CHARITIES AND POLITICS

An Argument for Changing the Law

Michael Chesterman, August 2003

'Political' activity as a disqualifying factor under the present law of charities

Under present law, a trust, company, incorporated association or other organisation cannot be a charity if one or more of its purposes are 'political', unless the political purpose or purposes that it has can be characterised as 'ancillary' to its primary purposes and these primary purposes are wholly charitable in law.

This principle applies even if the political purposes are wholly concerned with one or more of the recognised categories of charitable activity: for example, relief of poverty or advancement of education. In this sense, the adoption of political purposes, other than as ancillary purposes, is a 'disqualifying' factor. It prevents an organisation which could otherwise claim charitable status, with its associated fiscal and other benefits, from making such a claim.

The concept 'political' is given a wide definition in this context. A purpose pursued by an organisation will be considered political if, for instance, it (a) is concerned with party politics, or (b) involves the dissemination of 'propaganda' for some cause or other, or (c) involves seeking changes to the law, or to the administration of the law, or to government policy.

It is the third of these notions of 'political' that creates difficulties for activist welfare organisations. The present argument for changing the legal definition of charity focuses on this particular aspect of the definition of 'political' within charity law.

The judicial reasoning that has induced English and Australian to include activities such as advocating changes to the law within the notion 'political' is as follows. A purpose cannot be held to be charitable unless it is beneficial to the public. Accordingly, when a court has to decide whether a trust or other organisation which aims to change the law (or for that matter to change the administration of the law, or some government policy) is charitable, it must determine whether the change sought would be beneficial. But a court, whose task is to resolve disputes according to existing law, cannot

rule on whether a particular change to the law would or would not be beneficial. According to one judge in an English case, it would 'stultify' itself if it did so. When confronted with an organisation seeking to change the law, a court therefore cannot make the necessary ruling that its purposes are beneficial to the public. The court cannot do this even if the declared reason why the organisation advocates changes to the law is that the change will serve some recognised charitable purpose, such as relief of poverty within the community.

Defects within the present law

This judicial reasoning is open to criticism on a number of grounds. A major defect in it, with which the present proposal is specifically concerned, is that it equates the purpose of advocating a particular change to the law with the purpose of actually effecting a change to the law. It ignores the argument that, irrespective of whether the effecting of a particular change to the law (or to the administration of the law, or to some government policy) is beneficial to the public, the advocating of such a change can and should be regarded as beneficial. This is because, in a self-governing, democratic society such as ours, debates as to what laws should be enacted, how laws should be administered and what government policies should be adopted are part and parcel of public life. Participation in such debates is a crucial aspect of the freedom of communication that is inherent in the notions of self-government and democracy.

It follows that, whether or not a court can determine the merits of a proposed change to the law, it can and should be prepared to hold that advocating a change in the law is beneficial to the public. To incorporate this proposition in charity law would bring this branch of the law in line with a number of other areas of law – notably, constitutional law and defamation law – where participation in the discussion of political matters, or of other matters of public interest, has been clearly recognised as beneficial. So long as charity law maintains the principle that political activity, except where 'ancillary' to other purposes, is a factor disqualifying an organisation from charitable status, it is in conflict with these other branches of law.

It can indeed be argued that the existing 'disqualification' on political activity by charities infringes a principle of constitutional law known as the 'implied freedom of

political communication', or at least is counter to the spirit of this principle. The disqualification has the effect of stifling political debate, to the extent that organisations whose purposes are in other respects clearly charitable are deterred from engaging in the relevant forms of political communication – advocating changes in the law, the administration of the law, or government policy – in pursuit of those purposes. They are wary of doing so because they may be deemed non-charitable and may thereby lose valuable tax benefits.

I am not saying that an argument along these lines would necessarily succeed before the High Court. But it is worthy of consideration.

A proposal for change

Commonwealth tax legislation should be amended so as to state that a trust or other organisation whose purposes are in other respects wholly charitable should not be deemed non-charitable solely because (a) in pursuit of those purposes, they publish material advocating changes in relevant aspects of the law, the administration of the law or government policy, or (b) their purposes envisage that they might act in this way.

The practical effect of such a change would be that 'activist' charities would no longer operate under the fear that what they thought to be ancillary charitable activity might be held by the Tax Commissioner to be more than ancillary, with the result that they would lose the benefit of significant tax exemptions.

A disadvantage of simply making this change to Commonwealth legislation would be that state tax laws, which also confer exemptions on charities, would not be affected by it. Nor would the case-law definition of 'charitable', which is relevant in a number of non-fiscal contexts (for example, in relation to the validity of trusts). Ultimately, a change along the lines that I propose would not be complete until it had occurred within these other legal contexts.

Further reading: Michael Chesterman, 'Foundations of Charity Law in the New Welfare State' (1999) 62 *Modern Law Review* 333, at 333-336, 343-349.