

CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL: THE CHARITY TEST

GERRY MCINALLY

The Charities and Trustee Investment (Scotland) Bill was introduced to Parliament on 15 November 2004.

This briefing is the second in a series introduced by [SPICe briefing 04/84](#). It gives some background on the definition of charity in the UK; the policy background to the introduction of a new charity test; a brief look at 3 international models; the Executive's proposals themselves; and a brief look at the arguments concerning independent schools and hospitals. Further briefings looking at regulation, governance and fundraising will be produced to coincide with evidence taking at the Communities Committee's Stage 1 consideration of the Bill.

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KEY POINTS OF THIS BRIEFING

- The definition of a charity currently used in the UK dates back to 1601 with the preamble to the Charitable Uses Act, also known as the Statute of Elizabeth I and was updated in 1891 by the courts in the case of *Income Tax Special Purposes Commissioners V Pemsel*
- The Executive agreed with the principles concerning ‘the Charity Test’ recommended by both the Scottish Charity Law Review Commission (‘the McFadden Commission’), and the UK Cabinet Strategy Unit’s report, “Private Action, Public Benefit”
- The Commonwealth countries of Canada, Australia and New Zealand are also in the midst of modernising the laws affecting charities, with all considering the inclusion of a public benefit test
- The Scottish Executive proposals take the form of a two-part test, the first being a list of 13 charitable purposes, alongside a separate public benefit test

INTRODUCTION

It is estimated that there are over 28,000 charities in Scotland. The sector has been keen on reform of the legislative framework which governs the sector for a number of years. The main areas of work undertaken by the sector are religious activity, social care, culture and education, and it should be noted that 67% of Scottish charities have an income of less than £25,000 per year. (SCVO, 2004)

This briefing:

- looks at the history of the definition of charity in the UK
- discusses the policy background to and the various developments in setting a charity test
- looks briefly at models which other countries have developed
- discusses the Executive's proposals for a charity test
- looks briefly at the views of the independent schools and hospitals on the public benefit issue

A HISTORY OF HOW CHARITIES ARE DEFINED IN BRITAIN

The definition of a charity currently used in the UK dates back to 1601 with the preamble to the Charitable Uses Act, also known as the Statute of Elizabeth I. The statute outlines a number of charitable purposes in the following extract:

“The relief of the aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea-banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; the marriages of poor maids, the supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants....” (Cabinet Strategy Unit: 2002).

This list was updated in 1891 by the courts in the case of *Income Tax Special Purposes Commissioners V Pemsel* (A.C. 531, 583.). The interpretation by the court categorised the purposes under the following four headings:

- relief of poverty (specifically the aged, impotent or poor)
- advancement of education
- advancement of religion
- other purposes beneficial to the community (not falling under any of the preceding three heads)(Cabinet Strategy Unit (2002))

This interpretation set a precedent which has been used to define charities for tax purposes ever since. However Scotland has never had such a definition, other than for those organisations recognised by the Inland Revenue (Scottish Executive: 2002, Response to the Scottish Charity Law Review Commission), instead “emphasising the distinction between public and private trusts rather than the charitable/non-charitable split.” (Moody: 1999). This allowed Scotland to avoid some of the more controversial aspects of the categorisation of organisations as charities under the four broad headings above. According to Moody (1999):

“This classification operates both to include bodies that would not be regarded as charitable in lay terms, such as fee-paying schools, and to exclude others

whose objects would appear to be philanthropic and of social benefit, for instance self-help groups.”(p 4)

THE POLICY BACKGROUND TO THE DEVELOPMENT OF THE CHARITY TEST

“The McFadden Commission”

It was widely accepted that the regulation of charities in Scotland was in need of modernisation and reform (McFadden Report: 2001, SCVO: 2004). The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c 40) was an attempt to instil a regulatory regime for charities, however the definition of a charity was still founded on the Preamble to the Charitable Uses Act 1601, and the four heads of charity outlined in the Pemsel case in 1891.(A.C. 531, 583.)

In May 2001, after a year of consultation and deliberation, the McFadden Commission published its [report](#) into charity law reform. This was followed by the Scottish Executive’s response in December 2002: [Charity Regulation in Scotland – The Scottish Executive’s response to the report of the Scottish Charity Law Review Commission \(McFadden\)](#). In relation to defining a charity in Scotland the report made the recommendation that an organisation can be defined as a charity if its overriding purpose is for the public benefit.

The Scottish Executive Response

The Scottish Executive responded to the proposal above:

“Scottish Ministers take the view that substantial difficulties and no immediately obvious benefits would flow from a different definition of a charity in Scotland from that in the rest of the UK. They therefore take the view that, in principle, the definition of a charity in Scotland should be the same as that for the rest of the UK. The definition proposed by the Strategy Unit report is consistent with that recommended by McFadden and would not appear to exclude any charity which would have been recognised under the McFadden proposals.” (Scottish Executive: 2001)

The UK Cabinet Strategy Unit was of the view that the four heads under Pemsel (A.C. 531, 583.) “do not accurately represent the range of different types of organisations with charitable status today, nor the range of organisations that should have charitable status.” (Cabinet Strategy Unit: 2002). It was therefore proposed that there should be 10 charitable purposes; nine being framed in such a way as to allow case law to develop, with a tenth being designed to ensure that those organisations that are currently charitable, but do not fall into the other nine categories are covered. (p 38, para 4.13) The categories are as follows:

A charity should be defined as an organisation which provides public benefit and which has one or more of the following purposes:

1. The prevention and relief of poverty.
2. The advancement of education.
3. The advancement of religion.
4. The advancement of health (including the prevention and relief of sickness, disease or of human suffering).
5. Social and community advancement. (including the care, support and protection of the aged, people with a disability, children and young people)
6. The advancement of culture, arts and heritage.

7. The advancement of amateur sport.
8. The promotion of human rights, conflict resolution and reconciliation.
9. The advancement of environmental protection and improvement.
10. Other purposes beneficial to the community.

The question of whether all charities should be able to demonstrate a benefit to the public was also discussed by the Strategy Unit (2002). Their view supported McFadden (2001) in that public benefit should remain at the heart of the definition of charity and that this should be interpreted by the courts using case law (Cabinet Strategy Unit: 2002, page 40, para 4.18). The option of whether it may be easier to have a definition of charity based solely on the principles of public benefit, as interpreted by case law, was also considered. However it was recommended that this approach would not offer enough consistency, and that both parts should be in place to form a definition. This approach removes the automatic presumption under the previous system that the first three charitable purposes relating to poverty, education and religion provide a benefit to the public. All organisations applying to be charities would now have to satisfy both parts of the test.

However the report is clear that the removal of the presumption of public benefit for those organisations whose purposes related to poverty, education and religion, should not disadvantage them. In the example of churches the Unit (2002) states:

“In accord with existing case law, the Charity Commission currently applies public benefit tests to religious bodies seeking registration. Removing the legal presumption will not affect this approach”. (p 43, para 4.33)

In the case of independent schools the report says:

“However, those charities that charge have to ensure that they have a public character, that is, that they provide access for those who would be excluded because of the fees. For example, to maintain their charitable status, independent schools which charge high fees have to make significant provision for those who cannot pay full fees and the majority probably do so already.” (p 41, para 4.26)

INTERNATIONAL MODELS

There have been a number of reviews of charity legislation in recent years. Canada, Australia, and New Zealand have all approached the issue from the basic starting point of the Preamble to the Charitable Uses Act 1601, supplemented by Pemsel. As a result of these reviews all the countries have placed a greater emphasis on public benefit.

Canada

As a result of a recent review (Joint Regulatory Table (JRT) Report: 2003) the federal government decided on measures recommended by the report to improve the regulatory and legislative framework for charities.

The legislative features of the Canadian charity legislation are set in the Income Tax Assessment Act (1997 s. 50-52) which provides the statutory tax exemptions for charities. However the definition of charity is not set out explicitly in this Act, instead the courts refer to common law to determine its meaning. The JRT report recommended that guidelines should be produced to allow a more transparent system for applicants for charitable status. This [draft guidance](#) is out for consultation until 15 December 2004.

The main features of the guidance are an explanation of how the Canada Revenue Agency (CRA) will determine public benefit, the meaning of “public”, and to what extent individuals may benefit. Factors affecting any decisions include:

- the nature of the proposed charitable purpose and the category it falls under (as provided for by common law)
- the social and economic conditions of the time
- the extent to which the benefit may be quantified
- the existence of any harmful impact of the undertaking
- the relationship between the purpose and the intended beneficiaries. (Canadian Revenue Agency: 2004)

Australia

The Australian Government set up the Charities Definition Inquiry in 2000 to review the current legislative framework for charities and related organisations. The Inquiry [reported](#) in March 2001. The remit of the inquiry was as follows:

“The Committee will provide options for enhancing the clarity and consistency of the existing definitions in Commonwealth law and administrative practice with respect to charities, religious and community service not-for-profit organisations. These should lead to legislative and administrative frameworks at the Commonwealth level that are appropriate for, and adapted to, the social and economic environment of Australia.” (Charities Definition Inquiry: 2001)

After examining a number of options for both a charitable purpose, and for criteria for public benefit the Inquiry recommended that an organisation holding itself up to be a charity should be able to demonstrate that its dominant purpose falls under a new expanded list of charitable purposes, and should be for the public benefit. The list of purposes as recommended by the Charities Definition Inquiry (2001) was as follows:

- 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
 - 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
 - the care, preservation and protection of the Australian heritage
- the advancement of the natural environment
- other purposes beneficial to the community, which without limitation include:
 - the promotion and protection of civil and human rights
 - the prevention and relief of suffering of animals (p 15)

The Inquiry also recommended that “the public benefit test, as currently applied under the common law, continues to be applied; that is, to be of public benefit a purpose must:

- be aimed at achieving a universal or common good
- have practical utility
- be directed to the benefit of the general community or a ‘sufficient section of the community’.” (p 124)

However the Inquiry also decided that that the public benefit test be strengthened by requiring that the dominant purpose of a charitable entity must be altruistic (Charities Definition Inquiry: 2001). This was considered in the UK by the Cabinet Strategy Unit (2002) who decided that this “would create unacceptable uncertainty in law, and would have few advantages.” (p 39, para 4.16)

New Zealand

The Parliament of New Zealand formed the Charities Commission Preparatory Unit in 2004 with a remit to prepare for the introduction of legislation which will establish a new body, the Charities Commission, as a Crown Entity. The provisions in this legislation, the Charities Bill, list the Commission's main responsibilities as:

- approve and register charities
- receive annual returns and monitor the activities of charities
- educate, provide advice to and support the trustees and officers of charities to ensure that they understand, and can comply with, core regulatory obligations and duties
- provide advice to government ([Charities Commission Preparatory Unit](#), 2004)

During its consideration of the Charities Bill the New Zealand Parliament’s Social Services Select Committee looked at proposals to widen the charitable purposes an organisations may be classified under if they are to gain charitable status. However the proposals in the Bill refrain from making any change to the charitable purposes outlined in the Pemsel case, and established through common law. In their [report](#) the Select Committee considered expanding them similar to the proposals in the Scottish Bill, but decided that:

“the majority does not believe that expanding the definition of “charitable purpose” will offer any significant benefit, and therefore does not recommend the definition be amended. The majority is concerned that amending this definition would be interpreted by the Courts as an attempt to widen or narrow the scope of charitable purposes, or change the law in this area, which was not the intent of the bill. Amending the definition would also result in inconsistencies with other legislation that contain definitions of “charitable purpose”. (Social Services Committee Report, 2004)

THE SCOTTISH EXECUTIVE’S PROPOSALS FOR A CHARITY TEST

The Scottish Executive published its proposals for a charity test in the [Charities and Trustee Investment \(Scotland\) Bill](#) published on 15 November 2004. The proposals reflect the recommendations of both the McFadden Commission and the UK Cabinet Strategy Unit. Changes have also been made to the proposals following the extensive consultation exercise carried out by the Executive prior to the introduction of the Bill.

These changes reflect the Executive's view "that the link to the charity definition which will be used by the Inland Revenue for UK tax relief purposes is important to Scottish charities....and that as long as the definitions...are not widely different, the Inland Revenue will accept the Office of the Scottish Charity Regulator's decisions on charity status" (Scottish Parliament 2004a). The inclusion of a separate public benefit test based on "existing case law and interpretation", in conjunction with the removal of the presumption of public benefit for the charitable purposes relating to poverty, health and education, will mean that each organisation will have to prove not only that it is charitable, but that it also functions for the public benefit.

The proposals take the form of a two-part test which organisations will be required to meet in order to gain charitable status in Scotland. As mentioned above, the first part of the test is a list of charitable purposes which organisations will be required to have as their dominant purpose, and the second will be a requirement to provide public benefit.

The proposals take the following form:

(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 advancement of civic responsibility or community development
- f. the advancement of the arts, heritage, culture or science
- g. the advancement of amateur sport
- h. the advancement of human rights, conflict resolution or reconciliation
- i. the advancement of environmental protection or improvement
- j. the provision of accommodation to those in need of it by reason of age, ill-health disability, financial hardship or other disadvantage
- k. the provision of care to the aged, people with a disability, young people or children
- l. the advancement of animal welfare
- m. any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.

(3) 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 a third party to direct or otherwise control its activities, or
- c. it is, or one of its purposes is to advance, a political party

(4) In subsection (3)(b), a “third party” means any person who is not—

- a. a member of the body in question, or
- b. a person who would, if that body was a charity, be one of its charity trustees

Public benefit

(1) No particular purpose is, for the purposes of establishing whether the charity test has

been met, to be presumed to be for the public benefit.

(2) In determining whether a body provides or intends to provide public benefit, regard must be had to—

- a. how any—
 - i. benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and
 - ii. disbenefit incurred or likely to be incurred by the public

in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and

- b. where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit is unduly restrictive. (Scottish Parliament 2004a)

One of the central issues for many organizations has been whether a charity test set in Scottish legislation would satisfy the Inland Revenue which will make the decisions on whether an organisation can be considered a charity for tax purposes. Changes have therefore been made from the consultation draft of the Bill to the draft Bill in the list of the proposals, and the inclusion of broad criteria, “with the intention that it is compatible with that being proposed by the Home Office”. (Scottish Parliament 2004b)

The proposals for the two-part test mean that all charities are required to meet the public benefit test, as well as having one of the charitable purposes. This means that none of the purposes will be presumed to provide public benefit as they did under the criteria outlined in the Pemsel case. There has been much speculation that removing the presumption of public benefit for those organisations whose purpose is the relief of poverty or the advancement of education or religion will mean that there may be questions as to whether they will retain their charitable status.

This view is more akin to the ‘popular’ meaning of charity as noted by the Charity Definition Inquiry (2001) in Australia:

“the popular meaning of charity differs from the legal meaning. The popular meaning is the provision of relief for the poor or for those who for various reasons are destitute or in need. Adopting this definition of charitable purposes would result in a significant narrowing of the current range of purposes held to be charitable. For example, education would be a charitable purpose only when it was for the poor. It is doubtful whether religion would remain. Purposes that benefited all members of the community, whatever the state of their finances, would no longer be charitable purposes. The protection of the environment and heritage would no longer be charitable nor would purposes intended to promote the arts and culture.”

To avoid these limitations the Executive’s proposals “are based on the existing case law and interpretation that has been followed in recent years.”(Scottish Parliament 2004b).

VIEWS OF THE INDEPENDENT SCHOOLS AND HOSPITALS SECTOR

As discussed above the majority of the controversy surrounding the ‘charity test’ has been in relation to those types of organisations which do not fit neatly into the ‘popular’ meaning of charity. In the UK these types of organisations are predominately in the independent schools sector and the provision of private healthcare.

Independent Schools

While not confined by the ‘popular’ meaning of charity, views have been expressed that the law of England and Wales has interpreted that charities should be administered altruistically for the benefit of the community or a sufficient section of the community, (Charities Definition Inquiry: 2001) and that the benefit provided “is not elitist on economic grounds (save for the relief of poverty which plainly must be).”(White: 2001)

The Scottish Council of Independent Schools (SCIS) has argued that independent schools “welcome children from a wide and diverse spectrum of social [and economic] backgrounds” and that “most schools have substantive, voluntary fund-raising programmes to provide financial assistance for such families.” Furthermore the benefits include the achievement of high academic standards, so contributing to the education system both quantitatively and qualitatively promotion of inward investment in terms of employment, business recruitment, the economy and the housing market (SCIS: 2004). George Watson’s College added that it is non-profit-making and that its charitable purpose was not restricted to the “advancement of education, but it also, through its activities, fulfils many of the other 13 purposes.” A further benefit is that parents have “through taxation, already paid for the state education for their children....but they do not place a burden upon state provision by choosing an independent school.”(George Watson’s College: 2004).

Private Healthcare

The Joint House of Lords and House of Commons Committee at Westminster took [evidence](#) from Nuffield Hospitals Director of Finance on 30 June 2004 as part of their pre-legislative scrutiny of the draft UK Charities Bill. The issues that arose during the session included the level of tax advantages accrued by the hospitals and whether Nuffield Hospitals provides public benefit.

Nuffield Hospitals supplemented their initial evidence with a further memorandum outlining their position and why they thought it reasonable to be considered a charity. They claimed to have been forced to become a charity because “the fundamental point about charitable status, which is frequently overlooked, is that it protects property that has been allocated to the public

good.”(House of Lords, House of Commons, Joint Committee 2004, vol 2). According to the memorandum the protection of property is therefore the purpose of charity law and there is no option but to register as “the Charities Act orders them to register”(House of Lords, House of Commons, Joint Committee 2004, vol 2).

In their [report](#) the Committee was of the view that “Nuffield Hospitals struggled to make any convincing case for being a charity or receiving the tax advantages that go with it.”(House of Lords, House of Commons, Joint Committee 2004, p 30, para 90). They went on to add that “the Government should consider reviewing the charitable status of independent schools and hospitals with a view to considering whether the best long-term solution might lie in those organisations ceasing to be charities but receiving favourable tax treatment in exchange for clear demonstration of quantified public benefits.”(p 31, para 95).

CONCLUSION

The Scottish Executive has proposed a charity test which shares a significant number of factors with other countries who have tackled this issue. All of the comparator countries had the same starting point as the UK with the Preamble to the Charitable Uses Act 1601, and the Pemsel Case in 1891. The proposals are broadly in line with what was proposed by the McFadden Commission, and with proposals included in the draft UK Charities Bill. This could limit the possibility of onerous regulation and registration problems for UK-wide charities. Furthermore, the inclusion of a separate public benefit test based on case law, and the removal of the presumption of public benefit for some purposes, could result in the lessening of the controversy regarding independent schools and hospitals by allowing each case to be judged on whether it provides public benefit, rather than deliberately including or excluding an entire sector or group of organisations on the basis of the charging of fees.

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