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CHARITABLE PURPOSES – AN IRISH PERSPECTIVE

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1. **INTRODUCTION – THE DRIVERS OF CHARITABLE CHANGE**

“While the essential characteristics of charitable purposes do not change, what will satisfy those purposes changes with society . . . What is charitable is to be determined in accordance with contemporary community values. A contemporary activity may be charitable now, though it would not have been charitable a century ago, or less . . . Rules established a century ago relating to what is charitable need to be revisited in this light.”

The introduction of a new charity statute affords a state an opportunity to revise its policy approach on charities and in so doing to redraw the boundaries between the state, the market and the nonprofit sector. At its core, the power to determine what constitutes a charitable purpose is -- and always has been -- a political one. As history reveals, it matters not that definitional classification is not always to the fore of political intent or deliberation. The Statute of Charitable Uses 1601, although primarily intended as an accountability tool to ensure that charitable assets were applied to charitable ends, is today best and perhaps only remembered for its Preamble setting out the parameters of seventeenth century charity. It is somewhat less surprising then that history is once more repeating itself: whereas the political motivation for new charity legislation in Ireland springs primarily from concerns relating to transparency and accountability, the focus of popular, political (and most likely future legal) debate rests on the scope of the definition of charity.

Difficulties in defining what is meant by “charity” are not new. For centuries, courts and legislatures have relied on the preamble to the Elizabethan Statute of Charitable Uses 1601 and its common law reformulation in *Commissioners for Special Purposes of Income Tax v. Pemsel* as the source of charity. Despite the obvious difficulties of definition by analogy to a seventeenth century statute, past attempts to codify the meaning of “charity” have been unsuccessful. Historically, legislators balked at the idea of updating the list of charitable purposes, afraid that a more modern statutory listing would deny the flexibility present in the common law to adapt to changing circumstances. Lack of judicial opportunity and in some cases lack of judicial will has meant, however, that even the common law cannot always bring the concept of legal charity into line with its more popular modern conception. In short, providing a satisfactory definition of what it means to be charitable is a difficult and perennial question.

The past ten years have seen a flurry of legislative activity concerned with revamping the definition of charity in a number of common law countries. Canada put its toe in

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4 *Vancouver Freenet Association v MNR* (1996) 137 D.L.R. (4th) 206 (CA) (where in order to uphold as charitable the activities of the applicant which included the provision of internet facilities, the Federal Court of Appeal held that the provision of free access to information and to a means by which citizens can communicate with one another on whatever subject they may please via the internet was analogous to the repair of bridges, ports, causeways and highways, mentioned in the preamble to the Statute of Elizabeth I (both being essential means of communication in their day) and thus charitable as being within the spirit and intendment of the Statute.
the water with the Broadbent Reports\(^5\) and although initial proposals to expand the common law definition received some support\(^6\) the proposal died a quick death when the Canadian Revenue and Customs Authority held the issue to be non-negotiable.\(^7\) Australia went further with its Charity Definition Inquiry in 2001 but the resulting 2004 legislation fell far short of the promise that the Report had held out for radical redefinition.\(^8\) New Zealand, although still clinging firmly to Pemsel, transposed its common law test into a statutory test with minor cultural modifications in 2005.\(^9\) Closer to home, the various jurisdictions that make up the UK dared in their legislative deliberations to go where their Commonwealth counterparts had feared to tread. The first statutory definition of charity came with the Charities Trustee and Investment (Scotland) Act 2005, closely followed by the English Charities Act 2006. Northern Ireland was two years longer in the making of its changes but brought its revised charitable definition into force with the Charities Act (Northern Ireland) 2008.

In the midst of such change, Ireland drank deep and was silent;\(^10\) reviewing the changes made by our neighbours and contemplating the necessary changes required in our own jurisdiction. The need for such charitable change had existed for many years, driven by a lack of judicial opportunity to keep the common law definition current and the absence of a charities regulator with responsibility for pronouncing regularly (and publicly) on the evolution and status of charitable purposes in modern Ireland. Almost a decade ago, a coincidence of events combined to provide the necessary driver for the reform of charity law in Ireland and with it the revision of the common law Pemsel definition. In June 2002, the then newly elected coalition government made an express commitment that: “A comprehensive reform of the law relating to charities will be enacted to ensure accountability and to protect against abuse of charitable status and fraud.”\(^11\) The driver for this reform sprung, in large part,\(^12\) from earlier Irish government commitments to the UN’s Security Council’s

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\(^7\) The Voluntary Sector Initiative sponsored by the Privy Council Office set up a number of ‘joint tables’, one of which consisted of a regulatory joint table. However, unlike its predecessor, it refused to consider further the definitional issue despite third sector requests. See Voluntary Sector Initiative Joint Regulatory Table, Strengthening Canada’s Charitable Sector: Regulatory Reform: Final Report (May, 2003) available at: http://www.vsi-isbc.ca/eng/regulations/reports.cfm. See also Kathy Brock, The Devil’s in the Detail: The Chrétien Legacy for the Third Sector, 9(2) REVIEW OF CONSTITUTIONAL STUDIES, 263, 275 (2004).  
\(^9\) See s. 5(1) New Zealand Charities Act 2005 (No. 39 of 2005). This Act makes special provision for the protection of special Maori charities that might otherwise experience recognition difficulties under the common law charity test. Moreover, the Act attempts to bring the clarity of the twenty first century to the concept of “charity” by sanctioning such bodies to include amongst their purposes ancillary non-charitable purposes such as advocacy.  
\(^10\) With apologies to Austin Clarke and his poem, “The Planter’s Daughter.”  
\(^12\) The recommendations of previous government-sponsored reviews of charity law, although welcomed, had not been implemented by a succession of governments. See Costello, Mr Justice D. (1990) Report of the committee on fundraising activities for charitable and other purposes, Dublin,
Counter Terrorism Committee to strengthen charity regulation amidst general fears that absence of effective regulation in Ireland (amongst a number of other countries) provided a haven for terrorist organizations that wished to launder money through nonprofit and charitable entities. Thus international pressure served as an external catalyst in the prioritization of charity law reform where earlier domestic pressure had failed, resulting in the government’s newfound commitment to new legislation.

Legislation however provides only a framework into which content must be added and luck was with the Irish government in the timing of its policy agenda. A month after the government’s public commitment to charity law reform, the Law Society of Ireland published a 284-page report on the need for charity law reform in Ireland. The report was influential and wide-ranging, covering substantive issues relating to registration and regulation, legal structures for charities and legal requirements for charity trustees. Nearly 100 pages of the report dealt with the issue of charity definition and the need for public benefit. In examining the case for reform, the Law Society had reviewed research then ongoing in Canada, Australia and England relating to the definition of charity. Indeed, the work of the Australian Charities Definition Inquiry (hereinafter ‘CDI’) featured prominently in the Report and helped to shape the definition ultimately proposed by the Law Society. Many of the Law Society’s recommendations relating to charitable purpose find expression today in the new Charities Act. The report received a broad welcome from both charities and the government alike.

And so it came to pass that when the government department in charge of charity law reform published its Consultation Paper in 2003, amongst the chapters dealing with regulation and accountability was an entire chapter devoted to charitable purposes. Indeed, the Consultation Paper put the requirement for definitional clarity front and centre, citing as one of the Department’s main aims the need to “give clear statutory guidance regarding the definition of charity, thereby bringing the definition of charitable purposes into line with a modern perspective of what constitutes charity and protecting against abuse of charitable status.” The Consultation Paper, acknowledging the root problems of lack of judicial opportunity to update the common law definition and the ensuing dissatisfaction with the test, recommended

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13 See further Ireland’s Third Report to the Counter-Terrorism Committee established pursuant to paragraph 6 of resolution 1373 (2001), S/2003/816. In 2004, the Irish Minister of State for charity law reform confirmed that the UN Security Council’s Counter Terrorism Committee had requested Ireland to consider and update its charity legislation -- See VOL. 589 DÁIL DEBATES, COL 899 (Tuesday, 5 October 2004), Priority Questions: Charity Regulation. A similar request by the Counter Terrorism Committee to the New Zealand government provided a catalyst for new charity legislation in that country too; See New Zealand Response To The United Nations Security Council Counter-Terrorism Committee, Questions for Response (April 30, 2004).
14 Law Society of Ireland, Charity Law: The Case for Reform (Dublin, 2002).
16 Successful proposals include: the inclusion of prevention of poverty as well as relief; the inclusion of advancement of culture; the inclusion of advancement of health; new references to social inclusion and community welfare, the express inclusion of promotion of the natural environment; the continuation of a presumption of public benefit in respect of gifts to advance religion.
17 Irish Department of Community, Rural and Gaeltacht Affairs, Consultation Paper on Establishing a Modern Statutory Framework for Charities, chapter 4 (Dublin, December 2003).
18 Ibid, at 6.
that “[a] statutory definition could codify and replace the current common law interpretation, setting out clear charitable purposes of public benefit.”

The suggested heads put forward by the Department for consultation purposes drew heavily on the Law Society of Ireland Report and its proposed definition of charity, which in turn had been influenced by the Australian Charities Definition Inquiry’s proposals with one exception: the Consultation Paper did not include the advancement of human rights as a proposed head of charity. This omission drew much adverse comment from charities and the public; so much so, that the external Consultation Evaluation Report subsequently recommended its specific inclusion. When published in March 2006, the draft Charities Bill’s definitional provision parsed out eleven categories of activity under the heading ‘other purposes beneficial to the community’ that included express reference to “the advancement of human rights.”

Three years later, Ireland finds itself endowed with a new statutory definition consisting of 4 main heads of charity and 12 sub-heads; albeit one that once more omits reference to the advancement of human rights, an issue discussed further below. Part 2 of this paper outlines the changes wrought by the new statutory definition, detailing in so far as is possible the likely coverage of each new subsection. Part 3 discusses those areas excluded either expressly or implicitly from the new statutory definition before Part 4 concludes the paper by briefly examining the effect of the new Charities Act on the concept of charitable purposes in Ireland.

2. The New Statutory Definition of Charitable Purpose

The Irish Charities Act 2009 updates the Charities Acts 1961-1973 and the regulatory regime instituted there under. The 2009 Act introduces for the first time in Ireland a statutory definition of charitable purposes. To qualify as charitable, a purpose must fall within one of the headings set out in s. 3 of the Act and it must be for the public benefit.

To the casual observer, s. 3(1) retains (with some expansion) the language of the common law Pemsel headings with the last heading of ‘other purposes beneficial to the community’ receiving its own expansive elaboration in s. 3(11). To those familiar with the statutory definitions of charity recently added in Scotland, Northern Ireland and England and Wales, the language found in the Irish Act will

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19 Ibid at 7.
20 Breen, Establishing a Modern Framework for Charities: Report on the Public Consultation for Department of Community, Rural and Gaeltacht Affairs (Dublin, September 2004)
21 2006 Draft Bill, Head 3(1)(v).
22 See Part 3, infra.
23 On the issue of public benefit see 2009 Act, s. 3(2) (“A purpose shall not be a charitable purpose unless it is of public benefit.”); s. 3(3) (“Subject to subsection (4), a gift shall not be of public benefit unless— (a) it is intended to benefit the public or a section of the public, and (b) in a case where it confers a benefit on a person other than in his or her capacity as a member of the public or a section of the public, any such benefit is reasonable in all of the circumstances, and is ancillary to, and necessary, for the furtherance of the public benefit.”) and s. 3(7) (“In determining whether a gift is of public benefit or not, account shall be taken of— (a) any limitation imposed by the donor of the gift on the class of persons who may benefit from the gift and whether or not such limitation is justified and reasonable, having regard to the nature of the purpose of the gift, and (b) the amount of any charge payable for any service provided in furtherance of the purpose for which the gift is given and whether it is likely to limit the number of persons or classes of person who will benefit from the gift.”)
24 Charities Trustee and Investment (Scotland) Act 2005, s.7 (hereinafter, ‘2005 Act’).
25 Charities Act (Northern Ireland) 2008, s.2 (hereinafter, ‘2008 Act’).
be reminiscent of, albeit not identical to, the wording found in those neighbouring statutes. And, as every good lawyer knows, the devil lies in such detail.

This section examines the new definition of charity in Ireland; contextualizes the likely effects of this change and compares the emerging Irish perspective on modern charity with the outlook of our common law neighbours, close to home (in the UK) and further afield (in Australia). In further aid of this comparison, the Appendix provides a cross-reference guide for each of new Irish statutory heads of charity, linking them where possible with analogous legislative provisions in Scotland, Northern Ireland, and England and Wales.

Before assessing the individual provisions in more detail, a few preliminary comments are required to frame this discussion. Ireland is a sovereign state. Despite its geographical adjacency to Great Britain the laws of the United Kingdom do not extend to Ireland. Neither are the decisions of the English courts binding in Ireland although they are treated as persuasive authority. An Irish judge in arriving at his/her decision is as likely to refer to Australian or Canadian authorities as he/she is to refer to decisions of the English Court of Appeal or House of Lords. Until 2009, the definition of charitable purpose in Ireland has been a matter of common law and the Irish courts have applied Lord McNaghten's four heads of charity set out in *Pemsel.*

Ireland shares the island of Ireland with another legal jurisdiction -- that of Northern Ireland. Northern Ireland forms part of the United Kingdom. It enjoys a devolved government from Westminster in the form of the Northern Ireland Assembly, established as a result of the Belfast Agreement of 10 April 1998. The Assembly is responsible for making and enacting laws on transferred matters, such as charity law, in Northern Ireland. In areas in which there has been no transfer of powers, Westminster continues to make the laws for Northern Ireland. By way of example, tax laws apply uniformly across the United Kingdom and therefore affect Scotland, Northern Ireland, England and Wales in equal measure. In this regard, it is interesting to note HM Revenue and Customs (HMRC) uses the definition of charity as set out in the English Charities Act 2006 when deciding whether a UK organization is entitled to charitable tax-exempt status.

**Section 3 of the Charities Act 2009 – the new meaning of charity in Ireland**

Section 3 of the Charities Act 2009 sets out a new baseline for determining what constitutes ‘charitable’ in Ireland. It breaks the link with the common law by replacing and expanding the Pemsel heads of charity with a codified statutory version of ‘charitable purpose.’ Section 3(1) retains unchanged the charitable heads of advancement of education, advancement of religion and the advancement of any other purposes beneficial to the community and section 3(11), in a series of 12 subheads, expands upon the meaning of the fourth head. There was much debate in the Oireachtas (the Irish Parliament) during the passage of the Bill as to the political

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26 Charities Act 2006, s.2 (hereinafter ‘2006 Act’).
27 See *National Tourism Development Authority v Coughlan and ors.* [2009] IEHC 53 (HC), a recent charity law case, in which Charlton J., in addition to English judicial authorities cited decisions of both the Canadian Federal Court of Appeal and of the Australian Federal Court of Appeal.
28 *Supra*, n.3.
choices underlying the new definition. Whereas the opposition parties felt that the new statutory definition should update and, where possible, improve upon the existing common law definition, the government was adamant that the statutory definition was intended only to clarify – and not to expand upon – the existing common law meaning of charitable purpose in Ireland.

The government’s position gives rise to a number of difficulties: first, the decision to enshrine an existing common law position in statute is of itself a political choice. By abrogating its power to review the contents of charitable purpose in certain instances, the government nonetheless makes a political choice regarding charity’s scope and thereby influences the future direction of charitable giving. The decision to enshrine existing practice in legislation is particularly misfortunate in Ireland because lack of Irish charity case law coupled with an absence of published Revenue guidance regarding the grant or refusal of charitable tax-exempt status make it extremely difficult to state with any confidence the current common law parameters of charitable purpose in Ireland. Moreover, as will become clear below, some of the new statutory heads do indeed constitute legislative expansions of the common law concept of charity, resulting in inconsistency in the government’s stance on the basis for its definition.

a) Poverty
Section 3(1)(a) The prevention or relief of poverty or economic hardship.

Both the Australian Charitable Definition Inquiry and the Irish Law Society in their respective reports on charity law reform recommended that reference to poverty should tackle not only the symptoms of poverty (via relief) but also its causes (via the introduction of reference to prevention). The newly expanded poverty head in subsection (1) refers now to “the prevention or relief of poverty or economic hardship.” In the context of poverty, ‘prevention’ is normally conceived of as the power to question or challenge systems that are responsible for the beneficiaries’ poverty. The beneficiary class is normally given a broad interpretation to include amongst its number those who without assistance may in future become poor. As to the range of activities that a charity may be able to engage in under this new heading, advocacy will be possible provided it directly furthers the charitable purpose of preventing poverty. Thus, the need to engage in informed debate (as opposed to

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29 See the comments of Senator David Norris speaking during the Committee Stage of the Charities Bill 2007 to the effect that “The Minister of State has fundamentally misunderstood the purpose and function of Seanad Eireann under the Constitution. We are here to amend and improve legislation, not maintain the status quo, which is an absurd position.” Vol. 192 No. 12 Seanad Debates 758 (December 4, 2008).

30 Minister Curran addressing the Committee Stage hearings of the Charities Bill 2007 in Seanad Eireann to the effect that “I have outlined that it was a policy decision to reflect the practices. Revenue was consulted as to what the practices were. It is a policy decision to introduce this legislation to regulate charities. I know it is not what people want and they are looking to go somewhere else. That was not the policy decision. The decision was that we would reflect on what was happening.” Vol 192 No. 12 Seanad Debates 760 (December 4, 2008).


33 2009 Act, s. 2 (providing that a body will not be charitable if it promotes a political cause, unless the
propaganda) and the onus on the charity trustees to ensure that any lobbying or campaigning are proportionate and do not detract from the charity’s focus on mission or the ongoing needs of its beneficiaries will remain. As such, it is unlikely that this amendment would go so far as to enable any future ‘Make Poverty History’ campaign to be charitable in its own right although poverty charities could affiliate to the campaign without risk of losing their charitable status.\(^{34}\)

At common law, poverty is construed as a relative concept, which does not require proof of destitution.\(^{35}\) The addition of the descriptive term ‘economic hardship’ to s. 3(1)(a) may be a statutory reinforcement of this common law principle. A person whose standard of living declines dramatically might experience ‘economic hardship’ without necessarily falling within the popular conception of poverty. The focus here would appear to be on income poverty rather than poverty resulting from social exclusion. The UK also picks up on the notion of impecuniosity with all three acts making similar reference to the concept of ‘financial hardship.’ Interestingly, the reference to such hardship in each of those statutes arises not in the context of the poverty heading but under the broader community welfare heading of the expanded fourth Pemsel head.\(^{36}\) Moreover, ‘financial hardship’ in all three Acts expressly includes relief through the provision of accommodation or care, presumably covering childcare centres and housing associations.\(^{37}\)

b) Education

**Section 3 (1)(b) The advancement of education.**

The advancement of education has been the workhorse of the common law definition in Ireland, encompassing activities ranging from school and university education, research of all types (from literary to scientific), sports-related activities, theatre, the arts, and cultural activities.\(^{38}\) To a degree, the new statutory definition parses out these multiple spokes by creating specific subheadings for them under ‘other purposes beneficial to the community’ and thus freeing advancement of education to focus once more on the meaning of ‘education.’\(^{39}\)

Advancement of education will continue to cover both formal (e.g., school, university) and informal education (e.g., adult education, vocational training, and playgroups). In terms of the former, although the statutory definition of education extends to the activities of education bodies, schools and universities, these bodies...
will not be fully subject to the rigours of the Charities Act 2009, particularly with
regards to accountability. Thus, such educational bodies will be neither required to
submit their annual statements of accounts to the CRA under s.48 nor will they be
subject to the audit requirements of s.50. At present, the Revenue Commissioners
recognize private fee-paying schools as charitable. There has not been the same level
of debate to date in Ireland as has occurred in the UK over whether such institutions
provide sufficient public benefit to warrant their charitable status.\textsuperscript{40}

Notwithstanding the deliberate decision on the part of government to exclude sport as
a charitable heading in its own right, discussed below in section 3, it is likely that
sport will continue to find a home under the advancement of education heading
provided that it is sufficiently integrated with educational purposes.

c) Religion

\textit{3(1)(c) The advancement of religion.}

Since the early twentieth century, Irish law has treated the advancement of religion
differently to its common law neighbours. The differences, attributable to the socio-
cultural differences that exist between Ireland and the UK, have long been recognized
in both the statutory provisions\textsuperscript{41} and case law.\textsuperscript{42} The 2009 Act carries over and
updates the basic law relating to religious advancement and charities in Ireland. The
Irish Act does not set out a statutory definition of religion, thus leaving intact the
common law definition based upon there being worship of a Supreme Being. In
determining whether a gift advances religion, s. 3(6) of the 2009 Act reiterates the test
from the 1961 Act, to the effect that “A charitable gift for the purpose of the
advancement of religion shall have effect, and the terms upon which it is given shall
be construed, in accordance with the laws, canons, ordinances and tenets of the
religion concerned.”

The new Act also retains the presumption that a gift for the advancement of religion is
for the public benefit. Whereas this presumption was conclusive under s.45 of the
1961 Act, s. 3(4) of the 2009 Act makes it rebuttable. In other words, once an entity
proves to the Charities Regulatory Authority that the gift is in support of a recognized
religion and the gift’s purpose is to advance worship within the context of that
religion, then public benefit is presumed to flow without further need for
demonstrable proof. If the CRA concludes that the evidence before it rebuts the
presumption of public benefit in favour of a particular religion, it cannot decide
against the gift without the consent of the Attorney General. The Attorney General’s
power in this respect is unusual in the new statutory regime since s. 38 of the 2009
Act divests the Attorney of all his previous powers and functions in relation to
charities, transferring them to the CRA.\textsuperscript{43} Upon receipt of the AG’s consent and the

\textsuperscript{40} See Charity Commission for England and Wales, Charities and Public Benefit (January 2008). See
also, Alexandra Frean, Nicola Woolcock and Rosemary Bennett, “Five independent schools face
\textsuperscript{41} Charities Act, 1961, s. 45.
\textsuperscript{42} \textit{Attorney General v O’Hanlon v Logue} [1906] 1 IR 247; \textit{Maguire v Attorney General} [1943] IR 238.
\textsuperscript{43} C.f. the position of the Attorney General as residual \textit{parens patriae} under neighbouring common law
systems of England & Wales and Northern Ireland, respectively: s. 2C & 2D Charities Act 1993 (as
inserted by s. 8 Charities Act, 2006); s. 15 Charities Act (Northern Ireland) 2008.
CRA’s issuance of its determination that a gift does not advance religion, s. 3(5) closes off the avenue of an appeal to the Charities Appeal Tribunal for the disappointed applicant. Thus, the only recourse upon refusal of recognition as a charitable gift for religious purposes will be an application to the High Court.

The statutory presumption in favour of religious charities is not found elsewhere in the British Isles. Thus, whereas Northern Ireland takes a broader statutory view of what constitutes religion (as including polytheistic and non-theistic religions in addition to "any analogous philosophical beliefs") it is more demanding of the public benefit it requires for the gift to be held charitable. In contrast, the narrower common law definition of religion used in Ireland is enhanced by the presumption of public benefit and the fact that advancement of any religion is determined on the religion’s own terms and not objectively. The case law speaks to the State’s accordance of equal recognition for all theistic religions and there is some circumstantial evidence that the Revenue Commissioners do not discriminate between monotheistic and polytheistic religions in granting charitable tax-exempt status.

A last minute amendment to the Charities Bill at the Seanad Report Stage hearings, however, sought to prevent religious cults availing of Ireland’s more lenient public benefit provisions for religion. In this regard, section 3(10) provides that a gift is not a gift for the advancement of religion if it is made to or for the benefit of an organisation or cult —

“(a) the principal object of which is the making of profit, or
(b) that employs oppressive psychological manipulation—
(i) of its followers, or
(ii) for the purpose of gaining new followers.”

At present, there are no listed Scientology or Moonies-related groups on the Revenue charitable tax-exempt listing and presumably these types of bodies are the intended targets of s. 3(10). It remains to be seen how s. 3(10), which employs an objective test as to the purposes and effect of an organization, will be reconciled with s. 3(6), which adopts an inherently subjective approach in determining the manner in which a gift advances the religion in question.

On a comparative note, the Irish statutory presumption of public benefit in favour of the advancement of religion finds echoes, albeit on a narrower basis, in s.5 of the Australian Extension of Charitable Purposes Act, 2004. Section 5 deems an institution's purpose to have public benefit to the extent that the institution is a closed

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44 See Corway v Independent Newspapers (Ireland) Ltd [1999] 4 IR 484, at 502 (SC), Barrington J commenting on the standing of the Muslim, Hindu and Jewish religions under Art 44 of the Constitution, to the effect that Art. 44 “is an express recognition of the separate co-existence of the religious denominations, named and unnamed. It does not prefer one to the other and it does not confer any privilege or impose any disability or diminution of status upon any religious denomination, and it does not permit the State to do so.”

45 The evidence based on the registration of polytheistic religious organizations in Ireland is at best circumstantial since the Revenue Commissioners are not obliged to indicate the charitable heading under which a registered organization is granted charitable tax-exempt status. Thus it is quite possible that some of the polytheistic religious groups listed may have charitable status based on advancement of education rather than advancement of religion. See further Oonagh B. Breen, “Neighbouring perspectives: legal and practical implications of charity regulatory reform in Ireland and Northern Ireland” (2008) 59(2) Northern Ireland Legal Quarterly, 223–43 (hereinafter Breen, “Neighbouring Perspectives”).
or contemplative religious order that regularly undertakes prayerful intervention at the request of members of the public. The effect of s. 45 of the Irish Charities Act 1961, as revised and re-enacted in s. 3 of the Charities Act 2009, and Australia's s. 5 of its 2004 Act is the same. Underlying both is a policy choice that runs contrary to the House of Lord's decision in Gilmour v Coats and which says that if public benefit depends on a matter of religious faith, to require tangible proof may neither be logical or just.

d) Secular Philosophical Beliefs

Non-theistic religions may not fare so well under Irish law as their theistic counterparts. There is no provision in the Irish statutory definition of charitable purposes for the advancement of philosophical beliefs to be charitable. Attempts to include reference to humanism as a charitable purpose failed. The argument was made that notwithstanding the special place that religion holds in Irish law, an effort should be made to take a generous approach to those who hold different convictions on the meaning of life or the origin of our existence. Including reference to the advancement of humanism would, it was claimed, give effect to “the aspirations of groups who, while not professing religious faith, express a desire to be associated with strong ethical values that are communitarian in nature.” Refusing to contemplate the introduction of a broad statutory definition of religion that would cater to secular beliefs, the Minister thought that religion, like poverty and education, is best left undefined, and hence subject to existing common law constraints. In this regard, ‘religion’ in the context of Irish charity law can be contrasted with the more inclusive definition adopted by the government in its structured interfaith dialogue process, which brings together representatives of the various churches, philosophical and non-confessional organizations with government officials and specifically includes secular and philosophical traditions.

Sections 3(1)(d) & 3(11): Any other purpose that is of benefit to the community.

A statutory expansion of the fourth head of charity occurs in s. 3(11). This elaboration is significant since, according to Revenue records, more than 50 percent of tax-exempt charities were registered with the Revenue Commissioners under this

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47 The importance of theism is evident from the very wording of the Irish Constitution, Article 44 of which pledges the state to specifically acknowledge the importance of “the homage . . . due to Almighty God.” The state is thus not neutral on the issue of religion. The Constitution values the religious experience very highly. It refers in explicit terms to the value of acknowledging the role of religious faith in society, an aspiration that finds fruition in both the earlier 1961 charity legislation and the new Charities Act, 2009.
48 See n. 47 above.
52 The 12 categories of activities listed in s.3(11) are similar, though not identical, to the heads of charity approved by the relevant statutes in Scotland, Northern Ireland, England and Wales.
heading. The scope of s. 3(11) is intended to be non-exhaustive. The wording of subsection 11 reads that “other purposes beneficial to the community” includes the 12 categories of activity listed there but presumably is not limited to these. Nonetheless, there is no express provision, as there is in s. 2(4) of the English 2006 Act to allow for continued use of common law precedent in conjunction with future analogical extensions of the statutory definition when determining whether a purpose is charitable. The English approach is very much a belt and braces one, looking both backwards to common law and forward to any extensions in line with the spirit of the statute. A similar provision is found in the 2008 Northern Irish Act. Scotland does not go as far as these two Acts, ruling out reference to previous common law but it does ensure that any future extensions in line with the new statutory definition are specifically covered. In terms of implementation, what this may mean for the Irish Act is that its scope will be narrower than that of its counterparts so that a regulator who takes a narrow or literal interpretation of the charitable purposes head will exclude those entities that do not fall squarely within the corners of the statute.

Indeed, in the absence of enabling language similar to that found in the UK statutes, it would be open to the Irish courts to hold that only those purposes falling within the four corners of the statutory provision can be construed as charitable. When combined with the mandatory legislative five-year review of the Act, the Oireachtas’ deliberate exclusion of certain purposes from the statutory list might be further interpreted as making the legislature solely responsible for future organic growth within the statutory heads thereby inhibiting such development by the courts or the charities regulator.

With regards to the substantive list that now comprises section 3(11), there was little discussion in the Houses of the Oireachtas on the merits of the various sub-categories. To the extent that these categories constitute an expansion of the common law definition of ‘charitable purpose,’ no guidance is thus provided as to the types of activities now covered or the intended limitations. Given that the government expressed its intention to give legislative effect only to purposes that the Revenue Commissioners currently view as tax exempt for charitable purposes, the absence of

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53 Dáil Debates, 12 November 1997, Minister for Finance, Mr. Charlie McCreevy speaking during Private Members Business: Tax Relief on Charitable Donations: Motion (to the effect that “The data on bodies granted exemption between 1992 and 1996, inclusive, show that 7 per cent of the applications approved were for religious purposes, 12 per cent were for poverty, 24 per cent for educational purposes and 57 per cent for purposes beneficial to the community. It is significant that most of the recently exempt bodies fall into the ‘beneficial to the community’ category.”). By 2001, these figures had changed only marginally with Revenue figures indicating that the relief of poverty accounted for 3% of new registrations; the advancement of education for 26%; the advancement of religion for 7% and other purposes beneficial to the community for 54%.

54 2006 Act, s. 2(4) provides, “The purposes within this subsection (see subsection (2)(m)) are— (a) any purposes not within paragraphs (a) to (l) of subsection (2) but recognised as charitable purposes under existing charity law or by virtue of section 1 of the Recreational Charities Act 1958 (c. 17); (b) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of those paragraphs or paragraph (a) above; and (c) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised under charity law as falling within paragraph (b) above or this paragraph.”

55 2008 Act, s. 2(4).

56 2005 Act, s. 7(2)(p) to the effect that “any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.”

57 2009 Act, s. 6.

58 A role that the government vehemently eschewed during the debates on the Charities Act.
comment may be explicable but is nonetheless unhelpful since Revenue do not publish their decisions and no precedents therefore exist regarding the application of these sub-categories in Ireland.

Section 3(11)(a): The advancement of community welfare including the relief of those in need by reason of youth, age, ill-health, or disability.

This heading elaborates on the traditional Pemsel heading of relief of poverty. Proceeding simply on the basis of name reference and a website check where possible for verification, one can identify organizations currently enjoying tax exemption under each of these subheadings encompassed by the new wording. One would, of course, still have to demonstrate sufficient public benefit exists with regard to the activity/purpose at hand before the charity test will be satisfied.\textsuperscript{59} Similar subject matter is to be found in the UK Acts with the exception of Scotland, which excludes youth from its list of those in need.\textsuperscript{60}

Section 3(11)(b): The advancement of community development, including rural or urban regeneration.

The advancement of community development is an area that the Revenue Commissioners regularly approve of as beneficial to the community. In their 2001 Revenue Manual on Charities (issued under s. 16 of the Freedom of Information Act 1997), the Revenue Commissioners identify ‘improvements to an area’ as a classical example of charitable purpose. They list a range of activities (including Area Development Management Schemes, Partnerships, Leader Groups, Enterprise Boards, Community Councils/Associations, Community Centres, (where the centre exists for the benefit of the elderly, youth, handicapped, disadvantaged or for educational purposes) and Community Alert as all qualifying for charitable tax-exempt status. Given the large numbers of partnerships/leader groups and enterprise boards registered with Revenue, whose role it is to act as a conduit for distributing national grants as well as EU funding to regeneration projects and enterprise schemes in disadvantaged areas, it is not surprising from a policy perspective to see specific reference to rural or urban regeneration in s. 3(11)(b). Its inclusion serves only to clarify the broad scope of community development, though it is likely to come as a surprise to the general public that these entities – often based on a social partnership model and thus comprised of government officials, business and employee representatives as well as representatives of community organizations -- are charities in the first instance.

It will remain of interest to see to what extent the Charities Regulatory Authority, when operational, will encourage further enlargement of the concept of community development. This heading has the potential to encompass development in the context of social and affordable housing, training of unemployed persons, assisting in the creation of new businesses and the undertaking of social cohesion initiatives in the community whether through efforts to improve health care, to control drug use or

\textsuperscript{59} On the public benefit requirements see ss. 3(2), 3(7) and 3(8) Charities Act, 2009.

\textsuperscript{60} 2005 Act, s. 7(2)(n) (“(n) the relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage”). It could be argued that the reference to age in the Scottish text covers both ends of the spectrum – i.e., those in need as a result of either agedness or youth – and that it is less precise drafting on the part of other jurisdictions that has resulted in the overlapping references to both youth and age.
prevent crime. Since most of the funding for existing bodies under this heading comes from the public purse, the relationship between the state and the voluntary sector and the degree to which partnership is possible will be crucial to the charitable outcomes under this heading.\footnote{In this regard, see Department of Community, Rural and Gaeltacht Affairs, Guidelines on the Governance of Integrated Local Development Companies and Urban Based Partnerships (October 2007).}

**Section 3(11)(c): The promotion of civic responsibility or voluntary work.**

Although similar sentiments are expressed in each of the UK Acts, the language of the Irish Act differs from its UK neighbours with regard to the promotion of civic responsibility. Civiness, or the idea of active citizenship, is included with the concept of community development and broadened subsequently to include efficiency and effectiveness of charities in the UK. In Ireland, the promotion of civic responsibility or voluntary work stands alone. Traditionally, Revenue has granted charitable tax exempt status to volunteer centres, both on a local and national level. Moreover, in 2006 the Irish government convened a taskforce on active citizenship to carry on a “national conversation” on what it means to fully participate in one’s community in modern Ireland. The Taskforce delivered its final report to government in March 2007.\footnote{Report of the Taskforce on Active Citizenship (March 2007, Dublin) available at http://www.activecitizenship.ie/index.asp (last accessed February, 2009).}

Although there are no express references to the task force’s work, the government accepted the Task Force’s recommendations and a provision in the Charity Act recognizing the importance of civic responsibility would constitute a cost-free form of implementation of its proposals.

**Section 3(11)(d): The promotion of health, including the prevention or relief of sickness, disease or human suffering.**

The substance of this heading is unlikely to be controversial in its statutory format. As the Appendix illustrates, there are many examples on the Revenue listing of organizations falling under these headings. One of the more unusual examples listed is the Health Services Executive (HSE), established under the Health Act 2004, which is responsible for providing Health and Personal Social Services to everyone in the Republic of Ireland.\footnote{According to its website, the HSE is the largest organisation in Ireland, employing over 130,000 people, with a budget of €14.7 billion. See http://www.hse.ie/eng/About_the_HSE (last accessed February 2009).}

The agency, which enjoys charitable status, is independent of the government in so far as the Department of Health denies any responsibilities for its actions but all of its funding comes from government and appointments to the HSE Board are political,\footnote{Health Act, 2004, s. 11.} with Board members subject to ministerial control.\footnote{2004 Act, s.12(4) (“Board shall inform the Minister of any matter that it considers requires the Minister's attention); s. 13 (conditions of office subject to Ministerial control); s.14 (Ministerial power to remove Board).} The need for these agencies to enjoy charitable status is less clear\footnote{C.f. L.A. Sheridan, “Charity versus Politics” (1973) 2 Anglo-American L Rev 47, 63 (claiming that there is no warrant for denying charitable status to a body merely because it is subject to a greater or less degree of ministerial control and citing the cases of Re Frere [1951] Ch. 27 and Construction Industry Training Board v Attorney General [1971] 1 WLR 1303, 1308 affirm’d by [1972] 3 WLR 187 (CA).} and in some jurisdictions...
such government control is sufficient to deny eligibility for charitable status.\footnote{C.f. s.7(4)(b) of the Charities Trustee and Investment (Scotland) Act 2005, which provides that a body does not meet the charity test if its constitution “expressly permits the Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities.” This provision has caused difficulties for Scottish colleges of further education, which enjoy charitable status and has resulted in two Scottish executive orders (one in May 2008 to exempt these colleges from the rule that the government can’t appoint their boards and one in March 2009 which compels the Scottish Government to use the proceeds of any sale of their assets for other charitable purposes.) See Paul Jump, “Scots colleges secure charitable status,” \textsc{Third Sector}, March 17, 2009. \textit{See also} Australian CDI Report, Recommendation 19, at 240 (2001) (“That the current approach of denying charitable status to government bodies be maintained. The Committee agrees with the principles . . . for determining whether an entity is a government body, namely that the entity is constituted, funded and controlled by government.”) }

With regards to the substantive scope of this heading, the government has argued that the reference to ‘relief or prevention of human suffering’ will enable human rights organizations to register as charities notwithstanding the deliberate political choice to exclude reference to the advancement of human rights as charitable per se. It is unclear whether this amounts to an invitation to human rights organizations to reword their human rights activities in the language of relief of suffering in return for charitable status or whether an organization that professed both missions (i.e., to advance human rights and to relieve human suffering) would be viewed as being charitable. There is a certain overlap between this heading and s. 3(11)(a) ‘the advancement of community welfare including the relief of those in need by reason of . . . ill-health, or disability’ so one would assume that the organizations qualifying as promoting health under this heading will equally qualify as relieving those in need by reason of ill-health.

\textit{Section 3(11)(e): The advancement of conflict resolution or reconciliation.}\footnote{See \url{http://www.nccri.ie/}. \textit{See also} Philip Watt, “Budget cutbacks weaken State's capacity to combat racism” \textsc{The Irish Times}, November 19, 2008.} When this heading first appeared in the draft Charities Bill 2006 it took the more inclusive form of “the advancement of human rights, social justice, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity.” In the subsequent Charities Bill 2007 and now in its enacted form, conflict resolution/reconciliation have been separated from the promotion of religious or racial harmony (which now forms s. 3(11)(f)). References to the advancement of human rights, social justice, equality and diversity disappear entirely. No explanation was offered for this change in policy direction.

The deletion of the references to equality and diversity in the Charities Bill coincided with a Government decision to cut funding to and to merge a number of state-sponsored bodies dealing in the areas of equality and poverty. The Irish Equality Authority’s budget was cut by 43 percent in 2008 whereas the Irish Human Rights Commission lost 24 percent of its annual budget. In addition, the Government decided in late 2008 to close its own anti-racism advisory body, the National Consultative Committee on Racism and Interculturalism\footnote{See \url{http://www.nccri.ie/}. See also Philip Watt, “Budget cutbacks weaken State's capacity to combat racism” \textsc{The Irish Times}, November 19, 2008.} along with the Combat Poverty Agency (a government agency with responsibility for tackling poverty and promoting social inclusion), transferring the latter’s functions to the Department of Social and Family Affairs. Commentators claimed that the Irish government was using the cover of the economic recession to dismantle equality...
and human rights frameworks in Ireland.\textsuperscript{69} The exclusion of human rights engendered the most controversy during the Bill’s passage, an omission which is discussed further in section 3, below.

In terms of the remaining content of conflict resolution and reconciliation, there are a few Revenue examples of bodies previously qualifying under this heading, mostly related to North-South cooperation.\textsuperscript{70} The exact scope of this heading remains to be determined. Advancement of conflict resolution or reconciliation would seem to be distinct from the promotion of peace, which is charitable only under the Charities Act (Northern Ireland) 2008. Given the nature of conflict, its resolution may often involve political considerations such that the activities advanced under this heading may come close to the line drawn in s. 2 of the Charities Act, precluding from charitable status organizations promoting political causes unless those causes are in furtherance of an existing charitable purpose. The room for circularity of reasoning here is evident and it may be that the CRA will need to issue guidance on acceptable charitable activities under this heading.

\textit{Section 3(11)(f): The promotion of religious or racial harmony and harmonious community relations.}

The origins of this heading are most likely a mixture of the influence of the Scottish 2005 Act (which devotes a provision to religious and racial harmony)\textsuperscript{71} and the 2008 Northern Irish Act, the only UK Act to make specific reference to the advancement of "peace and good community relations."\textsuperscript{72} There are no identifiable Revenue precedents in the Revenue Listings that fall naturally under this particular heading. The inclusion of this heading rebuts therefore the government’s claim that it is not broadening the definition. As recently as fifteen years ago, Ireland was a homogenous nation still experiencing negative migration. In 1996, Ireland reached its migration "turning point," making it the last EU member state to become a country of net immigration. This change was due largely to the Celtic Tiger, which saw rapid economic growth create an unprecedented demand for labour. According to Ruhs:

\begin{quote}
During 1990-1994, Ireland was the only country among the member states of the EU-15 with a negative net migration rate. In contrast, between 1995 and 1999, Ireland's average annual net migration rate was the second highest in the EU-15, surpassed only by that of Luxembourg. And according to recently released Organization for Economic Cooperation and Development (OECD) data, by 2002, the estimated share of non-nationals in Ireland's population had surpassed those of the UK and France, countries with much longer immigration histories.\textsuperscript{73}
\end{quote}

\textsuperscript{70} See further the Appendix.
\textsuperscript{71} 2005 Act, s. 7(2)(k).
\textsuperscript{72} 2008 Act, s. 2(3)(c).
\textsuperscript{73} Martin Ruhs "Managing the employment of non-EU nationals in Ireland", (Studies in Public Policy, Policy Institute at Trinity College Dublin and COMPAS at Oxford University, 2005). According to Ruhs, Ireland’s labour immigration policies are amongst the most liberal in Europe such that “in the absence of quotas, the number of work permits issued to non-Irish migrant workers exploded from less than 6,000 in 1999 to about 50,000 in 2003.”
When these changing demographics are plotted against a 2003 decision of the Supreme Court removing the automatic right to permanent residence for non-national parents of Irish-born children and a successful Constitutional referendum in 2004 to eliminate an Irish-born child's automatic right to citizenship when the parents are not Irish nationals, the need for positive policy statements on racial harmony and harmonious community relations may be more readily understood. The stated aspirations of the racial harmony clause, however, must be balanced against the government’s actions in disbanding the National Consultative Committee on Racism and Interculturalism, which when coupled with a lack of strategy to build on the work of the National Action Plan Against Racism (which completed its four-year mandate in January 2009) “leave[s] a void at the heart of the government’s efforts in tackling racism.”

Section 3(11)(g): The protection of the natural environment & (h) the advancement of environmental sustainability.

It is quite possible that the insertion of a second charitable heading relating to the environment, which occurred at Committee Stage in the Seanad, is directly attributable to the presence of the Green Party in the current government coalition. The addition, however, does not constitute a departure from what appears to be existing Revenue practice. The Revenue lists include a number of environmental organizations engaged in conservation, environmental improvement, education and overseas development. The protection of the natural environment, first suggested by the CDI Report and adopted by the Irish Law Society, would not seem to extend to conservation of the built environment, which presumably will find a charitable home under the advancement of heritage.

Section 3(11)(i): The advancement of the efficient and effective use of the property of charitable organizations.

This heading has led a checkered life: included in the draft Charities Bill 2006, it disappeared from the Charities Bill 2007 as originally introduced to the Dáil, only to be re-inserted by way of Government amendment at Dáil Committee Stage. This heading again belies the government’s assertion that it is not changing the existing common law definition of charity. The purpose of this heading, it would appear, is to deliver on government commitments set out in the national social partnership agreement, Towards 2016, in which the government recognized the need for capacity building within the charity sector generally to enable it to meet the challenges of the pending regulatory regime. Such support might be thought of predominantly in the context of finance or funding and is vital to the charity sector given the typical constraints encountered by the sector in attracting mainstream institutional funding.

The development of the social finance initiative and the inclusion of the advancement

76 See the comments of the Chairwoman of the National Plan Against Racism, Lucy Gaffney, reported in Genevieve Carbery, “Winding up of integration groups makes policy weaker” THE IRISH TIMES, November 28, 2008. See also Ruadhan Mac Cormaic, “Minister says efforts to avoid racial discrimination crucial in time of recession,” THE IRISH TIMES, March 21, 2009
of efficient and effective use of charitable property as a charitable purpose in section 3(11)(i) point to an existing weakness in Irish voluntary sector development, namely the lack of an indigenous foundation sector. Reasons proffered for this absence are many: historically, a lack of indigenous wealth in Ireland to endow such entities; and culturally, a preference for ad hoc giving as opposed to strategic planned giving have meant that it is only in very recent years that philanthropic spirit has begun to sprout in Ireland. That the Revenue Commissioners are happy to encourage such development is clear from the Revenue listings with tax-exempt status awarded to social investment funds that provide both loan finance and occasionally direct investment to charities that find it hard to access funding from mainstream lending institutions. More recently, the Government under its Social Finance Initiative established the Social Finance Foundation with a seed funding grant of €25 million from the Irish banking sector to enable charities to access social finance capital at wholesale rates.

Aside from financial support, s.3(11)(i) may also provide a charitable home to third tier-support organizations, such as Boardmatch Ireland, which aims to build the governance skill sets of nonprofit boards by linking qualified professionals seeking volunteering opportunities with nonprofits seeking assistance in a variety of fields. In other words, support organizations that assist charities in achieving the latters' charitable purposes may also be charitable. This approach would avoid the problems raised in Social Ventures Australia v Chief Commissioner of State Revenue in so far as support would be viewed as charitable although interestingly, the Revenue Commissioners will retain their statutory discretion under the Tax Acts to refuse charitable tax-exempt status notwithstanding a finding of 'charitable' by the CRA.

Section 3(11)(j): The prevention or relief of suffering of animals.
This heading has long been accepted in Ireland as a charitable purpose both in the

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78 See generally Centre for Voluntary Action Studies, Two Paths, One Purpose: Voluntary Action in Ireland, North and South: A Report to the Royal Irish Academy Third Sector Research Programme (October 2003).
79 See, e.g., the listing of the Community Foundation for Ireland (http://www.foundation.ie), which was established in 2000 with the help of the Irish Government and the Irish business sector as a donor services and grant-making organisation, and Philanthropy Ireland (http://philanthropy.ie), established in 2004 with the objectives of “to contribute to and inspire an effective and robust philanthropic sector in Ireland by promoting philanthropy, advocating for an encouraging environment for giving and providing an effective network and quality services to members and those with an interest in philanthropy.”
80 Which itself now has charitable tax-exempt status.
81 2008 NSW ADT 331 (holding that a body whose main constitutional object was 'to improve the management of operational performance and to enhance the long term financial viability of charitable organisations by, without limitation, providing educational, mentoring and support services to charitable organizations” was charitable. In reaching this conclusion, the Administrative Tribunal, applying Word Investments [2008] HCA 55, held that although SVA’s activities might not be seen in isolation to be charitable, when fully examined in the context of the various charitable ventures, the activities were carried out essentially in furtherance of a charitable purpose.)
82 2009 Act, s. 7. New research into infrastructure organizations published by the UK Charities Evaluation Services research (Charities Evaluation Service, Demonstrating the Difference (March 2009, available at http://www.ces-vol.org.uk/index.cfm?format=400) reveals that the challenge facing such organizations lies in demonstrating the difference that they make. In this regard, 40 percent of the organizations surveyed reported struggling with demonstrating the difference that they make (at par. 4.1). It is likely that such demonstration would be a necessary element to prove public benefit in Ireland.
case law and by the Revenue Commissioners. Traditionally, the Irish courts view the prevention or relief of suffering of animals as a charitable purpose in its own right unlike the English courts, where the validity of such gifts depend heavily upon whether they produce a benefit to mankind. During the Dáil Debates on the Charities Bill, the political opposition parties raised the irony of the decision to make express provision for protection of animal rights while steadfastly refusing to make similar accommodation for human rights.

Section 3(11)(k): The advancement of the arts, culture, heritage or sciences.
Section 3(11)(k) is possibly the least controversial subsection in that the Revenue Commissioners have previously accepted each of the constituent elements contained therein as worthy of charitable tax-exempt status under the heading of advancement of education. The specific listing of arts, culture, heritage and sciences breaks the link between advancement of education and these purposes, which are of benefit to the community. Substantively, this clarification does not change the law and public benefit will still be required for charitable status to be granted.

Section 3(11)(l): The integration of those who are disadvantaged, and the promotion of their full participation, in society.
Section 3(11)(l) lacks a comparator in neighbouring charities legislation although the theme of integration in society does find echoes in the Australian CDI Report. Presumably, Revenue dealt with organizations that will come within this new heading under the old common law heading of relief of poverty. A skim of the Revenue listings indicates the presence of a number of tax-exempt registered entities that work with the indigenous- and immigrant- disadvantaged in Ireland. In essence, s. 3(11)(l) ensures that an Irish court could not reach a decision similar to that reached by the Canadian Supreme Court in 1999 in Vancouver Society of Immigrant and Visible Minority Women v. M.N.R. when a 4/3 majority held that assisting immigrant women to integrate into society through helping them to obtain employment was not a charitable purpose under the fourth head of charity. One would hope that this heading will provide a charitable home to victims of social exclusion that may not fit as easily within the Irish definition of poverty.

3. The Exclusion Zone – What falls outside the Definition and what are the consequences of exclusion?

“[T]he duty of the court is to the law. If a valid statute is enacted with relevant effect, that duty extends to giving effect to the statute, not ignoring it. No principle of the common law can retain its authority in the face of a

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83 Armstrong v Reeves (1890) 25 LR Ir 325.
84 Re Grove-Grady [1929] 1 Ch 557, 582. See also National Anti-Vivisection Society v IRC [1948] AC 31, 45.
85 [1999] 1 S.C.R. 10. The dissenting judges (L’Heureux-Dubé, Gonthier and McLachlin JJ) found that immigrants are often in special need of assistance in their efforts to integrate into their new home. The applicant provided assistance, guidance, and learning opportunities. It helped immigrants in developing and acquiring vocational skills, so that they may obtain employment. The dissenters held that an organization, such as the applicant, which assisted immigrants through a difficult transition, was directed towards a charitable purpose.
Under the provisions of the Charities Act, 2009, it will be a criminal offence for a body to hold itself out as a charity in Ireland without registering with the Charities Regulatory Authority. An organization wishing to use the charity moniker must therefore register and in so doing will be obliged to file an annual report on its charitable activities as well as making annual returns either directly to the CRA or the Companies Registration Office, as appropriate. Notwithstanding the broad nature of many of the headings in s.3 of the Act, there are a number of bodies that are excluded ab initio from charitable recognition.

The Act specifically excludes the following bodies from having charitable status:

- a political party, or a body that promotes a political party or candidate;
- a body that promotes a political cause, unless the promotion of that cause relates directly to the advancement of the charitable purposes of the body;
- a body established for promotion of athletic or amateur games or sports;
- a trade union or a representative body of employers;
- a chamber of commerce; or
- a body that promotes purposes that are— (i) unlawful, (ii) contrary to public morality, (iii) contrary to public policy, (iv) in support of terrorism or terrorist activities, whether in the State or outside the State, (v) for the benefit of an organisation, membership of which is unlawful.

That political parties, illegal or terrorist organizations, trade unions or employers’ confederations are excluded from the definition of charitable purpose is neither new nor out of line with social expectations. If anything, it illustrates that the Irish concept of “charity” is closer to the US §501(c)(3) category than the broader §501(c)(4) possibilities. The more striking exclusions in s.2(1) relate to amateur sports bodies and bodies “that promote a political cause, unless the promotion of that cause relates directly to the advancement of the charitable purposes of the body.” In addition to these express exclusions, no provision is made for human rights organizations, social and recreational organizations, defence-force related and peace-related activities, all of which are discussed now below.

a) Sporting Activities.
Historically, the charitable hook for sporting organizations has been advancement of education, thus limiting the beneficiaries of charitable sporting activities predominantly to school and university goers. As global perceptions of health have developed to incorporate exercise as a constituent element, some charity regulators developed policies that looked kindly upon non-educationally related participation in amateur sports. For the most part, this policy approach has been copper-fastened in

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2009 Act, s. 46 subject to a limited exception in s. 46(6) for foreign charities.
2009 Act, s. 2(1).
the recent UK charities acts. Both the English Charities Act 2006\(^{91}\) and the Charities Act (Northern Ireland) 2008\(^{92}\) recognise the promotion of "amateur sport" as charitable provided that the sport in question "promote[s] health by involving mental skill or exertion." Under the Charities Trustee and Investment (Scotland) Act 2005, it is a charitable purpose to promote "public participation in sport" when the sport in question involves "physical skill and exertion." In the first instance, these differences in language will force practitioners to consider the difference, if any, between 'participation in amateur sport' and 'public participation in sport.' \(^{93}\)

In Ireland, although the political opposition parties sought the inclusion of sport as a charitable purpose in the Charities Bill (and managed to engineer this result for a short period in the Seanad), the Irish government made a political choice to exclude sport from the list in section 3(11). \(^{94}\) The effect of such exclusion is that sporting bodies will not be required to register with the CRA but it also prohibits such bodies from registering as charities if they so wished. \(^{95}\) Those sports-related charities currently on the Revenue list of charitable tax-exempt bodies will be deemed 'charities' under the new regime \(^{96}\) and one must assume that their purposes relate to the advancement of education or that sport is simply an ancillary means to the achievement of a broader charitable purpose. \(^{97}\) Amateur sporting bodies in Ireland currently enjoy certain tax reliefs under the tax code separate from the exempt charitable purpose provisions that are not as co-extensive as those reliefs granted to charitable organizations. \(^{98}\)

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\(^{91}\) 2006 Act, s. 2(3)(d).
\(^{92}\) 2008 Act, s.2(2)(g).
\(^{93}\) c.f. the recent Supreme Court of Canada decision in *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)* 2007 SCC 42 refusing charitable tax exempt status to an amateur sporting organization on the grounds that such exemption would amount more to wholesale reform than incremental change of the common law would be best left to Parliament.
\(^{94}\) 2009 Act, s. 2(1). *SEANAD DEBATES, THE CHARITIES BILL 2007: REPORT STAGE, December 11, 2008* per Minister Curran, “Sport is not regarded as a charitable purpose. Therefore [amateur sports bodies] cannot become charitable organisations. I do not believe that considering the inclusion of sporting bodies as charities on the principled basis that a particular advantage might accrue to them under the taxation system is a sound approach. Revenue will still retain the absolute right to make its own determination on eligibility for tax exemptions for any body on or not on the register of charities. Therefore, I cannot accept the Opposition amendments before the House on this matter as they are directly contrary to the intent of the Bill and they also involve amendments to tax law, which is not within my remit.”
\(^{95}\) A similar problem exists in England and Wales under the Charities Act 2006 in relation to community amateur sports clubs, which under the Finance Act 2002 were given favourable tax treatment if they met certain requirements and registered with Her Majesty’s Revenue Commission (HMRC). According to Lloyd, *Charities: The New Law 2006, A Practical Guide to the Charities Acts (2007)* at 29, it was feared that the introduction of the promotion of amateur sport as charitable in its own right would result in such community clubs being forced to register as charities. Hence s. 5(4) & (5) of the 2006 Act expressly exclude such bodies from being charitable, whether they wish to or not. \(^{96}\) 2009 Act, s.40.
\(^{97}\) See, e.g., Cooneal Resource & Sports Centre Limited (CHY no. 17186); Irish Adventure Sports Training Trust (CHY 133324); Sligo Regional Sports Centre Limited (CHY 8477) aside from the many educationally related sports charities such as Cork County Primary School Sports (CHY 8216) and Irish Blind Sports Ltd (CHY 10793). Source: Revenue List of 7,438 bodies that have been granted charitable tax exemption at 27th January 2009 under Section 207, Taxes Consolidation Act, 1997.
\(^{98}\) See Taxes Consolidation Act, 1997, s.235, which allows approved sporting bodies to obtain tax relief on money spent on capital projects. However, one cannot claim tax back for hiring instructors or coaches, for example.
b) **Recreational and social activities**
Ireland does not have an equivalent statute to the UK’s Recreational Charities Act 1958. Activities that are purely recreational or social are thus not viewed as ‘exclusively charitable’ unless the recreational or social element is ancillary to a broader charitable purpose that benefits the community. This position is unlikely to change even with the introduction of the new statutory definition of charity in Ireland.

c) **Promotion of peace**
Although this is an express head of charity under the Northern Ireland Act 2008, it is not mentioned specifically in the Irish Act. Thus, one must assume, in the absence of a broad interpretation of the promotion of conflict resolution/reconciliation that promotion of peace *per se* is not exclusively charitable but would rather be viewed as a private purpose and thus suffer the same fate as the trusts in *Re Astor*.

Can one truly distinguish between a body that has as its objects the promotion of reconciliation and all that presumably entails and the promotion of peace? To ensure charitable status, drafters of charitable bequests should be mindful of the statutory language used in the jurisdiction in which they wish to charitable activity to be upheld.

d) **Promotion of the Defence Forces**
The promotion of the defence forces finds a statutory home only in the English Charities Act 2006 and even there its addition occurred at the eleventh hour. Its absence in the Scottish definition thus has probably to do with timing; the Scottish Act having been passed prior to Westminster’s *volte face* on the issue. Northern Ireland’s Act also omits reference to the defence forces. Here the omission can be attributed to political sensitivities in that region. The inclusion of an analogies provision in the Northern Ireland Act will ensure that defence force related-charities continue to enjoy charitable status in Northern Ireland.

There was no discussion in Ireland over whether promotion of the defence force should be listed as charitable, presumably based on the relatively small size of the Irish defence forces. A search of the Revenue Listings of organizations enjoying charitable tax-exempt status reveals one defence-related entity -- the Army Benevolent Fund -- that will be deemed to maintain its charitable status upon the coming into force of the Charities Act.

e) **Promotion of Human Rights**
One of the more controversial elements is the exclusion of the promotion of human rights from the definition of ‘charitable purposes.’ Although originally included in the draft Charities Bill 2006, the Charities Bill 2007 omitted reference to this

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99 *Clancy v Commissioner of Valuation* [1911] 2 IR 173 (holding that a hall used to promote temperance among the poor and labouring classes by providing recreational activities ranging from billiards, card games and taking baths had the primary charitable purpose of the moral and educational improvement of its users but finding the trust not exclusively charitable on other unrelated grounds).

100 [1952] Ch 534 (Roxburgh J. holding that a trust for “the establishment, maintenance and improvement of good understanding sympathy and co-operation between nations, especially the nations of the English speaking world and also between different sections of people in any nation or community” was non-charitable and void for uncertainty.)

101 2008 Act, s.2 (4). *See also* Breen, “Neighbouring perspectives” *supra* n. 45, at 231-233.

102 2009 Act, s.40.
objective. Despite the strenuous efforts of human rights organizations, scholars and politicians, the government resolutely refused to re-insert reference to human rights in the Bill, yet declined to explain the reason for its deletion.

A review of the Dáil and Seanad debates on the passage of the Charities Bill reveals that the exclusion of human rights results from a political and not a legal decision. It was the Cabinet rather than the Attorney General that dictated this course of action. Since, according to the Government, the charities legislation was intended only to codify the existing common law definition of charity and not in any way to expand upon it, it followed that the advancement of human rights should not be added to the list since the Revenue Commissioners previously had never recognized the advancement of human rights as a charitable object. There was, however, some indication that this position might be re-considered under the mandatory statutory review of the Charities Act’s effectiveness in five year’s time.

As to the reasoning behind the Revenue’s treatment of the advancement of human rights, this question is harder to answer in the absence of public reasons for Revenue’s decisions to grant or refuse charitable tax exemption. In this regard, not even the Dáil Debates are of assistance, indicating only Revenue’s objection to human rights organizations attaining charitable status and not the underlying reasons for this stance. If one were to surmise (as one must do with most charity law matters in Ireland), the objections to human rights organizations most likely stems from a strict application by Revenue of the principles set out by the English High Court in the case of Attorney General v McGovern. It will be recalled that in that case, a test case by Amnesty International, Slade J. refused to grant charitable status to a human rights trust, which included amongst its educational and poverty relief objectives, the objective to secure the release of prisoners of conscience by procuring the reversal of governmental policy or decisions by lawful persuasion. This object was held to be political in nature and thus tainted all of the objects, making the trust non-charitable. In its 2001 Charities Manual, Revenue make specific reference to McGovern in its section on non-charitable political purposes, citing the case as authority for the proposition that “The Amnesty International Trust was founded with the object of securing world-wide observance of the Universal Declaration of Human Rights - exemption refused.”

In the thirty-year period since McGovern, the general treatment of human rights organizations has changed. For instance, McGovern pre-dated the incorporation of the European Convention into domestic law and a plethora of international human rights instruments, leading many human rights charities in the UK to argue that

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103 Politicians received petitions from many human rights organizations, including Amnesty International, Free Legal Advice Centres, Trocaire, Human Rights Watch, Frontline, the Irish Council for Civil Liberties in addition to the Law Society of Ireland’s Human Rights Committee.

104 See Breen, “Neighbouring perspectives,” supra n. 45.

105 See in particular the contributions of Senators David Norris and Ivana Bacik at the Report Stage of the Bill, SEANAD DEBATES, December 11, 2008 and the contribution of Deputies Wall and Costello, VOL. 674 NO. 2 DAIL DEBATES, February 11 2009.


107 In Ireland, see European Convention on Human Rights Act, 2003 (No. 20 of 2003); in England see Human Rights Act, 1998 (c.42)
McGovern is no longer good authority. Prior to the enactment of the Charities Act, 2006 in England which expressly recognized the promotion of human rights as a charitable purpose, the CCEW had begun to offer guidance to charities working in the field of human rights on the extent to which their activities could be political in nature without endangering their charitable status. Since the enactment of the Charities Act, 2006, the CCEW has published revised guidance that provides greater clarity on the quantification of political activity for concerned charities. However, the absence of an equivalent Irish charity regulator has meant that no similar guidance was issued here. Nor does it appear (in so far as one can tell) that Revenue was persuaded by the English CCEW guidance to mitigate its McGovern line when it comes to charitable tax exemption.

Notwithstanding the Revenue Commissioner’s philosophically rigid approach to human rights organizations, in general these organizations appear to be no worse off than any other charitable organization from a tax-liability perspective for two reasons.

First, some human rights bodies re-organize their legal structures to ensure that an affiliate or parent organization does in fact qualify for charitable status while they run their “non-charitable” human rights activities typically through a non-charitable company limited by guarantee. Thus, to take one excellent example: Amnesty International Ireland has a charitable trust, Amnesty International Ireland Foundation, which is recognized by Revenue as tax-exempt for charitable purposes. This trust is legally separate from ‘Amnesty International Irish Section,’ a non-charitable company limited by guarantee which campaigns to promote respect for all the human rights set out in the Universal Declaration of Human Rights through ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination. Similarly, the Irish Council for Civil Liberties, an independent non-governmental Irish human rights organization committed to the defence and promotion of human rights and civil liberties in Ireland, does not enjoy charitable tax-exempt status. However, Revenue recognizes its sister organization, the Trust for Civil Liberties, Human Rights and Fundamental Freedoms, which carries out education, research and dissemination as having charitable purposes. Other similar examples abound. This legal restructuring option is also relevant to our

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110 See Charity Commission for England and Wales, Speaking Out - Guidance on Campaigning and Political Activity by Charities (CC9, 2008). The CCEW replaces its former dominant/ancillary activity test by stating that whilst political campaigning must not be the continuing and sole activity, it may be the only activity for a period of time. Accordingly under the guidance “a charity may choose to focus most, or all, of its resources on political activity for a period. The key issue for charity trustees is the need to ensure that this activity is not, and does not become, the reason for the charity's existence.”
111 CHY no. 11480. The trust furthermore shares the same contact details as the Irish Council for Civil Liberties, which is often the only connecting information between organizations that one can make out from the Revenue's listings.
112 See, e.g., Irish Charities Tax Reform Group (ICTRG) – a lobby group initially set up by and for charities to lobby for greater tax relief from Value Added Tax for the charity sector but which now lobbies in relation to wider variety of tax and regulatory issues affecting the sector. With advocacy as its primary purpose this body is not a charity. Yet its “sister” organization Irish Charities Tax Research Ltd (ICTR), which has the specific aim of providing research, information, and education on taxation and regulation issues that affect charities in Ireland, is a charity in its own right. A Chinese wall exists between these two organizations, which operate out of the same premises and share the same phone number.
discussion on political activities, below.

Second, for tax purposes, the Revenue Commissioners operate a separate exemption for human rights bodies. Under s. 209 of the Taxes Consolidation Act, 1997 where a body: a) enjoys consultative status with either the United Nations or the Council of Europe and has as its sole or main object the promotion of observance of the Universal Declaration of Human Rights or the implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms; and b) is precluded by its rules or constitution from the distribution of its assets to any of its members, that body will be granted similar income tax exemptions to bodies that qualify for charitable tax-exemption.

Thus, Amnesty runs its political campaigns through its non-charitable company Amnesty International Irish Section. This body enjoys consultative status with both the UN and the Council of Europe through its international general secretariat. Since Amnesty International Irish Section fulfills both of the other conditions in s. 209 above, the Revenue Commissioners treat it for tax exemption purposes in the same manner as a charitable organization. Thus, Amnesty qualifies as a deductible gift recipient and enjoys all of the other tax-exemptions granted to bodies on the Revenue’s list of charities are enjoyed by Amnesty. So, from a tax perspective (which up until now has been the only perspective that has mattered in Ireland in relation to charities) this ‘compromise’ is internally consistent.

The introduction of the Charities Act 2009, however, changes the focus of charity regulation in Ireland. The revenue perspective undoubtedly will remain important but the establishment of the CRA and the creation of a charities’ register governing entitlement to charitable status (as opposed to charitable tax exemption) raise issues for human rights organizations. First, s. 46(5) makes it an offence for an unregistered body to hold itself out as a charity in Ireland. Thus, a human rights organization that is not registered with the CRA cannot claim to be a charity in any of its dealings with the public without committing an offence.

Whereas existing human rights organizations that have charitable tax-exempt status will be deemed to be registered on the new register subject to s. 40 of the 2009 Act, new human rights bodies may be the most affected under the new regime. If an organization’s primary purpose is “to advance human rights” the new CRA will have to decide whether that body satisfies s.3 of the Act. The Charities Act requires that charities have “exclusively” charitable objects so the CRA will be called to adjudicate upon a body professing mixed human rights and more recognizable charitable purposes. How will it treat an organization that seeks in its objectives to relieve poverty, advance education and advance human rights? If it applies the Revenue’s interpretation of McGovern the body is unlikely to be charitable. If the CRA turns to legislative history, the outcome will be no different since the clear intent of the legislature was to exclude human rights as a charitable purpose. If it turns instead to first principles and seeks to unpack what is meant by ‘advancing or promoting human rights,’ it may or may not conclude that the promotion of human rights entails the promotion of a political cause resulting the body being statutorily ineligible for charitable status.

113 Subject to the limited exception for charities established outside the state under s. 46(6), which does not apply here.
registration as an excluded body under s. 2(1). The possibilities of the latter occurring are discussed further below.

In fact, given the disconnect that now exists between having charitable status, on the one hand, and enjoying charitable tax exemption, on the other, from a charity governance perspective, the legislature would have been wiser to give the CRA jurisdiction over human rights organizations by including it in the list of charitable purposes. Since section 7 of the Charities Act decouples charity and tax law affairs, the findings of the CRA would not bind the Revenue Commissioners,114 which would still have been free to deny charitable tax-exempt status. From a tax perspective, any newly established human rights body is unlikely to have consultative status with the UN or Council of Europe and so will be unable to access the mirror tax exemptions in s. 209 TCA 1997. The only other option for tax relief would be for the body to qualify for charitable tax-exempt status, something Revenue claims not to grant to organizations concerned with the advancement of human rights.115

In a nutshell, the exclusion of the promotion of human rights as a charitable purpose leaves human rights organizations with no ready hook upon which to hang their case for charitable status. Ineligibility to register, although separate from matters of taxation relief, will deny an organization the right to hold itself out as a charity in a new legal environment in which that claim will now actually have some meaning. Ineligibility to register will also mean that human rights organizations will not be subject to the transparency and accountability requirements of the Charities Act. This may cause the greatest disservice to those organizations that wish to use this mechanism to demonstrate their charitable efficiency and governance standards. Donors and the general public will also be deprived of an oversight mechanism for monitoring what human rights organizations do with their money.

f) Promotion of Political Causes

The final exclusion in the Charities Act 2009 relates to bodies “that promote a political cause, unless the promotion of that cause relates directly to the advancement of the charitable purposes of the body.”

Traditionally, the common law has stopped short of deeming the promotion of “political purposes” as charitable per se.116 The courts have interpreted “political purposes” broadly to encompass not just direct support for a political party or political candidate but also any activities that retain, oppose, or change the law, policy, or decision of any level of government domestically or in a foreign country.117 The

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114 S. 33 of the Charities Act 2009 provides for the CRA to enter into memoranda of understanding with any relevant regulator in relation to administrative cooperation on regulatory matters. One would assume that the Revenue Commissioners and the CRA would require such an understanding. Examples of such memoranda exist between other revenue agencies and charity regulators; see Memorandum of Understanding between the Office of the Scottish Charity Regulator and HM Customs and Revenue (2007) available at [http://www.oscr.org.uk/publicationitem.aspx?id=bb71672b-c53b-4ea7-96aa-a56b883d9736](http://www.oscr.org.uk/publicationitem.aspx?id=bb71672b-c53b-4ea7-96aa-a56b883d9736) (last accessed March 21, 2009).


117 McGovern v Attorney General [1982] Ch 321 (Ch D); Webb v O’Doherty (1991) 3 Admin LR 731 (Ch D); Southwood v Attorney General (2000) 80 P&CR D34 (CA). In Ireland see Re Ni Brudair,
courts refuse to recognize political purposes as charitable because judges cannot determine whether such purposes would be for the public benefit. The Charity Commission for England and Wales, however, has permitted charities – including human rights charities – to lobby and to engage in political campaigning when these activities could be said to be an ancillary means for the achievement of the bodies’ greater charitable objectives.

Thinking on the role of politics and charity has changed in the UK over the course of the 30 years since McGovern was decided. In its 2007 report, the Advisory Group on Campaigning and the Voluntary Sector recommended that charities should be able to engage exclusively in political (excluding party political) activity without endangering their legal status. Responding to those calls, the British government in its Third Sector Review agreed to work with the Charity Commission to update

unreported High Court, Gannon J. February 5, 1979. Cf. Public Trustee v Attorney General (NSW) & Others, NSW Supreme Court, 30 September 1997 (Santow J noting that “if persuasion towards legislative change were never permissible, this would severely undermine the efforts of those trusts devoted to charitable ends that ultimately depend on legislative change for their effective achievement”).

See Lord Parker in Bowman v Secular Society [1917] AC 406, at 442: “a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift”.

See n. 109, above.

The Charity Commission for England and Wales, Campaigning and Political Activities by Charities, CC9 (London: Charity Commission, September 2004). See also 2007 supplement to this revised guidance, “Campaigning and political activities by charities – some questions and answers” (available at www.charity-commission.gov.uk/supportingcharities/campaignqa.asp) in which CCEW stated that: “We are aware from our work with charities that trustees sometimes exercise a considerable degree of self-censorship in undertaking campaigns, and may not be aware of the extent to which they can campaign and engage in political activities to achieve their objectives. We want charities to be in no doubt about this point.” The more flexible approach adopted by the CCEW in interpreting the limits on charitable political engagement has been acknowledged by the charities sector - see the Advisory Group’s Report on Campaigning and the Voluntary Sector (May, 2007), infra n. 122, at par. 2.3.

Compare the language of the CCEW’s Report for 1969 at par. 5, p. 8 (“One contemporary development which has given us some concern has been the increasing desire of voluntary organizations for ‘involvement’ in the causes with which their work is connected. Many organizations now feel that it is not sufficient simply to alleviate distress arising from particular social conditions . . . [they] feel compelled also to demand action and to press for effective official provision to be made to meet those needs. But when a voluntary organization which is a charity seeks to develop such activities it nearly always runs into difficulties. . .”), as cited in LA Sheridan, “Charity versus Politics” (1973) 2 Anglo-American Law Review 47 with the language of the CCEW’s more recent 2008 guidance on political campaigning, supra n. 110 (“Political activity, including campaigning for a change in the law, is an entirely legitimate activity and can be an effective means of supporting a charitable purpose. . . A charity may choose to focus most, or all, of its resources on political activity for a period. The key issue for charity trustees is the need to ensure that this activity is not, and does not become, the reason for the charity’s existence.”)

Composed of twenty three NGOs (including the National Council for Voluntary Organisations) and chaired by Baroness Helena Kennedy Q.C., the Advisory Group’s Report on Campaigning and the Voluntary Sector (May, 2007) can be downloaded from: http://www.bateswells.co.uk/News/Detail.aspx?NewsID=57&Location=2&ID=1 (last accessed March 22, 2009)

guidance on political activities and campaigning by charities, taking into account the recommendations of the Advisory Group. In the words of the Review,

The [British] Government . . . believes that charities should be, and should feel, free to carry on political activities where those are effective means of pursuing their charitable purposes. Provided that the ultimate purpose remains demonstrably a charitable one the Government can see no objection, legal or other, to a charity pursuing that purpose wholly or mainly through political activities. Those running any charity have to justify its activities. If they can show that political activity, in preference to (or in conjunction with) any other type of activity, is likely to be effective in serving the charitable purpose then they will have succeeded in justifying the political activity.\(^\text{124}\)

Thus, the crucial distinction in the British government’s mind is the distinction between means (activities) and ends (purposes): a charity must not have, or pursue, political ends; but it may use some political means to achieve its charitable ends.\(^\text{125}\)

This thinking is now reflected in the most recent guidance of the CCEW, which abandons a dominant purpose/ancillary activity test in favour of a gradated test that looks at the overall mission of the charity and its use of political means and allows a charity to devote all of its efforts to a political activity for a limited time without endangering its charitable status, provided always that the political activity does not become the reason for the charity’s existence.\(^\text{126}\)

In Ireland, with limited Irish judicial guidance available,\(^\text{127}\) the Revenue Commissioners have applied the English judicial authorities up to and including \textit{McGovern}\(^\text{128}\) and refused charitable tax-exempt status in at least two documented cases in which applicant organizations had undefined political activities and the stated purpose of changing the law.\(^\text{129}\) The introduction of s.2 of the Charities Act 2009 states that a body will not be eligible for charitable status if it promotes a political cause. The only exception to that rule is when the political cause in question “relates directly to the advancement of the charitable purposes of the body.” Section 2 gives rise to three issues that require further consideration: a) what constitutes a “political cause”; b) are there any limits on the extent to which a charity can devote itself to

\(^{124}\) \textit{Ibid} at par. 2.31.

\(^{125}\) \textit{Ibid} at 2.29

\(^{126}\) See Charity Commission for England and Wales, Speaking Out - Guidance on Campaigning and Political Activity by Charities (CC9, 2008), supra n. 110 and accompanying text.

\(^{127}\) Re \textit{Ni Brudair}, supra n. 117 (holding that a bequest for the benefit of republicans was too vague to be charitable but that it had been properly defined it would still have amounted to a broad statement of political objectives and would not have constituted a valid charitable trust); see also \textit{Gurhy v Goff} [1980] ILMR 103 (SC) (holding that a lottery to benefit members of a political party was purely self-promotion and did not fall within the meaning of charitable or philanthropic purposes as defined by the Gaming and Lotteries Act, 1956).

\(^{128}\) Revenue Commissioners Charities Manual 2001, at p. 62-63, in which Revenue cites a number of authorities [\textit{Anti-vivisection Society v CIR} supra n. 116; \textit{Temperance Council of the Christian Churches of England and Wales v CIR}, KB 1926, 10 TC 748; \textit{Bonar Law Memorial Trust v CIR} supra n. 116; \textit{Keren Kayemeth Le Jisroel Ltd v CIR} [1932] AC 650 (HL) and \textit{McGovern} supra n. 116 to the effect that an organization with political aims such as law reform or which engages in lobbying will not qualify for charitable status.

\(^{129}\) The Charities Manual 2001, at 63 (noting that in APP 12317 exemption was refused as the main objects of the body included political activities and that in APP 6837 the objects involved changing legislation such that tax exempt status was also refused.
political causes without endangering its charitable status; and c) to what extent the CRA’s treatment of political causes under the Charities Act is likely to resemble the Revenue Commissioner’s treatment of political activity under the tax provisions.

a) What constitutes a “political cause?

The term ‘political cause,’ as used in s. 2 of the Charities Act 2009, is not further defined. Does having a political cause, for instance, equate with having a political purpose or a political end? In Colgan v Independent Radio and Television Commission, the Irish High Court defined a “political end” within the context of the Radio and Television Act 1988, as being an activity that is:

directed towards furthering the interests of a particular political party or towards procuring changes in the laws of this country or . . . countering suggested changes in those laws, or towards procuring changes in the laws of a foreign country or countering suggested changes in those laws or procuring a reversal of government policy or of particular decisions of governmental authorities in this country or . . . countering suggested reversals thereof or procuring a reversal of governmental policy or of particular decisions of governmental authorities in a foreign country or countering suggested reversals thereof.130

In reaching this conclusion, O’Sullivan J also drew heavily upon the English authority of McGovern v Attorney General. Thus if “political cause” equates with “political end” then a body can only engage in such activities if they directly relate to the body’s other charitable purposes. To the extent that a body enjoys charitable status, s. 2 brings some comfort that political activities aimed directly at achieving its charitable purposes will be permitted. Thus, for existing charities, it is clear that advocacy in support of valid charitable purposes is entirely permissible. Poverty charities could thus legitimately engage in a ‘Make Poverty History’ type campaign without endangering their charitable status. The very line, however, that has assuaged the hearts of established charities is likely to be the source of consternation for human rights organizations wishing to register as charities. For being expressly excluded from the definition of charitable purposes, these bodies cannot make the argument that advancement of human rights is per se charitable. And without this baseline, any advocacy in which they engage in support of their human rights activities will not enjoy immunity from the ‘no political cause’ clause. Rather, the onus of proof will lie upon such organizations to prove from first principles that their mission objectives come by analogy within the statutory definition – a difficult feat given the undefined nature of political cause, not to mention the clear intention of the drafters to exclude ‘human rights’ from the charitable purposes list.

Therefore, even if the Minister is correct and human rights organizations that relieve human suffering or poverty or engage in education will not be prejudiced by the omission of human rights as a charitable purpose but will find another suitable home in the Act’s purposes, any political activity undertaken by these organizations must be directly related back to these particular charitable purposes or it will fall outside the protection of s. 2 of the Act.

130 [2000] 2 IR 490 at 504 (H.C.) per O’Sullivan J.
b) Are there any limits on the extent to which a charity can devote itself to political causes without endangering its charitable status?

It is also unclear from the Charities Act whether there is any limit on the extent to which any charity can devote itself to political activity without endangering its charitable status. The draft Charities Bill 2006 had a dominant activity/ancillary activity test, which provided that a charity could engage in advocacy-related activities so long as they did not become the raison d’être of the organization. The removal of this provision would seem to imply a departure from this approach but no policy guidance is provided as to how charities are to operate in this new environment.

c) Will the CRA’s treatment of political causes tally with that of the Revenue Commissioners?

It remains to be seen whether the CRA, when established, will issue guidance on charities and political activity, along the lines of its English counterpart, the CCEW. The publication of such guidance would bring welcome clarity and transparency to this area of law and would make it easier to compare the approaches of the CRA and the Revenue should their views on ‘political causes’ diverge in the future. Since, under s.7 of the Charities Act, it will be possible for the Revenue Commissioners to continue to apply their strict interpretation of McGovern, the likely extent to which there may be interpretative differences will depend upon the autonomy of the newly appointed CRA. In anticipation of such differences arising between regulators it is to be hoped that the CRA, upon establishment, would follow the example of its Scottish counterpart, the Office of the Scottish Charity Regulator (OSCR) and enter into a memorandum of understanding with Revenue.\(^{131}\)

4. The Effect of the Charities Act on the Definition of Charity -- Dilution, Alignment or Confusion?

The likely effect of the new Irish definition of charity – namely, whether it is more likely to dilute the guiding principles of charity or align those principles with social expectations – depends upon two factors: a) the status of the guiding principles of charity in Ireland pre the 2009 Act; and b) the state of current social expectations.

As to the first issue, this paper argues that the lack of publicly available authoritative material, caused by the dearth of Irish case law,\(^{132}\) makes clarity on Irish charity law principles extremely difficult. In the absence of judicial authority, those who comment on the topic of charity law in Ireland must assume that the common law decisions (and indeed sometimes, the regulatory guidance) of foreign jurisdictions is more than just persuasive precedent.\(^{133}\)

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\(^{131}\) Power for the CRA to enter into such understandings is provided in s. 33 of the 2009 Act. C.f. Memorandum of Understanding between the Office of the Scottish Charity Regulator and HM Revenue & Customs (Charities) (2006).

\(^{132}\) See, e.g., In re Worth Library [1995] 2 IR 301, one of the few decisions handed down since 1961 that touches on the meaning and scope of “charitable purpose.” It is noteworthy that Counsel on both sides was willing to concede that the bequest at issue was charitable and it was only upon the court’s insistence that this matter was argued.

Until now, the development of the common law definition of charitable purpose in Ireland has occurred on a case-by-case basis in the context of revenue law rather than charity law. The Revenue Commissioners adjudicate on applications for charitable tax-exempt status, applying the McNaghten heads of charity. Although Revenue publishes a list of tax-exempt entities and some basic contact details,\textsuperscript{134} it does not publicize the grounds for its decisions nor does it specify under which Pemsel category the applications were successfully made. The closest that one comes to ascertaining the guiding principles of charity in Ireland is through Revenue's 2001 Charities Manual, issued under s. 16 of the Freedom of Information Act, 1997, which gives a broad indication of categories that Revenue is happy to approve for charitable purposes. Aside from the Revenue listings, if a charity is incorporated, one can obtain a copy of its memorandum and articles of association from the Companies Registration Office and therefore glean some insight as to what type of objects are acceptable to Revenue. If, however, the organization is unincorporated, it is under no obligation to share its governing instruments with any interested member of the public.

The existence of such information asymmetries makes it even more difficult in Ireland than in most countries to say whether the social or popular conception of charity is now aligned with the political version enshrined in the Act. To be sure, the express inclusion of human rights in neighbouring jurisdictions places the Irish legal position at odds with the legal position in the UK. Depending upon the approach adopted by the CRA, difficulties may arise for human rights charities registered in the UK but operating in Ireland that will need to register with the CRA. Charities that qualify for registration in the UK on the basis of human rights advancement may need to amend their constitutions in order to register in Ireland, with the attendant trustee and home regulator difficulties that this causes.

Given the express decoupling of the legal definition of charity and the taxation definition, the Charities Act 2009 provided the ideal opening for a more coherent definition of the former. For the most part, the Government decided not to avail of this opportunity. In some respects, s. 3 of the 2009 Act clearly enlarges on the common law definition of charity, making it charitable for the first time to act as support organization to other charities, thereby increasing their efficiency and effectiveness,\textsuperscript{135} including environmental sustainability as a new heading and the concept of relief of poverty to cover also its prevention.\textsuperscript{136} Yet, even in these respects, the government claim only codification as opposed to expansion -- \textit{a non sequitur}, surely. Until the CRA is established and the register of charities set up, one can only speculate on the likely effects of the new statutory definition. Much will depend on the calibre of appointments made to the CRA and the level of resources (in terms of both financial and human capital) provided by government.

On a positive note, the Charities Act provides a welcome space in which we can begin to develop a public sense of what constitutes charity. The creation of the register, the


\textsuperscript{135} 2009 Act, s. 3(11)(i).

\textsuperscript{136} 2009 Act, s. 3(11)(g) & (h) and s. 3(1)(a).
provision of details on the activities of registered charities and the publication by CRA of reasoned decisions relating to the grant or refusal of charitable status will help to create a necessary awareness of what it means to be charitable in Ireland. It is to be hoped that by the time of the mandatory five-year review of the Act’s operation, we will be in better informed position to begin the real challenge of modernizing charity law in Ireland.

5. CONCLUSION: THE USE OF STATUTORY DEFINITIONS AS POLICY TOOLS

If Osborne and Gaebler\textsuperscript{137} are right and the political economy works best when government sticks to ‘steering’ and stops trying to ‘row,’ then the regulatory indicators would suggest that in reforming charity law governments should concentrate more on developing mechanisms for good oversight, monitoring and ensuring accountability of charities and less on channeling the direction of private benevolence. And yet, of all areas, the decision as to what is charity is essentially political. It is no mere coincidence that there is frequently a lien between the accordance of charitable status to a particular activity or purpose and a lightening of financial burden on the public purse.\textsuperscript{138} The power to define ‘charity’ thus carries with it unavoidable fiscal implications, which colours the final definition chosen. As Lord Cross noted in his leading judgment in \textit{Dingle v Turner}, nearly 40 years ago:

\begin{quote}
“It is, of course, unfortunate that the recognition of any trust as a valid charitable trust should automatically attract fiscal privileges, for the question whether a trust to further some purpose is so little likely to benefit the public that it ought to be declared invalid and the question whether it is likely to confer such great benefits on the public that it should enjoy fiscal immunity are really two quite different questions.”\textsuperscript{139}
\end{quote}

In Ireland, the strong ties between charitable purpose and tax-exempt status have influenced the working definition of charity in the past. With the new Charities Act 2009, a legislative break in that link has occurred. Whether the separation of tax exemption from charitable status will be sufficient to liberate the concept of “charitable purpose” remains to be seen.


\textsuperscript{138} See Alison Dunn, “As cold as charity? Poverty, Equity and the Charitable Trust” (2000) 20(2) \textit{Legal Studies} 222 (viewing the particular charitable purposes identified in the Statute of Charitable Uses 1601 as comprehensible more as a pragmatic attempt to reduce the financial burdens imposed on the community than necessarily a list of altruistic or philanthropic ideals.)

\textsuperscript{139} [1972] AC 601, 624 (HL).
## APPENDIX

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| (a) the prevention or relief of poverty or economic hardship | Relief of poverty treated as charitable | • St. Vincent de Paul Society  
• Combat Poverty Agency | ✓ Suggested by Law Society  
✓ Present in CDI definition | 2005 Act, s. 7(2)(a)  
2006 Act, s. 2(2)(a)  
2008 Act, s. 2(2)(a) | UK statutes contain reference to ‘financial hardship’ under broader community welfare heading. |
| (b) the advancement of education | Advancement of charity treated as charitable and used as umbrella for arts, culture, science and research and certain sporting activities | • University College Dublin  
• Educate Through Sport Foundation  
• Higher Education Authority | Common law | 2005 Act, s. 7(2)(b)  
2006 Act, s. 2(2)(b)  
2008 Act, s. 2(2)(b) | |
| (c) the advancement of religion | Advancement of religion treated as charitable, enjoying conclusive presumption of public benefit | • Conference of Religious of Ireland (CORI)  
• Kilkenny Protestant Orphans Society  
• Dublin Jewish Holy Burial Society | ✓ Charities Act 1961, s. 45  
✓ Government Consultation Paper– common law definition | 2005 Act, s. 7(2)(c) & s. 7(3)(f)  
2006 Act, s. s. 2(2)(c) & s. 2(3)(a)  
2008 Act, s. 2(2)(c) & s. 2(3)(a) | UK requires proof of public benefit for religion to be charitable. Ireland has a broad statutory presumption in |
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| (a) the advancement of community welfare including the relief of those in need by reason of youth, age, ill-health, or disability | Generally treated under the relief of poverty heading or other purposes beneficial to the community | - National Youth Council of Ireland  
- Society for the Relief of the Poor and Aged.  
- Age Action Ireland  
- Enable Ireland  
- Anne Sullivan Foundation For Deaf/ Blind | ✓ Suggested by Law Society  
✓ Present in CDI definition | 2005 Act s. 7(2)(n) & s. 7(3)(e)  
2006 Act, s. 2(2)(j) & s. 2(3)(e)  
2008 Act, s. 2(2)(j) & s. 2(3)(f) | Note Scottish definition does not make reference to 'youth' |
<p>| (b) the advancement of | Revenue has regularly granted | - Athlone Community Development Assoc. | ✓ Similar language found | 2005 Act, s. 7(2)(f) &amp; s. 7(3)(b) |</p>
<table>
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<tr>
<th>Community Development, Including Rural or Urban Regeneration</th>
<th>Tax-Exempt Status to Community Development Organisations Including Those Set Up Under the National Social Partnership Agreement. Community Centres Supporting Broader Charitable Purposes Also Qualify</th>
<th>in UK Acts</th>
<th>2006 Act, s. 2(2)(e) &amp; s. 2(3)(c) 2008 Act, s. 2(2)(e) &amp; s. 2(3)(c)</th>
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</table>
| (c) The Promotion of Civic Responsibility or Voluntary Work | • Volunteering Ireland  
• Volunteer Centre Ireland | ✓ Similar Language Found in UK Acts but there this provision incorporates community development and urban/rural regeneration ✓ Taskforce on Active Citizenship? | 2005 Act, s. 7(2)(f) & s. 7(3)(b) 2006 Act, s. 2(2)(e) & s. 2(3)(c) 2008 Act, s. 2(2)(e) & s. 2(3)(c) |
<p>| (d) The Promotion of Health, Including the | Revenue Has Frequently Granted Charitable Status to | ✓ Suggested by Law Society ✓ Present in | 2005 Act, s. 7(2)(d) &amp; s. 7(3)(a) |</p>
<table>
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<th>Aim</th>
<th>Definition</th>
<th>Examples</th>
<th>Acts</th>
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| Prevention or relief of sickness, disease or human suffering | Disease support organisations as well as granting charitable status to the Health Service Executive. | • Kerry Mental Health Association  
• Killinarden Drug Primary Prevention Group | 2006 Act, s. 2(2)(d) & s. 2(3)(b)  
2008 Act, s. 2(2)(d) & s. 2(3)(b) |
| (e) the advancement of conflict resolution or reconciliation | Not many examples abound on the revenue lists but Revenue has granted charitable status for peace and reconciliation work, particularly that on a north-south basis | • Glencree Centre for Peace and Reconciliation  
• Journey of Reconciliation Trust  
• Irish Peace Institute | 2005 Act, s. 7(2)(j)  
2006 Act, s. 2(2)(h)  
2008 Act, s. 2(2)(h) & s. 2(3)(e)  
NI includes specific reference to ‘promotion of peace’  
Ireland alone in excluding specific reference to human rights, equality & diversity here. |
| (f) the promotion of religious or racial harmony and harmonious community relations | No precedents available from Revenue listings. | No ready examples from Revenue listings. | 2005 Act, s. 7(2)(k)  
2006 Act, s. 2(2)(h)  
2008 Act, s. 2(2)(h) & s. 2(3)(e) |
<p>| Revenue appears not to have distinguished | • Voice of Irish Concern for the Suggested by Law Society | 2005 Act, s. 7(2)(m) |</p>
<table>
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<tr>
<th>Environment</th>
<th>In the past between conservation and other environmental projects</th>
<th>Environmental Ltd.</th>
<th>Present in CDI definition</th>
<th>2006 Act, s. 2(2)(i) 2008 Act, s. 2(2)(i)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(h) The advancement of environmental sustainability</td>
<td>Revenue appears not to have distinguished in the past between conservation and other environmental projects</td>
<td>Centre for Environmental Training and Living (CELT) Environmental Foundation for Africa - Ireland</td>
<td>Origin unknown but most likely flowed from Green Party Government Coalition members</td>
<td></td>
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<tr>
<td>(i) The advancement of the efficient and effective use of the property of charitable organisations</td>
<td>Low level of indigenous foundation development in Ireland suggests that this is a weak area in voluntary sector development. Contributing reasons may lie in the traditional lack of indigenous wealth and preference for ad hoc as opposed to planned giving strategies.</td>
<td>Community Foundation for Ireland BoardMatch Ireland Philanthropy Ireland Social Finance Ireland</td>
<td>May be linked to promises in Social Partnership Agreement ‘Towards 2016’ to build sector capacity, encourage philanthropy &amp; implement a government Social Finance Initiative to provide wholesale</td>
<td></td>
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<td>(j) the prevention or relief of suffering of animals</td>
<td>This has long been an established common law charitable purpose and is accepted by the Revenue Commissioners</td>
<td>• Irish Society for Prevention of Cruelty to Animals</td>
<td>√ Suggested by Law Society</td>
<td>√ Present in CDI definition</td>
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| (k) the advancement of the arts, culture, heritage or sciences | Revenue has looked favourably on these areas in the past. | • Arts Council  
• Heritage Council  
• Irish Georgian Foundation  
• Royal Irish Academy  
• Food Science And Technology Trust Of Ireland  
• Irish Radiation Research Society  
• Beaumont Scientific Trust. | √ Suggested by Law Society | √ Present in CDI definition | 2005 Act, s. 7(2)(g) | 2006 Act, s. 2(2)(f) | 2008 Act, s. 2(2)(f) |
| (l) the integration of those who are disadvantaged, and the promotion of their full participation, in | Presumably, Revenue has dealt with these under relief of poverty | • Access Ireland Refugee Integration Project  
• Saint Clare’s Pre-School (for Disadvantaged | √ Finds echoes in CDI definition | | | | No similar provisions in neighbouring legislation |
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<th>society.</th>
<th>Children)</th>
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<td></td>
<td>• Wexford Money Advice &amp; Budgeting Service</td>
</tr>
<tr>
<td></td>
<td>• St. Stephen’s Green Trust</td>
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