

# To codify or not to codify – THAT is the question

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In recent times, there has been mounting pressure in common law jurisdictions to codify the definition of a charitable purpose. This necessarily involves distilling years of judge-made law and restating it (with various degrees of specificity) in a statute, which is, in turn, interpreted by judges (and other end users such as regulators). Both New Zealand and Australia have undertaken this process in very different ways. Australia has produced a detailed statutory definition, whereas New Zealand has only lightly touched the common law. In this paper, I will consider how these different statutory approaches have played out in the hands of the judiciary.

## The definition of ‘charity’ at common law

The term ‘charity’ has a popular meaning and a technical legal meaning.

Its popular (or dictionary) meaning has been judicially described to connote ‘the relief of any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief’.<sup>2</sup> It is said that ‘the most common signification of “charity” is conveyed by the word “alms”’.<sup>3</sup>

The technical legal meaning of ‘charity’ is far broader than the popular meaning of the term, and stems from the Elizabethan Statute of Charitable Uses 1601.<sup>4</sup> The object of the Statute was the ‘oversight and reform of abuses in the administration of property devoted by donors to purposes which were regarded as worthy of such protection as being charitable’.<sup>5</sup> The Preamble to the Statute (**Preamble**), which listed certain examples of purposes worthy of such protection, read as follows:

... for Relief of aged, impotent and poor People, ... for Maintenance of sick and maimed Soldiers and Mariners, Schools of Learning, Free Schools, and Scholars in Universities, ... for Repair of Bridges, Ports, Havens, Causeways, Churches, Sea-Banks and Highways, ... for Education and Preferment of Orphans, ... for or towards Relief, Stock or Maintenance of Houses of Correction, ... for Marriages of poor

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<sup>2</sup> *Pemsel* AC at 572.

<sup>3</sup> *Pemsel* at 586.

<sup>4</sup> 43 Eliz I, c 4.

<sup>5</sup> *Incorporated Council of Law Reporting for England and Wales v AG* [1972] Ch 73 (**ICLRUK**) at 87; see also *Pemsel* at 581.

Maids, ... for Supportation, Aid and Help for young Tradesmen, Handicraftsmen and Persons decayed, and others for Relief or Redemption of Prisoners or Captives, and for Aid or Ease of any poor Inhabitants concerning Payment of Fifteens, setting out of Soldiers and other Taxes ...

In *Morice v Bishop of Durham*,<sup>6</sup> Samuel Romilly of Counsel offered a four-fold classification of charitable purposes which became influential:

First, relief of the indigent; in various ways: money: provisions: education: medical assistance: etc; secondly, the advancement of learning; thirdly, the advancement of religion; and fourthly, which is the most difficult, the advancement of objects of general public utility.

In that case, Sir William Grant MR based his view of charitable purposes on those stated in the Preamble and ‘by analogies ... deemed within its spirit and intendment’.<sup>7</sup>

In the leading case of *Pemsel*, Lord Macnaghten noted that the Preamble contained ‘a list of charities so varied and comprehensive that it became the practice of the Court to refer to it as a sort of index or chart’.<sup>8</sup> However, his Lordship was quick to add that ‘it has never been forgotten that the “objects there enumerated ... are not to be taken as the only objects of charity but are given as instances”’.<sup>9</sup>

Whilst the technical legal meaning of ‘charity’ is wider than its popular meaning, it cannot be so wide as to ‘extend to every gift which the donor ... might happen to think beneficial for the recipient ... [for example] a trip to the Continent, or a box at the Opera’.<sup>10</sup>

Lord Macnaghten set out the legal meaning of the word “charity” as follows:

‘Charity’ in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.<sup>11</sup>

These four classifications or ‘heads’ of charity provide the technical legal meaning of ‘charity’ under common law, that is:

1. the relief of poverty;
2. the advancement of education;
3. the advancement of religion; and
4. other purposes beneficial to the community.

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<sup>6</sup> (1804) 9 Ves 399 (*Morice*).

<sup>7</sup> *Morice* at 405.

<sup>8</sup> *Pemsel* at 581.

<sup>9</sup> *Pemsel* at 581.

<sup>10</sup> *Pemsel* at 583.

<sup>11</sup> *Pemsel* at 583.

In respect of all four heads of charity, ‘an essential element is the real or imputed intention of contributing to the public welfare’.<sup>12</sup> This requirement of contributing to public welfare, i.e. the public benefit test, may be assumed in respect of the first three heads of charity until the contrary is shown.<sup>13</sup> However, in respect of the fourth head, the test is two-staged: the purpose is charitable only if it is beneficial to the community (i.e. for the benefit of the public<sup>14</sup>) and ‘within the equity of the preamble to the Statute of Elizabeth’ (**analogy requirement**).<sup>15</sup> Finally, a purpose that is contrary to public policy, for example an illegal object,<sup>16</sup> is not charitable.<sup>17</sup>

## A ‘moving subject’

As noted above, the examples listed in the Preamble ‘were from an early stage regarded merely as examples, and have through the centuries been regarded as examples or guideposts for the courts in the differing circumstance of a developing civilisation and economy’.<sup>18</sup> That is, the equity of the Preamble may operate upon additional matters and circumstances that lie beyond its actual terms.<sup>19</sup>

For example, the analogy requirement can be met where there is ‘sufficient analogy ... with something specifically stated in the [P]reamble, or sufficient analogy with some decided case in which already a previous sufficient analogy has been found’.<sup>20</sup> The ‘most obvious example’<sup>21</sup> of the former (i.e. the “stepping stones” approach<sup>22</sup>) is the ‘provision of crematoria by analogy with the provision of burial grounds by analogy with the upkeep of churchyards by analogy with the repair of churches’.<sup>23</sup>

In respect of the latter, ‘charitable status is recognised ... by analogy with previous common law authorities falling generally within the “spirit and intendment” of the preamble to the

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<sup>12</sup> *Royal North Shore Hospital of Sydney v AG* (1938) 60 CLR 396 (**Royal North Shore**) at 426, as cited in *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 (**Aid/Watch**) at [42].

<sup>13</sup> *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 (**Greenpeace**) at footnote 57, citing authorities including *National Anti-Vivisection Society v Inland Revenue* [1948] AC 31 (**National Anti-Vivisection**). See also *Aid/Watch* at [41], citing *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1, in respect of the advancement of religion.

<sup>14</sup> *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138 (**Scottish Burial**) at 154 per Lord Wilberforce.

<sup>15</sup> *Aid/Watch* at [13], citing *Incorporated Council of Law Reporting (Qld) v Federal Commissioner of Taxation* (1971) 125 CLR 659 (**ICLRQ**). The concept of being ‘within the equity of the preamble’ is sometimes referred to as being ‘within the spirit and intendment of the preamble’ or being ‘analogous to the preamble’ (see, for example, *Scottish Burial* at 146 and 152 respectively).

<sup>16</sup> See, for example, *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 at 395 (where abortion is illegal, its promotion or advancement cannot be charitable); *Re Collier (deceased)* [1998] 1 NZLR 81 at 91 (trust to promote euthanasia, an illegal activity, held not to be charitable).

<sup>17</sup> *Royal North Shore* at 426; *Bob Jones University v United States* (1983) 461 UA 574 at 591.

<sup>18</sup> *ICLRUK* at 87.

<sup>19</sup> *Aid/Watch* at [13], citing *Nelson v Nelson* (1995) 184 CLR 538 at 552–554.

<sup>20</sup> *ICLRUK* at 87 (Emphasis added).

<sup>21</sup> *ICLRUK* at 87.

<sup>22</sup> *ICLRUK* at 94.

<sup>23</sup> *ICLRUK* at 87, referring to *Scottish Burial*.

Statute of Charitable Uses’.<sup>24</sup> That is, ‘[o]bjects have been accepted to be charitable if they advance the public benefit in a way that is analogous to the cases which have built on the [P]reamble to the 1601 Act’.<sup>25</sup>

A key advantage of the analogy approach is that it allows ‘the law of charity [to be] a moving subject’<sup>26</sup> that evolves to accommodate ‘new social needs ... [as] old ones become obsolete or satisfied’.<sup>27</sup> For example, Sachs LJ held in *ICLRUK* in respect of the fourth head that:

[The] advancement of purposes beneficial to the community or objects of general public utility ... has an admirable breadth and flexibility which enables it to be reasonably applied from generation to generation to meet changing circumstances...<sup>28</sup>.

However, with flexibility comes a level of uncertainty, as minds can reasonably differ on whether or not a purpose is analogous to the equity of the Preamble. For example, it is conceivable, contrary to the conclusion reached in *Scottish Burial*, that learned minds could reasonably find that the promotion of (non-religious) cremation was not analogous to the repair of churches.

In addition, what is meant by the “equity of the Preamble” may be unclear. For example, in *ICLRUK*, Russell LJ expressed his sympathy with those who question the usefulness of the analogy approach:

‘Tell me’, they say, ‘what you define when you speak of spirit, intendment, equity, mischief, the same sense, and I will tell you whether a purpose is charitable according to law. But you never define. All you do is sometimes to say that a purpose is none of these things. I can understand it when you say that the preservation of sea walls is for the safety of lives and property, and therefore by analogy the voluntary provision of lifeboats and fire brigades are charitable. I can even follow you as far as crematoria. But these other generalities teach me nothing.’<sup>29</sup>

In addition, with the evolution of the meaning of ‘charity’ at common law, ‘the authorities show that the “spirit and intendment” of the [Preamble] ... [has] been stretched almost to breaking point’.<sup>30</sup> For example, in *Vancouver Regional FreeNet Association*, the association operated a free, publicly accessible community computer facility, which allowed users access to the internet. The court held that the association was established for charitable purposes. It reached this conclusion by drawing an analogy between the reference in the Preamble to the repairs of highways and the association’s provision of access to the ‘information highway’. It

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<sup>24</sup> *Greenpeace* at [18] (Emphasis added).

<sup>25</sup> *Greenpeace* at [18] (Emphasis added).

<sup>26</sup> *Scottish Burial* at 154.

<sup>27</sup> *Scottish Burial* at 154, as cited in *Aid/Watch* at [18].

<sup>28</sup> *ICLRUK* at 94–95.

<sup>29</sup> *ICLUK* at 88.

<sup>30</sup> *Scottish Burial* at 153.

begs the question, how useful is the requirement of a link, however tenuous, to the Preamble of ‘the Statute of Elizabeth ... [that is] now as dead as Queen Elizabeth herself’?<sup>31</sup>

### The definition of charity in NZ – an exercise in restraint

The New Zealand definition of a charitable purpose is perfect in its simplicity. Section 5(1) of the *Charities Act 2005* (**NZ Charities Act**) simply states that:

In this Act, unless the context otherwise requires, **charitable purpose** includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.

There are some additional clarifications set out in section 5 (for example, that the promotion of amateur sport may be a charitable purpose if it is the means by which a charitable purpose referred to in subsection (1) is pursued<sup>32</sup>) but otherwise the common law is gently lifted in its entirety and left to thrive within the Act without any significant legislative intervention.

An interesting case where the NZ Charities Act has been applied in accordance with the great tradition of the law of charity as a moving subject is that of *Re The Foundation for Anti-Aging Research and the Foundation for Reversal of Solid State Hypothermia*<sup>33</sup>. Justice Ellis was called upon to consider whether, in essence, fundraising for cryonics research was a charitable purpose. She noted that:

The Supreme Court in *Re Greenpeace* held that the Act builds on the pre-existing common law understanding of charitable purpose. So case law about that remains relevant and guides the interpretation and application of s 5.<sup>34</sup>

She then proceeded to apply a very orthodox analysis to a purpose that would have been dismissed as witchcraft or sorcery in Elizabethan days – namely research into the preservation of the (dead) human body in order to permit eventual restoration of a person to full health in the event that appropriate technologies for resuscitation are available in the future.

Another interesting case<sup>35</sup> is that of *In re Draco Foundation (NZ) Charitable Trust*<sup>36</sup> where Ronald Young J similarly applied an orthodox analysis to decide that an organisation which was concerned with advising citizens on their rights relating to their relationship with local and central government was not a charitable entity because its purposes were “general, wide

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<sup>31</sup> *Inland Revenue Commissioners v Yorkshire Agricultural Society* [1928] 1 KB 611 at 630. Atkin LJ was referring to the repeal of the Statute of Elizabeth, which was incorporated in s 13 of the *Mortmain and Charitable Uses Act 1888*.

<sup>32</sup> Section 5(2A).

<sup>33</sup> [2016] NZHC 2328.

<sup>34</sup> FAAR at [15] footnotes omitted.

<sup>35</sup> I will not deal with the *Greenpeace* decisions in this paper as “advocacy” is the subject of a separate session at this conference.

<sup>36</sup> [2011] NZHC 368.

and vague”<sup>37</sup> (and allowed it to carry out non-charitable purposes)<sup>38</sup>, its website material was partisan rather than educational<sup>39</sup> and was, in any event, merely the provision of material for self study, which is not for the advancement of education.<sup>40</sup>

These cases are merely examples of the application of the common law “definition” of charitable purpose to novel situations where the court has been able to go about its work unconstrained by statutory interference with the common law.

### The codification of the definition of charity in Australia – an each way bet?

In a major development in charity law in Australia, a statutory definition of ‘charity’ was introduced in the *Charities Act 2013 (Australian Charities Act)* for the purposes of all Commonwealth legislation. The common law “definition” of charitable purpose has now been all but codified.

This was not an uncontroversial move. The “increasingly statutorified nature of the law” has been analysed in an insightful paper by Leeming J entitled “Equity: Ageless in the Age of Statutes”<sup>41</sup> where His Honour notes that it has been said (as long ago as 1895!) that statutes “choke the life out of principles under a weight of dead matter which posterity may think no better than a rubbish-heap”<sup>42</sup>. Leeming notes that Frankfurter J referred to the traditional regard for statutes “as wilful and arbitrary interference with the harmony of the common law and with its rational unfolding by judges”<sup>43</sup> and that Lord Scarman wrote in 1980:

Statutes are predators in the sense that they can, and some of them do, destroy common law rules and principles.

Furthermore, as noted above, the beauty of the common law “definition” was that it could move with the times. In 1972, Sachs LJ specifically cautioned against constraining this flexibility:

... [F]or my part I appreciate the wisdom of the legislature in refraining from providing a detailed definition of charitable purposes ... and preferring to allow the existing law to be applied. Any statutory definition might well merely produce a fresh spate of litigation and provide a set of undesirable artificial distinctions. There is indeed much to be said for flexibility in such matters.<sup>44</sup> (Emphasis added)

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37 At paragraph [35].

38 At paragraph [70].

39 At paragraphs [53]-[67].

40 At paragraph [43].

41 Presented at the Melbourne Law School conference *Equity in the Age of Statutes* 27 February 2015 (**Lemming 2015**) at p.7

42 Leeming 2015 at p.22 citing Pollock’s Oration given in 1895, reprinted in F Pollock, *The Expansion of the Common Law* (1904), 137-138.

43 Leeming 2015 at p.21.

44 *ICLRUK* at 94–95.

The danger of seeking to codify the common law “definition” of charity is that, in my opinion, it stultifies the ability of the law to deal with new charitable purposes as they arise. The Australian Charities Act has sought to deal with this issue in a number of ways. First, as the relevant Explanatory Memorandum states:

The meaning of charity and charitable purpose has not previously been comprehensively defined in statute for the purposes of Commonwealth law. [45] The meaning has been largely determined based on over 400 years of common law. The statutory definition generally preserves the common law principles by introducing a statutory framework based on those principles but incorporating minor modifications to modernise and provide greater clarity and certainty about the meaning of charity and charitable purpose.<sup>46</sup>

The EM notes that the categories of charitable purposes set out in the *Charities Bill 2013 (Bill)* ‘describes categories of charitable purposes that have significant recognition in the common law, broadly following the categories identified in [the 2001 *Report of the Inquiry into the Definition of Charities and Related Organisations (Charities Definition Inquiry report)*].<sup>47</sup> In addition, ‘the Bill incorporates purposes specified in the *Extension of Charities Purposes Act 2004*, makes further minor extensions to charitable purposes, and modernises the language and categories’.<sup>48</sup>

The categories, as set out in s 12(1) of the Australian Charities Act, are as follows:

[C]haritable purpose means any of the following:

- (a) the purpose of advancing health;
- (b) the purpose of advancing education;
- (c) the purpose of advancing social or public welfare;
- (d) the purpose of advancing religion;
- (e) the purpose of advancing culture;
- (f) the purpose of promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia;
- (g) the purpose of promoting or protecting human rights;
- (h) the purpose of advancing the security or safety of Australia or the Australian public;

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<sup>45</sup> The *Extension of Charitable Purpose Act 2004* extended the common law meaning for Commonwealth purposes to include child care, self-help bodies and closed or contemplative religious orders.

<sup>46</sup> The Explanatory Memorandum to the *Charities Bill 2013 (EM)* at p 3; see also the preamble to the Australian Charities Act.

<sup>47</sup> The EM at [1.112].

<sup>48</sup> The EM at [1.17].

- (i) the purpose of preventing or relieving the suffering of animals;
- (j) the purpose of advancing the natural environment;
- (k) any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) to (j);<sup>49</sup>
- (l) the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if:
  - (i) in the case of promoting a change – the change is in furtherance or in aid of one or more of the purposes mentioned in paragraphs (a) to (k); or
  - (ii) in the case of opposing a change – the change is in opposition to, or in hindrance of, one or more of the purposes mentioned in those paragraphs.<sup>50</sup>

Where an entity has a purpose that falls outside the categories above, that purpose must be ‘incidental or ancillary to, and in furtherance or in aid of’ the purposes set out in the categories above for the entity to fall within the definition of ‘charity’.<sup>51</sup>

To qualify as a ‘charity’, none of the entity’s purposes can be ‘disqualifying purposes’,<sup>52</sup> being:

- (a) the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or
- (b) the purpose of promoting or opposing a political party or a candidate for political office.<sup>53</sup>

As noted above, under common law, public benefit may be presumed in respect of the first three heads of charity until the contrary is shown.<sup>54</sup> This has been retained in the Australian Charities Act, and expanded/clarified in light of the new categories of charitable purpose.<sup>55</sup>

According to the EM, the statutory definition of charity would seem to be intended to be ‘a vessel for ... development [of the common law and not] a cage for confinement’<sup>56</sup>:

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<sup>49</sup> There is a note to paragraph (k) which is set out and discussed at the end of this paper.

<sup>50</sup> Statutory note omitted.

<sup>51</sup> Paragraph (b)(ii) of the definition of ‘charity’ under s 5 of the Australian Charities Act.

<sup>52</sup> Definition of ‘charity’ under s 5 of the Australian Charities Act.

<sup>53</sup> Section 11 of the Australian Charities Act (statutory notes omitted).

<sup>54</sup> *Greenpeace* at footnote 57, citing authorities including *National Anti-Vivisection*. See also the EM at [1.79]. (However, in the UK, the presumption of public benefit is ousted by the *Charities Act 2011* (UK), as discussed in section C below.)

<sup>55</sup> Section 7 of the Australian Charities Act.

<sup>56</sup> Justice RS French, ‘Mabo – Native Title in Australia’, speech delivered at the Landmark Cases Roundtable Conference, Constitutional Court of South Africa, 10–11 December 2004, Johannesburg, at [73] in the context of ss 223(a) and (b) of the *Native Title Act 1993*.

The statutory definition provides a framework for considering charity and charitable purposes. However, the definition retains the flexibility inherent in the common law that enables the courts, as well as Parliament, to continue to develop and extend the definition to other charitable purposes beneficial and relevant to contemporary Australia within the statutory framework. This will ensure that the definition remains appropriate and reflects modern society and community needs as they evolve.<sup>57</sup>

In my opinion, the apparent breadth of this statement is belied by the qualification that the envisaged development of the definition must nevertheless be “within the statutory framework”. In other words, “new” charitable purposes must always be within the purposes set out in sections 12(1) (a) to (j) and (l) or analogous to the purposes denoted in s 12(1)(a) to (j). Whereas under the common law, charitable purposes could be found by analogy “with something specifically stated in the Preamble, or sufficient analogy with some decided case in which already a previous sufficient analogy had been found”<sup>58</sup> the analogy allowed under s 12(1)(k) of the Australian Charities Act is confined to “any of the purposes mentioned in paragraphs (a) to (j)”. Thus, if a judge has found that purpose X is a charitable purpose under common law, that purpose will not be regarded as charitable under the Australian Charities Act unless it is also analogous one of the purposes set out in s 12(1)(a) to (j).<sup>59</sup>

It is perhaps for this reason that the note to s 12(1)(k) was included. It seems designed to preserve the previous common law position:

In the case of a purpose that was a charitable purpose before the commencement of this Act and to which the other paragraphs of this definition do not apply, see item 7 of Schedule 2 to the *Charities (Consequential Amendments and Transitional Provisions) Act 2013*. (Emphasis added)

In turn, item 7 of Schedule 2 to the *Charities (Consequential Amendments and Transitional Provisions) Act 2013* provides that:

For the purposes of paragraph (k) of the definition of ***charitable purpose*** in subsection 12(1) of the *Charities Act 2013*, a purpose:

- (a) that, on the day before the commencement day, was a charitable purpose; and
- (b) to which paragraphs (a) to (j) and (l) of that definition do not apply;

is treated as being a purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) to (j) of that definition. (Emphasis added)

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<sup>57</sup> The EM at [1.9]; see also the Second Reading Speech dated 29 May 2013 at p 4242, ‘The bill lists categories of charitable purpose. This list is not intended to be exhaustive, but rather identifies purposes that have strong recognition in the common law’.

<sup>58</sup> ICLRUK at 87.

<sup>59</sup> See, for example, the *TIO* case discussed below.

This note is interesting for two reasons. First, it is an acknowledgment that not all purposes that are charitable at common law are encapsulated in the definition of charitable purpose in s 12(1) of the Australian Charities Act.

Secondly, it allows purposes which were charitable at common law as at the commencement date to be “treated as” being charitable (even though they do not otherwise fall within s 12(1)) but it freezes this concession at the date of the commencement of the Australian Charities Act.

Thus, if a court were to find today that a new purpose was a charitable purpose at common law, and that purpose did not fall within the statutory definition in s 12(1) – it may not be “treated” as falling within s 12(1) if it was thought not to be a charitable purpose before the commencement day. If this analysis is correct, this definitely establishes the statutory definition as a cage for confinement, rather than as a vessel for development.

A case in point is the recent Victorian Supreme Court decision in *TIO*. In that case, Croft J found that the TIO’s purpose of providing a free, independent dispute resolution service to residential and small business consumers of telecommunications services was beneficial to the community<sup>60</sup> and within the equity of the Preamble.<sup>61</sup> However, such a purpose would not necessarily be found in the statutory definition in s 12(1) of the Australian Charities Act.

It has been observed that:

Legislation and the common law are not separate and independent sources of law; the one the concern of parliaments, and the other the concern of courts. They exist in a symbiotic relationship.<sup>62</sup>

This is because statute ‘occurs in a broader structural and temporal context where the enacted text becomes part of the law that is to be applied by courts ... The meaning of a statutory text is ... informed, and reformed, by the need for the courts to apply the text each time, not in isolation, but as part of the totality of the common law and statute law as it then exists’.<sup>63</sup>

In a charitable context, the plurality of the High Court noted in *Aid/Watch* that:

Where statute picks up as a criterion for its operation a body of the general law, such as the equitable principles respecting charitable trusts, then, in the absence of a

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<sup>60</sup> *TIO* at [114]

<sup>61</sup> *TIO* at [123].

<sup>62</sup> *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [31].

<sup>63</sup> Justice Gageler, ‘Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process’ (2011) 37(2) *Monash University Law Review* 1 at 1-2; see also Justice Leeming, ‘Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room’ (2013) 36(3) *UNSWLJ* 1002 (**Leeming 2013**) at 1016-1017, citing Windeyer J in *Vallance v The Queen* (1961) 108 CLR 56 at 76: ‘We cannot interpret ... provisions [in statute] ... as if they were written on a *tabula rasa*, with all that used to be there removed ... Rather [the statute is] written on a palimpsest, with the old writing still discernible behind’.

contrary indication in the statute, the statute speaks continuously to the present, and picks up the case law as it stands from time to time.<sup>64</sup>

Earlier, the plurality had noted that:

A law of the Commonwealth may exclude or confirm the operation of the common law of Australia upon a subject or, as in the present case, employ as an integer for its operation a term with a content given by the common law as established from time to time.<sup>65</sup>

The statute under consideration in *Aid/Watch* utilised the (undefined) term “charitable institution”. Similarly, the NZ Charity Act simply states that “charitable purpose includes every charitable purpose”. In both these situations, it is clear that the statute has “employ[ed] as an integer for its operation a term with a content given by the common law as established from time to time.”<sup>66</sup>

The question that has so far remained unanswered is whether the courts will regard the Australian Charities Act as “pick[ing] up the case law as it stands from time to time” in circumstances where that Act specifically delineates what is a charitable purpose. Does the Australian Charities Act exclude or confirm the operation of the common law of Australia or does it have an each way bet and confirm the law as it stood prior to the commencement of the Act and exclude it thereafter?

In these circumstances, as pointed out by Leeming J<sup>67</sup>, it is necessary to determine whether the statutory language translates to the general law concept, or whether a new statutory creature with incidents resembling those at general law is denoted. Another possibility is that the statute has created something quite new.

In Australia, our Federation has thrown up the problem that an entity can be characterised as a charity for federal income tax purposes under the statutory definition and yet the same entity can be found NOT to be charitable under the common law concepts relevant for state taxation purposes. A case in point is the Supreme Court decision in *LIV v Commissioner of State Revenue*.<sup>68</sup> The Law Institute of Victoria had been registered as a charity by the Australian Charities and Not-for profits Commission (“ACNC”) under the Australian Charities Act under s 12(1)(b), (c), (l) and (k). Despite this, the court refused to find that it was a charity at common law stating:

In my view the recognition and registration [by the ACNC under the Australian Charities Act] provides no assistance to me in relation to the task of interpreting the

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64 *Aid/Watch* at [23].

65 *Aid/Watch* at [20].

66 *Ibid*.

67 Leeming 2015 at p.25.

68 [2015] VSC 604 (21 October 2015) (**LIV**).

provision [sic] of s 48 of the PT Act<sup>69</sup> because that recognition and registration was achieved pursuant to a separate and distinct framework and criteria.<sup>70</sup>

If the view expressed in the LIV case is to prevail, it would seem that the statute has, indeed, “created something quite new”.

In my opinion, the courts will look to the common law when known concepts such as “advancing religion”<sup>71</sup> are invoked but develop their own understandings of new concepts such as promoting “mutual respect and tolerance between groups of individuals that are in Australia”<sup>72</sup>. Finally, to the extent that the common law develops to include a new charitable purpose that was not in existence prior to the commencement of the Australian Charities Act and which does not fall within the purposes denoted in s 12(1)<sup>73</sup>, this new purpose can only be recognised in Australia for Federal purposes by way of statutory amendment.

**Jennifer Batrouney QC<sup>74</sup>**  
4 May 2018

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69 Which simply referred to a “charitable institution”.

70 LIV at [130].

71 Section 12(1)(d).

72 Section 12(1)(f).

73 For example, if the common law were to find that amateur sport *per se* is now a charitable purpose given our sedentary lifestyle and the health consequences thereof.

74Liability limited by a scheme approved under Professional Standards Legislation