution still may be **Option 5**, that is to adopt the broad categories of Option 4 but include the specific purposes listed in Option 3 as appropriate. Under this approach, there may also be less likelihood of courts interpreting the terms

used in Option 4 to give them a narrow meaning. It would provide greater guidance than Option 4 but retain its conceptualisation and its neatness.

In summary then, there are three options which we would recommend as viable — Options 3, 4 and 5. We have a preference for Option 5 because, in our view, it best meets the needs of both clarity and flexibility. However, we would regard the adoption of any of the Options 3, 4 or 5 as practical and feasible. They are not in themselves a definition of charity but they provide clearer guidance than is currently available on what is a charitable purpose. None of the options is of itself sufficient to bestow charitable status. As stated earlier, all three options require that in order to be charitable an entity must also meet the other necessary conditions.

### ***Recommendation 13***

*Charitable purposes shall be:*

- *the advancement\* of health, which without limitation includes:*
  - *the prevention and relief of sickness, disease or of human suffering;*
- *the advancement\* of education;*
- *the advancement\* of social and community welfare, which without limitation includes:*
  - *the prevention and relief of poverty, distress or disadvantage of individuals or families;*
  - *the care, support and protection of the aged and people with a disability;*
  - *the care, support and protection of children and young people;*
  - *the promotion of community development to enhance social and economic participation; and*
  - *the care and support of members or former members of the armed forces and the civil defence forces and their families;*
- *the advancement\* of religion;*
- *the advancement\* of culture, which without limitation includes:*
  - *the promotion and fostering of culture; and*
  - *the care, preservation and protection of the Australian heritage;*

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- *the advancement\* of the natural environment; and*
- *other purposes beneficial to the community, which without limitation include:*
  - *the promotion and protection of civil and human rights; and*
  - *the prevention and relief of suffering of animals.*

(\*Advancement is taken to include protection, maintenance, support, research, improvement or enhancement.)