

Re-defining charity for the twenty-first century

by Peter Luxton

Legislative proposals to reform the law of charity are expected soon. The author sets out the current law and reviews the issues which a new Bill must address.

To those unacquainted with the law of charity, it may be surprising to learn that the meaning of charity in English law depends on the wording of a statute enacted in the reign of Elizabeth I, namely the so-called Statute of Charitable Uses 1601, more commonly simply referred to as the Statute of Elizabeth. The statute was designed to remedy breaches of charitable trusts by providing for a system of Commissioners to go round the country investigating abuses. The body of the Act itself is of purely historical interest, since it was repealed in the latter part of the nineteenth century long after the system that it introduced had fallen into disuse; but its Preamble (although no longer on the statute book) remains important because it set out a list of purposes that were regarded as charitable at the time of the first Elizabeth, and these purposes still forms the basis for the meaning of charity in English law.

The courts have for centuries held that, for a purpose to be charitable, it must either be listed in the Preamble, or fall within what has been called “the spirit of the Preamble”. A purpose is said to fall within the spirit of the Preamble if the courts have declared a purpose to be charitable by analogy with a purpose set out in the Preamble. Later analogies can be drawn from such analogous cases as well as from the Preamble directly. Over the centuries therefore, the meaning of charity has broadened as analogies are built upon analogies.

Put into modern English, the Preamble lists the following purposes:

“The relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea-banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; the marriages of poor maids, the supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.”

Some of these purposes are undoubtedly archaic.

Nevertheless, it is also striking how the purposes in the Preamble contain notions of charity that remain important today. Although the popular meaning of charity has perhaps widened, it might be safely maintained that the concern with the relief of the aged, the poor and the infirm - the first purposes listed in the Preamble - still lies at the core of what might be popularly considered charitable. Other specific purposes in the Preamble echo this broader theme: “the marriages of *poor* maids”; “the aid or ease of any *poor* inhabitants” in the payment of their taxes. Apart from the relief of poverty, the Preamble lists of other purposes that seem to be concerned with what might be called public works (“the repair of bridges, ports, havens, causeways, churches, sea-banks and highways”), upholding the law (“maintenance of houses of correction”), and civil defence (the “setting out of soldiers”, also echoed in “the maintenance of sick and maimed soldiers and mariners”).

Near the end of the nineteenth century, in a well-known decision of the House of Lords, *Special Comrs of Income Tax v Pemsel* [1891] AC 531, Lord Macnaghten suggested a simpler four-fold classification of charitable purposes:

- (1) *the relief of poverty;*
- (2) *the advancement of education;*
- (3) *the advancement of religion; and*
- (4) *other purposes beneficial to the community.*

The relief of poverty and the advancement of education both feature in the Preamble; but if we look in the Preamble for any direct reference to the advancement of religion, we look in vain. The nearest approach seems to be “the repair of churches”, but this particular purpose seems designed, not to advance religion as such, but to reduce the burden on the parishioners, who would otherwise have been under a duty to contribute to such repairs themselves. Elizabeth’s reign followed a period of religious turmoil in which it was dangerous to profess an adherence to Protestantism (when Mary was on the throne) or (at other periods) to the Church of Rome. In any event, it soon became clear, later in the seventeenth century, that the advancement of religion was a charitable purpose within the spirit of the Preamble.

The fourth head of *Pemsel* is more problematic: it seems to be an attempt to group the other purposes listed in the Preamble, and purposes held charitable by analogy, under some broad category of “public benefit.” It is quite clear, therefore, that the fourth head, unlike the first three, does not identify any particular category of charity: rather it is a portmanteau, within which are to go all purposes which, not falling under the first three heads, all share the common characteristic of being beneficial to the community – although later cases have made it clear that merely being beneficial to the community is not itself enough: to come within the fourth head, the purpose must still fall within the letter or the spirit of the Preamble. The fourth head therefore contains different lines of cases illustrative of distinct purposes: these include purposes as diverse as the relief of the aged; the promotion of public health; the undertaking of public works; the protection of human life and property; the promotion of agriculture, industry, and commerce; the promotion of the arts; the relief of unemployment; the care of animals; and the moral or spiritual welfare of mankind.

THE STRATEGY UNIT PROPOSALS

A reform of the meaning of charity in English law is, however, imminent. In September 2002, the Strategy Unit within the Cabinet Office put forward proposals for widespread changes to the law of charity, including the enactment of a statutory definition. It expressed the view that the present meaning of charity is confusing and unclear, and that the four heads of *Pemsel*'s case do not accurately represent the full range of organisations that have, or should have, charitable status today. It recommended instead a statutory list of 10 charitable purposes. The first three purposes on the list would be essentially the existing first three heads of *Pemsel*'s case, although the first category is modified to include the prevention of poverty; six new purposes would be added (categories four to nine) and the existing final head of *Pemsel* (other purposes beneficial to the community) would complete the list as category ten.

The statutory list recommended by the Strategy Unit was therefore:

- (1) *the prevention and relief of poverty;*
- (2) *the advancement of education;*
- (3) *the advancement of religion;*
- (4) *the advancement of health;*
- (5) *social and community advancement (including the care, support and protection of aged persons with a disability, children and young people);*
- (6) *the advancement of culture, arts and heritage;*
- (7) *the advancement of amateur sport;*
- (8) *the promotion of human rights, conflict resolution and reconciliation;*

(9) *the advancement of environmental protection and improvement;*

(10) *other purposes beneficial to the community.*

The extension of the first head of *Pemsel* to include the prevention of poverty was recommended in 1976 in the report of the Goodman Committee, *Charity Law and Voluntary Organisations*, paras 58–59 and Appendix I; but what precisely it would encompass is uncertain. Generally, however, the enactment of the proposed list would not in itself result in any great change in the law, as most of the additional purposes are already regarded as charitable, either by the courts or by the Charity Commissioners, under one or more of the existing heads of *Pemsel*'s case. Decisions of the courts have held that the advancement of health is charitable under the fourth head of *Pemsel*; and the advancement of culture, arts and heritage would currently be treated as charitable either under the fourth head, or under the second head, the advancement of education. The Charity Commissioners have in recent years come to treat the protection and improvement of the environment as charitable under the fourth head; and although the promotion of sport is not charitable in itself, the Commissioners currently recognise that the promotion of healthy sports can usually be charitable under the fourth head or (if in relation to the young) within the second head of the advancement of education. The enactment of the Human Rights Act 1998 has also resulted in the Commissioners' accepting that the promotion of human rights in the United Kingdom can now be regarded as a charitable purpose.

Some purposes currently regarded as charitable were notable from their omission from the Strategy Unit list. The protection of animals, for instance, was not mentioned, and some animal charities objected to this. Even without a separate category, existing animal charities would not have lost their charitable status, since the protection and welfare of animals would have continued to be charitable under the final category, other purposes beneficial to the community. In its response to the Strategy Unit proposals, the Government has accepted the introduction of the statutory list, but has decided that the promotion of animal welfare should have its own separate category, as should the provision of social housing: *Charities and Not-for-Profits: A Modern Legal Framework*, Home Office, July 2003. The advancement of science would also be added to the proposed purpose for the advancement of culture, arts and heritage. The Government's proposal is therefore for a list of 12 (and not 10) separately numbered purposes. It is also evident from the Government's response that the statutory list is merely picking out some existing sub-categories of the fourth head and making them substantive categories in their own right. The rationale is expressed to be that “the specific purposes contained in the list should reflect major areas of charitable endeavour which have, or should have, strong public recognition”: *ibid*, para 3.15. Nevertheless, the list remains somewhat arbitrary, and the suggested categories are not of

equal significance: whilst the advancement of amateur sport might in some circumstances be deserving of charitable status, it is hardly to be compared in breadth and importance with, say, the relief of poverty.

Whether there is advantage in putting charitable purposes into the proposed statutory form is also debatable. The proposal is essentially a statutory enactment of *Pemsel* with additional categories. An argument against putting *Pemsel* onto the statute book is that it endorses the view of charity underlying Lord Macnaghten's classification. The Elizabethan concept of charity might be considered to comprise two distinct strands: public utility (exemplified in the repair of bridges and the like) where the community benefited as a whole, and the relief of poverty. It might be argued that where the purposes in the Preamble involved the conferring of benefits on individuals, this was implicitly a means of relieving the recipients' lack of means. The Preamble speaks, for instance, of "free" schools, and the marriages of "poor" maids; it might also be inferred that the young tradesmen were too impoverished to set up in trade without charitable assistance. On this interpretation, *Pemsel* confirmed the development of charity law away from the Elizabethan concept, with the result that the relief of poverty, instead of running through this second strand of charity, was restricted to a separate head, thus divorcing the advancement of education, for example, from any idea of relieving the needy. Interestingly, this uncertainly reaches into the modern law. Cases have held that the phrase in the Preamble "the relief of aged, impotent and poor people" is to be read disjunctively; so that provision for the elderly does not have to be for the elderly poor. But does that mean that fees can be charged which would have the effect of excluding the elderly poor? This issue was addressed in a case involving the Joseph Rowntree Memorial Trust Housing Association Ltd in the 1980s, in which it was held that the elderly persons do not have to be poor, but they must have a need that is being relieved (in that case, housing). The difference between "need" and the "needy" is a subtle but important one.

PUBLIC BENEFIT

There is, however, a sting in the tail. Under the existing law, it is not enough for a purpose to be charitable that it falls within the letter or the spirit of the Preamble. The purpose must also be for the public benefit. The requirement of public benefit is self-evident in the fourth head, since it is built into the definition of that head (other purposes beneficial to the community). If, therefore, it is sought to bring a new purpose into the charitable sphere under the fourth head, it must be shown positively that that purpose is for the public benefit. It is different in the first three heads of *Pemsel*, since it is to be presumed that the relief of poverty, the advancement of education, and the advancement of religion, are for the public benefit. What the Strategy Unit proposes is to strengthen the

requirement for public benefit so that the same requirement of proof would be required under every category of charity as is currently required only under the fourth head. This proposal is evidently based on proposals which were put forward a year earlier by the National Council for Voluntary Organisations, (the NCVO) in its report entitled *For the Public Benefit*. The Government has now endorsed this proposal.

It seems, then, that although the statutory list is innocuous enough, the real potential for altering the meaning of charity in English law is to come through a modified application of the public benefit test. This is probably the most controversial part of the proposed changes to charity law. The difficulty with it is that, although the phrase "public benefit" is used in two different ways in the case law concerning charities, the Strategy Unit report evidently uses it in a third way. In the case law, public benefit can mean either:

- (a) that the purpose itself must promote public benefit;
- or
- (b) that the section of the community capable of benefiting must be sufficient.

Let us consider sense (a) first. A trust for the advancement of education is charitable for the public benefit, since education itself is for the public benefit. If the Strategy Unit intended to refer to public benefit in this sense, what change would there be in requiring that public benefit be positively proven? Would the courts or the Charity Commissioners have to receive positive evidence that the advancement of education is for the public benefit? That it is surely self-evident. Would it mean instead that positive evidence would have to be brought to show that a particular purpose does in fact advance education? This would give sense to the proposal, but it would not involve any change in the law. Whilst the advancement of education is charitable in the abstract, there might still be doubts about whether a particular purpose that has been proposed is in fact for the advancement of education. In a well-known case, *Re Hummeltenberg* [1923] 1 Ch 237, Russell J said that, no matter under which of the four classes a gift may prima facie fall, it is still necessary (in order to establish that it is charitable in the legal sense) to show that the gift will or may be operative for the public benefit; otherwise "trusts might be established in perpetuity for the promotion of all kinds of fantastic (though not unlawful) objects, of which the training of poodles to dance might be a mild example." In another notable case, *Re Pinion* [1965] Ch 85, a testator left his studio and its contents upon trust as a museum for the public. Harman LJ said that it was not charitable: he could "conceive of no useful object to be served in foisting upon the public this mass of junk. It has neither public utility nor educative value."

Viewed in this light, it is clear that there is not the difference between the first three heads of *Pemsel* and the

fourth that the Strategy Unit and the NCVO report claim there to be. The fourth head, as mentioned earlier, is really a portmanteau that contains a number of specific purposes that are considered to fall within it. For a new purpose to come within this fourth head, it must be shown to be for the public benefit. But once a purpose has been admitted into that head, it is presumed that such purpose is for the public benefit. In a later case involving that purpose, the courts or the Commissioners do not have to decide this abstract question again, although they might (in a borderline case) have to determine if the particular purpose in fact falls within that abstract purpose. A recent example is in regard to faith healing, which is accepted as a charitable purpose in the third head (if it involves the advancement of religion) and within the fourth head (if it is secular): *Re Le Cren Clarke* [1996] 1 WLR 288. In a future case involving secular faith healing, the courts will have to decide only whether what is specifically proposed in fact falls within the concept of faith healing. This is in principle no different, however, from the process of determining (as in *Re Shaw* [1957] 1 WLR 729) whether research into the development of a phonetic alphabet falls within the second head, the advancement of education.

The Government makes the point in its response to the Strategy Unit proposals that the presumption of public benefit in the first three heads “has in any case been of limited benefit to charities, since the Charity Commission, at the point of registration, examines the public benefit credentials of all applicants, without distinction between those pursuing purposes said to enjoy the presumption and those pursuing other purposes.” (*Charities and Not-for Profits: A Modern Legal Framework*, para 3.18). Yet this observation hardly supports the Government’s view of the law: on the contrary, it shows that the presumption of public benefit operates only at the level of the abstract purpose, and that whether the particular object proposed in fact falls within one of the recognised categories of charity does still have to be proved in all heads of *Pemsel*.

Turning to sense (b), that the section of the community capable of benefiting must be sufficient, the requirement of public benefit varies from one head of *Pemsel* to another. In the first head, the relief of poverty, it is virtually non-existent (so that it is charitable to set up a trust for one’s poor relations, or for poor employees of a company one owns). In the second head, the advancement of education, it is quite strict: thus a trust to educate the descendants of a named person is not charitable. Even without going further into the intricacies of public benefit in this second sense, it will be clear that the Strategy Unit cannot be using the expression in this sense when it talks of tightening the public benefit requirement.

PUBLIC CHARACTER?

It would therefore seem that the Strategy Unit report is using the expression public benefit in a different sense from either (a) or (b). It is evident that the report’s

concern is that some existing charities are charging fees at a level that is perceived to be excluding a significant section of the population. The prime candidates here are the public and independent schools, and private (fee-paying) hospitals. The Charity Commissioners currently take the view that fee charging that excludes a substantial proportion of the beneficiary class does not satisfy the public benefit criterion. This is what they state in their publication, *The Public Character of Charities*. It seems that the proposed change in the law is intended to give a firmer legal basis for the Commissioners’ views; for it is difficult to find clear support for them in the case law. It has been stated judicially that a trust cannot be charitable if it in terms excludes the poor, so that a rest home for aged millionaires would not rank as a charity. This, however, is not the same thing as saying that a trust cannot be charitable merely because the effect of charging fees is (self-evidently) to exclude those who cannot afford them.

If these proposals are to have the effect intended, it would seem that there is a need for those drafting the proposed legislation to put the new extended notion of public benefit into a clear statutory form; yet the Government has accepted the Strategy Unit recommendation against the introduction of a statutory definition of public benefit. Without a statutory definition, it will be difficult to determine precisely what the province of public benefit is meant to be. It is evidently not intended that charities should be prohibited from charging fees; but where is the line to be drawn? Fees are charged by many charities, including nursing homes and elderly persons’ homes, private hospitals, theatrical trusts, museums, independent schools, and universities. Should providers of the City Legal Practice Course be concerned? It seems that the Government has the independent schools in its sights, but prefers not to pick them out in the intended legislation. Yet whether independent schools (or private hospitals) should continue to enjoy charitable status (and the tax reliefs that go with it) is essentially a political issue, and any attempt to remove such status calls for very clear and specific legislation. It is not acceptable to attempt to treat this issue in a purportedly non-political way simply by trying to put a spin on the accepted legal meaning of public benefit.

The Strategy Unit report states that, if its proposals were enacted, “the Charity Commissioners would identify charities likely to charge high fees and undertake a rolling programme to check that provision was made for wider access.” Whether this would mean some independent schools having to provide more free places or bursaries, or whether wider access might merely mean allowing local schools to use the playing fields in the vacations or at weekends, is not clear. It might nevertheless be inferred that the proposed tightening of public benefit is not really directed to removing charitable status, but is more related to the way charities operate, and this is now made plain in the Government’s response: *Charities and Not-for-Profits: A*

Modern Legal Framework, para 3.27. If this is the policy underlying the proposals, it is easier to appreciate why the Government might paradoxically prefer the uncertainty of an amorphous concept of public benefit: with no clear legal principle laid down, institutions under scrutiny might find it easier to resign themselves to toe the Commissioners' line rather than to risk the expense and uncertainties of litigation. The Government's approach, furthermore, confuses charitable status (which depends on an institution's purposes or objects) and the manner in which a charity is run. A charitable institution's purposes do not cease to be charitable (and so its assets are not made applicable to other similar charitable purposes under section 13 of the Charities Act 1993) merely because the trustees act wrongfully in carrying out their duties.

FUTURE DEVELOPMENT?

If the Government's slightly modified version of the Strategy Unit proposals are enacted as they stand, the real

development of charity law in the twenty-first century (subject to piecemeal additions or modifications to the statutory list) will continue to be in the final head, other purposes beneficial to the community. This last category will not, however, be a blank canvas. The Strategy Unit recognises that any attempt to repeal the existing case law would lead to excessive uncertainty; therefore the form of words used, repeating that of *Pemsel's* final head, will ensure that the development of the final category will continue to be based on the existing case law. Moreover, since the case law is itself based on the Preamble, it is in the case law that the Preamble will continue to survive. 

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IALS News

Retirement of Professor Barry Rider

Professor Barry Rider has relinquished the Directorship of the Institute of Advanced Legal Studies and taken early retirement with effect from 31 March 2004. He has been Director since September 1995, but has been unwell since September last year. Sir Graeme Davies, Vice-Chancellor of the University of London, paid tribute to Professor Rider in the following statement:

“During his term of office, Barry Rider has developed many new international programmes and relations for the Institute in the areas of financial services law, corporate law, comparative law and criminal justice. He has significantly increased the Institute's publications and established a number of new journals. Professor Rider has also played a significant role in establishing a number of important research programmes often in collaboration with governmental and other academic institutions. He has also contributed a great deal to fostering the Institute's teaching role and, in particular, the supervision of research degrees of the University of London. All this has enhanced the international reputation of the Institute and its research profile.

His creation of the Society for Advanced Legal Studies and its highly successful journal, *Amicus Curiae*, has had the effect of consolidating and increasing interest in and support for the Institute. He has taken the concept and design of the new Institute building a considerable way towards realisation. In the School of Advanced Study he has been an active member of the Directorate, and has

played a key role in his chairmanship of the Academic Policy and Standards Committee.

Professor Rider has been accorded the title of Honorary Senior Research Fellow in the Institute and will continue to carry out his commitments in supervising his existing research students”.

Jules Winterton, IALS Librarian, has been appointed acting Director, and the Dean of the School of Advanced Study and the Vice Chancellor have expressed their confidence that the Institute is in safe hands. The full-time post of Director of the Institute will be advertised shortly, and a notice will be posted on the IALS website.

Sir Graeme Davies visits the Institute

The recently appointed Vice-Chancellor of London University, Sir Graeme Davies, accepted an invitation by the Institute to visit Charles Clore House on 30 March and acquaint himself with the work of the IALS. He was welcomed by acting Director Jules Winterton, Professor Avrom Sherr and Administrative Secretary David Phillips, and given a series of presentations by staff. These included a demonstration by Senior Librarian Steve Whittle of the SOSIG, FLAG and BAILLI e-projects; information from Senior Librarians David Gee and Mark Hayward on distance services to lawyers; an explanation of the work of the Society for Advanced Legal Studies and the role of publications by Julian Harris, the Secretary of SALS; and an exhibition of IALS publications in the council chamber.