

Background Briefing

A Statutory Definition of Charity – Pros and Cons

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"The law of charity is a moving subject"
– Lord Wilberforce

About Us

Named after the 1891 House of Lords decision, *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531, which established the four principal common law heads of charity used in Canada and elsewhere, The Pemsel Case Foundation is mandated to undertake research, education and litigation interventions to help clarify and develop the law related to Canadian charities. The Pemsel Case Foundation is incorporated under the Alberta *Societies Act* and is a registered charity.



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1. A Statutory Definition of Charity – Pros and Cons

Literally hundreds of thousands of words have been written by interested parties about whether the definition of charity should take a statutory form and what form that should be. There are a number of issues in these discussions which are common whatever the context, and other issues that have particular impact on the final decision in different jurisdictions. Like most major policy decisions, it is often an issue of compromise between influential forces in the political system and an alignment of circumstances. A statutory definition may be part of a package of reforms, such as moving from a tax gatekeeper for the definition to an independent charity regulator, and charity definition legislation would not have been enacted on its own.

Another issue is the form the statutory definition takes. A statutory definition may be:

1. An amendment that confirms a specific purpose as charitable, for example:
 - a. Following the decision of the House of Lords in *Inland Revenue Commissioners v Baddeley* [1955] AC 572 the English Parliament enacted the *Recreational Charities Act 1958* (UK) to overcome the effect of the decision; similar Acts were passed in many other common law jurisdictions.
 - b. The *Extension of Charitable Purpose Act 2004* (Cth) clarified a number of issues in Australia, e.g. stating that closed religious orders were for the public benefit.
2. A code which covers the whole field. Here the common law definition would be completely ousted by the intention of parliament to create a self-contained statutory code. An orthodox codifying Act gathers together all the relevant statute and case law on a given topic and restates it as a complete and exclusive statement of the law on that topic. A common issue relating to the judicial interpretation of codifying statutes is whether or not it is possible to have regard to either the case law or the statutes that have been superseded by the code. Usually, a Code must be interpreted according to its terms without resort to any presumption that its provisions reflect the common law, either at the time of the Code's enactment or subsequently. This option was discussed in Australia, but was rejected, and there is no known orthodox code for a charity definition in existence elsewhere.
3. A restatement of the common law with additions or subtractions. This has occurred in the UK jurisdictions, Ireland, New Zealand and Australia. The statute is intended to replicate the common law, retaining all that which is not specifically excluded, with some minor additions. In this situation, the common law still exists to the extent that it is not in conflict with statutory provisions.

2. Common Arguments Against a Statutory Definition

The common law has established a solid foundation for defining charity and there are strongly reasoned arguments against replacing it with a statutory definition, for example:

1. The concept of charity is elusive, changing with society, embodied in a corpus of decided cases built up over the centuries. Replacing it with a statutory definition would lead to confusion and litigation. The process of building case law would have to start afresh, creating uncertainty and litigation costs.

2. A statutory definition can become ossified through lack of amendment to reflect changing values, just as a lack of case law can lead to the same result.
3. The common law should not be fettered by legislation, allowing the courts to reflect the common understanding of the definition of charity according to time-honoured principles.
4. As a statutory definition is under the control of parliament, future parliaments may alter the definition as part of an ill-considered reaction to political circumstances, or based on an ideological agenda that the majority of voters may not favour.

3. Common Arguments in Favour of Statutory Provisions

On the other hand, the common law can only change as cases come before the courts, and arguments in favour of legislating a definition include:

1. Desire to modernise definition to bring legal definition closer to the public understanding of charity in order to strengthen public trust and confidence in charity.
2. The traditional charity heads are placed in contemporary language so that a lay person can readily comprehend the nature of charitable purposes. The community purposes contained within the fourth head are often given as an example of where this would be useful.
3. Without a vibrant case flow, the common law definition may tend to ossification, unless some quasi-judicial body such as a Charity Commission is able to keep the definition contemporary.
4. Where there is a quasi-judicial body which has been promoting a contemporary definition, a statute may affirm or contradict that definition, providing clarity and certainty without the spectre of court action.
5. A clear statutory definition of charity is essential if a statutory scheme for the regulation of charitable organisations is to be established.
6. The creation of a statutory definition of what amounts to a charity would be in line with the general trend of legal development in the common law world.

4. Common Risk Mitigation Measures for Enacting a Statutory Definition

In some cases the perceived risks of statutory reform to the definition of charity can be offset by measures such as:

- Ensuring the statutory definition is administered by an independent agency with clear objectives to promote the viability of the sector and formalised direct input from the sector. This is preferable to an agency with dual capacity as a tax regulator and a charity registrar, which has inherent conflicts of interest;
- Inclusion of provision in legalisation to enable introduction of new charitable purposes by analogy to reduce risk of ossification following statutory definition.
- Preserve existing case law in legislation so that process of building case law need not start again avoiding confusion and litigation

- Ensuring that there is broad community, and bi-partisan political support for the legislation. This would help shield the legislation from hasty and ill-considered amendment;
- Including a review clause in the legislation to prompt an evaluation of its effectiveness;
- Creating judicial or quasi-judicial review mechanisms that are designed to be efficient, specialist, low-cost venues for dispute resolution;
- Setting up a litigation fund for parties to access, in order to bring disputes before the courts in a timely and cost-effective manner; and
- Demonstrating that having a modern regulatory framework will increase trust and confidence in the charity brand. In turn, this will mitigate against undue or adverse political meddling.



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