*Charitable status*

# Back to basics with a purpose

*A group of academics and lawyers is thinking the unthinkable – a radical change to how the concept of charity is defined.* **JOHN GARDNER** *explains why.*

The guiding light of the law relating to charitable status is the spirit of the preamble to the Charitable Uses Act of 1601. 400 years on, is this spirit still worth preserving? In the spirit of the preamble, the main touchstone of a charitable purpose, according to Lord MacNaghten's famous decision in *Pemsel's* case, is 'public benefit'. Is this a timeless test? Do the main categories of charitable purpose identified under it, and only slightly adjusted since, still suit the world as we find it over a century later? Indeed, is it still right in this day and age to look for a *charitable* purpose, or for a charitable *purpose,* at all?

The British approach to the legal recognition and fiscal treatment of voluntary endeavour has shown remarkable resilience in the face of profound social change. Nevertheless, the strain upon it is ever more apparent. In recent times parliament has often found the legal category of charity too restrictive to capture all the worthwhile voluntary endeavour which it hopes to nurture – for example, in structuring relief from business rates, and funding from the National Lottery.

In some Commonwealth jurisdictions the question of whether, and how, to preserve and develop the legal concept of charity has been opened up to official review. Meanwhile, the British focus upon the charitability of purposes juxtaposes oddly with the continental European tendency to classify similar kinds of voluntary endeavours mainly according to their activities and/or organisational structures.

Even the Charity Commission, charged with the day-to-day administration of the law relating to charitable status, clearly finds the inherited legal framework obstructive, and has used its recent consultation exercise on the review of the Register of charities not only to moot more innovative applications of the 'public benefit' test but also to push at the boundaries of their legal jurisdiction by invoking some previously unheard-of alternative tests of charitability.

On top of all this, the legal concept of charity bemuses and frustrates many working in the voluntary sector. The Deakin Commission on the Future of the Voluntary Sector picked some of the problems out for comment but stopped short of embarking on a full-scale study and review.

## Eclectic thinkers

Against this background the National Council for Voluntary Organisations (which initiated the Deakin project) has now convened a new steering group to develop a programme of work reviewing the structure and operation of the law relating to charitable status.

This work programme does not begin from the premise that radical change is called for. Indeed one real possibility that remains on the table is that there is nothing one could do, at any rate by design, to make significant improvements to the legal tests for, and implications of, charitable status. On the other hand dramatic reforms – such as the complete abolition of charitable status and all of its benefits and burdens – are also open for consideration. As are the myriad more complex possibilities in between.

In this open-minded climate, phase one of the work programme – entitled *Foundations of Charity* – took the form of an inquiry into the most fundamental purposes and functions of the legal category of charity.

Funded by the Economic and Social Research Council and the *Modern Law Review,* this initial phase of work brought together a team of around a dozen academics worldwide with interdisciplinary interests: some established scholars of the voluntary sector or charity law, and other generalists with fresh argumentative resources to bring to bear. The group was deliberately eclectic and met twice to gather its thoughts before presenting more polished papers at a two-day public conference, held at King's College London in September 1998 and attended by many senior figures from the law, government, charity, and academia.

The aim was not to develop any specific reform proposals nor even to arrive at any kind of consensus of principle. The aim was to deepen understanding of the pivotal questions and to provide enriched intellectual resources for conducting a serious reform debate. What follows is just a taste of the key recurring ideas.

## Situating charity

Charitable pursuits were located above in the domain of 'voluntary endeavour'. In a more modern idiom we may say that the charitable sector is part of the voluntary sector. This idiom focuses, however, on charitable pursuits conducted within organisational frameworks. As is well-known, the law does not share

this focus. The law of charitable status blithely crosses the boundaries between corporations, unincorporated associations and trusts, the latter often having no associated organisational edifice nor any plan to develop one.

One recurring question is whether we are now trying to do too much with one concept. Is the 'public benefit' test, originally developed to validate otherwise unenforceable purpose trusts, equally suitable to demarcate a range of organisations for public recognition and special tax treatment? Should not the value of organisations be tested, at least if they are to enjoy tax advantages, by their achievements as much as by their objects? Some argued that the current legal approach failed to give sufficient scrutiny to the actual social contributions of worthy-sounding bodies. Others saw this as, on the contrary, a major strength of the current legal approach, whatever its other failings. Attaching charitable status to purposes, and then tax reliefs to charitable status, was one way of securing independence from here-today, gone-tomorrow government policies.

## Public or private?

Moreover, one should be cautious of trying to justify charitable activities, or indeed more broadly voluntary sector activities, on either the public sector or the private sector model. On the public sector model charitable tax relief is public funding, and is justified only on condition of public accountability. On the private sector model it is justified only on condition that it does not distort markets.

But the value of charity, and of more broadly voluntary sector activity, is not comprehensible either as a reflection of popular priorities or as a reflection of individual market preferences. Those who aim to use hypothetical pricing research or focus group testing to justify conferrals or removals of charitable status work, it was widely agreed, do so with excessively parsimonious and largely unsuitable world views. Their metrics tended to undervalue public goods – not only the public goods provided by charities but also the much larger public good of there being charities, in which the intrinsic good of voluntary endeavour can be harnessed.

## Altruism and the third sector

Shifting charitable and more broadly voluntary activity out of the government and business paradigms naturally yields the idea of a 'third sector'. This idea, however, was also subjected to criticism.

Most of human life is conducted outside the peculiar realms of government and business with their restrictive internal norms. At the conference there was, therefore, much enthusiasm for the idea that the so-called third sector was fundamentally the first sector. There was also enthusiasm for the idea that it wasn't really a 'sector' at all. Both views militated against marginalising charitable pursuits under the heading of 'altruism'. The real difficulty is not to explain why people help each other spontaneously and without reward, but rather to explain why, when they work in some specialised contexts like 'business', they reputedly stop doing it.

Nevertheless it was thought to be essential to maintain the link between legal recognition for particular voluntary endeavours and their voluntary character. Some focused here on the need for unpaid boards. Others, more radically, were concerned at the proliferation of charitable 'welfare bureaucracies' which, even though supervised by unpaid boards, were run at lower levels with a civil service 'functionary' ethos incompatible with the true spirit of charity.

## Charity and other virtues

The true spirit of charity, understood as a moral virtue, was also compared with that of some other moral virtues. Talk of 'altruism' encourages us to collapse these together, but they differ widely. The charitable person is a quite different kettle of fish from the fair-minded person, as both are from the public-spirited person. The charitable person is a person with an unquestioning attitude to the needs of others, which contrasts with the more questioning or inquiring attitude of the fair-minded and the public-spirited. Or, in another characterisation heard at the conference, the charitable person is 'self-giving'.

It was thought that the law of charity, originally set up to enable the charitable person to thrive, had in various ways changed its emphasis and had become concerned more with encouraging public-spiritedness. Whether this was a loss or a gain was a matter of some disagreement. Some regarded charity as in any case an outmoded virtue, one which insulted those in need. Others defended its total openness to individual as well as social predicaments. Be it loss or gain, however, the legal labelling of a system for encouraging public-spiritedness as a system of 'charity' was widely regarded as a fraud.

## Religion and politics

A particular manifestation of the drift from charity to public-spiritedness may be said to be the move away from the old paradigm of a religious community and towards the modern paradigm of the social welfare 'service provider'.

One argument heard at the conference was that in this move we have lost the plot. Religious institutions lie at the heart of the cultivation of the true spirit of self-giving, and this holds true whether or not they join in the culture of 'service provision'. A complementary critique of the 'service provider' model was that it militated against the political mobilisation at the heart of charity, the natural extension of self-giving into campaigning for the dispossessed and suffering. Those who are moved by their charity to its natural conclusions are promptly frozen out by the legal framework, which accepts only those who undertake not to be (too) oppositional.

Along these lines there was some support for the idea that the law of charitable status exists to create a further constitutional check and balance on governmental monopolisation of social capital. This created a reformer's dilemma. On the one hand statutory reform might be hijacked by the government in order to make charity the servant of its sectional policy agenda. At the same time statutory reform might well be the only way to give charities a more radical role in questioning conventional wisdom and propelling social change, even against the popular current. %

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