

To the Board of Taxation:

I wish to make a short but firm submission against enacting a general definition of charity in legislation for Commonwealth purposes as is currently proposed.

Even if the definition could be refined so that it was a perfect reflection of the current case law (before adding the intended extensions), this process would have the effect of ossifying the law which has so successfully developed in the courts over the last 400 years and result in the definition being locked in a 2003 time warp. Whilst the possibility of legislative review from time to time exists - we all know that in the real world there are resource constraints and things get overlooked and neglected.

The case law shows that the Courts have proved not only capable of developing the law in a steady and responsive way, but they have also proved themselves a keen judge of who is genuinely charitable and who is worthy of public subsidy under this banner. I am less confident that a statutory definition will produce the same keenness. Instead we are likely to get silly and unfortunate decisions emerge based aspects of the definition which in retrospect seem silly or unfortunate. The current controversy dogging the draft definition is, I think, a foretaste of this.

These views are expressed in a more scholarly and effective way by my colleague John Emerson whose paper on this subject is attached by way of an extension of this submission.

I would recommend that the Commonwealth Parliament only pass laws to extend the common law definition in the way that they want - leaving the bulk of the definition in the hand of the Courts. If the Government is concerned that members of the public struggle to synthesise case law - that too is no reason for ossifying such an important concept in a statute. The Tax Office does already synthesise this law by way of rulings and it can continue to do so. The advantage with this approach is that if it gets it wrong we are not all stuck with stupid statute law. Rather the mistake can be fixed administratively or if need be by the next court case.

I note only by way of back-ground that I have been a taxation lawyer now for over 20 years and have practised in this area. I have practised with some of the major legal firms in Australia and sit on the Law Council's and Law Institute of Victoria's tax committees (chairing the latter).

I should say that these views are only my own and should not necessarily be attributed to Freehills (where I consult), Monash (where I lecture), the Law Council of Australia or the Law Institute of Victoria . I have no objection to this submission being made public.

I commend the Board in this important work.

Yours sincerely,

F John Morgan
Independent Tax Practitioner

Case Studies of Statutory Interventions into the Common Law Concept of Charity

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John Emerson
Partner, Freehills,
Melbourne

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QUT
Brisbane

Centre of Philanthropy and Nonprofit Studies
Queensland University of Technology
Brisbane, Australia

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The Queensland University of Technology
GPO Box 2434
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Phone: 07 3864 1020

Fax: 07 3864 9131
Email: cpns@qut.edu.au
<http://cpns.bus.qut.edu.au>

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Abstract

This paper considers four examples of statutory interventions into the common law concept of charity, namely, those of Pennsylvania, Barbados, the definition recommended by the Report of the Inquiry into the Definition of Charities in Australia, and the Recreational Charities legislation of United Kingdom. It comments on some issues affecting each style of intervention. The paper does not argue against statutory intervention but submits that legislative changes are best made by deeming a particular purpose to be charitable, or not charitable, so that, except to that extent, the common law concept remains intact – this is the approach adopted by the Recreational Charities legislation.

Introduction

I have chosen to discuss four statutory interventions that I think provide useful examples of different legislative approaches. In order of complexity, these are:

- the definition of "institutions for purely public charity" in Pennsylvania.
- the definition of "charity" in Barbados.
- the definition recommended by the Report of the [Australian] Inquiry into the Definition of Charities and Related Organisations publicly released on 24 August 2001.
- the Recreational Charities legislation of United Kingdom.

I comment in particular detail on the Pennsylvania definition as many of those comments are relevant to the other definitions.

Pennsylvania definition

Section 5 of the *Institutions for Purely Public Charity Act 1997* of Pennsylvania is outlined in Appendix 1.

Before the enactment of this Act, the qualities of an "institution of purely public charity" were apparently well settled. In a 1985 decision of the Supreme Court of Pennsylvania, *Hospital Utilisation Project v Commonwealth*¹, a five-part test had been articulated². An institution would be an institution of purely public charity if it:

- (a) advances a charitable purpose;
- (b) donates or renders gratuitously a substantial portion of its services;
- (c) benefits a substantial and indefinite class of persons who are legitimate subjects of charity;
- (d) relieves the government of some of its burden; and
- (e) operates entirely free from private profit motive.

The 44 words of the test established by the Supreme Court were codified by the legislation into more than 2,500 words.

The legislative intent outlined in section 2 includes the following statements:

"It is in the best interest of this Commonwealth and its citizens that the recognition of tax exempt status be accomplished in an orderly, uniform and economical manner."

¹ R 507 Pa 1, 487 A.2d 1306

² The issue was relevant because the constitution of Pennsylvania permitted its General Assembly to exempt from taxation "[i]nstitutions of purely public charity".

Lack of specific legislative standards defining the term "institutions of purely public charity" has lead to increasing confusion and confrontation among traditionally tax-exempt institutions and political subdivisions to the detriment of the public.

There is increasing concern that the eligibility standards for charitable tax exemptions are being applied inconsistently, which may violate the uniformity provision of the constitution of Pennsylvania.

It is the intent of the General Assembly to ensure that charitable and public funds are not unnecessarily diverted from the public good to litigate eligibility for tax-exempt status by providing standards to be applied uniformly to all proceedings throughout this Commonwealth for determining eligibility for exemption..."

The legislation requires the institution to satisfy the same five tests outlined in the *Hospital Utilisation Project Case*. However, the tests are amplified by imposing numerous conditions and financial formula.

I suggest that although the definition may achieve certain of its objectives (the formula should create certainty in most situations), the definition also illustrates how a comprehensive statutory definition can:

- contain arbitrary requirements;
- have the potential to inhibit flexibility in the development of the concept of charity;
- create a new set of interpretation and evidentiary issues; and
- present additional challenges to those administering charities.

Arbitrary requirements

One example of the many arbitrary provisions relates to the requirement that the institution must "donate or render gratuitously a substantial portion of its services"³. This is satisfied if any of seven tests are fulfilled. One test contains a requirement that "at least 10% of the individuals receiving goods or services from the institution either pay no fees or fees which were 90% or less of the cost of the goods or services provided to them, after consideration of any financial assistance provided to them by the institution"⁴.

This test allows no discretion in its interpretation. And so, if an institution sold goods to 10,000 people:

- and 1000 paid less than 90% of the cost of the goods, the test would be satisfied; but
- if only 999 had paid less than 90% of the cost, the test would be not satisfied.

In contrast, courts tend to adopt a substantive approach when applying the common law concept.

Ryland v FCT (1973) 128 CLR 404 illustrates how a court can interpret an Act benevolently in a charity context where the language of the Act avoids arbitrary formula or other absolute requirements. It was necessary for the High Court of Australia to decide whether a gift in a will "for the relief and assistance or support of former officers and members of the naval military or airforces of the [British] Commonwealth who are sick, wounded, disabled or out of employment"

³ Section 5(D)(1)

⁴ Section 5(D)(1)(IV)

was exempt from Australian estate duty (a type of death duty) on the basis that it was a gift to a fund "for the purpose of providing money for the relief of persons in necessitous circumstances in Australia".⁵

The Commissioner of Taxation argued that because the gift was not confined to benefit persons in necessitous circumstances **in Australia**, the gift was not exempt from estate duty.

Barwick CJ said, at page 411, that:

"Charity being involved, generosity rather than pedantry is called for in the construction of the section; so long as the predominant purpose of the fund is to afford relief to persons in Australia and there is no specific intention to include persons out of Australia within the scope of the gift, the fact that consistently with the language of the gift, relief might possibly be given out of the fund to persons not in Australia, will not in my opinion prevent the gift from qualifying for exemption from duty."

Menzies J said at page 415:

"The strength of the case for the Commissioner is in the words "the purpose" which do suggest an exclusive purpose. I have, however, reached the conclusion that there may be a fund for the purpose stated notwithstanding that it would not be in breach of trust to use moneys from the fund in such a way as, if looked at by itself, would not be for the relief of persons in necessitous circumstances in Australia. It seems to me that the question 'What is the purpose of the fund?' falls to be determined by a test different to that to be applied in determining whether a particular application of the fund would be in breach of trust. Parliament's language is not that of an equity lawyer. The legislative provision is dealing with a broad category and it is, I think, legitimate to seek the essential purpose for the establishment of the fund. If, upon the broad general view, it was to provide relief for needy persons in Australia, that will be enough, notwithstanding that without breach of trust, a payment could be made to a person outside Australia."⁶

In summary, even if a court is disposed to a generous interpretation of a statutory provision in the context of charity, unless permitted expressly to do so by the Act, it will not have that opportunity where financial formula are used.

Flexibility in the development of the concept

The flexibility in the development of the common law concept was commented upon by two Court of Appeal judges in *Incorporated Council of Law Reporting for England and Wales v A-G* [1972] Ch 73.

Russell LJ when explaining the history of the development of the common law concept referred to the use of analogies. At pages 87 and 88 he said:

"On [the point as to whether the sound development and administration of the law is charitable], the law is rooted in the Statute of Elizabeth I, a statute the object of which was the oversight and reform of abuses in the administration of property devoted by donors to purposes which were regarded as worthy of such protection as being

⁵ Section 8 (5) of the *Estate Duty Assessment Act* 1914-70 provided that "duty shall not be assessed or payable upon so much of the estate as is devised or bequeathed or passes by gift inter vivos or settlement ... (c) for the establishment and maintenance of a fund, or to a fund established and maintained ... for the purpose of providing money for the relief of persons in necessitous circumstances in Australia."

⁶ Another example is that despite the public benefit requirement of a charitable purpose, an incidental private benefit is acceptable *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 583

charitable. The preamble to the Statute listed certain examples of purposes worthy of such protection. These were at an early stage regarded merely as examples, and have through the centuries been regarded as examples or signposts for the courts in the differing circumstances of a developing civilisation and economy. Sometimes recourse has been made by the courts to the instances given in the preamble in order to see whether in a given case sufficient analogy with some decided case in which already a previous sufficient analogy has been found. Of this approach perhaps the most obvious example is the provision of crematoria by analogy with the provision of burial grounds by analogy with the upkeep of churchyards by analogy with the repair of churches. On other occasions a decision in favour or against a purpose being charitable has been based in terms upon a more general question whether the purpose is or is not within the "spirit and intendment" of the Statute of Elizabeth and in particular its preamble.

...

The Statute of Elizabeth I was a statute to reform abuses: in such circumstances and in that age the courts of this country were not inclined to be restricted in their implementation of Parliament's desire for reform...: and they deliberately kept open their ability to intervene when they thought necessary in cases not specifically mentioned by applying as the test whether any particular case of abuse of funds or property was within the "mischief" or "equity" of the Statute"

For myself I believe this rather vague and undefined approach is the correct one, with analogy, its handmaid..."

At pages 94 and 95, Sachs LJ said in relation to the fourth *Pemsel* head of charity⁷ as follows:

"... the wider test – advancement of purposes beneficial to the community or objects of general public utility – has an admirable breadth and flexibility which enables it to be reasonably applied from generation to generation to meet changing circumstances: it has thus such patent advantages that for my part, I appreciate the wisdom of the legislation in refraining from providing a detailed definition of charitable purposes in the 1960 Act...any statutory definition might well produce a fresh spate of litigation and provide a set of undesirable artificial distinctions".

The Pennsylvania definition lacks flexibility. Indeed, this seems to be a deliberate outcome⁸.

Although certainty has advantages, it can come at a high price. It would be very difficult in my view for a court to do other than apply the terms of the definition strictly as expressed, thereby resulting in an entrenched application of the meaning of charity incapable of meeting changing circumstances from generation to generation⁹ except by parliament. It exemplifies the statement that the more that detail as to what is meant by "public benefit" is added to a definition, "the fewer appear the advantages of a new definition. Instead of being simplified, the law would be ossified"¹⁰.

⁷As outlined by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 at 583

⁸This intention is outlined in section 2 of the Act.

⁹See Sachs LJ above.

¹⁰The White Paper following the Woodfield Report, Secretary of the State for the Home Department, Charities: A Framework for the Future, Her Majesty's Stationery Office, London, Cm 694, 1989 at page 7

Finally, it is interesting I think to reflect on the comments in May 1983 of Lord Justice Sir Robert Goff when he delivered the Maccabaeian Lecture on Jurisprudence¹¹. The lecture was called "*The Search for Principle*".

He said at page 172:

"For the greater part of the nineteenth century ... the development of the common law was the work of the judges alone; and an admirable example of this type of development is to be found in the law of the sale of goods ... If we thumb our way through the law reports of [the nineteenth century], we can watch the principles developing ... Then came the Sale of Goods Act 1893, and we can see the effect of codification. Codification is sometimes necessary: ***but it should only be undertaken where the good it may do is perceived to outweigh the harm it must do, and that is, generally speaking, only likely to be the case where substantial reforms are both necessary and urgent.*** Where the intention is merely to restate the existing law in a codified form, the code is like a photograph: it records the law as it has developed at a particular point of time. Moreover, it is not possible for any code to provide an absolutely accurate, still less a complete, statement of the law on any topic. The camera will, as usual, lie." [emphasis added]

New interpretation and evidentiary issues

The passing of any legislative provision introduces the potential for disputes as to its meaning and how to evidence its satisfaction. This occurs in particular where legislation attempts to enact new concepts.

The Pennsylvania definition has many areas of possible dispute.

For example, one provision has a criteria that grants be made "to an institution of purely public charity [or] an entity similarly recognised by another state or foreign jurisdiction, ..." ¹²

The words "similarly recognised" raise issues as to what degree of similarity is required. Is another 2500 word definition necessary in the foreign jurisdiction? Must the recognition be by legislation or would a common law concept in similar terms to the basic criteria outlined in the *Hospitals Utilisation Case* be sufficient?

Another area for dispute is that of evidencing compliance with a statutory requirement. Four tests must be satisfied for an institution to operate "entirely free from public profit motive". The third is that "[c]ompensation, including benefits, of any director, officer or employee, is not based primarily upon the financial performance of the institution." ¹³

How will it be decided whether or not compensation is based "primarily" upon the financial performance of the institution. Is this to be determined having regard to the terms of the employment contract or must evidence be provided by the persons deciding the compensation as to what factors they took into account when deciding the remuneration level?

Additional administrative requirements and compliance costs

The advantage of a definition of this type is that at least to the extent of the numerous formula, certainty as to compliance can be arithmetically calculated.

¹¹ Published in the *Proceedings of the British Academy* for 1983.

¹² Section 5(D)(1)(VII)

¹³ Section 5(C)(3)

However, it must be somewhat daunting for some institutions to comply with the requirements. It would be necessary to carefully and perhaps artificially structure the operations of the institution so that the various applicable formula are complied with on an ongoing basis.¹⁴ Presumably, this would require detailed accounting advice and auditing.

Barbados

This definition is in Appendix 2. Although comprehensive, the definition is inclusive and does not purport to describe all that is charitable. Its inclusiveness and omission of formula seems to avoid the arbitrariness, inflexibility and compliance issues mentioned above.

However, the Barbados definition could well result in interpretative issues, simply by introducing new concepts.

One risk with a comprehensive definition is that at least some matters listed will be construed by a court as covering the field in the particular area.

For example, section 3(e)(v) illustrates, inclusively, one method of advancement of education, namely, the provision "both within and without such institutions of physical training and sport for young persons". This raises the following questions:

- if physical training and sport were provided for mature age university students, would that be charitable under this definition? What other reason was there for inserting the words "for young persons"?
- does section 3(z), by adopting terminology similar to that adopted with regard to the preamble to the Statute of Elizabeth, namely, "any purpose within the spirit of, and analogous to, the foregoing", permit the provision of physical training and sport to mature age students to be charitable?
- do the words "both within and without such institutions" mean that any physical training and sport for young persons is charitable, whether or not connected with an educational institution?¹⁵

A further difficulty with comprehensive lists is that they invite lobbying by particular interest groups for the listing of their own purpose and a series of stopgap additions can add to confusion regarding the interpretation of the list. They also might invite successive governments to amend particular provisions to suit their particular ideologies.

Other interpretative issues include:

- does the use of terms derived from the *Pemsel* heads (eg, the advancement of education) permit reference to be had to the common law concept or must the courts make a "fresh start"?
- what place do the common law rules regarding political purposes¹⁶ and governmental purposes¹⁷ have when applying the definition?

¹⁴ Although the averaging of data is permitted for some purposes (section 5(D)(2))

¹⁵ See *Re Laidlaw Foundation* (1984) 13 DLR (4th) 491

¹⁶ See, for example, *Re Hopkinson (dec)* [1949] 1 All ER 346

¹⁷ See, for example, *Re Cain (dec)* [1950] VLR 382

Definition recommended by the Committee conducting the Inquiry into the Definition of Charities and Related Organisations in Australia

This is outlined in Appendix 3.

The recommended definition comprises a list of categories but unlike the Barbados definition, purports to exclusively list the categories by commencing with the words "Charitable purposes shall be:" However, inclusiveness is permitted within a number of the categories. For example, one category of charitable purpose is:

- " the advancement of culture, which without limitation includes:*
- o *the promotion and fostering of culture; and*
 - o *the care, preservation and protection of the Australian heritage;"*

The recommended definition is an expansion of the four *Pemsel* heads of charity and includes similar language. It arguably does not materially differ from the common law concept.

The Report includes recommendations in relation to a number of other principles the courts have applied in determining whether a body is a charity. These include issues such as public benefit, political purposes, illegality, and governmental function.

The recommended definition of charitable purposes avoids the arbitrary formula and compliance issues of Pennsylvania. It also usefully states more fully the common law concept – it is more "user friendly".

However, It does not have a "spirit of, and analogous to" provision similar to that in section 3(z) of the Barbados definition to enable courts to develop the definition and so, at least in the categories not specified as inclusive¹⁸ may result in an ossification of the law or require further legislative intervention.¹⁹

Other examples of issues which arise from the recommended definition are:

- (a) does the use of terms also used in the *Pemsel* heads (eg, the advancement of education) permit reference to be had to the common law concept or must the courts make a "fresh start"?
- (b) as "advancement" is taken to include "protection, maintenance, support, research, improvement or enhancement", is a special meaning intended when after using the word "advancement", words of similar meaning are used, for example, the "care support and protection" of the aged?
- (c) does "health" include animal and plant health?
- (d) is the care, support and protection of the aged intended to be a charitable purpose, even if the persons receiving support are not afflicted?

¹⁸ Namely, the advancement of education, the advancement of religion, and the advancement of the natural environment.

¹⁹ See footnote 10.

- (e) is the use of the term "Australian heritage" intended to mean that the preservation of the heritage of another country is not charitable?

The Report outlines the views of the committee on a number of these issues and if it is enacted in the recommended form, it could well be necessary to refer to the Report for guidance as to the legislative intent.²⁰

The Report stresses that "whatever [definition] is adopted for determining whether a purpose is a charitable purpose, there needs clearly to be set out a number of additional characteristics or conditions which must be present before an entity is to be regarded as charitable Thus a charitable entity must be not-for-profit. Its essential or dominant purpose or purposes must be altruistic and for the public benefit ... An entity's activities must support its dominant purpose or purposes, and the purposes and the activities of an entity must not be unlawful or contrary to public policy, nor promote a political party or a candidate for political office."²¹

One wonders how provisions covering these areas could be appropriately framed. Would we see definitions of public benefit or a description of what was public policy? It may well be impossible to adequately draft these provisions.

Recreational Charities legislation

Section 1 of the *Recreational Charities Act* (UK) is outlined in Appendix 4. Similar legislation exists in New Zealand, Queensland, Western Australia, South Australia and Tasmania. The definition of course is not comprehensive and merely extends the common law definition.

I would argue that the advantages of the *Recreational Charities* style of statutory intervention is that it:

- (a) retains as a base the common law concept (with its flexibility to develop)
- (b) changes only what parliament intends to be changed;
- (c) if a change is made which results in unintended consequences, that consequence can be addressed by parliament in a more confined statutory environment;
- (d) if formula are avoided, the courts will remain permitted to adopt a generous interpretation; and
- (e) avoids, except to the extent of the change, using language attempting to re-state the common law concept but which may indeed result in other intended changes to that concept.

Conclusion

In my view, the approach of the *Recreational Charities* legislation is the safest option for the reasons outlined in the preceding paragraph. The approach of the Australian Inquiry is, though,

²⁰ This may be possible under section 15AB of the Acts Interpretation Act 1901 of Australia where in certain circumstances in relation to the interpretation of an act, authority is given to refer, among other things, to reports of an inquiry laid before a house of parliament.

²¹ At page 154

more useful for community use as it attempts a comprehensive description. If the issues raised above can be addressed in the drafting of the legislation to give effect to the recommendations of the Inquiry, and, in particular, by clearly preserving the common law concepts except where there is an intention to do otherwise, an effective statutory description is possible based on the recommendations.

APPENDIX 1**Section 5 of *Institutions of Purely Public Charity Act (1997)* - Pennsylvania****SECTION 5. CRITERIA FOR INSTITUTIONS OF PURELY PUBLIC CHARITY.****(A) GENERAL RULE**

An institution of purely public charity is an institution which meets the criteria set forth in subsections (B), (C), (D), (E) and (F). An institution which meets the criteria specified in this section shall be considered to be founded, endowed and maintained by public or private charity.

(B) CHARITABLE PURPOSE

The institution must advance a charitable purpose. This criterion is satisfied if the institution is organised and operated primarily to fulfil any one or combination of the following purposes:

- (1) Relief of poverty.
- (2) Advancement and provision of education. This paragraph includes postsecondary education.
- (3) Advancement of religion.
- (4) Prevention and treatment of disease or injury, including mental retardation and mental disorders.
- (5) Government or municipal purposes.
- (6) Accomplishment of a purpose which is recognised as important and beneficial to the public and which advances social, moral or physical objectives.

(C) PRIVATE PROFIT MOTIVE

The institution must operate entirely free from private profit motive. Notwithstanding whether the institution's revenues exceed its expenses, this criterion is satisfied if the institution meets all of the following:

- (1) Neither the institution's net earnings nor donations which it receives inures to the benefit of private shareholders or other individuals, as the private inurement standard is interpreted under section 501(C)(3) of the Internal Revenue Code of 1986 (Public Law 99-514, 26 USC s501 (C)(3)).
- (2) The institution applies or reserves all revenue, including contributions, in excess of expenses in furtherance of its charitable purpose or to funding of other institutions which meet the provisions of this subsection and subsection (B).
- (3) Compensation, including benefits, of any director, officer or employee, is not based primarily upon the financial performance of the institution.
- (4) The governing body of the institution of purely public charity has adopted, as part of its articles of incorporation, or if unincorporated, other governing legal documents, a provision that expressly prohibits the use of any surplus funds for private inurement to any person in the event of a sale or dissolution of the institution of purely public charity.

(D) COMMUNITY SERVICE

(1) The institution must donate or render gratuitously a substantial portion of its services. This criterion is satisfied if the institution benefits the community by actually providing any one of the following:

- (I) Goods or services to all who seek them without regard to their ability to pay for what they receive if all of the following apply:
 - (A) The institution has a written policy to this effect.
 - (B) The institution has published this policy in a reasonable manner.
 - (C) The institution provides uncompensated goods or services at least equal to 75% of the institution's net operating income but not less than 3% of the institution's total operating expenses.
- (II) Goods or services for fees that are based upon the recipient's ability to pay for them if all of the following apply:
 - (A) The institution can demonstrate that it has implemented a written policy and a written schedule of fees based on individual or family

- income. An institution will meet the requirement of this clause if the institution consistently applies a formula to all individuals requesting consideration of reduced fees which is in part based on individual or family income.
- (B) At least 20% of the individuals receiving goods or services from the institution pay no fee or a fee which is lower than the cost of the goods or services provided by the institution.
 - (C) At least 10% of the individuals receiving goods or services from the institution receive a reduction in fees or at least 10% of the cost of the goods or services provided to them.
 - (D) No individual receiving goods or services from the institution pays a fee which is equal to or greater than the cost of the goods or services provided to them, or the goods or services provided to the individuals described in clause (b) are comparable in quality and quantity to the goods or services provided to those individuals who pay a fee which is equal to or greater than the cost of the goods or services provided to them.
- (III) Wholly gratuitous goods or services to at least 5% of those receiving similar goods or services from the institution.
 - (IV) Financial assistance or uncompensated goods or services to at least 20% of those receiving similar goods or services from the institution if at least 10% of the individuals receiving goods or services from the institution either paid no fees or fees which were 90% or less of the cost of the goods or services provided to them, after consideration of any financial assistance provided to them by the institution.
 - (V) Uncompensated goods or services which, in the aggregate, are equal to at least 5% of the institution's costs of providing goods or services.
 - (VI) Goods or services at no fee or reduced fees to government agencies or goods or services to individuals eligible for government programs if any one of the following applies:
 - (A) The institution receives 75% or more of its gross operating revenue from grants or fee-for-service payments by government agencies and if the aggregate amount of fee-for-service payments from government agencies does not exceed 95% of the institution's costs of providing goods or services to the individuals for whom the fee-for-services payments are made.
 - (B) The institution provides goods or services to individuals with mental retardation, to individuals who need mental health services, to members of an individual's family or guardian in support of such goods or services or to individuals who are dependent, neglected or delinquent children, as long as the institution performs duties that would otherwise be the responsibility of government and the institution is restricted in its ability to retain revenue over expenses or voluntary contributions by any one of the following statutes or regulations or by contractual limitations with county children and youth offices in this Commonwealth:
 - (I) Sections 1315(C) and 1905(D) of the Social Security Act (49 Stat 620, 42 USC ss1396D(D) and 1396N(C)).
 - (II) 42 CFR 440.150 (relating to intermediate care facility (ICF/MR) services.
 - (III) 42 CFR pt 483 subpt 1 (relating to conditions of participation for intermediate care facilities for the mentally retarded).
 - (IV) The Act of October 20, 1966 (3rd SP SESS, PL96, No 6), known as the Mental Health and Mental Retardation Act of 1966.

- (V) Articles II, VII, IX and X of the Act of June 13, 1967 (PL 31, No 21), known as the Public Welfare Code.
 - (VI) 23 PA CS Ch 63 (relating to child protective services).
 - (VII) 42 PA C S Ch 63 (relating to juvenile matters).
 - (VIII) 55 PA Code CHS 3170 (relating to allowable costs and procedures for county children and youth), 3680 (relating to administration and operation of a children and youth social service agency) 4300 (relating to county mental health and mental retardation fiscal manual), 6400 (relating to community homes for individuals with mental retardation), 6500 (relating to family living homes), 6210 (relating to participation requirements for the intermediate care facilities for the mentally retarded program), 6211 (relating to allowable cost reimbursement for non-state operated intermediate care facilities for the mentally retarded) and 6600 (relating to intermediate care facilities for and 6600 (relating to intermediate care facilities for and 6600 (relating to intermediate care facilities for the mentally retarded).
- (VII) Fundraising on behalf of, or grants to, an institution of purely public charity, an entity similarly recognised by another state or foreign jurisdiction, a qualifying religious organisation or a government agency and actual contribution of a substantial portion of the funds raised or contributions received to an institution of purely public charity, an entity similarly recognised by another state or foreign jurisdiction, a qualifying religious organisation or a government agency.
- (2) The institution may elect to average the applicable data for its five most recently completed fiscal years for the purposes of calculating any formula or meeting any quantitative standard in paragraph (A).
- (3) For the purposes of calculating the number of individuals for use in the percentage calculations in this subsection, educational institutions may use full time equivalent students as defined by the Department of Education.
- (4) For purposes of this subsection, the term "uncompensated goods or services" shall be limited to any of the following:
- (I) The full cost of all goods or services provided by the institution for which the institution has not received monetary compensation or the difference between the full cost and any lesser fee received for the goods or services, including the cost of the goods or services provided to individuals unable to pay.
 - (II) The difference between the full cost of education and research programs provided by or participated in by the institution and the payment made to the institution to support the education and research programs.
 - (III) The difference between the full cost of providing the goods or services and the payment made to the institution under any government program, including individuals covered by Medicare or Medicaid.
 - (IV) The difference between the full cost of the community services which the institution provides or participates in and the payment made to the institution to support such community services.
 - (V) The reasonable value of any moneys, property, goods or services donated by a primary donor to an institution of purely public charity or to a government agency or the reasonable value of the net donation made by a secondary donor to a primary donor. As used in this subparagraph, the following words and phrases shall have the following meanings:

"Net donation"

In the case of a donation of money, property or identical goods and services made by a secondary donor, the difference between

the value of the donation made by the secondary donor and the value of the donation made by the primary donor, provided such value is positive.

"Primary donor"

An institution which makes a donation of any money, property, goods or services to an institution of purely public charity.

"Secondary donor"

An institution which receives a donation of any money, property, goods or services from a primary donor and then makes a donation back to that primary donor within three years of having received such donation.

- (VI) The reasonable value of volunteer assistance donated by individuals who are involved or assist in the provision of goods or services by the institution. The reasonable value of volunteer assistance, computed on an hourly basis, shall not exceed the "Statewide Average Weekly Wage" as defined in section 105.1 of the Act of 2 June 1915 (P L 736, No 338), known as the Workers' Compensation Act divided by 40.
- (VII) The cost of goods or services provided by an institution licensed by the Department of Health or the Department of Public Welfare to individuals who are unable to pay provided that reasonable and customary collection efforts have been made by the institution.
- (VIII) The value of any voluntary agreement as set forth in section 7(C).

(E) **CHARITY TO PERSONS**

- (1) The institution must benefit a substantial and indefinite class of persons who are legitimate subjects of charity.
- (2) As used in this subsection, the following words and phrases shall have the meanings given to them in this paragraph:
 - "Legitimate subjects of charity"**
Those individuals who are unable to provide themselves with what the institution provides for them.
 - "Substantial and indefinite class of persons"**
Persons not predetermined in number, provided that, where the goods or services are received primarily by members of the institution, membership cannot be predetermined in number and cannot be arbitrarily denied by a vote of the existing members. This subsection specifically recognises that the use of admissions criteria and enrolment limitations by educational institutions do not constitute predetermined membership or arbitrary restrictions on membership so as to violate this section and recognises that an institution may reasonably deny membership based on the types of services it provides, as long as denial is not in violation of federal or state antidiscrimination laws, such as the Civil Rights Act of 1964 (Public Law 88-352, 78 stat 241) and the Act of 27 October 1955 (P L 744, No 222), known as the Pennsylvania Human Relations Act.
- (3) An institution shall be considered to benefit a substantial and indefinite class of persons who are legitimate subjects of charity if the institution is primarily engaged in fundraising on behalf of or making grants to an institution of purely public charity, an entity similarly recognised by another state or foreign jurisdiction, a qualifying religious organisation or a government agency and there is actual contribution of a substantial portion of the funds raised or contributions received to an institution of purely public charity, an entity similarly recognised by another state or foreign jurisdiction, a qualifying religious organisation or a government agency.
- (4) An institution which operates exclusively on a voluntary basis to provide emergency health and safety services to the community or an institution which provides funds and support exclusively to volunteer institutions which provide emergency health and safety services to the community shall be considered to

benefit a substantial and indefinite class of persons who are legitimate subjects of charity.

- (5) An institution shall not be considered to benefit a substantial and indefinite class of persons who are legitimate subjects of charity if:
- (I) the institution is not qualified under section 501(D)(3) of the Internal Revenue Code of 1986 (26 USC s501(C)(3)); and
 - (II) the institution is qualified under section 501(C)(4), (5), (6), (7), (8) or (9) of the Internal Revenue Code of 1986 (26 USC s501(C)(4), (5), (6), (7), (8) or (9)) as any of the following:
 - (A) an association of employees, the membership of which is limited to the employees of a designated person or persons.
 - (B) a labor organisation.
 - (C) an agricultural or horticultural organisation.
 - (D) a business league, chamber of commerce, real estate board, board of trade or professional sports league.
 - (E) a club organised for pleasure or recreation.
 - (F) a fraternal beneficiary society, order or association.
- (F) **GOVERNMENT SERVICE**
 The institution must relieve the government of some of its burden. This criterion is satisfied if the institution meets any one of the following:
- (1) Provides a service to the public that the government would otherwise be obliged to fund or to provide directly or indirectly or to assure that a similar institution exists to provide the service.
 - (2) Provides services in furtherance of its charitable purpose which are either the responsibility of the government by law or which historically have been assumed or offered or funded by the government.
 - (3) Receives on a regular basis payments for services rendered under a government program if the payments are less than the full costs incurred by the institution, as determined by generally accepted accounting principles.
 - (4) Provides a service to the public which directly or indirectly reduces dependence on government programs or relieves or lessens the burden borne by government for the advancement of social, moral, educational or physical objectives.
 - (5) Advances or promotes religion and is owned and operated by a corporation or other entity as a religious ministry and otherwise satisfies the criteria set forth in section 5.
 - (6) Has a voluntary agreement under section 7.

APPENDIX 2**Barbados*****Laws of Barbados, Volume VIII, Title XVIII, Chapter 243, Charities***

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 institutions;
- (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.

APPENDIX 3

Definition Recommended by the Committee conducting the Inquiry into the Definition of Charities and Related Organisations in Australia

Recommendation 13

Charitable purposes shall be:

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

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

APPENDIX 4
Recreational Charities Act 1958 (UK)

Section 1 provides as follows:

- (1) Subject to the provisions of this Act, it shall be and be deemed always to have been charitable to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare:

Provided that nothing in this section shall be taken to derogate from the principle that a trust or institution to be charitable must be for the public benefit.

- (2) The requirement of the foregoing subsection that the facilities are provided in the interests of social welfare shall not be treated as satisfied unless –
- (a) the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended; and
 - (b) either -
 - (i) those persons have need of such facilities as aforesaid by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances; or
 - (ii) the facilities are to be available to the members or female members of the public at large.

- (2) Subject to the said requirement, subsection (1) of this section applies in particular to the provision of facilities at village halls, community centres and women's institutes, and to the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation, and extends to the provision of facilities for those purposes by the organising of any activity.

Section 3(1) provides that nothing in the Act shall be taken to restrict the purposes which are to be regarded as charitable independently of the Act.