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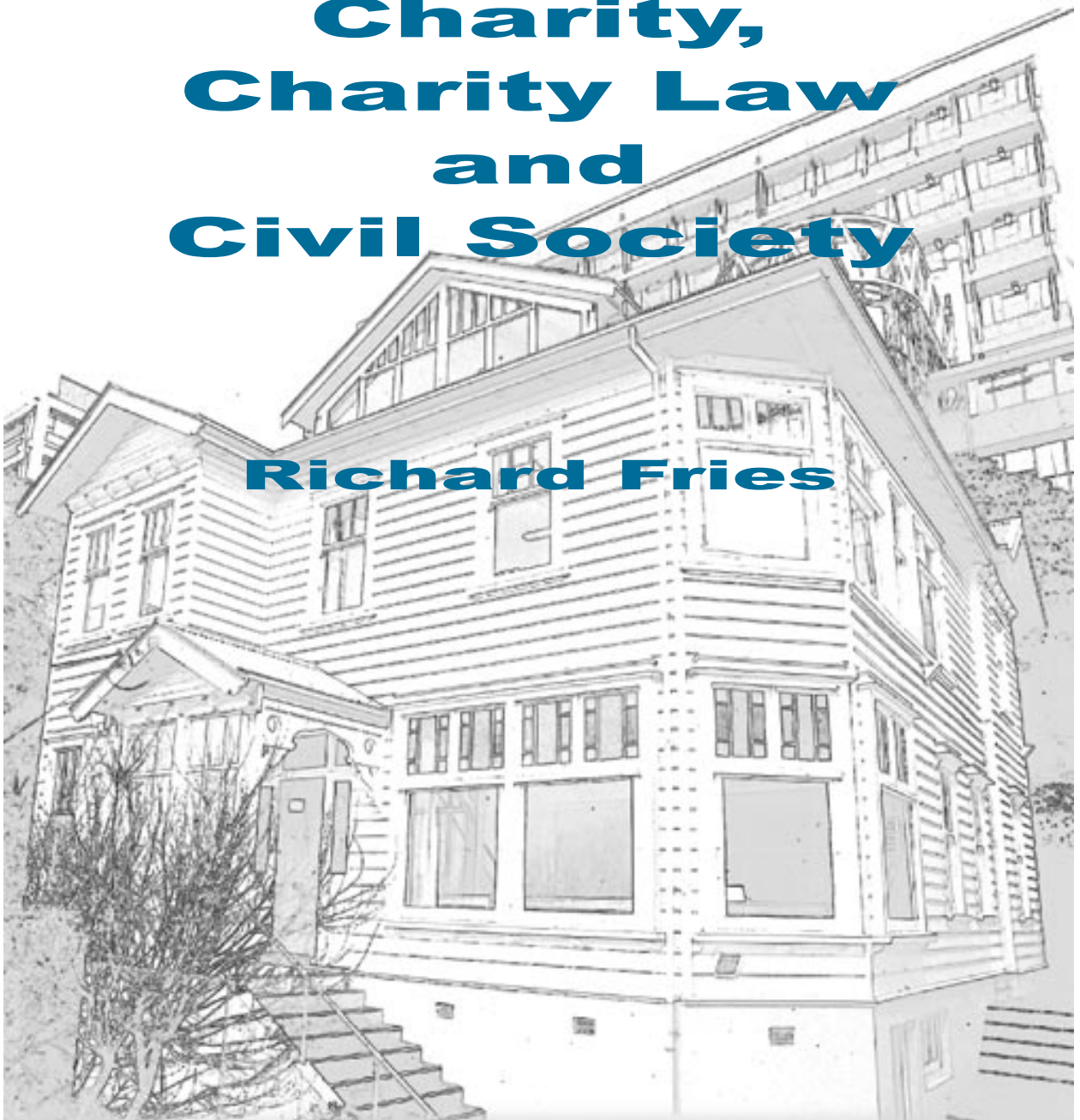
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# **Charity, Charity Law and Civil Society**

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# charity, charity law and civil society

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## Abstract

Charity is old and well established. It has its critics but continues to play an indispensable role in the modern world. In recent years, the term ‘civil society’ has become fashionable in voluntary sector, NGO circles, as the label for the independent non-profit, non-governmental sphere. Charity is part of civil society – a ‘realisation of its rhetoric’. But interesting questions arise when one examines the basis on which charity rests and the principles that the discourse of civil society claims. In particular, the legal basis for charity in the common law jurisdictions of the Commonwealth is strikingly different from the presumptions on which civil society rests. Charity is, in concept and origins, the natural partner of government, the state; civil society is a separate sphere counterbalancing the state, holding government to account.

There is no definition of charity in law. Indeed, the flexibility of the common law basis of charity is its strength, or so at least its adepts claim. There is a continuous history of charitable institutions underpinned by a legal tradition codified, but not defined, at certain salient points, notably in the Preamble to the Charitable Uses Act 1601 and the Pemsel judgment of 1891. Underlying charity are four principles: public benefit purpose, independent governance, non-profit distribution and non-political. The principles define that part of the voluntary sector which is determined by an overriding commitment to the public interest.

A key characteristic of the notion of civil society is that it determines a sphere separate from the state and the private sector. The role of civil society as a counterbalance to the state is central to the notion. Often there is an assumption of superior virtue in civil society institutions. Freedom of association is, of course, basic to democratic society. It is, however, dangerous to exaggerate the extent to which free associations guarantee social well-being. While many civil society organisations contribute to public well-being, many are sectional, even divisive. And some extreme bodies, like the Ku Klux Klan, which are at least in formal terms (being neither state nor market) part of civil society, are evil. So the question arises as to what the relationship is between the parts of civil society that serve the public good and counterbalance the state, and charity that likewise serves the public good in which the notion of partnership with the state is pronounced.

The notion of partnership is rooted in the modern origins of charity – the 1601 Preamble. That Act codified what we might now call a compact between the Tudor state and charity. It was part of the Poor Law reforms designed to enlist charitable resources to support the minimal social provision the state made in the interests of communal well-being. This tradition is reflected in the upsurge of philanthropy that marked the 19<sup>th</sup> century response to the Industrial Revolution. The 20<sup>th</sup> century saw the ‘nationalisation’ of parts of the charitable sector to form the welfare state, leaving it a reduced, but still vital, role to complement state provision and act as a source of innovation. The latter half of the 20<sup>th</sup> century, however, saw a swing back to voluntary action. The emphasis on advocacy and self-help are important features of this. A key issue in addressing the question of how charity relates to civil society is how charity law and regulation has dealt with this swing.

In England and Wales, the key role has been played by the Charity Commission, given responsibility in 1960 for maintaining a public register of (most) charities and strengthened in the 1990s to monitor registered charities on a systematic basis. As now constituted, the Commission is the determining agency for what constitutes charity in the modern world, and maintains an active supervisory relationship with bodies accepted for registration as charities. It approaches the determination of charitable status flexibly, adding and

removing issues in line with changing circumstances. The essential test is what constitutes the public benefit. Reform issues focus on the question of how that should be defined. The virtue of the common law is its flexibility, in contrast to statutorily codified systems; but that raises questions as to the criteria and authority for deriving modern judgments of public benefit from a court tradition in which there is little litigation and the basic statement is 400 years old!

The regulation of charities is a sensitive and disputed sphere. The role of the Charity Commission is to provide a framework of accountability under which charities prepare an annual report of activities and accounts, graded according to their size. This is designed to underpin good management and transparency. It also provides the basis for the annual monitoring of the larger charities through which the Commission provides support and guidance, including using legal powers of modernisation. The Commission also has powers of investigation and remedy in response to abuse and mismanagement. The Commission's general duty is to use its powers to support charity and its 'mission' is to maintain public confidence in the integrity of charity. It is precluded from overruling trustees' judgment of how to achieve their charitable purpose. This ensures the independence of charities – though there is debate about whether there is need for some test of the effectiveness of charities.

Charities may not have political purposes, a concept the law interprets (too) widely. They may, however, engage in political activity and campaigning in pursuit of their charitable purposes. Thus the advocacy role of voluntary action is endorsed by the law, and the civil society principle of counterbalancing the state permitted to charities. The role of charity as a partner of the public sector is, however, increasingly important and complex. Many charities provide services to public authorities on a contractual basis. The principles underlying this partnership are set out in a 'Compact' negotiated between government and the voluntary sector. The central importance of the independence of charities is a key element in the Compact.

Charities are part of civil society. That a defining feature of charity is the public interest makes charities natural partners of government, but this makes securing their independence and advocacy role all the more

important. The increasing role of charities likewise makes their integrity and accountability all the more important. The value of a body like the Charity Commission, independent of but committed to the charitable sector, lies in its ability to provide an independent framework of accountability and suspension.

## Introduction

Charity has a resonance worldwide. For some it is tinged with negative associations, for most it is positive. Charity is generosity, altruism, reflecting the better qualities of human nature in a world of greed and selfishness. For a minority, it reflects, reinforces inequality, is condescending. For the old left (in Britain anyway), charity has memories of class, of social provision by favour – replaced by the statutory rights of the welfare state. Yet charity has never died, and New Labour (like Thatcherite Conservatism) casts charity – or, at any rate, the civic engagement of the active citizen – in an important, if subsidiary, role as partner of government.

The resonance charity commands – in countries in which civil law gives it no legal meaning as well as in the common law countries which do – is colloquial and cultural, not legal. That there is a gap between the ordinary person's sense of charity and the lawyer's is well-recognised – by lawyers, certainly, and, at least dimly, by people at large. (Lord MacNaghten made the distinction explicit in his seminal *Pemsel* judgement – saying the law must follow the legal meaning, not that of everyday life. If people knew just how far the law had diverged from the common sense, they might think [even] less of the law!) The essence of 'popular' charity is relief of need – poverty, sickness etc. In law it goes – indeed, always has gone – far wider, to embrace and underpin what enriches life. Part of this paper is concerned with examining the implications of this divergence.

The paper is also concerned with the relationship between charity, and charity law in particular, and civil society. In so far as ordinary people talk about civil society, they mean charities, voluntary bodies and all the forms of 'citizen' action that we think of as reflecting a free society. Actually, I don't think 'ordinary' people have adopted the language of civil society. I think that it remains part of the international language of the third sector, primarily a Western – American – export as part of the response to the collapse of communism. As such

– like charity – the current use diverges from its origins, academic not legal in the case of civil society. Again I want in this paper to explore that divergence, and relate it to charity. My slogan is that ‘charity is the realisation of the rhetoric of civil society’. That was my one-liner, to encapsulate the relevance of the ancient tradition of charity to the modern discourse of civil society when it was my duty as Chief Charity Commissioner to uphold charity law. Now I have the luxury – or duty! – of testing that proposition.

## Charity Law

Now I will go back to the legal concept of charity, and first give a brief description of what it is in practice.

It is notorious that there is no definition of charity in law. (This is also, arguably, its strength – or so common lawyers argue!) Indeed, it is so tiresome and unsatisfactory that one cannot give a definition of charity, that many (like the recent Scottish Charity Law Review Commission!) treat MacNaghten’s Pemsel judgement as a definition: the four ‘heads’ of relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community. That last (fourth head) undermines definitional purpose – its openness even with Lord MacNaghten’s qualification ‘recognised by the law as charitable’. It is, of course, the very openness – the capacity to grow – which, to charity lawyers (and the Charity Commission), is the virtue of the common law of charity; and which raises the questions now being asked in the three charity jurisdictions of the United Kingdom (England and Wales, Scotland and Northern Ireland – yes, we are a federal nation!), and in Australia, Canada and here in New Zealand, about the basis for determining what, in the 21<sup>st</sup> century, should constitute charity (and what actually, under present law, does, which are not necessarily the same), questions about who determines what is beneficial to the community and on what authority. I need to explore that further, but for the moment suffice it to say that *public benefit* is one component of charity.

Public benefit is, however, only *one* test of whether a body counts in law as a charity. In broad terms, one may identify three other tests (as the Scottish Commission – anxious to establish what was right for Scotland, and not be tied to English law! – did). They are:

- *independence*: the absolute responsibility of a charity’s trustees to decide how to fulfil their charity’s purposes on their own account and not at the dictat of, for example, government;
- *non-profit distribution*: the requirement that all the resources of a charity must be devoted, directly or indirectly, to its purposes, and not, for example, paid to trustees as ‘shareholders’ dividend’; and
- *non-political*: the requirement that a charity’s purposes must be charitable and may not be political, and that any campaigning of a political nature is in pursuit of charitable purposes.

Technical issues arise about these principles, especially the last; but for general purposes these four principles of public benefit, independence, non-profit and non-political are plausible determinants for civil society organisations – or at any rate an important part of civil society in the 21<sup>st</sup> century, that part which is specifically devoted to a purpose which is primarily serving the interests of the community.

## Civil Society

If charity is part of civil society, where in general terms does civil society fit? Before exploring the details of charity law, it is necessary to make some general remarks about civil society.

Like charity (in this respect at least!), civil society has no agreed definition. (I like Barry Knight’s quip that it has passed from obscurity to vacuousness without going through the intermediate stage of meaningfulness!) For present purposes, I take Ernest Gellner’s definition:

... that set of diverse non governmental institutions which is strong enough to counterbalance the state.

Add, as he implicitly does, not-for-profit and non(-party)-political and one has a working definition of the organised voluntary sector. (It begs all sorts of questions about organised labour and religion, but we need not go into those here.) The key component missing from this definition of civil society in contrast to that of charity is that of public benefit. But civil society has been promoted as the guarantor of freedom (‘counter balancing the state’), as the ‘glue of democracy’. Thus CIVICUS is

premised on the basis of the virtue of civil society; and the Commonwealth Foundation is seeking to engage the support of Commonwealth Heads of Government next week on the importance of civil society for good governance. Is civil society inherently good, whether or not it meets the public benefit test of charity (or charity modernised)? This is the contention, or assumption, of the academics who promoted the concept of civil society. Thus Robert Putnam identified the rich tradition of civic association in parts of Italy with the fact that those parts enjoyed good governance – and by contrast those lacking that tradition as suffering bad governance.

Where sports, choirs and bird watching flourish, the people are content! So charity can be assimilated into civil society? The public benefit test scrapped, or at least knocked off its pedestal, made perhaps a test of tax relief only? There are two objections at this point. The right of association, the key right on which civil society is based, is fundamental to freedom. But it is a freedom that can be abused. The Ku Klux Klan is an independent not-for-profit movement – of sheer evil. Even the value of residents, sects or the rich coming together for their own exclusive benefit, as opposed to the wider benefit, may be negative and divisive. So there is a ‘dark side’ to civil society. And blameless, even culturally valuable activities like sports, singing and bird watching may divert from democratic duty, and may be an opiate of the people! As my colleague Nicholas Deakin has commented, the choirs sang on when fascism rose. Sport indeed was actively encouraged by fascist (and other) dictatorships. So we must not be uncritical and starry-eyed about civil society!

## Origins of Charity Law

I turn now to the way in which the common law of charity law developed. This is partly historical – fascinating enough in its own right, I think, but not solely of historical interest because, as is the very nature of common law, it is a live tradition, drawing on its historical development. Some would say that that is the strength of common law – that it respects the past, that it grows through the interaction of the tradition as it develops with the changing needs of the present. I will need to discuss that capacity to grow later, but here are the origins first.

Charity as a recognisable tradition goes back at least

1000 years in Britain. Almshouses claim, collectively, to be the oldest part of the charitable sector. Whether there are actually almshouses with a 1000-year continuing life is uncertain, but there are certainly documented charities going back continuously for many hundreds of years – I attended the 700<sup>th</sup> anniversary of the Sheffield Town Trust when I was at the Charity Commission, to name but one. (Perhaps only in Britain would longevity be a matter of pride! – something New Labour is, in part at least, seeking to challenge.) Thus charitable institutions predate the text which is regarded as the basis for charity law now – the preamble to the Charitable Uses Act of 1601, whose 400<sup>th</sup> anniversary we are celebrating this year.

The preamble is a key document, and indeed (although the 1601 Act has long been repealed) a live part of the law – though how alive one of the issues is I have (later) to address. Lest it be thought that there is only one definition of charity, even an outmoded definition, it has to be stressed that the preamble is an illustrative list of things regarded as beneficial to the community in Tudor times. That is significant on two counts: it confirms that the common law of charity has always been an open ended matter of tradition, and it illustrates the dialectic of tradition and modernisation. The preamble shows a striking similarity to a passage in the 14<sup>th</sup> century poem ‘Piers Plowman’. A rich merchant asks what he should do to save his soul, and is given a list of objects for good works. (Ulterior motives are not new in charity!) The draftsman of the 1601 Act took up the medieval tradition and adapted it to the needs of the times – the turbulent period of transition from medieval to modern society. The 1601 Act was part of and sat in the Statute Book next to the Poor Law legislation of Queen Elizabeth. It was there part of a balanced policy (as we might say now) between public provision for the poor and the charity of the well-to-do.

The Poor Law was a key initiative of the late Elizabethan period. It lasted until 1834 and is an important element in the context in which charity – and charity law – developed. This is not the place (nor am I historian enough) to expand on the origins and history of the Poor Law, but the consequences of the dissolution of the monasteries, which had been the core of medieval English social provision in the changing social and economic circumstances of the post-medieval world, left a vacuum

which threatened social stability. The Poor Law, with its mixture of relief and sanction, was designed to address it. The Charitable Uses Act complemented it by seeking to enlist the well-to-do to take on public provision. Directly it gave legal security to, and redress for the abuse of, charity. Technically it was about benefactions – charitable trusts. Associations for charitable activity did not feature then – a point of importance in the subsequent development of charity law.

Thus one may characterise the origins of charity law as it now is, to a greater or lesser extent, throughout the common law jurisdictions as a ‘compact’ between state and citizen. In other words, the legal tradition supports the move, pronounced in Britain over the last 20 years, to create a partnership between government and voluntary action, codified in the Compact formally promulgated by government and the voluntary sector in Britain in the last few years. Controversial this may be – critics led by Ralf Dahrendorf fear for the soul of the voluntary sector getting into bed with the state or swimming into the mouth of Leviathan (as Frank Prochaska more elegantly put it); but novel or unprincipled it is not. Here we have a contrast between charity law, based on the notion that the interests of the state and the purposes of charity are the common good, and civil society, based on the notion that the state must be counterbalanced.

Before turning to the present day, and the resolution of that contrast – if resolution is needed – I need to trace through the way in which the ‘modern’ basis of charity law has unfolded from the 1601 preamble. The history is fascinating, but I must give a very abbreviated account. The encouragement of charity – and its integrity – waned, perhaps with growing social stability and confidence, to the point where Mortmain legislation was explicitly directed against charity. The legislation was designed to protect inheritance. It did so by deeming invalid property bequests to charity. The courts leant over backwards to pronounce bequests to charity as properly charitable – and therefore to be set aside in favour of the ‘rightful’ heir! This means that charity judgements from the 18<sup>th</sup> century have to be ready with what Blake Bromley has called a kind of intellectual dyslexia – favouring charity to deny it! But a good many judgements widening the scope of charity derive from this period. In parallel, the courts responsible for overseeing the administration of charitable trusts – the

notorious Chancery Courts of Dickensian infamy – fully lived up to this reputation. Far from being a source of modernisation and integrity, they locked charity into outmoded restrictions – at vast expense in lawyers’ fees and time.

The outlook for charity at the end of the 18<sup>th</sup> century – at the start of the Industrial Revolution – was bleak. Not surprisingly the public-spirited whom the 1601 Act was designed to attract to charity sought instead to bypass it. Philanthropic association, rather than charitable trusts, were the preferred form for good works in the Victorian era. (Of course, there was more to it than the negative effect of the Chancery. Forming associations, rather than creating benefactions, had its own attractions. I suspect – to digress – that US philanthropy owes much to the fact that the USA developed at a time when charitable trust was inconvenient and the association of free citizens attractive, and formed the basis for the tradition of which the US is rightly proud. The soul-saving benefactions of the robber barons of industry came later!) In so far as philanthropy was conducted through charitable law in the 19<sup>th</sup> century, it was a period of reform. First the codification represented by the Pemsel judgement (of 1891) sought to rationalise the preamble tradition – and did so by adopting the legal growth (in contrast to the moves at the beginning of the century to return charity to its core concern with need). And the 19<sup>th</sup> century gave the revival and institutionalisation of charity regulation in the form of a standing Charity Commission, finally established in 1853 to fulfil cost, effectively the modernising supervisory functions of the Chancery Court.

The Pemsel judgement was also important in establishing the nexus between charitable status and fiscal relief. This was not an inevitable development, and was indeed contested that time as the permanence of taxation became clear. This is an important current legacy.

To conclude this historical whistle stop tour with two broad issues. The first is the role, in social policy, of philanthropy. The replacement of the Poor Law with a more market-driven approach to poverty, combined with the novel problems of the Industrial Revolution, created greater and new needs for charity. As the history of the Charity Operating Society illustrates, although pure market economists regarded charity as a distortion,

the government, intent then (as now) on minimising its responsibilities (and burdens), sought to encourage philanthropy to take on a wide range of social provision. As the century passed, the religious focus of philanthropy changed and many spheres developed a more professional approach to social provision. Thus long before the state, in what may turn out to be an aberration, nationalised significant parts of the charitable sector into the welfare state, voluntary organisation had ceased to be volunteer bodies and had become increasingly professionalised.

The other aspect of the historical record of current importance was the transformation of the Charity Commission from being a quasi-judicial agency, operating as an extension of the Chancery Court, to being something nearer to a regulator in a modern sense, in particular maintaining a register of charities for the purposes of public information and supervision. This was triggered by the Nathan Report of 1952, given effect in the Charities Act of 1960. The legal significance, with which we are still living, was the extension of the Commission's remit from charitable trusts in the legal sense to all forms of charitable organisation, in particular charitable associations and companies, which had previously operated outside the purview of the Commission and therefore, although charitable in law in that they had charitable purposes, in practice outside the active supervision of charity law and its constraints. The extension of the principles of charity trust law to all forms of charity is one important feature of current charity law.

## **Charity in the Post-Welfare State World**

The welfare state appeared to put an end to charity at any rate as the key provider of social services. That it still had a role, albeit subsidiary, was never denied. Indeed, the architect of the welfare state, Lord Beveridge himself, devoted his third great report to voluntary action. Admittedly this was concerned as much with cooperation – the friendly society, mutuality tradition (which indeed sponsored his report) – as with charity as such. But that citizen engagement was as important to him as to present day politicians is clear, even if it was forgotten by the labour movement for some decades. Certainly, there was a sense in the charity world that its role was reduced and needed redefining. One of my

predecessors, the first non-lawyer Chief Charity Commissioner, Christopher Hill, expressed it thus in setting out the duties of trustees under the new Charities Act of 1960: the role of charity in relation to the state was now principally innovation and supplementation, to fill in the gaps the state could not, would not cover, and to experiment with new ways of tackling old problems or ways of tackling new problems.

In fact, the War and post-War period saw as much charitable activity as before or since. To start with, much was left untouched by the state – animal, environmental and heritage issues, for example (reflected in the continuing role of the RSPCA – with statutory inspection powers, the RSPB and the National Trust). Much continued in partnership with – or parallel to – state provision: ‘public’ schools notoriously, but also childcare (Barnardos) and much specialist health provision. And new charities started up, sometimes with government support or encouragement, such as WRVS and CABx. New ways of tackling intractable problems like juvenile criminality were developed by charities (in this case, ‘intermediate treatment’ which has become mainstream criminal justice policy). So were new problems like race relations, which led to the development of community relations bodies subsequently taken under the wing of government policy (and provision). Topical for today we might add refugee advocacy and settlement. And there was always room for citizen innovation, for which Oxfam, founded in response to wartime poverty, may stand as an outstanding example.

But undeniably there was a low point for charity under the shadow of the welfare state for a couple of decades – up to some time around 1970. By then, dissatisfaction – on the left as well as the right – with statutory services grew to the point where citizen initiative and voluntary action swung back into prominence. A series of reports encouraged the growth – and growing consciousness – of the voluntary sector. Talk of a sector, with its claim to unity, is as misleading as talk of unitary public or private sectors. Indeed, some commentators, more quizzically than critically, have spoken of the ‘invention’ of the voluntary sector. (And latterly the community end of the sector has rebelled against being submerged by the large bodies and insisted, in the Compact negotiations, on the label ‘voluntary and community sector’ – though whether that is better is a

moot point!) But the ‘new’ voluntary sector has emphasised self-help, the voice of beneficiaries (and staff) and advocacy, among other features not traditionally associated with charity – and not naturally accommodated by the traditions of charitable trust law. How has it fared? How far has the claim to flexibility gone, and its ability to respond to changing times, with changing needs (and fashions)?

## The Charity Commission

It is important, in addressing these questions, to note that the implementation of the Nathan Report, however half heartedly, in the Charities Act 1960 fundamentally changed the context in England (and Wales, but only indirectly in Scotland and Northern Ireland). The Act converted the Commission from a legal support body to a unique law-determining and regulatory body, a process only now being completed through the implementation of the Charities Act 1993, which is the present, strengthened, basis for the Commission. The Commission is responsible for (most) charities from cradle to grave. The creation of the register, initially made up of existing bodies accepted as charities (i.e. not re-examined before entry – a problem only now being addressed by the Commission’s review of the register initiated in 1998), has given the Commission prime responsibility for determining charitable status; and the requirement with which all except a few privileged categories must comply to apply to the Commission for registration means that virtually all charities must pass the Commission’s scrutiny.

So a key question in how charitable status has grown with changing circumstances is ultimately a question of how well the Commission has risen to the responsibility of common law determination. It has to be said that for many years, simply at the administrative level, it was a source of much grievance, for slowness and complexity. This has all been streamlined now. More substantively, the Commission has progressively asserted its power – its duty – to apply the tests of charitable status law flexibly, and in favour of charity. Thus, whereas, for example, the Australian and Canadian charity jurisdictions appear stuck with the Victorian mumbo-jumbo of applying ‘the spirit and intendment’ of the 1601 preamble (as though that could be a practical guide to the needs of the 20<sup>th</sup> century – let alone the 21<sup>st</sup>), the

Commission has for years approached the question of how to apply the tradition of common law to new issues in a spirit of analogy – what is the public benefit today as compared to the public benefit of the issues set out for Tudor merchants in 1601? And this has enabled the Commission to develop charity law.

Race relations is a good example. In the face, it must be admitted, of resistance from the Inland Revenue (a lesson, dare I say, to jurisdictions which rely on the tax authorities to determine what should get the benefits of charitable status), the Commission readily saw that citizen initiatives to tackle problems of racial prejudice and encourage good community relations as immigration posed problems to British society in the 1960s were in the public interest. This process is now institutionalised in the review of the register which is, in effect, drawing up criteria appropriate to the modern world for charitable status for bodies tackling other key problems of society today, like regeneration and unemployment.

The transformation of the Charity Commission has raised other profound issues about the accountability of charities which it may be appropriate to address at this point. Charitable trusts have always been subject to the oversight of the courts; and the Attorney General has long had the role of ‘parens patriae’ – in effect, guardian of the public interest in charity. This reflects one fundamental difference of spirit between the common law of charity and the civil law basis for civil society. The common law notion of the Crown served by minimalist ‘state’ authorities in partnership with free citizens – a very ‘civil law’ notion – means that charity is by definition public, and therefore subject to public oversight. The trade-off is that the individual – the benefactor, the trustee – has absolute discretion within the framework of public benefit purposes as to how to give effect to those purposes. But the law, with the Attorney General to raise the public interest before the courts, oversees and enforces or administers the trusts. Thus if a charity is failing, if the trustees are not complying with its legal purposes, the courts are not only a source of appeal, but they also, on the motion of the Attorney General, impose terms – for example, by rewriting the charity’s constitution. This close involvement of the courts, with specific consequences I shall touch on later, still operates in England. (And the role of the Attorney General is still extant in other common law jurisdictions.)

But onto it (uncomfortably – a parochial reform issue in England) has been grafted an administrative agency, the Charity Commission (technically a non-ministerial department), with the powers of the courts (parallel jurisdiction) and its own ‘regulatory’ powers.

Thus the Charity Commission has the power of the courts, in addition to determining charitable status as described above, to make ‘schemes’ to amend the constitutions of charities, appoint and remove trustees, and dispose of property. On to that have been grafted monitoring and investigatory powers to enable the Commission to supervise charities. Under the most recent reforms, the Charities Act 1993, the Commission sets a framework of accounting and reporting under which the 180,000 registered charities have to prepare a report of their activities and accounts, in a form determined by their size, and, for the large ones, submit them annually to the Commission. This is the basis for routine monitoring, supportive intervention and, in cases of abuse or maladministration, investigation and remedy.

This degree of ‘state’ intervention is, on the face of it, antipathetical to the ethos of a free civil society. And some voices are raised against the oppressiveness of the Commission. But equally (and perhaps even more) voices are raised against the weakness of the Commission. The rationale for Commission supervision – which reflects the purpose of the 1601 Act itself, expressed in the long title of the Act, that abuse of charitable resources must be checked – is that by definition charity is devoted to the public benefit and the public interest must therefore be protected. The modern Commission sets its overall goal as maintaining public confidence in the integrity of charity. This has the pragmatic rationale of assuring the giving public that their money goes to the object claimed and intended. That of course raises many questions, and is the source of controversy over the role of the Commission.

The virtue – as it seems to me – of the new framework is that it is based on standards of reporting and openness. The register, accessible on the Commission’s website, and the reporting requirements, likewise publicly available, mean that the way charities operate is open and public. Supervision backs up this openness by enabling the Commission to intervene if legal or financial integrity is undermined. But it leaves charities, under their trustees, free to conduct their affairs and undertake

programmes of their choosing. To whom they are accountable – members in membership charities, beneficiaries, but not formally – is a matter of debate. That the Commission has neither the power nor the competence to pass judgement on the substantive performance of charities across the whole of range of public issues in which charities are, by definition, engaged is obvious.

But the limitation of the Commission to integrity and not effectiveness and efficiency raises questions about how performance is to be assessed and maintained. As charities are drawn increasingly into partnerships with public authorities, questions of who assesses the value obtained from public money arise. Clearly, funders have a responsibility as well as an interest. For public donations, the Commission is seen as proxy. The interim answer has to be that the Commission provides a framework of accountability within which questions can be asked.

## Charitable Status Now

I have referred to the role of the Charity Commission in developing charitable status. The modernising flexibility it can bring to the issue means that some of the acute problems experienced by some common law jurisdictions, for example, Canada, do not arise. And the review of charity law undertaken by a working party of the National Council for Voluntary Organisations concluded, in the report published for consultation earlier this year, that, having started with an open mind about the whole issue, the principles of the common law of charity are sound. In particular, it endorsed the principle of public benefit as the key determinant and the value of the common law flexibility. It did regard the presumption of public benefit given to organisations falling under substantive ‘heads’ of the Pemsel classification – poverty, education and religion – as outmoded and therefore recommended that all would-be charities should meet a positive test of being beneficial to the public.

This is not the place for a technical discussion of the legal tests for public benefit. But it is a key element in the way in which the common law provides a framework for civil society organisations, and some discussion of the principles is essential. Once one accepts that the civil society sphere of free associations embraces a wide variety of activities and aims, some central to the public

interest, some marginal or trivial, some divisive, some harmful, one cannot set the civil society sector above others as such. The principle that some deserve to be singled out as positively beneficial and therefore given special status becomes attractive. And indeed in practice the civil law jurisdictions make this distinction, albeit through tax law. Thus, behind the priority of form – foundation, association – lies the tax-led judgement of whether the organisation meets a public purpose deserving of fiscal support. (The work of ICNL in developing new civil society law codes for the former communist countries in Central and Eastern Europe and elsewhere reflects this. On to the foundation and association law models, ‘public benefit organisations’ model laws now being developed.)

The strength of the charity law approach is that it gives primacy to the public benefit role, underpinning in law the popular belief that if it’s for charity it must be good. That cultural commitment, reflected in readiness to give, is of inestimable value. (The reforms of charity law and regulation in England start from that premise, and the fear that, if lost, it would be immeasurably difficult to recover it.) And the strength of the English system, with a framework of law overseen by an independent agency (even if in constitution it is a government department – a status on which there is a case for reform!) with a fundamental duty to use its powers in support of charity, is that it puts the concept of public benefit at the forefront of the determination process. One of the virtues of the common law tradition is that it evolves through the exercise of determination – i.e., by decisions of the courts and, in later years, the Charity Commission. Even where the determining authority is the tax authority – with the danger that its decisions are influenced by public expenditure considerations, or even by government expediency – the weight of common law constrains that.

The virtue particularly claimed for common law, in contrast to statutory-based systems, is that the capacity to respond to changing circumstances makes it more flexible than systems based on legally enforceable lists of purposes set out in statute. It is interesting that the recent Australian Inquiry report recommends, rather in the spirit of the Goodman report in England back in the 1970s, basing charity on a legislative framework and setting out the range of purposes charity should embrace.

The key issue, which all systems have to face, is that broad categories of purposes, like education and health, do not guarantee that an organisation purporting to promote such a purpose will necessarily be in the public interest. Whether it is education for false or harmful beliefs, or the promotion of dubious or damaging medicine, these are organisations which must be beyond the pale. Attempts to define that in statute suck the legislator into a quagmire of detail which truly would undermine discretion and flexibility in the face of future novel proposals. And of course the judgement about what is not a publicly beneficial way of seeking to give effect to an undoubtedly beneficial purpose is fraught with difficulty. Not so long ago the courts could refer to received opinion, which reasonable well-informed people agree upon. Not now. The judgement about where to draw the line between innovative experiment challenging conventional wisdom (which may succeed or may not, but which should be tried) and idiosyncratic obsession, which is harmful, is difficult and ultimately subjective. There is a strong temptation to hold onto authority in the face of such choice. For common law, it is the tradition of court judgements flowing from 1601. Not, as sport, religion and political purpose show, a tradition well attuned to the 21<sup>st</sup> century. So a determining agency with authority to pronounce on the public interest now, but with a clear framework – perhaps set by the legislature – and clear accountability – perhaps to an expert tribunal – may be the best way forward.

There are a number of issues about where the line of public benefit, in the light of the charity law tradition, is currently drawn. Religion is one obvious one, in an age in which it can hardly be said, as it was in the leading judgement as recently as 50 years ago, that any religion is better than none. Whether it is better to be inclusive, allowing all manner of beliefs to qualify, as the law now does, or to exclude religion altogether, leaving it to the state to decide how it wants to support religion as an institution in modern society, is a difficult question. Indeed, the history of religion in charity (not mentioned in the 1601 preamble, perhaps because religion was altogether too sensitive an issue in those days) is curious and interesting. But for modern day purposes the controversy surrounding ‘new religions’ (cults) makes the idea of applying a public benefit test, or even testing the rebuttal of the presumption that an organisation

claiming to be a religion is for public benefit, is fraught with difficulty. The application of the Church of Scientology gave the Charity Commission problems for a number of years.

There are many boundary issues – where the line should be drawn for cultural, sporting, heritage and environmental bodies, for example. But once it is accepted that charitable status covers a wide range of organisations contributing to the well-being of the community, and not just relief of need, the broad framework seems to reflect public attitudes well enough. That certainly is the finding of surveys the Charity Commission carried out as part of the review of the register.

This conclusion needs qualification, however. There are a number of issues about what a charity should be which are controversial. They are mostly about the nature – the ethos – of charities, rather than status as such. I will address these in a moment. But one issue does go to status. It is reflected in the peculiarly English issue of public schools – the Etons and Winchester. That is a matter of public controversy. Perhaps the question which most readily comes to mind if ordinary members of the public are asked what is wrong with charity is why elite schools are charities. Actually, this is an example of an important but narrow point. This is the question of access. No one challenges the rightness of charitable status for institutions promoting education, or for that matter medical care. The issue is whether access to such benefits should be reserved to those who can pay high fees for schooling or hospital treatment. And in fact the law is clear. While charging is not improper for charities, it may not be set at a level which restricts access to a wealthy elite. This is one aspect of the detailed question of what is meant by charitable benefits being available to the public or a section of the public.

The wider issues of what charity covers concern such issues as self-help, enterprise, the relationship with the state and political purposes. These deserve separate consideration.

### **Charity, Self-help and Mutualism**

Charity in Britain is much marked by the distinction between altruism and self-help. This reflects the two strands of 19<sup>th</sup> century activity: philanthropy by the well-to-do towards the poor, and mutuality by the working

classes for self-help. Alongside charity, charity law and the Charity Commission, the whole movement of cooperatives, mutuals and friendly societies developed during the 19<sup>th</sup> century with its own framework of law and regulation, in particular the Registrar of Friendly Societies. That whole tradition has not flourished in comparison with charity. But it does continue and in some respects is receiving renewed life and encouragement, with new forms like credit unions being created. But the fact that mutuality forms have not developed alongside charity has put pressure on charity law to accommodate forms of self-help. The changing attitude to governance, emphasising the desirability of user representation on boards, has challenged the pure principle of the altruism of trusteeship.

This is an example of the influence of trust law on charity. The principle that a trustee should not benefit from his trust is fundamental – the trustee is there to administer the intentions of the benefactor. It is not self-evident that the boards of charitable associations or companies should be subject to the same self-denial. As a matter of principle, the public does, as surveys demonstrate, attach a lot of weight to the value of voluntary trusteeship. Recent consultation by the Charity Commission has confirmed the view that trustees should not in general be paid. And the law has always allowed for exceptions where that is in the charity's best interests. Where one is dealing with the board of a substantial organisation, responsible for delivering complex services and handling substantial resources, it is essential that people with the right range of skills and time to commit to the oversight of the organisation are attracted. Otherwise too much is left to the chief executive and staff with too little oversight and accountability.

Self-help is an aspect of this. That organisations like housing associations benefit from having users involved in governance has become increasingly accepted. Charity law, influenced by the trust law inheritance, had some difficulty in reconciling this good practice with the principle of altruistic unremunerated trustees. It is perhaps a mark of the flexibility of the common law tradition that it has been able to embrace this concept, to the point indeed where the Charity Commission will in principle allow boards of trustees composed entirely of users, provided there are adequate arrangements to ensure that they oversee the charity in its best interest and not simply

for their own benefit. But a line has to be drawn between bodies with a wider public benefit and ones serving the interest of its members. The moves to encourage mutualism are welcome in offering a viable alternative form for people who want to create self-help groups which undoubtedly are valuable.

## **Charity and Politics**

The fact that charities may not be political strikes a chord with the public, at least in the sense that, particularly in an age when politics is not held in high esteem, people expect charities to steer clear of party politics. But the role of charities in championing their cause, in advocating the interests for which they stand, is well-established. Nineteenth century philanthropists like Thomas Barnado were campaigners. And the advocacy role of charities has been more pronounced since the Second World War, perhaps reflecting the change of balance between state and charity – the more the state committed itself to delivering services and maintaining standards, the more the voluntary sector saw itself cast in the role of holding government to account.

Charity law had difficulty in keeping pace with the role of charities as campaigning bodies. It is perhaps significant that it was Oxfam, a wartime creation of committed individuals, that should fall foul of the Charity Commission for overstepping the line of political campaigning – over the line it took in relation to Nicaragua, among other places. That led to a prolonged and somewhat agonised reappraisal of the interpretation of the law, out of which came new guidance from the Commission which has won the support of the sector and the political process. In essence, it holds that charities may campaign on behalf of their interests provided they do so on a well-informed responsible basis. Thus, charities may engage in public discussion of government policies in their sphere of activity on the basis of their knowledge and experience. This has enabled charities such as RSPCA and Shelter, not to mention Oxfam, to campaign vigorously on, in these cases, hunting, homelessness and third world debt.

It is important that charities should not be politically emasculated by the law – their contribution to informed public debate about important issues of public policy is an essential element in a healthy democracy. But charity law is still restrictive in that the current guidelines

depend on the distinction between a charity's purposes and the activities which it undertakes to fulfil them. The activities may be political, its purposes not. And charity law defines political purposes very widely, to cover purposes directed at changing the law or even government policy. This doctrine upheld (in the Amnesty case) as recently as 1982 derives from the fact that charities are, in law, trusts whose purpose must be capable of being enforced by the courts. The courts regard the political sphere as beyond their competence, issues of changing the law as outside their remit. Thus the basis of charity law still excuses a distorting effect on modern charity.

## **Charities and Government**

The role of charities as 'counterbalance' to the state (to pick up Ernest Gellner's word) is at the heart of the civil society project. As I have described, the whole tradition of charity is the opposite, namely as partner of the state – and the difficulties charity law has had in supporting the counterbalance role is a tangible sign of this. In the practical world of voluntary action, the partnership role has developed alongside the advocacy role. In Britain the 'contract' culture became a matter of note – and concern – a good many years ago. This led the Deakin Commission (on the future of the voluntary sector) to propose a 'concordat' between government and sector, both in recognition of this development and in reaction to it. This is to say that Deakin recognised the value and certainly the inevitability of the partnership – public funding for charitable activity; but also recognised the dangers – the risk that charities become mere agents of government, dancing to that piper's tunes.

The result has been the creation of a government-voluntary sector compact, providing a framework of principles stating and protecting the interests of the 'partners'. From the point of view of the voluntary sector, the compact is designed to ensure that public funding authorities understand the nature of the voluntary sector and in particular respect its independence and right to speak on and to criticise policies. The compact process – as its creators emphasise – is a continuous process of developing and reviewing the framework and its operation. It has taken root at central and local level – patchily, of course, but has been the stimulus to dialogue between public authorities and voluntary bodies over the terms and modalities of cooperation. The interest

which has been shown in this process from many parts of the world demonstrates the importance of addressing the principles on which civil society organisations should enter into partnerships with government authorities, in the face of the inevitability of that process.

Charity law has provided an effective framework for this process. It starts from the premise that the overall purposes of the state and charity are the same, namely in the public interest. And it reflects the civil society principle that charities must be independent and free to develop their own programmes, their own interpretation of what is in the public interest; and with the right and even the duty of holding government to account for its policies. Perhaps that is the way to solve the paradox that charity is civil society but partner of government. The emanations of the state are fallible human agencies (just as charities are). As such they need the counterbalance which civil society organisations provide as well as being partners.

Of course, independence in law is a principle easily expressed. It is more difficult, in the face of the temptations of funding, to uphold it. The Charity Commission has issued guidance on how trustees should seek to safeguard their independence. And as part of the review of the register, the Commission has set out the principles of independence which charities must meet. While in principle the law permits charities to have trustees who are the nominees of other bodies, including funding public authorities, there is also a need to ensure that the trustees act independently in the best interests of the charity and that nominees do not operate as representatives of, for example, public authorities acting in their, not their charity's, interests.

Of greater concern is the process by which public services, for example, in housing or recreation, are undertaken by charities established by public authorities, or even out of the hiving off of public departments. The same principles – of genuinely independent trusteeship – apply. Again, given the history of charity, this is not a new issue so much as a new form of an old issue. There are many bodies which must be regarded as part of the public sphere – the British Council, the Arts Council and many cultural establishments like the Royal Opera House. Whether institutions of this kind – which have been called 'public service organisations' – fit the ethos (let alone the public conception) of charity, or ought, like the

BBC, to have their own non-government public agency status, is an issue which needs to be addressed, in my view. And the way to do this is to set out the principles about remuneration, governance, independence and the importance of the trustees versus the public, and to test the organisations against these criteria.

## **Charity, Commercial Activity and Enterprise**

One issue that arises in the discussion of the role of civil society organisations is the extent to which they can engage in commercial activities, and on what terms. For codes where civil society is a third sector distinct from the profit-making market sector as well as the governmental public sector, this is inevitably one of the key defining issues. For charity, the issue is not one of principle. Issues of law and ethos arise, but the basic contention that charities may trade, i.e. sell their services and not merely donate them, is standard. Even in public opinion, once the place of arts, heritage and environmental bodies as charities is accepted, the idea that beneficiaries should make a payment for the enrichment they enjoy – for example, cultural experiences provided by such bodies – is easily accepted. (As I have discussed above, the issue, in law as in public confidence, is more who pays what, and in particular the extent to which 'charitable benefits' are rationed or allocated by price – a £100 seat at Covent Garden is not one's normal idea of a charitable benefit!)

The legal underpinning for trading is logical enough. It derives from the requirement that charities must use their resources in pursuit of their charitable purposes. So 'primary purpose trading', as the lawyers call it, in pursuit of the charity's objectives, is legitimate, but commercial activity not related to the purpose is not charitable. Even there the law allows charities to benefit from trading, through the device of setting up a wholly-owned, non-charitable trading subsidiary, which covenants its profits, with tax relief, to the charity. Thus a heritage charity, like an industrial museum that preserves old production practices, and errs from sale of such products, can trade as a charity, whereas a charity which wants to raise money through, say, a shop which deals in unrelated second-hand goods will normally have to do so through a subsidiary.

Nevertheless, there is dissatisfaction at a supposed

anti-enterprise bias of charity, with calls for the not-for-profit sector to engage in the public interest through entrepreneurial activity outside charity. This is at least to some extent a matter of ethos. It is true that many charities are not, and do not wish to be, entrepreneurial. And it is certainly true that in some cases traditionally-minded trustees may unnecessarily restrain their charity's activities by thinking it impermissible, or unseemly, for their charity to engage in enterprise activity.

But there are notable examples of charities with strong enterprise activities. Anyone who has visited York will know that the Jorvik Viking Centre is one of its leading tourist attractions – developed by the charity York Archaeological Trust. And recently reservoirs in the heart of London no longer needed have been redeveloped as a wetland centre by the charity Wildfowl and Wetlands Trust in partnership with a property developer.

The Charity Commission's review of the register addressed the issue of enterprise in consultations on charitable status for bodies engaged in urban and rural regeneration. The issue is, of course, the extent to which the process of regeneration yields profits for private developers taking part of the initiative. But wealth creation is a legitimate part of public policy and, in the modern world, so the Commission has held, a body which engages in promoting economic improvement in a deprived area is contributing to sustained relief of poverty, which is better than mere handouts. Provided the body itself is operating on a proper non-profit, independent charitable basis, it can legitimately be regarded as a charity. Nevertheless, the requirements of charitable status may be inhibiting, for example, in relation to capital formation, and there are moves to develop, on American examples, a not-for-profit 'public interest company' which would operate on commercial lines without shareholders. The pros and cons of this initiative are still being debated.

## **Charity, Civil Society and Community**

One of the issues around the concept of civil society is where the private sphere – of family and friends – stops and the civil society sphere starts. On one view, civil society is the extension of the personal – the natural human wish to join together in the pursuit of common

interests. And the importance of promoting civil society, in practice if not necessarily in name, is to provide structures and security for individuals to come together to pursue legitimate common interests. (Note 'legitimate'. The uncritical advocacy of civil society about state overlooks the divisive, even oppressive role association, particularly of the powerful or well-to-do, can play.) The resonance of civil society in former communist countries is, of course, the need for a counterbalance to the intrusive, oppressive role the state played, not just in matters of politics and power but throughout daily life.

In Britain, the encouragement of the community is a feature of recent politics. Government sees the community as the natural partner in tackling social and economic problems. Whether under the Conservative label of the active citizen or New Labour's civic engagement, the wish to encourage community groups, whether to tackle crime (neighbourhood watch) or improve pre-school child provision (Sure Start), has become a pronounced strand of government policy. The relationship between state and community is thus as much an issue, in its different way, in Britain now as in Communist Europe.

Much community activity proceeds in a more or less unorganised fashion, through informal support groups exchanging help, for example. A network of capacity-building support organisations has developed to give practical advice to community groups; and there are specialist associations, for example, to support parent/teacher groups in schools.

Three factors have now in recent years raised the issue of formal organisation of community groups more actively: government interest, funding and regulation. The more the government has looked to the community sector as a partner, the more the pressure on community to form organisations to be the partners of public authorities. As public funding has become the sweetener, lubricant (or tempter!) for this process, the greater the pressure on the community to fit into forms of organisation which enable accountability for grants to be imposed according to government requirements.

A similar process has occurred with the development of the National Lottery. This has become a significant source of funding for local bodies. Although not strictly part of public expenditure, lottery funding is subject to

public accountability. And many community bodies – like parent-teacher associations – are, in law, charities, since their purpose is for the public benefit. And even if alternative forms of organisation are available, such as self-help groups, there is considerable pressure on community groups seeking lottery funding to register as charities since this facilitates applications. Community groups are thus sucked into the formal processes of charity law and accountability.

In Britain, the Charities Act currently requires any organisation which is in law a charity to register with the Commission if it has a turnover of £1000 a year. This is, of course, a very low threshold. In practice, this means no more than that the organisation must meet the simple report and accounting requirements the Commission lays down for small bodies (below £10,000 annual turnover); and while they have to prepare an annual report and accounts to be available if required, they do not have to submit them to the Commission routinely, nor are they subject to routine monitoring. In principle, the requirements are intended to be more appropriate for small organisations, and the procedures desirable for good management. The risk, of course, is that informal groups get distrusted and distorted into unnecessarily bureaucratic procedures.

## **Conclusion**

So where do charity, charity law and civil society stand? That charity continues to play a central role in society today is clear, as is the fact that that role is as varied as ever but changing in significant respects. All that is healthy and certainly inevitable in a fast-changing world. And, as I have tried to show, the changes, in particular the heightened, increasingly complex relationship between charity and government, reflect the underlying principles on which charity and its role in society is founded. The independent but co-operative relationship between charity and state is a proper reflection of the commitment which both should have to the public interest.

What is healthy about the spread of the idea of civil society is the emphasis on holding the state to account, as well as working with it. The human embodiment of the state in the form of governments and the political process needs a vigorous independent challenge. That charities should contribute to that role is healthy.

I hope I have made it clear that the law needs to be developed to keep pace with the changes in charitable and voluntary practice. The strength of the common law is its ability to respond with principle and flexibility to changing circumstances. At the same time it needs to keep in touch with public opinion. Perhaps the greatest need is to oil the common law mechanism if it is to retain, or perhaps regain, public confidence. While the technicalities of charity law may properly remain the preserve of lawyers and charity practitioners, the principles and outcomes must command general confidence. What charity is, and how it is determined, must be credible. And in the context of the compact and the principles of civil society, the need for the law to underpin proper engagement by charities with public policy and the political process is essential.

And civil society? That it, like charity, has no accepted, let alone legal, definition is perhaps a strength. That it reflects the diverse and even discordant nature of free society is important. That individual independence, free of state control, remains fundamental and not to be taken for granted, is reflected in the discourse of civil society. That personal motivation, for the public interest or purely private, not driven by the pursuit of profit, remains at the heart of life is likewise fundamental. A healthy society must foster that, as well as hold the ring to enable diversity to flourish without undermining social harmony. The challenge to the notion of civil society, as it seems to me, is how to square that circle, to recognise the variety and conflict in human motivation, and to recognise the propensity for evil as well as good.

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