

Politics and charity

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asks whether the water is getting clearer or muddier

This article considers the turbulent relationship of charities and politics and debates whether there is a judicial move towards creating a more harmonious relationship between the two objects. The issues are considered in light of the Charities Act 2006 (England and Wales) and the recent publication by the Charity Commission for England and Wales of guidance on campaigning and political activity by charities. The article suggests that there is scant authority for the current approach of the common law and that clear guidance is necessary. The article concludes that although the intentions of the Charity Commission may be honourable, the results are inconclusive, and are unlikely to clarify many of the issues.

THE DEFINITION OF CHARITY

The starting point for any foray into charity is the Statute of Elizabeth I, 43 Eliz I c4 1601 known as the Charitable Uses Act 1601. The preamble to the Act provides certain purposes that are considered charitable, including inter alia, the relief of the poor; the aged; the impotent; the maintenance of sick and maimed soldiers and mariners; and scholarly activities. It is these purposes that provide the basis for the modern law of charities. The purposes set out in the preamble, however, are not definitive, and other purposes may be construed as being charitable, as noted in *Morice v Bishop of Durham* (1805) 9 Ves 399 at 405.

The body of the Act has long since been repealed, but Morgan in *The Spirit of Charity* (Professional Lecture, Sheffield Hallam University, 3 April 2008) at 3.10 to 3.11 notes that the preamble has remained and has been interpreted by the courts and the Charity Commission as to what may be deemed charitable. Lord MacNaghten, in the seminal case of *Commissioners for the Special Purposes of the Income Tax v Pemsel* (1891) AC 531, set out the four heads of charity into which all charitable trusts must fall, which are as follows:

- relief of poverty;
- advancement of education;
- advancement of religion; and
- other purposes beneficial to the community not falling under any of the preceding heads.

Richardson in *Neville's Law of Trusts* (2004) 9th ed, p 119 notes that an object may fall within one of the heads, but that does not mean that it will qualify automatically as a charity, the law still requires the object to satisfy further tests. These are: that the trust is for public purpose; that the trust is for the benefit of the public; and that the trust is capable of being controlled by the court, if necessary.

The enactment of the Charities Act 2006 in England and Wales brought with it a number of developments to the law of charity. The tests of charitable purpose and public benefit remain, as per ss 2 and 3, but have been defined in a different

way. The new Act, in s 2, has increased the number of heads that were first set out in *Pemsel* from four to thirteen, and such purposes now explicitly include, inter alia, in addition to the original three heads in *Pemsel*:

- the advancement of health or the saving of lives;
- the advancement of amateur sport;
- the advancement of animal welfare.

This may look like a large increase, but in reality, however, it does not represent a substantive change as many of the new heads would have been accepted under the fourth head of *Pemsel's* case, that of "trusts for other purposes beneficial to the community not falling under any of the preceding heads".

The public benefit test has also been modified by the new Act. Prior to the Act, the majority of charitable trusts were presumed to be for the benefit of the public, unless proven otherwise, however, s 3 of the Charities Act 2006 now stipulates that "it is not to be presumed that a purpose of a particular description is for the public benefit" and all charities must explicitly determine how they benefit the public.

One aspect of charity law that has not changed with the implementation of the new Act is that a trust will not be charitable if its purposes are political. However, the Charity Commission in *Speaking Out: Guidance on Campaigning and Political Activity by Charities* (CC9) March 2008, Foreword, noted that this principle has caused "considerable debate" by academics and the judiciary when considering the relationship between charities and politics. Fundamentally, a charity must be established for a charitable purpose and in order to do so, it may undertake campaigning and political activity in order to achieve that objective, or to support its purposes. However, the decisions in *Bowman v Secular Society Ltd* [1917] AC 406 and *National Anti-Vivisection Society v IRC* [1948] AC 31 reflect that charities are not permitted to undertake political activity. Such a definition has led to authors, including DeHavilland in "Should Charities Have Greater Freedom to Engage in Campaigning and Political Lobbying" in *National Council for Voluntary Organisations* (2007) www.ncvo-vol.org.uk/press/speeches/index.asp?id=7216, demanding clarity as to what constitutes campaigning with political purpose as it is asserted that charities "currently operate in a minefield of confusion".

A HISTORY OF POLITICS IN CHARITIES?

Dunn notes in "Demanding Services or Servicing Demand? Charities, Regulation and the Policy Process" in (2008) 71 MLR 247 that charities and politics have, from the outset, had a symbiotic relationship where charities were born out of "an overtly political climate". Dunn comments at 252 that the 1601 Statute was thought to have been enacted to suppress social and political crises, and further, charities themselves began to form the backbone of a philanthropic era

where state welfare had yet to make inroads, thereby making charitable acts “political substitutes”. The strong influence of politics on charitable purposes from the outset is clear to see: education, relief of poverty, public health and the support of religion are all linked to political priorities, and little has changed over the decades since the enactment of the 1601 Statute. Certainly the extended charitable purposes set out in s 2 of the 2006 Act reflect the interplay between political interests and charity. Dunn, at 252, notes that the purposes “have a distinct public policy theme, extending from urban and rural regeneration ... to relief of employment ... and the promotion of human rights”. The latter clearly reflects the link between political priorities and charitable purposes, as the enactment of the (UK) Human Rights Act 1998 implicitly furthered the objectives of the charitable organisation Amnesty International, including, *inter alia*, mandating the right to life, the prohibition of torture, and the right to liberty and security.

Regardless, however, of the implicit affiliation between charity and politics, it is a long-standing principle that a voluntary organisation that wishes to acquire or retain charitable status must avoid having political purposes and to avoid engaging in most forms of political activity. This stems principally from one dictum, that of Lord Parker in *Bowman* at 442:

a trust for the attainment of political object has always been held invalid, not because it is illegal, but for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that gift to secure the change is a charitable gift.

Gousmett, in “Charities and Political Activity” in [2007] NZLJ 63, comments that Lord Parker established that it is not for the courts to determine whether a public benefit “would eventuate from a political activit[y]”. This principle was affirmed in *McGovern v Attorney General* [1982] 1 Ch 321, which further influenced the common law approach to charities and politics. This case determined the legal status of Amnesty International which proposed to set up a charitable trust. Amnesty International declared that the purpose of the trust was:

- looking after the needy, eg prisoners etc;
- promoting the abolition of capital and corporal punishment;
- researching and disseminating information on human rights;
- securing the release of political prisoners.

Slade J held that purposes 1 and 3 could be charitable, however, 2 and 4 were political. Slade J, at 509, determined further that the following matters could be construed as political purposes:

- furthering the interests of a particular political party;
- procuring changes in the laws of this country;
- bringing about changes in the laws of a foreign country;
- bringing about a reversal of government policy or of particular decisions of governmental authorities, in this country;
- bringing about a reversal of government policy or of particular decisions of governmental authorities in a foreign county.

Slade J's opinion was adopted in *Re Collier* [1998] 1 NZLR 81. Mrs Collier wished to set up a charitable trust to promote world peace. This would be by means of a telegram being sent to the United Nations urging soldiers to lay down their arms. Richardson noted that this was “overtly political and so failed”. However, such approaches are not without criticism.

Lord Porter commented, in his dissenting judgment in the case of *National Anti-Vivisection* that (at 54) “it is curious how scanty the authority is for the proposition that political objects are not charitable”. In *Public Trustee v Attorney General* [1997] 42 NSWLR 600 at 621, Santow J added to the debate by noting that “persuasion directed to political change is part and parcel of a democratic society in which ideas and agendas compete for attention and allegiance”. This echoes the considerations that charity was born out of the needs of politics, and if this is so, then Dal Pont in *Charity Law in Australia and New Zealand* (2000) p 212, may be correct in his suggestion that it is not unreasonable that the principle in the case of *Bowman* is “fraying around its edges, and perhaps even in substance”.

Nonetheless, there are arguments for denying charitable status to bodies engaged in political activity. Charities do not submit themselves to the scrutiny of the democratic electoral system, and as such, are not publicly accountable. O'Halloran, in *Charity Law and Social Inclusion, an International Study* (2007) 126, notes therefore that any political activity that a charity might undertake could be construed as undermining the “established democratic process”. Further, political campaigns can garner and lose support, which would impact on the requirement of public benefit, a crucial element in establishing charitable status, therefore to disassociate a group from political purposes would be a benefit for a body trying to attain charitable status.

CURRENT ISSUES

However, DeHavilland notes that there are uncertain demarcations between those bodies that may be seen as being too politically active to be able to attain charitable status, and those who campaign with a political purpose but it is not fatal to their charitable purpose. O'Halloran, at 125, distinguishes between bodies with political purposes and bodies that engage in political activities: the former are not charitable and the latter will be charitable if the activities are ancillary and subordinate to its non-political activities and purposes. Although this definition appears logical, it may not be as straightforward as it first appears. Santow, in “Charity in its Political Voice: a Tinkling Cymbal or Sounding Brass” (1999) 52 CLP 255, comments that charities that “proselytise risk their charitable status” because current law suggests that if an actual purpose, whether it central or otherwise, encourages a change of government law or policy, either nationally or internationally, then this will be fatal to its charitable status, as it is considered to be against the public interest. However, where the purpose is merely influential in changing public opinion as opposed to direct pressure on governmental policy, then the position is not so clear.

Santow argues that when charities adopt a political voice, it must be done so cautiously, “as a tinkling cymbal, not a sounding brass” as a charity cannot be certain whether the judiciary will consider even a conservative approach as merely an ancillary activity. DeHavilland supports this view, noting that it is easy to know what the law says, but far more difficult is knowing how to apply it to charitable activities. Indeed,

DeHavilland further suggests that some charities may be prevented from campaigning due to perceived political bias and confusion as to what would constitute an ancillary purpose. Dunn supports this concern, noting at 260, that charities with political experience, and with the resources and commitment, may be able to challenge the restrictions effectively, or even just test the law, but for other charities without such resources and experience, this may be too great a risk to take, as any Charity Commission inquiry may alienate support and thus undermine the organisation's status.

Dunn highlights further areas of concern, at 259: although charities may not have political purposes as their main objective, they may undertake political activities, including responding to consultations, presenting petitions and campaigning for changes in policy or regulations, but only where those activities are subsidiary to its main purpose and are presented in a manner that is non-partisan and with independence from any political party. However, there is no clear demarcation as to what constitutes subsidiary and what constitutes core activity, either in regulatory frameworks or in the common law. Nevertheless, Dunn argues at 259 that if there were clear demarcations then this may only add to the issues, as the regulatory rules would become inflexible and would not be subject to interpretation, which is key when assessing policies in a variety of contexts.

Regardless of the lack of standardisation, the English Charity Commission suggests in the *Survey of Campaigning Activities and Charity Commission Guidance (CC9)*, 2006, that charities may be self-regulating on this matter and do so by measuring the political activity boundary as no more than one fifth of their overall activities. Dunn argues that such self-regulation "leads to a degree of second guessing and ultimate censorship of an organisation's activities by trustees" when it may not even be appropriate. If bodies do carry out such self-regulation, then it is likely that a number of such bodies will have failed to apply for charitable status due to concerns that may, or may not, be unsubstantiated, thereby suggesting that the current regulatory framework supports arbitrary discrimination.

Regardless of the issues associated with political activity and its relation to charity, obtaining charitable status matters. Morgan notes at 4.2 to 4.6 that the significance of attaining charitable status can be great. Such advantages include tax benefits and the reputational benefit that can attach to those with organisations with charitable status.

Perhaps this is why there appears to be positive shift towards recognising the integral relationship between politics and charitable status. Baroness Kennedy in the *Advisory Group on Campaigning and the Voluntary Sector* (2007) at 2.3 notes that in the past the Charity Commission has interpreted court judgments on political activities with some rigidity, but welcomes their more contemporary flexible approach. Her Ladyship also suggests that charity and politics are unequivocally intertwined, and always have been, and proposes that Lord Parker's dicta in the case of *Bowman* "considerably overstated the position" with regard to the judiciary failing to recognise political objects as being charitable. Indeed, it is further suggested at 1.4.1 to 1.5.8 that the case of *Bowman* incorrectly influenced the development of guidelines on political activities and campaigning by charities, thus leading to the case of *McGovern's* strict reaffirmation of the common law, and such a conservative approach led to an inhibiting set of guidelines formulated by the Charity Commission. The Advisory Group acknowledges the established legal justifica-

tion that charities cannot undertake political purposes because the judicial system is not in a position to judge whether a political purpose is for the public benefit due to the links with the constitutional doctrine of the separation of powers between the executive and the legislature, and as such, acknowledges the proposal that the courts would be undermining the sovereignty of Parliament if they were to make a judgment on changing the law or policy. However, her Ladyship, at 1.6.1 and 1.6.2, is unconvinced that the "public policy considerations that underpin the restrictions on charities and campaigning" are justified and indeed are contradictory.

Baroness Kennedy's opinion echoes the considerations of Hammond J in *Re Collier* at 89-90:

Is it really inappropriate for a judge to recognise an issue as thoroughly worthy of public debate, even though the outcome of that debate might be to lead to a change in the law? After all, it is commonplace for judges to make suggestions themselves for changes in the law today ... And we do ... live in an age which enjoys the supposed benefits of [freedom of thought, conscience, religion and expression]. Should not the benefits be real in all respects, including the law of charities?

The author concurs with such an approach, and submits that if the court is able to make such a categorical decision in deciding what is not in the public's interest, as was decided by the Court in *National Anti-Vivisection Society*, then there can be little difference in deciding what is beneficial to the community in the context of political objects. As Santow rightly points out with regard to the *National Anti-Vivisection Society* case, the Court "had no difficulty in making such a judgment negatively - it held that the law change sought was not in the public interest". There is no judicial comment on this particular approach, although Dal Pont suggests at 213 that the courts should presume that the current law represents that which is beneficial to the community, which could be rebutted where appropriate.

Embracing just such an approach, as advocated by Dal Pont, may already be receiving favour. The Sensible Sentencing Group Trust was incorporated as a charitable trust in February 2002. It has as its aims:

1. That within New Zealand and for the benefit of both the local and national communities, provide in respect of sentencing for violent and serious criminal offences education as to relevant issues, options for reforms and the design and or drafting of appropriate mechanisms, procedures, regulations and or law for consideration of legislative adoption to help ensure all New Zealanders are adequately insulated and protected from violent and serious criminal offenders.
2. To do any act in furtherance of the charitable objects of the Trust.

Gousmett states that it is clear that this charity has at its core predominantly political agendas and activities, yet equally so, any individual who wishes to be informed of issues "relating to the sentencing of criminals for violent and serious offences would find the aims ... to be unquestionably of public benefit". Here then is clear evidence that the Charity Commission in New Zealand is able to determine an overtly political organisation as being in the public's interest. However, the author would argue that its very aims conflict with the matters elucidated by Slade J in the Amnesty International case, thereby suggesting a weakening in the approach

of the principles established in the case of *Bowman*. Nonetheless, Goumett notes that the Sensible Sentencing Trust "may well be justified in its concerns regarding its future ability to perform its charitable obligations" as the Charities Commission was reported to have commented that they would be investigating thoroughly any organisations that appear to be set up predominantly to advocate social change, and where this is not deemed to be charitable, then steps to deregulate would be undertaken. This is an uncomfortable notion, although in light of the current common law approach, it is perhaps unsurprising. However, the UK appears to be advocating a much more positive approach with regard to harmonising the issue between politics and charities.

THE CHARITY COMMISSION (E&W)

The Charity Commission for England and Wales has responded to the considerable public debate about the complex relationship between politics and charity, and in light of the 2006 Act its new guidelines on campaigning and political activity by charities, published in March 2008, attempt to simplify some of the issues. The Commission, in its Foreword, is at pains to comment however that the fundamentals of charity law on campaigning and political activity have not changed, although their latest guidance attempts to ensure its relevance in contemporary times.

The Charity Commission recognises at C2 that some charities have been overly cautious "and inclined to self censor their campaigning activity", and as a result the Commission wants charities to be confident about what charities are legitimately able to do under the constraints of the legislative framework. The Commission states clearly that a charity cannot have political activity as one of its charitable purposes, therefore an organisation with a political purpose, such as promoting a change in the law, cannot be a charity. This will be so even if the organisation has other purposes that are charitable. The Commission's argument at D3 is that it would involve the Commission or the court having to consider political questions, which they are unable to do constitutionally.

The author submits however that such decisions have already been made, at least in the negative, as discussed earlier in the case of *National Anti-Vivisection Society*, therefore if a decision is able to be made in the negative about political activity, then surely it must be able to be made in the positive? It appears that the Commission is unwilling to contemplate such an approach, and it seems that it will only construe political activity in the negative. However, this issue is still not actually clarified in its entirety. The Commission suggests at D3 that certain areas of political activity may not automatically be fatal to charitable status, for instance, charities established for the advancement of human rights, clearly bodies with political agendas, will not automatically be presumed to be pertaining to political activity. Instead, the Commission will explore with the said charities their boundaries and their overall purposes. The author suggests that this is a double-edged sword: on the one hand, the Commission is intimating that it is flexible in its approach and thus its criteria are open to interpretation, but on the other hand, for charities to submit themselves to such scrutiny when the boundaries are unclear means they risk, at best being seen as being scrutinised for their actions and so hazard losing support, and at worst, they risk losing charitable status. I

submit that few bodies will have the means or the will to test the guidelines, and if this is so, then self-regulation will still remain, regardless of the intentions of the Commission.

Interestingly even though the Charity Commission was quick to raise, and implicitly criticise, the concept of self-regulation at C2, it would appear to be implicitly supported by the Commission in its own guidance. The Commission confirms its stance at F1 that trustees must not be "overly cautious or risk averse" and yet the Commission is also keen to indicate that trustees must equally need "to consider the impact of the proposed campaign or political activity for the charity's reputation" as failing to do so will risk the charity's independence and reputation. Responsibility falls fully with the trustees of the charity and as such, it is likely that until such boundaries are tested to the full, a number of charities will still feel compelled to act cautiously. However, the Commission has attempted to reassure those bodies by noting at H that "trustees who have considered this guidance, and acted in good faith, should have few worries". Unfortunately, such vaguely-worded platitudes will do little to restore confidence to bodies that are already confused by the regulatory framework that is as yet untested and instead, the very issue of overt self-censoring that the Commission has been keen to extinguish will simply be implicitly supported.

CONCLUSION

It is undeniable that charities and politics share an intimate past, but their relationship throughout the decades has been turbulent and often contradictory. The law has tried to distinguish between charities carrying out political activity and having charitable purposes, in order to establish whether a body may obtain, or retain its charitable status, however, such attempts have not always been clear and have oftentimes been subject to criticism. The new English Act has done little to clarify these issues and DeHavilland would even go so far as to say that it is "woefully inadequate". As a result of such criticism, the Charity Commission for England and Wales published its most up-to-date guidance on campaigning and political activity in March 2008. This was an opportunity for the Commission to satisfy its critics and verify its requirements. Certainly, the guidance implies that it is fully understanding of the onerous burdens that are placed on trustees, and that suggests that it is keen to quash overt self-regulation on the part of charitable bodies. However, this article suggests that regardless of the intentions of the Charity Commission, the regulatory framework is still unclear and it is unlikely that it will fully reassure trustees. Those charitable institutions that have the funds, experience and resources to test the framework will be able to do so, and may be supported by the Commission for their intrepid stance, however, those organisations that do not have the funding or support may still be prone to strict self-regulation rather than risk submitting themselves to such scrutiny when potentially they have so much to lose. Nonetheless, the article submits that the Commission's attempt to clarify the law, albeit not without criticism, is a positive step, and one that may be construed as promoting a more flexible approach towards politics and charities, but until such times as the regulatory frameworks are challenged and tested, it is likely that the waters surrounding the subject of charities and their involvement with politics will remain muddled. □