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Options for the Development of the New Zealand Law of Charities

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Executive Summary

This is an options paper. It plants seeds and nurtures budding ideas that could grow into legal developments. It is not a treatise on the current law. Quite to the contrary, a good working knowledge of the law of charities is assumed as the extant law is taken as a springboard for discussion of possibilities. The paper's role is to generate constructive, even lively discussion. Important issues and implications are flagged rather than traversed as the paper seeks to cut straight to central issues and to be brief. Four options are sketched. Recommendations are not made as to which option is to be preferred. There are strengths and weaknesses, opportunities and threats with each of the four approaches canvassed.

Charitable purpose is defined at law for two quite different reasons. One is to define the scope of a regulator's jurisdiction and the other is to act as a gateway to favours such as income tax exemption or deductibility. These are quite different purposes. This foundation distinction becomes important when considering the options. The paper therefore begins with a discussion of this distinction. The following four options are then discussed:

1. **The status quo**: This proposal is put forward, not only because it is presently working at least satisfactorily, but also because it is a benchmark against which all alternatives must be measured and shown to be an improvement. The paper takes the problem of public benefit under the status quo and looks at how this issue has been addressed. The conclusion suggested is that the response in other jurisdictions is not necessarily superior to the response in New Zealand and therefore the status quo in New Zealand in relation to this issue is at least defensible. Turning to the issue of stultifying common law development, the issue of political purposes is taken as an example and the conclusion reached there is that the common law can continue to develop. There may be a practical problem for charities funding litigation to appellate courts to ensure the law develops. It is suggested that practical solutions to this problem could include no cost orders and test case funding. Either way, the common law can continue to develop. The status quo is a defensible position to take.

2. **Pemsel plus**: This proposal is essentially the same as the status quo but with the addition of other purposes by statute as needed from time to time by the New Zealand community. This follows the concept set out in a minimalist way in Australia's *Extension of Charitable Purpose Act 2004* and it is the approach taken in the United Kingdom *Charities Act 2006*. This approach has some appeal as it will address some concerns. There are limitations with this approach that must be acknowledged. We have set out, in Schedules to this paper,

legislative models from various common law jurisdictions as examples to inform discussion of this option. In the UK, cases are now progressing to superior courts in response to this approach and extensive parliamentary reviews will take place in 2011. We suggest that it may be prudent to await these developments in the UK before committing to a particular set of changes or form of wording if this option is to be pursued.

3. **Identify the spirit and Intendment of the *Preamble***: This option seeks to identify the essence of the *Preamble* with a view to replacing it with modern language. Replacing the *Preamble* requires identification of the function that its 'spirit and intendment' plays. In this section the role the *Preamble* plays is recognized as identifying purposes that (in addition to being for public benefit) are pursued altruistically and voluntarily. A form of wording that would replace the *Preamble* is offered.
4. **A nonprofit sector approach (with carve-out)**: This proposal takes cognizance of the early history of exemption in New Zealand and developments in other disciplines, particularly economics, and sets out an alternative framework for reform. In summary it builds from, but also differs from, the current common law approach which seeks to list purposes entitled to recognition as charitable. This approach identifies the whole nonprofit sector and then carves out from that whole sector purposes which are not charitable. The net effect could be the same but the approach is quite different.

These four alternatives provide paradigms for discussion. Of course hybrid combinations are also open.

We then turn to the question of justification of favours extended to charities. We point out that the reasons for favour are not well established but contributions of public benefit are central. We suggest two new models for carrying forward the discussion regarding this aspect of the law.

We conclude noting that New Zealand seems well positioned to explore all or any of these options and in that regard is perhaps to be envied by many other common law jurisdictions.

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The Brief

This Australian Centre for Philanthropy and Nonprofit Studies was briefed to advise the Charities Commission of New Zealand on ways in which the law might be developed.

The substantive issue underpinning the brief is a need to enable charity law in New Zealand to continue to develop in accordance with the values of New Zealand society. In practical terms what this means is that there is no difficulty with the first three heads recognised as charitable purposes under *Pemsel's case,*[1] but challenges arise when dealing with what is to be included in the fourth head, other purposes beneficial to the community. To understand and interpret the fourth head the New Zealand Charities Commission must continually reference the spirit and intendment of the *Preamble* to the *Statute of Charitable Uses* of 1601.[2] This is less than ideal.

The question framing this brief then becomes: is it possible to modernise the concept of charity to do away with the reference to the *Statute of Charitable Uses* without losing the 400 years of charity jurisprudence?

This paper provides four options with commentary on advantages and disadvantages of each. The four options canvassed are as follows:

1. The status quo. This proposal is put forward, not only because it is presently working at least satisfactorily, but also because it is a benchmark against which all alternatives must be measured and shown to be an improvement.

2. Pemsel plus. This proposal is essentially the same as the status quo but adds other purposes by statute as needed from time to time by the New Zealand community. This follows the concept set out in a minimalist way in the *Extension of Charitable Purpose Act 2004* in Australia and in a broader manner in the United Kingdom's *Charities Act 2006*.

3. Identify the spirit and Intendment of the *Preamble*. This proposal seeks to identify the essence of the *Preamble* with a view to replacing it with modern language. Replacing reference to the *Statute of Charitable Uses* requires us to identify the function that the spirit and intendment of the *Preamble* plays. Once the role of the *Preamble* is identified an alternative conception is provided.

[1] *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 (*Pemsel's case*)

[2] A reference to the *Preamble* throughout this paper is a reference to the preamble to the *Statute of Charitable Uses 1601*, 43 Eliz c 4 (*Statute of Elizabeth*).

4. A non-profit sector approach (with carve-out). This proposal takes cognizance of the early history of exemption in New Zealand and developments in other disciplines, particularly economics, and sets out an alternative framework for reform. In summary it builds on, but also differs from the current common law approach which seeks to list purposes entitled to recognition as charitable purposes. This approach identifies the whole nonprofit sector and then carves out purposes which are not charitable. The net effect can be the same but the approach is quite different.

Before embarking upon a discussion of these options there is an important threshold issue that is frequently overlooked but is central to *how* charitable purpose is defined. The threshold question is: '*why* is charitable purpose being defined'? We therefore comment briefly upon this. There is a second very important and related issue and that is: why do charities enjoy favour? This issue will be left for discussion after the four possible options are considered. At the end, we put forward two alternative ways of justifying access to favours, both drawn from contributions to public benefit. First, a simple continuum of public benefit is suggested: the greater the contribution to public benefit the greater the entitlement to favour. The second is a suggestion that favour be granted to organisations that belong to particular classes. Three classes developed from the four set out in *Pemsel's case* are offered for consideration. We come first to the question of why charitable purpose is defined.

Clarity about the Function of Defining Charity

As Peter Luxton, a British expert on charity law, declared: 'There is no necessary link between charitable status and tax relief'.[3] This is not a new idea. The need to distinguish the two different functions performed by what the law labels 'charitable purpose' was highlighted by Lord Chancellor Halsbury in *Pemsel's case* itself. The Lord Chancellor saw no difficulty with a broad interpretation of the doctrine of charitable purpose for defining the jurisdiction of the court for regulatory purposes, but considered a different definition should apply to the granting of favours such as income tax exemption.[4] This is an important distinction. Is charity being defined for scoping of the jurisdiction of the Charities Commission of New Zealand or is it being defined as the gateway to taxation favours, or it being defined for both reasons? If both, then there will be a tension whenever New Zealand society wishes to regulate but not favour, and this cannot be resolved easily, as long as one definition must discharge two purposes. The tension has been at the heart of the common law

[3] P Luxton, *The Law of Charities* (Oxford University Press, 2001) 30.
[4] *Pemsel's Case* [1891] AC 531, 542 (Lord Halsbury).

definition for over 100 years. It arises because for regulatory purposes the definition might quite reasonably be broader than the list of entities entitled to tax exemption or tax deductibility.[5] As being a charity has tended to bring with it both regulation and favours, the two are understandably intertwined, but this need not occur. It is a threshold issue for legal development of the law applying to charities in New Zealand.

The separation of regulation from favours does not necessarily require a legislative division. There is room for development of the common law in such a way that there are at least two readings of charitable purpose. The simpler path is through legislation. These two different readings of charitable purpose logically follow the two quite different functions being fulfilled at law by the doctrine of charitable purpose mentioned above. A broad reading logically applies to the defining of a jurisidiction which *regulates* charities. For example, all charities, that fall within this definition will be under the jurisdiction of the New Zealand Charities Commission,but these charities need not all be entitled to the same *favours*.

A narrow reading may be appropriate in the situation where the doctrine determines entitlement to favour. For example, not all regulated charities need enjoy the same favours. Some may enjoy only exemption from taxation while others enjoy exemption *and* deductibility. So the legislation granting favours describes different tests for the organisations entitled to them. For example, to enjoy deductible gift recipient status, charities in Singapore, South Africa and Australia must satisfy tests of publicness and benevolence; the remainder only enjoy exemption. This will be taken up for comment in the next section.

The implication of this for New Zealand society is that there is a basis for separating exemption and deductibility taxation issues from charitable purpose, at least generally. One definition of charitable purpose could apply for the purpose of defining the jurisdiction of the New Zealand Charities Commission and another could apply to determine entitlement to taxation favours.

Conceptually, this division is an important threshold, and will become increasingly marked as the paper proceeds into more progressive alternatives. It is a division that began in New Zealand with the creation of the Charities Commission, by which the regulatory function was explicitly excised from the favouring. Lord Cross considered understanding this division was central to an

[5] Throughout this paper the expression 'tax deductibility' is used as a shorthand for the benefit received by donors to a charity entitling them to deduct the amount of their donations from their income before the amount of tax payable is calculated, e.g. *Income Tax Act 2004* ss BD 2, DV 8 and DV 9. For other examples of such favours see: in Australia, *Income Tax Assessment Act 1997* (Cth), Div 30; US, *Internal Revenue Code* ss 501(c)(3) and 170; UK, *Income Tax Act 2007* c 3, ss 521–523; Canada, *Income Tax Act* (1985) c 1 (5th Supp) ss 110.1(1)(*a*)(ii), 118.1(1)(*b*) and s 118.1(3), and 149(1)(*l*)).

understanding of twentieth century charity law.[6] Even if it is not a division that presently informs the doctrine of charitable purpose, it can be discerned from the methodology applied in *Pemsel's case,* but not by focusing exclusively on Lord Macnaghten's classification. Following this approach, a gift for a purpose which is not charitable, for example a gift for a superstitious or indifferent purpose, could be recognised as a purpose gift, but entitlement to the favours available to charitable purpose trusts could be declined.[7] These issues are discussed in the next section where the defence of the status quo is explored.

[6] *Dingle v Turner and Ors* [1972] AC 601, 625, but note that the majority expressly rejected this. See also J Warburton, D Morris and NF Riddle, *Tudor on Charities* (Sweet & Maxwell, 2003) 3. It has been explicitly acknowledged as relevant in Canada: *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)* 2007 SCC 42.

[7] *Morice v Bishop of Durham* (1805) 10 Ves Jr 522; see also AJ Hirsch, 'Bequests for Purposes: A Unified Theory' (1999) 33 *Washington and Lee Law Review* 62.

Option One: The Status Quo

When it established the Charities Commission by Act of Parliament as an Autonomous Crown Entity (ACE), the New Zealand government set up a regulatory agency separate from its taxing agency. To define the scope of the regulatory agency's powers it relied only upon the common law definition of charitable purpose to define the Commission's jurisdiction.[8] Other jurisdictions had added to the common law definition but New Zealand did not follow that path.

From as far back as 1979, Barbados had begun the tradition of adding to the definition of charitable purpose by statute. Australia had already passed legislation extending the definition of charitable purpose under the *Extension of Charitable Purpose Act 2004*. The debate was raging in Great Britain, over the statutory extension of charitable purposes; and the *Charities Act 2006* added 13 heads of charitable purpose to the law for England and Wales. Nevertheless New Zealand elected not to follow that lead in the *Charities Act 2005*. The question to be asked now is: should the status quo remain? In this section we discuss continuing with this 'common law only' approach to the definition of charitable purpose.

This option is put forward, not only because it is presently working at least satisfactorily, but also because it is a benchmark against which all alternatives must be measured and shown to be an improvement. The status quo has 400 years of history to commend it. There is a long line of case law evidencing the capacity of the law to develop incrementally by analogy from existing charitable purposes. The fact that other jurisdictions have moved to augment this development by statute suggests that, at least in some jurisdictions, this approach is inadequate. If the status quo is to continue then it must be able to meet the challenge of continuing to develop without statutory assistance. This challenge is therefore taken up now.

Two issues are considered in this section. They illustrate how the status quo approach of developing the common law in the usual way might meet the challenges brought forward by those arguing the need for statutory intervention. The first is the issue of public benefit and the second is political purposes. The conclusion to which we will come is that the idea of maintaining the common law only approach can be defended in New Zealand in the twenty-first century.

[8] For a discussion of the way that the common law was imported and continues to operate see *Greenpeace of New Zealand Incorporated v Charities Commission* [2011] NZHC 77 (6 May 2011) [34]–[40] (Heath J).

Public benefit

The pursuit of public benefit purposes is the overarching characteristic of charities and they are granted favours because they provide public benefits.[9] In New Zealand and other common law countries there are at least two significant fiscal favours: income tax exemption[10] and deductibility.[11] There is concern across the common law world that fiscal favours attaching to charities are being extended to organisations that purport to be charities under one of the first three heads of *Pemsel's case,* but in fact appear to operate for private benefit. This has brought the presumption of public benefit extended to these organisations under intense scrutiny. The response in common law jurisdictions has been quite different. These responses are now discussed.

The New Zealand legislation addresses this concern regarding private benefit directly. Under the *Charities Act 2005* the courts are obliged to undertake an enquiry into both public and private benefit. To be registered as a charity in New Zealand, a charity must not only show the usual common law characteristics, but it must also demonstrate that it is not for private benefit.[12] This has led to the development of a jurisprudence in New Zealand which explicitly weighs public and private benefit in assessing whether or not an organisation is pursuing an exclusively charitable purpose. Justice Mackenzie, relying upon the decision of Justice Simon France in *Re The Grand Lodge of Antient Free and Accepted Freemasons*[13], explained the way this process operates in New Zealand jurisprudence in the following way: 'the assessment is a situation-specific analysis of the relative relationship between public and private benefits'.[14] This approach, which has express regard to private benefits, bears some similarity to the approach taken to entitlement to exemption and deductibility in the United States under sections 501(c)(3) and 170 of the *Internal Revenue Code*. This express reference to private benefit as a disqualifying factor is not the most common response. By

[9] *Re New Zealand Computer Society Inc.* (High Court of New Zealand, Mackenzie J, 28 February 2011) [13]. See also H Picarda, *The Law and Practice Relating to Charities* (Butterworths, 3rd ed, 1999) 19–20; J Warburton, D Morris and NF Riddle, *Tudor on Charities* (Sweet & Maxwell, 2003) 7; Charity Commission for England and Wales, *Charities and Public Benefit: The Charity Commission's General Guidance on Public Benefit* (2008); Charity Commission for England and Wales, *Commentary on the Descriptions of Charitable Purpose in the Charities Act 2006* (2007); PS Atiyah, 'Public Benefit in Charities' (1958) 21 *Modern Law Review* 138.

[10] *Income Tax Act 2004* s CW 36. For other examples of such favours, see Australia: *Income Tax Assessment Act 1997* (Cth), Div 50; US: *Internal Revenue Code* s 501(c)(3); UK: *Income Tax Act 2007* c 3; Canada: *Income Tax Act* (1985) c 1 (5th Supp).

[11] *Income Tax Act 2004* ss BD 2, DV 8 and DV 9. For other examples of such favours see Australia: *Income Tax Assessment Act 1997* (Cth), Div 30; US: *Internal Revenue Code* ss 501(c)(3) and 170; UK: *Income Tax Act 2007* c 3, ss 521–523; Canada: *Income Tax Act* (1985) c 1 (5th Supp) ss 110.1(1)(*a*)(ii), 118.1(1)(*b*) and s 118.1(3), and 149(1)(*l*).

[12] *Charities Act 2005* s 13 provides the following as essential requirements:
(b) in the case of a society or an institution, the society or institution—
(i) is established and maintained exclusively for charitable purposes; and
(ii) is not carried on for the private pecuniary profit of any individual; …

[13] [2010] NZHC 1723 (23 September 2010) [44].

[14] *Re New Zealand Computer Society Inc* (High Court of New Zealand, Mackenzie J, 28 February 2011) [16].

way of passing comment we note that the New Zealand cases do not suggest that they have taken cognizance of the way in which private benefit has been theorised in the United States. This is a matter that could be explored further by the New Zealand Charities Commission. We do not recommend that the US jurisprudence be followed – it has its own context and challenges – but as a body of law it could be informative.[15]

What then is the approach to public benefit elsewhere in the common law world?

Australia has a two tiered approach that does not statutorily reference private benefit. As noted above, only some charities in Australia enjoy deductibility status – those that are also public benevolent institutions – the remainder only enjoy exemption.[16] This statutory division of charities into two groups for the purposes of accessing income tax favours arose in 1927, after the Privy Council overruled the High Court's common law solution to the problem of distinguishing between entities entitled to different exemptions.[17] To address uncertainty about the meaning to be applied to 'charitable institutions' in different taxing Acts, the Australian parliament enacted legislation that distinguished between classes of charity entitled only to exemption and those also able to give deductible receipts.[18] There is no express statutory reference to exclusion of private benefit.

This two tiered approach has been followed in Singapore, where charities known as Institutions of Public Character are able to grant deductible receipts.[19]

South Africa has abandoned the idea of referencing charitable purpose in tax. It repealed reference to 'charitable' as a ground for exemption on 19 July 2000. It elected to directly reference and define 'public benefit organisation' and allowed deductibility for specific expenditures such as environmental waste disposal.[20] It has therefore avoided problems with the definition of charitable purpose by simply referring to public benefit only for tax purposes. As to regulation of charities; this issue is avoided by there not being a requirement to register in South Africa. There have been some calls for a Charities Commission but that route has not been followed.[21]

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[15] For a summary of US developments see John Colombo, 'In Search of Private Benefit' (2006) 58(5) *Florida Law Review* 1063.

[16] Compare *Income Tax Assessment Act 1997* (Cth) s 30-45 Item 4.1.1, and s 50-5.

[17] *Chesterman v Federal Commissioner of Taxation* (1923) 32 CLR 362 (HC); *Chesterman v Federal Commissioner of Taxation* (1925) 37 CLR 317 (PC)

[18] A O'Connell, 'Charitable Treatment? – A (Potted) History of the Taxation of Charities in Australia' (Paper presented at the Tax History Conference 2010, Cambridge, 5–6 July 2010) 21.

[19] *Charities Act* (Chapter 37); *Charities (Institutions of a Public Character) Regulations 2007*.

[20] GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) 534; and South Africa: *Income Tax Act 1962* ss 10(CN), 30(1) and 37B.

[21] Yvonne Morgan, 'The Potential for an Independent Regulatory Authority for NGOs in South Africa' (2005) 7(3) *International Journal of Not-for-Profit Law* http://www.icnl.org/knowledge/ijnl/vol7iss3/art_1.htm.

India is also expected to abandon reference to 'charitable' when its new *Direct Taxes Code 2010* comes into effect, expected to be on 1 April 2012.[22]

In Ireland, where the most recent legislative additions have been made, the legislation defining charities is expressly stated not to have fiscal impact.[23]

In England and Wales, exemption and deductibility both attach to charitable purpose. The *Charities Act 2006* removed the common law presumptions as to public benefit, but problems are emerging over the statutory definition of public benefit. Anticipated problems with inadequate drafting have materialised amid allegations of politicisation of the Charity Commission's function.[24] In debates leading up to the passage of the *Charities Bill* both the then government and the opposition gave commitments to review the public benefit provisions three years after implementation of the legislation. The Act was implemented in April 2008 making the due date for review April 2011. Notwithstanding this commitment, following the 2010 General Election the newly appointed Attorney General, Dominic Grieve QC, referred a case, of his own motion, to the First-tier Tribunal (Charity) seeking clarification.[25] This matter has been driven by a particular construction of the concept of public benefit taken by the Charity Commission following the need to prove public benefit after the *Charities Act 2006* came into force. The case was heard in May 2011 and a decision is pending. Given the importance of the issue to this body of jurisprudence in the United Kingdom the matter may well be appealed. So there is some controversy in the UK over both the scope and operation of the *Charities Act* and the role being discharged by the Charity Commission, and the issues are working their way through both parliamentary review processes and the courts.

This international overview raises a number of options for New Zealand to consider. An argument can be made for continuing the status quo in the short to medium term. In the light of the controversy currently in the UK, it might be prudent for New Zealand to watch the developments in England and Wales before embarking on a journey into statutory regulation of public benefit. As the litigation in Britain is driven by a particular reading of the concept of public benefit taken by the Charity Commission, and that issue does not arise in New Zealand, an argument can be made for not legislating a definition at present. The New Zealand courts have a workable requirement under the *Charities Act* that applicants prove that a charity operates exclusively for a charitable purpose that is

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[22] *Direct Taxes Code Bill 2009*; see also KW Simon, 'International Non-Governmental Organizations and Non-Profit Organizations' (2010) 44 *International Lawyer* 399 at footnote 34; NH Dadrawala, 'Difficult Times Ahead for Charities in India' (2009) 7(4) *International Journal of Civil Society Law* 57.

[23] *Charities Act 2009* s 7(1).

[24] P Luxton, 'Making Law? Parliament v The Charity Commission' (2009) 64 *Politeia* 1.

[25] Her Majesty's Attorney General, *Questions for Reference by HM Attorney-General to Tribunal under para 2(1)(a) of Schedule 1D to the Charities Act 1993*, CRF/2010/0001 (28 September 2010). See also, S Cook, 'Attorney General Refers Charity Commission's Public Benefit Guidance to the Courts', *Third Sector*, 9 September 2010, http://www.thirdsector.co.uk/news/Article/1031979/Attorney-General-refers-Charity-Commissions-public-benefit-guidance-courts/.

not conducted for private profit. That is not to say that these other alternatives are without merit. Only that none of the options pursued in other jurisdictions show clear superiority to the way that challenges arising from the public benefit presumption are managed currently in New Zealand. What, though, of areas where New Zealand society may wish to develop the common law? Is that possible? We will now consider political purposes as a gateway to that discussion.

Political and charitable purposes

Can the common law continue to develop in line with the social expectations of New Zealand society as case law, or is it stymied? The common law position in New Zealand, traceable through the Court of Appeal decision of *Molloy v Commissioner of Inland Revenue*[26] back to the Privy Council decision in *Bowman v Secular Society*[27] is that political purposes are not charitable and this body of law is controversial. There have been three recent decisions on political purposes that provide an excellent focus for a discussion of the capacity of the New Zealand law of charities to develop without the need for statutory intervention. On 15 February 2011 in *Re Draco Foundation (NZ) Charitable Trust* Ronald Young J of the High Court affirmed that the pursuit of advocacy and political purposes is not a charitable purpose in New Zealand.[28] This decision was handed down with knowledge of the Australian High Court decision in *Aid/Watch Incorporated v Commissioner of Taxation*, handed down on 1 December 2010.[29] In *Aid/Watch* the Court developed the common law in Australia to allow that the pursuit of political purposes in more than an incidental or ancillary way was no longer presumed to be inconsistent with the pursuit of a charitable purpose. However, on 6 May 2011 in the *Greenpeace case*, Heath J in New Zealand's High Court 'with a degree of reluctance' felt 'constrained to apply the full extent of the *Bowman* line of authority on the basis that [he] was bound to do so by the Court of Appeal decision in *Molloy*'.[30] Clearly, different directions are being taken on either side of the Tasman in relation to the public benefit 'in the generation by lawful means of public debate'.[31] One New Zealand commentator, Mark Van Dadelszen, considers that the way the Charities Commission approached this issue in *Re Draco*, and the way that the Court decided the case were regressive and limited legal developments.

[26] [1981] 1 NZLR 688.
[27] *Bowman v Secular Society Ltd* [1917] AC 406.
[28] High Court of New Zealand, Ronald Young J, 15 February 2011.
[29] (2010) 272 ALR 417.
[30] *Re Greenpeace of New Zealand Incorporated* [2011] NZHC 77 (6 May 2011) [59].
[31] *Re Draco Foundation (NZ) Charitable Trust* (High Court of New Zealand, Ronald Young J, 15 February 2011) [57].

In argument in the case, the Charities Commission pointed out to the Court that the law as laid down by the Privy Council in *Bowman v Secular Society*[32] is currently the law in New Zealand and that a New Zealand court is bound to follow it. As Justice Ronald Young stated:

> [58] The difficulty for the [foundation] in such an approach is that contrary to the law of Australia New Zealand does have, as part of its law, a general doctrine which excludes from charitable purposes, political objects.
>
> [59] I agree with the Commissioner that *Bowman* remains good law in New Zealand which I must follow.[33]

That case makes it clear that the issues to be considered were properly ventilated and Ronald Young J reached a different decision from the Australian High Court based on his understanding of the constitutional differences between Australia and New Zealand. Mark Von Dadelszen, has argued that the Australian High Court reasoning 'can be mounted in any democratic country' and expressed concern that the effect of the Charities Commission's approach affirmed in the Court's decision 'has altered perceptions and arguably the law'.[34] However, following the *Greenpeace case*, whether those concerns remain justified is moot. In that case*,* Heath J stated that unlike Ronald Young J, he had 'no real concerns that the political system in Australia ought to bring about a different conclusion' from that in New Zealand.

So does this unwillingness of two High Court judges to develop the common law of New Zealand by following Australian developments mean that the law of New Zealand is 'stultified'?[35] Not at all, *at least not as a matter of law*. It is the proper process for legal development. Single judges are bound by the decisions of superior courts. The cases are evidence of the proper processes for common law development in New Zealand. What is needed is a decision of a court that can overrule *Molloy*. This brings us to the qualification noted above: 'at least not as a matter of law'.

The cost of running actions in appellate courts, and the risk of costs orders against the charity if unsuccessful can dissuade charities from advancing cases through the appeal process. This could have the practical effect of stultifying the common law's development in this area. Two possible practical responses can be made. The first is evident in the *Greenpeace case.* Heath J did not follow the usual rule that the successful party should be awarded costs, instead deciding: 'As the issues raised were of some public importance, I make no order as to costs'.[36] This is a precedent that New Zealand courts could choose to follow wherever the issues in this area of law were of 'some public

[32] *Bowman v Secular Society Ltd* [1917] AC 406.
[33] *Re Draco Foundation (NZ) Charitable Trust* (High Court of New Zealand, Ronald Young J, 15 February 2011) [58]–[59].
[34] Mark Van Dadelszen, 'Charities and Societies' *NZ Lawyer* (11 March 2011) 14.
[35] The term used in *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 272 ALR 417, [30] and [41]
[36] *Re Greenpeace of New Zealand Incorporated* [2011] NZHC 77 (6 May 2011) [34]–[78].

importance'. But the issue need not be up to a decision of the court. There is nothing to stop parties such as the Charities Commission agreeing with any charity with which it is in litigation that the parties will not seek costs, whatever the outcome. A second option utilised by the Australian Taxation Office to advance cases that develop the tax law is test case funding. The Charities Commission could also fund charities to advance cases that raise issues 'of some public importance' through to the appellate courts. Advancing cases to appeal is, a practical problem not a problem with the law, and practical problems can be met with practical solutions. The problem of lack of appeals to develop the law can be met with funding. It does not oblige the New Zealand people to rely upon statutory amendment to ensure that its charity law keeps step with contemporary New Zealand values.

In summary then, the issue of public and private benefit, whilst controversial seems to be managed, at least satisfactorily under the combination of statutory private benefit exclusions and case law developments. The myriad international responses to this problem are offered as alternatives but none stand out as exemplary. The status quo could continue. It has 400 years of history to commend it and on two of the more controversial areas discussed there are at least adequate responses that can be made in defence of the status quo.

Option Two: Pemsel Plus

The Pemsel plus proposal is essentially the same as the status quo but with other purposes added to the definition of charitable purpose by legislation, as needed from time to time.

The background to this approach is that a little over a decade ago England and Wales led common law countries on a journey into statutory reform of the law of charities.[37] The promise was of a new legal framework.[38] Arguably what was delivered fell well short of that and New Zealand did not follow this trend. Before the legislative reform in those other jurisdictions common law jurisdictions had the *common law's* three principal divisions of charitable purpose and a catch-all. Through legislative reforms those common law countries added variously between zero and 12 *statutory* divisions and a catch-all.[39] As Dunn and Riley warned in 2004 the reclassification with additional statutory divisions 'will inevitably lead to a burgeoning final category and, eventually, to the same criticisms that beset the current [prelegislation] regime'.[40] At best this form of legislative intervention could only postpone the need for a new legal framework.[41]

On the other hand it may be argued that even if these amendments did not resolve all of the problems they have at least addressed some of them. Australia[42] Barbados,[43] England and Wales,[44] Ireland,[45] Northern Ireland,[46] and Scotland,[47] have passed legislation defining or extending the common law definition of charitable purpose. Schedule 1 to this paper sets out the sections where an extended definition appears in each of these jurisdictions. A different approach has been taken in the United States where a long list of exempt and deductible entities has been included in the *Internal Revenue Code*. These are set out in Schedule 2. In Singapore, statute defines the concept of an 'Institution of a Public Character' by focusing on activities that 'are exclusively beneficial to the community in Singapore as a whole and are not confined to sectional interests or groups of persons based on race, belief or religion'. These provisions are set out in Schedule 3. One of the options for

[37] The beginning was P Woodfield et al, *Efficiency Scrutiny of the Supervision of the Law of Charities: Report to the Home Secretary and the Economic Secretary to the Treasury* (1987). Barbados had moved to a statutory definition in 1979 but this did not trigger the widespread interest in statutory reform. See Barbados: *Charities Act 1979* Volume VIII, Title XVIII, Chapter 243.

[38] United Kingdom Secretary of State for the Home Department, *Charities: A Framework for the Future* (1989).

[39] Australia: *Extension of Charitable Purpose Act 2004* (Cth); Barbados: *Charities Act 1979* Volume VIII, Title XVIII, Chapter 243; UK: *Charities Act 2006* (Eng.&W) c 50; *Charities Act (Northern Ireland) 2008* c 12; *Charities and Trustees Investment (Scotland) Act 2005*; Ireland: *Charities Act 2009*.

[40] A Dunn and C Riley, 'Supporting the Not-For-Profit Sector: the Government's Review of Charitable and Social Enterprise' (2004) 67 *Modern Law Review* 632, 644.

[41] Ibid.

[42] *Extension of Charitable Purpose Act 2004* (Cth).

[43] *Charities Act 1979* Volume VIII, Title XVIII, Chapter 243.

[44] *Charities Act 2006* c 50, Part 1.

[45] *Charities Act 2009* s 7.

[46] *Charities Act (Northern Ireland) 2008* c 12, Part 1.

[47] *Charities and Trustees Investment (Scotland) Act 2005* asp 10, s 7.

New Zealand is to identify purposes which are presently excluded from the definition of charitable purpose at common law, and add these by statute to extend the scope of the Charities Commission's jurisdiction. In so doing it could adopt any of these approaches or a combination. For example the definition of charitable purpose might be extended, but certain benefits might be limited to organisations that satisfy a definition similar to that of Singapore's Institutions of Public Character.

As an example of extending the definition we set out below the central operative part of the *Charities Act 2006*, for England and Wales. The meaning of charitable purpose is included in Part 1:

> **2 Meaning of "charitable purpose"**
>
> (1) For the purposes of the law of England and Wales, a charitable purpose is a purpose which—
>
> > (a) falls within subsection (2), and
> >
> > (b) is for the public benefit….
>
> (2) A purpose falls within this subsection if it falls within any of the following descriptions of purposes–
>
> > (a) the prevention or relief of poverty;
> >
> > (b) the advancement of education;
> >
> > (c) the advancement of religion;
> >
> > (d) the advancement of health or the saving of lives;
> >
> > (e) the advancement of citizenship or community development;
> >
> > (f) the advancement of the arts, culture, heritage or science;
> >
> > (g) the advancement of amateur sport;
> >
> > (h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
> >
> > (i) the advancement of environmental protection or improvement;
> >
> > (j) the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;
> >
> > (k) the advancement of animal welfare;
> >
> > (l) the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services;
> >
> > (m) any other purposes within subsection (4).

Part 1 includes further guidance as to public benefit. We have included those provisions in Schedule 1.[48]

[48] See 1.2 England and Wales.

Extending favours such as tax deductibility only to some charities, would involve New Zealand amending the relevant taxing statute.

In summary, there is a long list of possible purposes that could be added by statute to the common law definition of charitable purpose. These additions might not address all concerns expressed by New Zealanders, but they will address some. We have provided models in the Schedules to this paper. If New Zealand were to take such an approach it would be following an example set by many other common law jurisdictions. This approach has adoption across many jurisdictions to commend it.

Option Three: Identify the Spirit and Intendment

This proposal seeks to identify the essence of the *Preamble* with a view to replacing it with modern language. This could do away with the need for lists of purposes. At present charitable purposes are defined as purposes falling within the spirit and intendment of the *Preamble* and for public benefit. In this section we set out a basis for replacing reference to the spirit and intendment of the *Preamble* with reference to altruism and voluntarism. Put in legislative terms and following the model of the legislation for England and Wales the drafting might read as follows:

> **2 Meaning of "charitable purpose"**
>
> (1) For the purposes of the law of New Zealand, a charitable purpose is a purpose which—
>
> (a) is pursued altruistically,
>
> (b) is pursued voluntarily, and
>
> (b) is for the public benefit.

Further definition sections could then develop the meaning of these words to ensure that they captured New Zealand society's values. The above sets out a method to develop the law by statutory amendment. This development is possible from within the common law by returning to the reasoning in *Pemsel's case*. We do not set out those arguments completely here but introduce key concepts to sketch how the developments could occur.[49]

Reference to spirit and intendment is critical to the current law because it avoids the need to refer to motive. By adopting the technical definition, the reference to motive is removed and charities are institutions that satisfy certain 'objective' criteria.[50] In adopting the technical meaning Lord Macnaghten held that:

> The majority of the Court of Appeal tell [the Special Commissioners vested with the task of deciding what is a charitable institution for tax exemption purposes under the English *Income Tax Act* (1842)] they must be guided by the popular meaning of 'charity', and that 'each individual case must be decided on its own facts.' There is certainly no indication in the Act that such a hopeless task as that was laid on the Special Commissioners.[51]

The law has consistently returned to the *Preamble* to overcome this difficulty but as the doctrine of charitable purpose has become focused on the institution (not the altruistic characteristic) it bears little, if any, link to common parlance. If the legal class of charities does not represent the values of New Zealand society's expectations of charitable purpose, what do New Zealand citizens expect to

[49] For more detail as to how this could be done, see MD Turnour, *Beyond Charity: Outlines of a Jurisprudence for Civil Society* (PhD Thesis, Queensland University of Technology, 2009), http://eprints.qut.edu.au/31742/; see particularly chapters VIII and IX.

[50] Gino Dal Pont, *Charity Law in Australia and New Zealand* (Oxford University Press, 2000) 8–13; *Pemsel's Case* [1891] AC 531, 583 (Lord Macnaghten).

[51] *Pemsel's Case* [1891] AC 531, 587.

reside at the heart of this body of law? Case law from Canada points to altruism and voluntarism and given the cultural similarities between New Zealand and Canada this may provide a useful line of inquiry. Justice Gonthier summarised the law on this point in *Vancouver Society of Immigrant Women:*

> Two central principles have long been embedded in the case law. Speaking of the existing Pemsel categories, Rand J. observed …, that 'the attributes attaching to all are their voluntariness and, directly or indirectly, their reflex on public welfare'. These two principles, namely, (1) voluntariness (or what I shall refer to as altruism, that is, giving to third parties without receiving anything in return other than the pleasure of giving); and (2) public welfare or benefit in an objectively measurable sense, underlie the existing categories of charitable purposes, and should be the touchstones guiding their further development.[52]

Justice Gonthier effectively equated voluntariness and altruism. Nothing is lost by referring to voluntariness and altruism as coterminous when considering the role of charitable purpose as one of determining *favour* such as entitlement to income tax exemption or deductibility which was the question before the court in that case. For the purposes of determining the *scope of the jurisdiction* of the Charities Commission of New Zealand we suggest that when defining charities it is helpful to keep the two concepts separate. This is because charities are *distinguished from government* organisations by *voluntariness*, but it is *altruism* that distinguishes them *from businesses*. We now discuss these two concepts very briefly.

Altruism

In *Pemsel's case* Lord Macnaghten said that the foundation of the concept of charitable use is not in the categories he listed, nor in the *Preamble per se* but in 'the piety of early times'.[53] This piety, and its expression through pious uses, or charitable purpose trusts as they are commonly known, can be argued to find expression in contemporary English as 'altruism'.

George Lewes introduced the word 'altruism' into the English language in 1853 with his translation of Comte's *Philosophy of the Sciences.*[54] The Oxford English Dictionary defines altruism as: '[D]evotion to the welfare of others, regard for others, as a principle of action; opposed to egoism or selfishness'.[55] In psychology and sociology, it is part of a broader class called 'prosocial behaviour'.[56]

[52] *Vancouver Society of Immigrant and Visible Minority Women v MNR* (1999) 169 DLR (4th) 34, 57–58.

[53] *Pemsel's Case* [1891] AC 531, 583 (Lord Macnaghten).

[54] G Lewes, *Comte's Philosophy of the Sciences* (G Lewes trans, 1890 ed). Comte evidently invented the word, possibly drawing upon a French legal phrase *Alteri huic*; he intended 'to establish the opposite reference point to the self-gratifying, utility-maximising "economic man" of economic theory': see H Anheier and R List, *A Dictionary of Civil Society, Philanthropy and the Non-Profit Sector* (2005) 6. Note also the similarity with Italian word 'altrui' meaning 'others'.

[55] JA Simpson and ESC Weiner, *The Oxford English Dictionary* (2nd ed, 1989).

If altruism is accepted as a rough equivalent of pious use, reference to the 'spirit and intendment' of the *Preamble* or the four heads of *Pemsel's case* is not necessary.

There are difficulties with this approach. Defining 'pious use' in the context of the law as it was before the passing of the *Statute of Elizabeth* is not a straightforward exercise; consequently it is not an easy step to altruism. That is not because a simple legal definition cannot be set out, but rather because the bare definition of 'pious use' or altruism without explanation denudes the idea of value. It must be remembered that the idea of charity in the *Preamble* was an idea anchored in notions of civil relations which preceded the present property rights discourse that has dominated modernity. It may seem strange in twenty-first New Zealand to be focused on the use to which something is put, rather than on the title or right to use it. There is now a widely accepted belief that once something is 'owned' the owner may do as he or she pleases with it, regardless of moral constraints.[57] The concept of pious use belongs to a different moral frame.[58] Both words, 'pious' and 'use' are important.[59] The 'use' must be directed to others who are in need; the motive must be generosity, as opposed to self-interest. A focus on *why* people give is fundamentally a focus on the supply side of the transaction, but the reason for supply is manifest in the form of beneficiary to whom the transfer is made.[60] The others benefiting in a charitable sense are the public. These ideas can be seen in *Pemsel's case* but they are not developed in the same way as the four principal divisions set out by Lord Macnaghten. A more radical and variant reading would have to be developed from other judgments in *Pemsel's case*, such as those of Lords Watson and Herschell.

Lord Watson, whose reasoning was accepted by a majority on this point in *Pemsel's case*[61] found not just public benefit, but also 'pious' motive to be integral to the concept of charitable purpose at law:

> So far as I am able to discover, 'godly' and 'pious' as applied to trusts or uses, had, in early times much the same significance in Scotland as in England. Their meaning was not limited

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[56] G Vaughan and M Hogg, *Introduction to Social Psychology* (Prentice Hall, 1998) 324; D Shaffer, *Social and Personality Development* (Wadsworth, 2000) 306.

[57] M Turnour, *The Stewardship Paradigm: an Enquiry into the Ethical Obligation Associated with being in Control of Resources* (MA Thesis, Queensland University of Technology, 1999), 48.

[58] FW Maitland, 'The Origin of Uses' (1894) 8 *Harvard Law Review* 127.

[59] The Christian foundation for the terms appears in the following passage by Augustine: 'but in you let the love of riches grow cold, and let a pious use of what property you possess be directed to spiritual delights, that your liberality wax warm rather in helping such as are in want than in enriching covetous persons': Saint Augustine, *Of the Good of Widowhood* (CL Cornish trans, unknown year [trans of: De Bono Viduitatis] New Advent) http://www.newadvent.org /fathers/1311.htm.

[60] See, e.g. *Sacerdotii Nostri Primordia, Encyclical of Pope John XXIII On August 1, 1959* (Papal Encyclicals Online, 2000–2008) http://www.papalencyclicals.net/John23/j23sacer.htm.

[61] Lord Halsbury concurred with the reasoning of Lord Watson on the meaning of Godly and pious informing the understanding of charitable purpose: 'That "godly" and "pious" are convertible terms, and may be so treated, is true' *Pemsel's case* [1891] AC 531, 549. Lord Bramwell agreed with the reasoning although he came to a different decision: at 563. Lord Herschell agreed with both Lord Watson's reasoning and his conclusion: at 574.

> to objects of a religious or eleemosynary character, but *embraced all objects which a well-disposed person might promote from motives of philanthropy.*[62]

In relation to the word 'pious' Lord Watson gave three examples: 'the building and repairing of bridges, repairing of churches or entertainment of the poor'.[63] He referred also to the case of *Lord Saltoun v Lady Pitsligo*[64] where 'the Court of Session held that the repair of a public harbour was a pious use' within the meaning of the relevant legislation. His point was clear: if a 'well-disposed person' was motivated by 'philanthropy' the courts could find charitable intent, as the traditional conception of pious use or godliness had broad application. Lord Watson did not just point to motives of philanthropy leading to the provision of physical needs, but also held that those motives could be to make contributions to religious,[65] intellectual and moral culture.[66]

Lord Herschell also wrote his own opinion, whilst agreeing with Lord Macnaghten,. He did not categorise charitable purposes into the four heads, but referenced a motive of benevolence as integral to charitable purpose:

> I think, then, that the popular conception of a charitable purpose covers the relief of any form of necessity, destitution, or helplessness which *excites the compassion or sympathy* of men, and so *appeals to their benevolence* for relief.[67]

The reasons for setting out these judgments, in part, is to show that altruism – or at least reference to philantropic motive, has a long history traceable to impeccable foundations. Pious uses or charitable purposes are not just public benefiting purposes. They also have as a central dimension, motive to benefit others. This is not the orthodox reading of the law as it presently stands.[68] Ignoring motive is justified under the doctrine of charitable purpose because the focus is entirely on the recipient – the demand side – not on the supplier. Focusing on the supply side as well as the demand side overcomes the problems which flowed from looking only to public benefit. It is an approach that has assisted economists[69] and might assist New Zealand in the development of the law. To re-focus in this way requires taking up a concept that is not often considered in the current jurisprudence. Voluntarism is altruism's partner in this third alternative approach.

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[62] *Pemsel's Case* [1891] AC 531, 558 (Lord Watson), [emphasis added].
[63] *Pemsel's Case* [1891] AC 531, 559 (Lord Watson).
[64] M Dict 9948.
[65] *Pemsel's case* [1891] AC 531, 558 (Lord Watson).
[66] *Pemsel's case* [1891] AC 531, 561 (Lord Watson).
[67] *Pemsel's case* [1891] AC 531, 571-572 (Lord Herschell), [emphasis added].
[68] J Warburton, D Morris and NF Riddle, *Tudor on Charities* (Sweet & Maxwell, 2003) 7.
[69] A Ben-Ner and T Van Hoomissen, 'Nonprofit Organisations in the Mixed Economy: A Demand and Supply Analysis' (1991) 62 *Annals of Public and Cooperative Economics* 519; R Steinberg, 'Economic Theories of Nonprofit Organisations' in WW Powell and R Steinberg (eds), *The Nonprofit Sector: A Research Handbook* (Yale University Press, 2nd ed, 2006) 117.

Voluntarism

Something provided voluntarily is clearly not provided under coercion. Citizens provide funds for public benefiting purposes when they pay taxes, but those payments are not in pursuit of a charitable purpose. Lord Macnaghten stated in that most famous part of his opinion that 'a layman would probably be amused if he were told that a gift to the Chancellor of the Exchequer for the benefit of the nation was a charity'.[70] It is not an absolute rule that a gift to government cannot be charitable. In *Pemsel's case* Lord Chancellor Halsbury cited a number of authorities to that effect.[71] In *Re Cain*, a gift to the state government of Victoria (the Department of Health) was held to be for a charitable purpose.[72] Nevertheless there is a clear dividing line at common law between organisations pursuing charitable purposes and governments.[73] Giving for a charitable purpose is characterised by voluntariness.

If the provision of a good is coerced, then it is not supplied charitably. How much coercion is tolerable, though, for a purpose to remain charitable?[74] Some funding and perhaps some contributions of time result from coercion. A most obvious example is where a charity pursuing community service purposes is entirely funded by government and subject to detailed compliance requirements and directions (set out in the form of a contract or other form of arrangement).[75] Does this remove the requisite voluntariness?. At some point between the entirely voluntary pursuit of purposes and entirely coerced pursuit of those same purposes, a threshold will be crossed – the boundary between charities and government. The New Zealand courts are familiar with this weighing process in assessing public and private benefit. Arguably a similar process of weighing factors to find which side of the boundary between charity and its other (be it business or government) could be adopted in relation to both altruism and voluntarism.

There is a growing science in the measurement of altruism.[76] If altruism and voluntarism can be identified and measured, then theory development could progress significantly, even into quantitative measurement if the *Preamble* is abandoned and replaced by these concepts.[77] This is

[70] *Pemsel's case* [1891] AC 531, 584 (Lord Macnaghten).
[71] *Pemsel's case* [1891] AC 531, 544.
[72] *In re Cain (decd); The National Trustees Executors Agency Co of Australasia Ltd v Jeffrey* [1950] VLR 382, 387.
[73] *Central Bayside General Practice Association Limited v Commissioner of State Revenue* (2006) 228 CLR 168.
[74] GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010); M Harding, 'Distinguishing Government from Charity in Australian Law' (2009) 31 *Sydney Law Review* 559, 559.
[75] *Central Bayside General Practice Association Limited v Commissioner of State Revenue* (2006) 228 CLR 168, 181.
[76] United Nations Department of Economic and Social Affairs Statistics Division, *Handbook on Non-Profit Institutions in the System of National Accounts* (UNDESA, 2003) 69.
[77] For example at the most basic level, altruism can be measured by volunteering. The UNDESA's Handbook (ibid) sets out a method for valuing volunteer labour input, having regard to the two presently dominant methods of opportunity cost and market or replacement cost..

not to oblige theory development to move to complex measurement, but the possibility of the Charities Commission drawing upon quantitative analysis of both altruism and voluntariness when determining entitlement to registration is foreseeable under this approach.[78] This is because altruism could be measured in some way. Coercion could be identified by reference to such things as the capacity to oblige participation, to require allocation of funds to particular objects, or compel delivery of charitable goods.

A third option, then is that New Zealand could move to a definition of charitable purpose that looks to altruism, voluntarism and public benefit to evidence charitable purpose. This approach has the advantage of conceptual simplicity. It can be argued from the case law. It is a higher level of abstraction of the principles and this has advantages and disadvantages. The *Preamble* no longer has any legislative force in Australia,[79] Canada and other common law countries. It may be argued that the time has come for New Zealand to let it go and take up these modern concepts inherent in charity as a means of defining it.

[78] MD Turnour, *Beyond Charity: Outlines of a Jurisprudence for Civil Society* (PhD Thesis, Queensland University of Technology, 2009) 335, http://eprints.qut.edu.au/31742/.

[79] For discussion of the history generally see: GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) 79–126.

Option Four: A Nonprofit Sector Approach (with Carve-out)

This proposal takes cognizance of historical developments in the law and developments in other disciplines, particularly economics, to set out an alternative framework for reform. In summary it differs from the current common law approach which seeks to list all of the purposes entitled to recognition as charitable purposes. This approach identifies the whole nonprofit sector and then carves out from it purposes which are not charitable. The net effect can be the same, but the approach is quite different.

The beginning of the argument for this model is New Zealand's *Property Assessment Act 1879.* That Act set the model for the southern hemisphere and possibly the world when it made 'any public body society or persons for public charitable or public educational purposes' and any organisation 'not formed wholly or mainly for the purpose of gain or profit' exempt from its operation.[80] Importantly for the purposes of this discussion this appears to have been the first time exemption was extended to '*all* non-profit societies, without reference to "charitable purposes"'.[81] This legislative approach was followed in South Australia, the first Australian jurisdiction to import the exemption, where it was applied to 'all Companies, Public Bodies, and Societies not carrying on any business for the purpose of gain'.[82] The principle embedded in this approach is that the legislation applies to all nonprofit entities and those not intended to be within the class are then carved out. Applying this requires a very broad definition such as the one in the *Property Assessment Act*. To adopt this approach now in New Zealand a very broad statutory definition of charitable purpose would be needed. It might extend the jurisdiction of the Charities Commission to the borders of the whole nonprofit sector which may have appeal to some. Following this 19th century legislative model but updating the language, the Charities Commission's jurisdiction would have this scope if the government passed legislation defining charitable purpose as follows:

> A charitable purpose is a purpose pursued voluntarily, altruistically and for public benefit. A business, government or family purpose is not a charitable purpose.[83]

Simply defining charitable purpose is not sufficient; the definition of charity must be extended. Having regard to the definition of charitable purpose, and informed by the discussion under option 3 above, charity might be defined as follows:

> A charity is an organisation that pursues purposes voluntarily, altruistically and for public benefit. Charities are distinguished from government organisations by their voluntariness,

[80] A O'Connell, 'Charitable Treatment? – A (Potted) History of the Taxation of Charities in Australia' (Paper presented at the Tax History Conference 2010, Cambridge, 5–6 July 2010) 4, referring to s 26.
[81] Ibid 4.
[82] Ibid citing *Taxation Act 1884* (SA) s 9.
[83] Family is used in this context as an equivalent to household: the smallest private gathering that is too personal to be a nonprofit organisation.

from businesses by participation being for altruistic purposes, and from family and other private groups by the purposes being public.

Redefined as altruistic, public benefiting, voluntary associations, the legal space defined by reference to charitable purpose could become co-terminous with the definition of the nonprofit sector as a whole. Organisations to be excluded from the regulatory net could then be carved out. This approach is as old as the *Statute of Elizabeth* which carved out certain entities from the scope of regulation. Charitable purpose has been identified as the essence of the sector for centuries. Charities are recognised as central to the nonprofit sector and the nonprofit sector is the whole third sector – leaving nothing that does not belong to another sector. The nonprofit sector is differentiated from business (the first sector); government (the second sector); and family (the fourth sector). With this definition, charities now comprise the whole third sector in a four sector model of society.

That does not mean that the whole sector has to be regulated by the Charities Commission. If some organisations that would now be caught within the sector should not be so regulated then they can be carved out. Instead of a list of purposes included in the definition of charitable there would be a list of purposes excluded. For example political purposes might be one example of purposes carved out by either the courts or legislation. Political parties obviously might be regulated by other laws. Another form of organisation that might be regulated separately is co-operatives, which arguably are on the boundary between nonprofit and business.

This approach, defining the sector and then carving out exceptions, also does not mean that all these *regulated* organisations that might now fall within the definition of 'charity' should enjoy the same taxation and other *favours* as charities presently enjoy in New Zealand. This model may necessitate changes to the tax laws as there could be fiscal implications of redefining the organisations included within the definition of charities – particularly if it is expanded substantially. This brings us back to where we began with a discussion of whether the definition of charitable purpose for regulatory purposes necessarily aligns with the definition of charitable purpose for taxation favouring. We make suggestions for managing that distinction in the next and final substantive section of this paper. In concluding this section, the critical point is that this fourth model provides a concept for regulation of the whole sector (less any carve out) separate from the entitlement of entities to taxation favours. It is arguably a redevelopment of a New Zealand idea that preceded *Pemsel's case*.

Justifying the Favours to Charities and Building on the Justification

The division between the functions of charitable purpose as a basis for defining the jurisdiction of the Charities Commission on the one hand and as a gateway to favour on the other commenced this

discussion and four models for developing the idea of charitable purpose have been canvassed. At the outset it was promised that the justification for favour would be reviewed and ways it which the central ideas might be developed would be brought forward. This section is directed to that end. First the question is asked: why do charities enjoy favours? Some of the history behind the issue is set out but the conclusion reached is that the reasons are clear. The cases and commentary point to contribution to public benefit but how the law is to be theorised is disputed.[84] If New Zealand is satisfied with the way that public benefit is currently applied no change is required. Because this is an options paper, two possible alternatives are put forward for discussion.

Why are charities favoured?

Charities have existed and have enjoyed favourable treatment since time immemorial but we do not know exactly why. Elaine Abery has observed that the favouring of charities is at least as old as Ezra's return of the exiled Jews.[85] Colombo and Hall point to evidence of tax favour for charities in ancient Greece, ancient Rome and ancient Egypt:[86] 'Exempting charities from various forms of taxation is a practice that appears as old as western civilization itself'.[87] The exemption has applied in the United Kingdom since William Pitt introduced income taxation.[88] New Zealand adopted a similar policy of exempting charities which is traceable to the broad exemptions given in 1879 to all nonprofit organisations.[89] The long history of exemption is clear but the reasons why are not. One academic has observed in relation to the the United States Congress – but the point is true internationall –, when governments pass into law this favoured status, they are 'generally silent about the dispositive reasons'.[90]

If the legislatures are silent, what is the theory? There are various contested views.[91] At a foundational level underpinning charities, is a body of law which enables these gifts, which tend to

[84] *Guild v Inland Revenue Commissioners* [1992] 2 AC 310; *Central Bayside General Practice Association Limited v Commissioner of State Revenue* (2006) 228 CLR 168, (Kirby J); and *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)* 2007 SCC 42 and *Commissioner of Taxation v Word Investments Limited* (2008) 236 CLR 204, 240 where Kirby J (dissenting) said: 'My own attempt to drag this body of law into the twenty-first century, in conformity with modernity and applicable general principles, came to nothing'. See also Andrew Murray and Mary O'Donovan, 'One Regulator One System One Law: The Case for Introducing a New Regulatory System for the Not for Profit Sector' (Parliament of Australia[?], 2006).

[85] Elaine Abery, 'Charities: A Target for Ralph' (2000) 29 *Australian Tax Review* 224, 224 referencing *The Holy Bible New International Version* (1984) Ezra 7:24 .

[86] John Colombo and Mark Hall, *The Charitable Tax Exemption* (1995) 1, 14.

[87] ibid 3.

[88] J Warburton, D Morris and NF Riddle, *Tudor on Charities* (Sweet & Maxwell, 2003) 305.

[89] A O'Connell, 'Charitable Treatment? – A (Potted) History of the Taxation of Charities in Australia' (Paper presented at the Tax History Conference 2010, Cambridge, 5-6 July 2010) 4, referring to s 26.

[90] Penina Kessler Lieber, 'United States Tax Treatment of Nonprofit Organisations' in Paul Bater, Frits Hondius and Penina Kessler Lieber (eds), *The Tax Treatment of NGOs: Legal, Ethical and Fiscal Frameworks for Promoting NGOs and their Activities* (Kluwer, 2004) 173, 180.

[91] ibid, 180–181.

public benefit, to take place.[92] There is a facilitative function of enabling gifts for public benefit. Following this idea leads into a rich debate that has raged within economics since the late 1970s in an endeavour to explain what, why and how public goods are provided by charities and other nonprofit organisations.[93] As public goods are goods supplied to the public at large, as distinct from private buyers, applying the concept of markets and the rules of supply and demand to them is clearly flawed.[94] The *Preamble* upon which the doctrine of charitable purpose is founded is, essentially, a list of public goods. The exemplars of these public goods in the *Preamble* are the 'Repaire of Bridges Portes Havens Causwaies … Seabanks and Highewaies'. What can be said then is that public benefit is central and has been at least since the *Preamble* was published in 1601.

What then, does it mean to grant favour based on contributions of public benefit? At its base is the question: when does an organisation provide sufficient public benefit to justify tax favour or some other favour frequently enjoyed by charities across the common law world? Whilst different courts, legislators or regulators may draw upon presumptions or different factors to inform them of how much or how little public benefit must be evident to be entitled to favours, and different factors may be taken into account, or weighed differently, to decide the extent to which public benefit is evident, some quite sophisticated criteria for categorising publicness have emerged.[95] These criteria could usefully inform the more general principles for developing legal theory.

For the purpose of advancing the discussion we suggest that when the debate is distilled it might be that in weighing the publicness of the benefit regard must be had to certain factors such as:

1. remoteness, informed by whether or not the persons benefiting are members of the organisation, such as members of a club, or are truly independent and therefore genuinely the public; and
2. the size of the group benefiting and whether it may be described as the public as a whole or a subsection of it. The larger the number of people benefiting the more public the purpose.

All charitable trusts were originally considered public trusts[96] and if charitable trusts are taken as the foundation typology of the voluntary public organisational form for the supply of goods (which they were), then charitable purpose resides at one extreme of the 'benefit continuum'. At the other end are organisational forms which are purely for private purposes. So ranking of public benefit provides

[92] Kerry O'Halloran, *Charity Law and Social Inclusion: An International Study* (Routledge, 2007) 1.
[93] Charles T Coltfelter, *The Economics of Giving* (1997); Robert Scott Gassler, 'Nonprofit and Voluntary Sector Economics: A Critical Survey' (1990) 19 *Nonprofit and Voluntary Sector Quarterly* 137.
[94] Richard Steinberg, 'Economic Theories of Nonprofit Organisations' in Walter W Powell and Richard Steinberg (eds), *The Nonprofit Sector: A Research Handbook* (Yale University Press, 2nd ed, 2006) 117; Avner Ben-Ner and Theresa Van Hoomissen, 'Nonprofit Organisations in the Mixed Economy' in Benedetto Gui (ed), *Annals of Public and Cooperative Economics* (Blackwell, 1991) 519.
[95] Rob Atkinson, 'Nonprofit Symposium: Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Syntheses' (1997) 27 *Stetson Law Review* 395, 565–566.
[96] *Pemsel's case* [1891] AC 531 at 580 (Lord Macnaghten).

a basis for legal theory to go beyond the general idea of 'public' to a 'continuum of publicness'. Figure 1 illustrates how favouring would depend on where a purpose is positioned on the public benefit continuum. The greater the public benefit the greater the favour that can be justified. This is our first and simplest model for discussion.

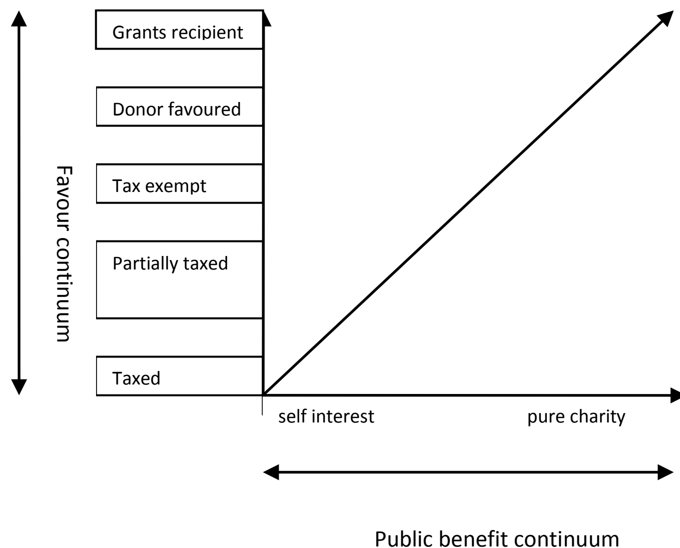

Figure 1

The *Preamble* also lists such things as the relief of poverty, which, in economic terms, usually involves the supply of private goods, such as food, to particular individuals.[97] So a basis for division between charitable goods that are essentially private and those which are clearly public already exists in case law. Rob Atkinson puts it thus: 'in summary, charities provide primary public benefits in two ways: especially good goods to ordinary people, and ordinary goods to the especially deserving.'[98]

This brings us to the second model that we propose. Rather than analysing public benefit as on a continuum it can be arranged into classes. An example of such a classification based on the first three heads of *Pemsel's case* might be that favour is extended to organisations that pursue public benefit by one of three means.

1. Dealing with Disadvantage;
2. Encouraging Edification; or
3. Facilitating Freedom.

[97] It might be asked where the advancement of religion fits. The repair of churches was listed in the *Preamble* but that has been expanded to advancement of religion as the law is presently understood. We would argue that advancement of religion, broadly understood and recast, will be theorised as fundamentally a public good.

[98] Rob Atkinson, 'Nonprofit Symposium: Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Syntheses' (1997) 27 *Stetson Law Review* 395, 402.

Dealing with disadvantage

The first head of charitable purpose under *Pemsel's case* is the relief of poverty. This generally involves the supply of private goods to a person for the purposes of dealing with the disadvantage that person experiences. In England and Wales, the *Charities Act 2006* lists 'the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage'.[99] The federal jurisdiction in Australia has added 'open and nondiscriminatory self help groups', to the list of charitable purposes.[100] New Zealand might instead attempt to define this class of charitable purpose as 'dealing with disadvantage'. We suggest that the broader rationale for the class can be seen in that it advances equality. The foundation of the common law's jurisprudential obligation to equality under the law is, according to Brooks, traceable to Cicero.[101] If the common law is taken to have a commitment to equality, then granting favours to those who voluntarily relieve and prevent poverty, assisting the weak to join equally with the strong in enjoying society is to encourage that which the law itself deigns. As the French *Declaration of the Rights of Man* put it: 'all citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents'.[102] It becomes a function of New Zealanders of goodwill to endeavour to lift all other citizens up so that they may enjoy that equality.

Encouraging edification

The second head of charitable purpose under *Pemsel's case* is advancement of education, a purpose that supplies a *quasi-public good* that, to use Lord MacNaghten's phrase, benefits 'the rich as well as the poor'.[103] Advancement of education, along with other purposes recognised as charitable under the fourth head are recognised because they belong to a broad category of quasi-public goods that edify society. A category of purposes centring on community development by the provision of quasi-public goods that 'benefit the rich as well as the poor'[104] is required. Lord Watson identified the class with reference to 'intellectual and moral culture' and seemed to include advancement of religion.[105] 'Encouraging Edification' is an appropriate way to describe this class of charitable purpose.

To fall within this category a purpose must demonstrate that its advancement leads to a greater measure of public benefit than would dealing with disadvantage (where the benefit could be entirely private). So the enjoyment of the benefit must be 'socialised' at least to sufficently large subsections

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[99] *Charities Act 2006* (Eng.&W) c 50, s 2(2).
[100] *Extension of Charitable Purpose Act 2004* (Cth) ss 4–5.
[101] Christopher W Brooks, *Lawyers, Litigation and English Society Since 1450* (Hambledon Press, 1998) 208.
[102] *The Declaration of the Rights of Man* 1789.
[103] *Pemsel's case* [1891] AC 531, 583-584 (Lord McNaghten).
[104] *Pemsel's case* [1891] AC 531, 583-584 (Lord McNaghten).
[105] *Pemsel's case* [1891] AC 531, 557-559 (Lord Watson).

of communities to be considered public.[106] Purposes that involve the provision of social goods such as public art and other cultural activities, are examples. The class would also include the provision of physical infrastructure that literally 'edifies' a community – the 'Bridges Portes Havens Causwaies … Seabanks and Highewaies' listed in the *Preamble* can find their twenty-first century equivalents in social infrastructure such as public libraries and museums. The socialisation of goods suggests communal sharing and so arguably this class is favoured because it advances *fraternity*. Advancement of fraternity must at least include purposes that edify the 'intellectual and moral culture'. Advancement of religion is also justifiable on this basis but there is reason to treat that category of charitable purpose separately.[107]

Facilitating freedom

The third head of charitable purpose under *Pemsel's case* is the advancement of religion. Advancement of religion is favoured because of its role in providing the moral foundations for western democracies and consequently the foundation for the freedoms upon which the rule of law rests. On this basis we can argue for extending the class beyond organisations pursuing the advancement of religion, to other organisations that similarly contribute to the common weal. Tocqueville observed with reference to the role of religion in the United States: 'Thus, while the law permits the Americans to do what they please, religion prevents them from conceiving, and forbids them to commit, what is rash or unjust.'[108] His point was that religion operated as a moral restraint on unbridled freedom to ensure that people in that newly democratic nation exercised their liberty as they should; that is, having regard to others. Three nineteenth century American cases discussed by Picarda[109] ground the charitable function of advancement of religion and the role religion plays in encouraging concern for others and self restraint. This is because these qualities are essential to civilisation and the welfare of society. In *Holland v Peck* the court held that religion was 'the surest basis on which to rest the superstructure of social order.'[110] In *People ex rel Seminary of Our Lady of Angels v Barber* religion was described as necessary to the advancement of civilisation and the promotion of the welfare of society'.[111] In *Gass and Bonta v Wilhite* it was held that religion is a 'valuable constituent in the character of our citizens'.[112] In such a context, advancement of religion is recognised as a charitable purpose enjoying the favour it does because of its role in underpinning

[106] Rob Atkinson, 'Altruism in Nonprofit Organisations' (1990) 31 *Boston College Law Review* 501, 565–566.
[107] *Pemsel's case* [1891] AC 531, 557-559 (Lord Watson).
[108] Alexis de Tocqueville, *Democracy in America* (George Lawrence trans, 1835, 1992 ed).
[109] H Picarda, *The Law and Practice Relating to Charities* (Butterworths, 3rd ed, 1999) 84.
[110] *Holland v Peck* (1842) 37 NC 255, 258.
[111] *People ex rel Seminary of Our Lady of Angels v Barber* (1886) 3 NY St Rep 367 affirmed in (1887) 13 NE 936.
[112] *Gass and Bonta v Wilhite* (1834) 32 Ky 170, 180.

the social order and creating social cohesion.[113] That religion operates as a force obliging people to be good and thus underpins society is anchored in a widely accepted proposition that even though there is a great diversity of belief amongst religions, in the out-workings of behaviour, all of the major religions teach the equivalent of what is known in most common law countries as the golden rule. The golden rule which is often articulated as, 'do to others as you would have them do to you'[114] exhorts adherents to behave altruistically. Under this argument, religion provides a glue that binds society together voluntarily into community of citizens – the Greek *polis* or the Latin *civitas*. Such a voluntary binding together reduces the need for coercive compliance through enforced law. It also provides the substrate for voluntary concern for others as religious messages 'conveyed from pulpits and in numerous publications' are effective at 'invigorating ... informal giving and support' even if 'not wholly consistent'.[115] This role of religion arguably underpins Lord Cross's pronouncement that the law 'assumes that any religion is at least likely to be better than none'.[116] Understood in this light, religion is favoured because it binds the *polis* together, which facilitates freedom. In other words the favour is extended to advancement of religion because it advances *liberty*.

If this recategorisation is accepted three alternative classes exist justifying favour on the grounds that they advance liberty,equality and fraternity. These are three concepts with deep historical and philosophical foundations. New Zealand courts and parliament could draw upon these foundations in the development of legislation or the common law.

While these three classes are collectively exhaustive they are not mutually exclusive categories. Different classes of favour might attach to one but not another. For example the advancement of liberty by facilitating freedom might only justify tax exemption but advancement of equality by dealing with disadvantage might justify both tax exemption and deductibility.

Here then are two ideas for developing access to favours based on contribution to public benefit.

Concluding Comments

New Zealand is well positioned to reform the law of charities further. In part, this may well be because it is managing its charity regulation better than many other common law countries. By separating the charity taxing function from the charity regulating function in 2005, New Zealand enabled itself to vary its regulatory space separate from its taxation agenda. By addressing private

[113] Patrick M Garry, 'Religious Freedom Deserves more than Neutrality: The Constitutional Argument for Non-Preferential Favouritism of Religion' (2005) 57(1) *Florida Law Review* 1, 12.
[114] *The Holy Bible New International Version* (1984) Luke 6:31.
[115] Ilana Krausman Ben-Amos, *The Culture of Giving: Informal Support and Gift-Exchange in Early Modern England*` (Cambridge University Press, 2008) 14 and chapter 7.
[116] *Neville Estates Ltd v Madden* [1962] 1 Ch 832, 853.

benefit directly and leaving alone the common law presumption of public benefit it may have avoided considerable angst. Common law development is a potential challenge, but if this is a pressing practical concern there are relatively simple strategies to have more cases come to higher courts, such as cost agreements regardless of outcome and test case funding. The option of adding further heads to the definition of charitable purpose could be taken up. It may not solve all challenges, but it will address some. It is an option adopted in many jurisdictions and case law on this approach is expected to emerge out of the UK over the next year or two.

If New Zealand wishes to press beyond these two options there are two further possibilities. One is to define the essence of charitable purposes as altruistic voluntary public benefiting purposes. This can be done by statute or case law development. Statute is the simpler, but the case law approach could be tried. A more expansive development is to extend regulation to the whole of the nonprofit sector, perhaps carving out purposes that are to be excluded from regulation. Within and between these options there will also be a variety of hybrid options, which New Zealand is well positioned to explore. The Charities Commission, appears to have the confidence of the sector and is not embroiled in political controversy. It can provide a platform for both debate and common law case development. The variety of responses internationally, and commentary on those responses, provide insights into what could, and sometimes what should not, be done. In simply being able to consider so many diverse options New Zealand is arguably the envy of other common law jurisdictions.

This options paper has been designed to encourage reflection on possibilities. Each of the options presented has advantages and disadvantages which should be examined further. We have also set out two possible alternative approaches to the question of how to control access to favours. We would be pleased to explore each and any of the options in greater depth either in writing or in person.

Schedule 1 Models of Extension of Charitable Purpose Legislation

1.1 Australia

Extension of Charitable Purpose Act 2004 (Cth)

4 Provision of child care services is a charitable purpose

(1) Without limiting what constitutes a charitable purpose, ***charitable purpose*** includes the provision of child care services on a non-profit basis.

(2) This section applies:

(a) for the purposes of a provision of an Act or instrument; and

(b) for the purpose of determining whether an institution or fund is, for the purposes of a provision of an Act or instrument, a charity.

(3) The fact that, because of this section, a purpose of an institution or fund is a charitable purpose does not affect the question whether that purpose is for the public benefit.

4A Provision of a rental dwelling under National Rental Affordability Scheme is a charitable purpose

(1) Without limiting what constitutes a charitable purpose, ***charitable purpose*** includes the provision of a rental dwelling if:

(a) the rental dwelling is provided by an entity that is:

(i) endorsed as exempt from income tax by the Commissioner of Taxation under section 50-105 of the *Income Tax Assessment Act 1997*; and

(ii) an approved participant in the National Rental Affordability Scheme; and

(b) either:

(i) an allocation in relation to the rental dwelling has been made to the approved participant by the Secretary that specifies a date in the first 2 NRAS years from which the allocation will operate or is taken to have operated; or

(ii) an allocation in relation to the rental dwelling has been reserved and it is genuinely intended by the approved participant that the conditions on which the allocation has been reserved will be fulfilled in the first 2 NRAS years.

(2) To avoid doubt, the provision of the rental dwelling by the entity has effect as a charitable purpose only during the incentive period for the allocation.

(3) This section applies:

(a) for the purposes of a provision of a taxation law or any instrument made, granted or issued under a taxation law; and

(b) for the purpose of determining whether an entity that has been endorsed as exempt from income tax by the Commissioner of Taxation under section 50-105 of the *Income Tax Assessment Act 1997*, remains, for the purposes of a provision of a taxation law or any instrument made, granted or issued under a taxation law, entitled to be so endorsed.

5 Self-help groups and closed or contemplative religious orders are for the public benefit

(1) Without limiting what constitutes a public benefit, an institution has a purpose that is for the public benefit to the extent that the institution is:

(a) an open and non-discriminatory self-help group (see subsection (2)); or

(b) a closed or contemplative religious order that regularly undertakes prayerful intervention at the request of members of the public.

(2) An institution is an ***open and non-discriminatory self-help group*** if:

(a) it is an association of individuals that has an open and non-discriminatory membership; and

(b) it is established for the purpose of assisting individuals affected by:

(i) a particular disadvantage or discrimination; or

(ii) a need, arising out of a particular disadvantage or discrimination, that is not being met; and

(c) it is made up of, and controlled by, individuals who are affected by the disadvantage or discrimination; and

(d) all of its criteria for membership relate to its purpose; and

(e) its membership is open to any individual who satisfies the criteria.

(3) This section applies for the purpose of determining whether an institution is a charity, for the purposes of a provision of an Act or instrument.

(4) The fact that, because of this section, a purpose of an institution is for the public benefit does not affect the question whether that purpose is a charitable purpose.

1.2 England and Wales

Charities Act 2006 c 50

Part 1 Meaning of "charity" and "charitable purpose"

1 Meaning of "charity"

(1) For the purposes of the law of England and Wales, "charity" means an institution which—

(a) is established for charitable purposes only, and

(b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities.

(2) The definition of "charity" in subsection (1) does not apply for the purposes of an enactment if a different definition of that term applies for those purposes by virtue of that or any other enactment.

(3) A reference in any enactment or document to a charity within the meaning of the Charitable Uses Act 1601 (c. 4) or the preamble to it is to be construed as a reference to a charity as defined by subsection (1).

2 Meaning of "charitable purpose"

(1) For the purposes of the law of England and Wales, a charitable purpose is a purpose which—

(a) falls within subsection (2), and

(b) is for the public benefit (see section 3).

(2) A purpose falls within this subsection if it falls within any of the following descriptions of purposes—

(a) the prevention or relief of poverty;

(b) the advancement of education;

(c) the advancement of religion;

(d) the advancement of health or the saving of lives;

(e) the advancement of citizenship or community development;

(f) the advancement of the arts, culture, heritage or science;

(g) the advancement of amateur sport;

(h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;

(i) the advancement of environmental protection or improvement;

(j) the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;

(k) the advancement of animal welfare;

(l) the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services;

(m) any other purposes within subsection (4).

(3) In subsection (2)–

(a) in paragraph (c) "religion" includes—

(i) a religion which involves belief in more than one god, and

(ii) a religion which does not involve belief in a god;

(b) in paragraph (d) "the advancement of health" includes the prevention or relief of sickness, disease or human suffering;

(c) paragraph (e) includes—

(i) rural or urban regeneration, and

(ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities;

(d) in paragraph (g) "sport" means sports or games which promote health by involving physical or mental skill or exertion;

(e) paragraph (j) includes relief given by the provision of accommodation or care to the persons mentioned in that paragraph; and

(f) in paragraph (l) "fire and rescue services" means services provided by fire and rescue authorities under Part 2 of the Fire and Rescue Services Act 2004 (c. 21).

(4) The purposes within this subsection (see subsection (2)(m)) are—

(a) any purposes not within paragraphs (a) to (l) of subsection (2) but recognised as charitable purposes under existing charity law or by virtue of section 1 of the Recreational Charities Act 1958 (c. 17);

(b) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of those paragraphs or paragraph (a) above; and,

(c) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised under charity law as falling within paragraph (b) above or this paragraph.

(5) Where any of the terms used in any of paragraphs (a) to (l) of subsection (2), or in subsection (3), has a particular meaning under charity law, the term is to be taken as having the same meaning where it appears in that provision.

(6) Any reference in any enactment or document (in whatever terms)—

(a) to charitable purposes, or

(b) to institutions having purposes that are charitable under charity law,

is to be construed in accordance with subsection (1).

(7) Subsection (6)—

(a) applies whether the enactment or document was passed or made before or after the passing of this Act, but

(b) does not apply where the context otherwise requires.

(8) In this section—

- "charity law" means the law relating to charities in England and Wales; and
- "existing charity law" means charity law as in force immediately before the day on which this section comes into force.

1.3 Northern Ireland

Charities Act (Northern Ireland) 2008 c 12

PART 1 INTRODUCTORY

Meaning of "charity"

1.–(1) For the purposes of the law of Northern Ireland, "charity" means an institution which—

(a) is established for charitable purposes only, and

(b) falls to be subject to the control of the Court in the exercise of its jurisdiction with respect to charities.

(2) The definition of "charity" in subsection (1) does not apply for the purposes of a statutory provision if a different definition of that term applies for those purposes by virtue of that or any other statutory provision.

(3) A charity shall be deemed for the purposes of this Act to have a permanent endowment unless all property held for the purposes of the charity may be expended for those purposes without distinction between capital and income, and in this Act "permanent endowment" means, in relation to any charity, property held subject to a restriction on its being expended for the purposes of the charity.

(4) The Commission may direct that for all or any of the purposes of this Act an institution established for any special purposes of or in connection with a charity (being charitable purposes) shall be treated as forming part of that charity or as forming a distinct charity.

(5) The Commission may direct that for all or any of the purposes of this Act two or more charities having the same charity trustees shall be treated as a single charity.

Meaning of "charitable purpose"

2.–(1) For the purposes of the law of Northern Ireland, a charitable purpose is a purpose which—

(a) falls within subsection (2), and

(b) is for the public benefit (see section 3).

(2) A purpose falls within this subsection if it falls within any of the following descriptions of purposes—

(a) the prevention or relief of poverty;

(b) the advancement of education;

(c) the advancement of religion;

(d) the advancement of health or the saving of lives;

(e) the advancement of citizenship or community development;

(f) the advancement of the arts, culture, heritage or science;

(g) the advancement of amateur sport;

(h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;

(i) the advancement of environmental protection or improvement;

(j) the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;

(k) the advancement of animal welfare;

(l) any other purposes within subsection (4).

(3) In subsection (2)—

(a) in paragraph (c) "religion" includes—

(i) a religion which involves belief in one god or more than one god, and

(ii) any analogous philosophical belief (whether or not involving belief in a god);

(b) in paragraph (d) "the advancement of health" includes the prevention or relief of sickness, disease or human suffering;

(c) paragraph (e) includes—

(i) rural or urban regeneration, and

(ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities;

(d) in paragraph (g) "sport" means sports or games which promote health by involving physical or mental skill or exertion;

(e) paragraph (h) includes the advancement of peace and good community relations; and

(f) paragraph (j) includes relief given by the provision of accommodation or care to the persons mentioned in that paragraph

(4) The purposes within this subsection (see subsection (2)(l)) are—

(a) any purposes not within paragraphs (a) to (k) of subsection (2) but recognised as charitable purposes under existing charity law or by virtue of section 1 of the Recreational Charities Act (Northern Ireland) 1958 (c. 16);

(b) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of those paragraphs or paragraph (a) above; and

(c) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised under charity law as falling within paragraph (b) above or this paragraph.

(5) Where any of the terms used in any of paragraphs (a) to (k) of subsection (2), or in subsection (3), has a particular meaning under charity law, the term is to be taken as having the same meaning where it appears in that provision.

(6) Any reference in any statutory provision or document (in whatever terms)–

(a) to charitable purposes, or

(b) to institutions having purposes that are charitable under charity law,

is to be construed in accordance with subsection (1).

(7) Subsection (6)—

(a) applies whether the statutory provision or document was passed or made before or after the passing of this Act, but

(b) does not apply where the context otherwise requires.

(8) In this section–

"charity law" means the law relating to charities in Northern Ireland; and

"existing charity law" means charity law as in operation immediately before the day on which this section comes into operation.

1.4 Scotland

Charities and Trustees Investment (Scotland) Act 2005 section 7

7 The charity test

(1) A body meets the charity test if—

(a) its purposes consist only of one or more of the charitable purposes, and

(b) it provides (or, in the case of an applicant, provides or intends to provide) public benefit in Scotland or elsewhere.

(2) The charitable purposes are—

(a) the prevention or relief of poverty,

(b) the advancement of education,

(c) the advancement of religion,

(d) the advancement of health,

(e) the saving of lives,

(f) the advancement of citizenship or community development,

(g) the advancement of the arts, heritage, culture or science,

(h) the advancement of public participation in sport,

(i) the provision of recreational facilities, or the organisation of recreational activities, with the object of improving the conditions of life for the persons for whom the facilities or activities are primarily intended,

(j) the advancement of human rights, conflict resolution or reconciliation,

(k) the promotion of religious or racial harmony,

(l) the promotion of equality and diversity,

(m) the advancement of environmental protection or improvement,

(n) the relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage,

(o) the advancement of animal welfare,

(p) any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.

(3) In subsection (2)—

(a) in paragraph (d), "the advancement of health" includes the prevention or relief of sickness, disease or human suffering,

(b) paragraph (f) includes—

(i) rural or urban regeneration, and

(ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities,

(c) in paragraph (h), "sport" means sport which involves physical skill and exertion,

(d) paragraph (i) applies only in relation to recreational facilities or activities which are—

(i) primarily intended for persons who have need of them by reason of their age, ill-health, disability, financial hardship or other disadvantage, or

(ii) available to members of the public at large or to male or female members of the public at large,

(e) paragraph (n) includes relief given by the provision of accommodation or care, and

(f) for the purposes of paragraph (p), the advancement of any philosophical belief (whether or not involving belief in a god) is analogous to the purpose set out in paragraph (c).

(4) A body which falls within paragraphs (a) and (b) of subsection (1) does not, despite that subsection, meet the charity test if—

(a) its constitution allows it to distribute or otherwise apply any of its property (on being wound up or at any other time) for a purpose which is not a charitable purpose,

(b) its constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities, or

(c) it is, or one of its purposes is to advance, a political party.

(5) The Scottish Ministers may by order disapply either or both of paragraphs (a) and (b) of subsection (4) in relation to any body or type of body specified in the order.

1.5 Ireland

Charities Act 2009 section 3

3.—

(1) For the purposes of this Act each of the following shall, subject to subsection (2), be a charitable purpose:

> (a) the prevention or relief of poverty or economic hardship;
>
> (b) the advancement of education;
>
> (c) the advancement of religion;
>
> (d) any other purpose that is of benefit to the community.

(2) A purpose shall not be a charitable purpose unless it is of public benefit.

(3) Subject to subsection (4), a gift shall not be of public benefit unless—

> (a) it is intended to benefit the public or a section of the public, and
>
> (b) in a case where it confers a benefit on a person other than in his or her capacity as a member of the public or a section of the public, any such benefit is reasonable in all of the circumstances, and is ancillary to, and necessary, for the furtherance of the public benefit.

(4) It shall be presumed, unless the contrary is proved, that a gift for the advancement of religion is of public benefit.

(5) The Authority shall not make a determination that a gift for the advancement of religion is not of public benefit without the consent of the Attorney General.

(6) A charitable gift for the purpose of the advancement of religion shall have effect, and the terms upon which it is given shall be construed, in accordance with the laws, canons, ordinances and tenets of the religion concerned.

(7) In determining whether a gift is of public benefit or not, account shall be taken of—

> (a) any limitation imposed by the donor of the gift on the class of persons who may benefit from the gift and whether or not such limitation is justified and reasonable, having regard to the nature of the purpose of the gift, and
>
> (b) the amount of any charge payable for any service provided in furtherance of the purpose for which the gift is given and whether it is likely to limit the number of persons or classes of person who will benefit from the gift.

(8) A limitation referred to in subsection (7) shall not be justified and reasonable if all of the intended beneficiaries of the gift or a significant number of them have a personal connection with the donor of the gift.

(9) There shall be no appeal to the Tribunal from a determination of the Authority to which subsection (5) applies.

(10) For the purposes of this section, a gift is not a gift for the advancement of religion if it is made to or for the benefit of an organisation or cult-

(a) the principal object of which is the making of profit, or

(b) that employs oppressive psychological manipulation—

(i) of its followers, or

(ii) for the purpose of gaining new followers.

(11) In this section "purpose that is of benefit to the community" includes—

(a) the advancement of community welfare including the relief of those in need by reason of youth, age, ill-health, or disability,

(b) the advancement of community development, including rural or urban regeneration,

(c) the promotion of civic responsibility or voluntary work,

(d) the promotion of health, including the prevention or relief of sickness, disease or human suffering,

(e) the advancement of conflict resolution or reconciliation,

(f) the promotion of religious or racial harmony and harmonious community relations,

(g) the protection of the natural environment,

(h) the advancement of environmental sustainability,

(i) the advancement of the efficient and effective use of the property of charitable organisations,

(j) the prevention or relief of suffering of animals,

(k) the advancement of the arts, culture, heritage or sciences, and

(l) the integration of those who are disadvantaged, and the promotion of their full participation, in society.

1.6 Barbados

Charities Act 1979 Volume VIII, Title XVIII, Chapter 243

2. For the purposes of this Act

…

'charity' means any institution, corporate or not, which is established for charitable objects or purposes, is intended to and does operate for the public benefit, and is subject to the control of the court in the exercise of its jurisdiction with respect to charities;

'charitable objects' has the same meaning as 'charitable purposes' as defined by section 3, and *vice versa*;

…

3. For the purposes of this Act, the expression 'charitable purposes' includes the following purposes, namely:

(a) the relief and prevention of poverty, howsoever caused;

(b) the relief and prevention of sickness and disability, both physical and mental, including:

(i) the provision and staffing of hospitals, nursing and convalescent homes and clinics;

(ii) the promotion of medical research;

(iii) the provision of advice, treatment or comfort; and

(iv) the establishment of homes, workshops or other centres for the disabled or the mentally or physically handicapped or any other disadvantaged or needy persons;

(c) the relief of the suffering and distress or disability caused by old age, including the provision of homes for the care and maintenance of the old, and of housing for old people adapted to their special needs;

(d) the relief of distress caused by natural disasters or sudden catastrophes;

(e) the advancement of education, including:

(i) the improvement of knowledge and its public dissemination in a way not constituting propaganda;

(ii) the provision of schools, colleges, universities and other like institutions;

(iii) the establishment in such institutions of professorships, fellowships, lectureships and other teaching and research posts;

(iv) the provision in such institutions of scholarships, bursaries, prizes and other awards,

(v) the provision both within and without such institutions of physical training and sport for young persons; and

(vi) the education of the public generally, including those not engaged in full-time study at such institution;

(f) the promotion and publication of research with a view to increasing the common stock of knowledge;

(g) the advancement of science and all recognised branches of learning and the establishment and maintenance of institutions therefor, including the support and maintenance of learned societies;

(h) the cultivation of public taste in aesthetic matters, including art, music, literature and fine craftsmanship, and the establishment and development of facilities for their practice;

(i) the provision and maintenance of museums and art galleries;

(j) the advancement of religion and the encouragement of belief in, and reverence for, a divine power, and of the practice of worship of that power, including:

(i) the organisation and carrying out of religious instruction and pastoral and missionary work in Barbados and overseas;

(ii) the provision and maintenance of buildings for worship and other religious uses;

(iii) the payment of stipends to and the provision of houses for ministers of religion, their widows and dependent children; and

(iv) other purposes tending to promote the moral or spiritual welfare of the community;

(k) the advancement of ethical and moral teachings and studies;

(l) the provision of social welfare services for those in need of them;

(m) the provision of housing for those in special need;

(n) the promotion and improvement of the national heritage, whether physical, environmental, artistic, cultural or otherwise;

(o) without prejudice to the operation of paragraph (e) (v), the promotion of sport and recreation, including the provision of facilities for recreation or other leisure-time occupations with the object of improving the conditions of life for those who have need of such facilities;

(p) the welfare of children, including prevention of cruelty to them;

(q) the promotion of the social welfare of the family, including the provision of facilities for family planning;

(r) the welfare of animals, including prevention of cruelty to them;

(s) the rehabilitation and resettlement of persons who have need of such services;

(t) the establishment in life of young people;

(u) the promotion and encouragement of projects for community development;

(v) the establishment of organisations to assist members of the community with special needs such as one-parent families, single persons with dependants, battered spouses, specially gifted children and minority groups;

(w) the provision of public work for the benefit of the community and the protection of the lives and property of the community;

(x) the advancement and improvement of the standards of efficiency of industry, commerce and agriculture;

(y) the maintenance and improvement of the efficiency of the armed forces and the Police Force and their welfare; and

(z) any purpose within the spirit of, and analogous to, the foregoing.

4. 'Public benefit' includes benefit of a kind comprised within the scope of charitable purposes which is available to members of the public at large or to a section of the public ascertained by reference to some specified geographical area, but does not include such a benefit if the persons for whom it is intended to be available are to be ascertained by reference to their relationship with some body or other person, whether that relationship is one of blood, status, contract or otherwise.

Schedule 2 United States Internal Revenue Code Exemptions

26 USC §501(c)(3)

(a) Exemption from taxation

An organization described in subsection (c) or (d) or section 401 (a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

…

(c) List of exempt organizations

The following organizations are referred to in subsection (a): …

…

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

26 USC §501(c)(4)

(a) Exemption from taxation

An organization described in subsection (c) or (d) or section 401 (a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

…

(c) List of exempt organizations

The following organizations are referred to in subsection (a):

…

(4)
(A) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

(B) Subparagraph (A) shall not apply to an entity unless no part of the net earnings of such entity inures to the benefit of any private shareholder or individual.

Schedule 3 Singapore Institutions of a Public Character

Income Tax (Approved Institutions of a Public Character) Regulations 2004

PART II APPROVAL OF INSTITUTIONS OF A PUBLIC CHARACTER

Conditions for approval of institution of a public character

3.—(1) An institution or fund may be approved as an institution of a public character if it satisfies the following conditions:

(*a*) it is—

(i) a charity registered under section 5 of the Act;

(ii) an exempt charity or other charity that is not required to be registered by virtue of section 5(4) of the Act;

or

(iii) an institution or fund that is described within paragraphs (*a*) to (*i*) of the definition of ''institution of a public character'' under section 40A of the Act;

(*b*) its governing instruments are approved by the Sector Administrator;

(*c*) its activities are exclusively beneficial to the community in Singapore as a whole and are not confined to sectional interests or groups of persons based on race, belief or religion;

(*d*) its activities meet its objectives under its governing instruments and the objectives of the Sector Administrator;

(*e*) it is administered by trustees—

(i) at least half of whom are independent; and

(ii) at least half of whom are citizens of Singapore;

(*f*) its trustees are accountable for the management of donations received;

(*g*) its auditor is approved by the Sector Administrator; and

(*h*) it meets such other conditions that the Sector Administrator may impose.

(2) The conditions set out in paragraph (1)(*c*) or (1)(*e*)(ii) may be waived in respect of an applicant if such waiver is approved by the Minister.

(3) The condition set out in paragraph (1)(*e*)(i) may be waived in respect of an applicant if such waiver is approved by the Commissioner.

(4) For the purposes of paragraph (1)(*e*)(i), a trustee shall be deemed to be not independent if—

(*a*) the trustee is related to any individual or institution that established the applicant;

(*b*) the trustee is related to any individual who is involved in the general control and management of the administration of any institution that established the applicant; or

(*c*) the trustee is one of a number of trustees of the applicant who are related to each other and who collectively constitute at least half of the total number of trustees of the applicant.

(5) For the purposes of paragraph (4), a trustee is related to an individual or another trustee if the trustee is a family member of that individual or other trustee and, for this purpose, a ‘‘family member’’ means a child, sibling, parent, spouse, spouse’s parent, spouse’s sibling, grandparent or grandchild.

(6) For the purposes of paragraph (4), a trustee is related to an institution if the trustee is—

(*a*) a director (other than an independent director) or senior executive of—

(i) the institution; or

(ii) a holding company or subsidiary of the institution,

where the institution is a company or corporation within the meaning of the Companies Act

(*b*) an officer of the institution, where the institution is a society registered under the Societies Act (Cap. 311);

(*c*) a trustee of the institution, where the institution is a trust; or (*d*) involved in the general control and management of the administration of the institution, in any other case.

(7) For the purposes of paragraph (1)(*e*)(ii), where the trustee is a company, it shall be treated as a citizen of Singapore if at least half of the number of directors of the company are citizens of Singapore.