

Charitable Status, Advocacy and advancement of religion: an Australian perspective

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At: Charity Law & Policy Unit, School of Law and Social Justice

University of Liverpool,

Eleanor Rathbone Building, Bedford Street South Liverpool

When: Thursday 21 May 2015 4:00pm

A warm up event

Advocacy and advancement of religion

- Controversy around advocacy
 - The 20th century and political purposes
 - Australian *Aid/Watch* case
 - New Zealand Greenpeace case
- Controversy around advancement of religion
 - As a head of charity
 - As to public benefit
 - As to substrate of society

The goal

- To carry forward a discussion about the theory of charity law and consequently where it is headed
- To focus on both advocacy and advancement of religion to stimulate that discussion
- I come with ideas for the journey and an interest in exploring topic and those ideas

The context

People need to be reminded more often than they need to be instructed.

Dr Samuel Johnson

He who loves practice without theory is like the sailor who boards ship without a rudder and compass and never knows where he may cast.

Leonardo De Vinci

The 20th century

- *Statute of Elizabeth* and the four Pemselian heads entrenched
- Third head is Advancement of Religion and fundamentally charitable entrenched
- Political purposes were and sometimes are not charitable
- Emergence of third sector studies outside of law particularly in economics

The twenty-first century

- Twin towers (terrorism)
- Global Financial Crisis (retreat of government from provision of public benefits and public goods)
- Big data (we can and want to know)
- Leads to two conflicting agendas
 - Enabling charity *and* regulation (wide net)
 - Encouraging and limiting access to tax concessions (small net)

Traditional position

Justice Slade in *McGovern's case*, which involved Amnesty International, as follows:

Even if it otherwise appears to fall within the spirit and intendment of the preamble to the statute of Elizabeth, a trust for political purposes ... can never be regarded as being for the public benefit in the manner which the law regards as charitable... Trusts for political purposes falling within the spirit of this pronouncement include, inter alia, trusts of which a direct and principal purpose is either:

- (i) to further the interests of a particular political party; or
- (ii) to procure changes in the laws of this country; or
- (iii) to procure changes in laws of a foreign country; or
- (iv) to procure a reversal of government policy or of particular decisions
- (v) of governmental authorities in this country; or
- (vi) to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country.

Aid/Watch Incorporated v Commissioner of Taxation

[2010] HCA 42 (1 December 2010) [44] – [49] (5 to 7 majority)

- The political context
 - Environmental organisation
 - World Bank 60 yrs old retire
 - Massive decline in political party memberships
 - Increase in NGOs
 - An Exemption not deductibility case *but ...*
 - Political significance Govt v small NGO

The rejection of *Bowman*

In Australia, the foundation of the "coherent system of law" of which Dixon J spoke in *Royal North Shore Hospital* is supplied by the Constitution. The provisions of the Constitution mandate a system of representative and responsible government with a universal adult franchise, and establishes a system for amendment of the Constitution in which the proposed law to effect the amendment is to be submitted to the electors. Communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is "an indispensable incident" of that constitutional system. While personal rights of action are not by these means bestowed upon individuals in the manner of the *Bivens* action known in the United States, the Constitution informs the development of the common law. Any burden which the common law places upon communication respecting matters of government and politics must be reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of that system of government. (references removed)

The rejection of *Bowman*

The system of law which applies in Australia thus postulates for its operation the very "agitation" for legislative and political changes of which Dixon J spoke in *Royal North Shore Hospital*. There is none of the "stultification" of which Tyssen wrote in 1888. Rather, it is the operation of these constitutional processes which contributes to the public welfare. A court administering a charitable trust for that purpose is not called upon to adjudicate the merits of any particular course of legislative or executive action or inaction which is the subject of advocacy or disputation within those processes.

The Aid/Watch submissions

'It was with this understanding of the system of law that applies in Australia that Aid/Watch submitted that the generation by it of public debate as to the best methods for the relief of poverty by the provision of foreign aid has two characteristics indicative of its charitable status. The first is that its activities are apt to contribute to the public welfare, being for a purpose beneficial to the community within the fourth head identified in *Pemsel*. The second is that whatever else be the scope today in Australia for the exclusion of "political objects" as charitable, the purposes and activities of Aid/Watch do not fall within any area of disqualification for reasons of contrariety between the established system of government and the general public welfare.'

The ratio

These submissions by Aid/Watch should be accepted. By notice of contention the Commissioner submitted that the Full Court should have decided the appeal in his favour on the ground that the main or predominant or dominant objects of Aid/Watch itself were too remote from the relief of poverty or advancement of education to attract the first or second heads in *Pemsel*. It is unnecessary to rule upon these submissions by the Commissioner. This is because the generation by lawful means of public debate, in the sense described earlier in these reasons, concerning the efficiency of foreign aid directed to the relief of poverty, itself is a purpose beneficial to the community within the fourth head in *Pemsel*.

It also is unnecessary for this appeal to determine whether the fourth head encompasses the encouragement of public debate respecting activities of government which lie beyond the first three heads (or the balance of the fourth head) identified in *Pemsel* and, if so, the range of those activities. What, however, this appeal should decide is that in Australia there is no general doctrine which excludes from charitable purposes "political objects" and has the scope indicated in England by *McGovern v Attorney-General*

Ratio continued

It may be that some purposes which otherwise appear to fall within one or more of the four heads in *Pemsel* nonetheless do not contribute to the public welfare in the sense to which Dixon J referred in *Royal North Shore Hospital*. But that will be by reason of the particular ends and means involved, not disqualification of the purpose by application of a broadly expressed "political objects" doctrine.

The significance of the case

- Could have simply extended the common law to include political purposes
- Chose to locate charities freedom to engage in political advocacy in constitutional freedoms inherent in our democracy
- Australian parliament could have passed negating legislation but affirmed political purposes as charitable in *Charities Act 2013*

Greenpeace case

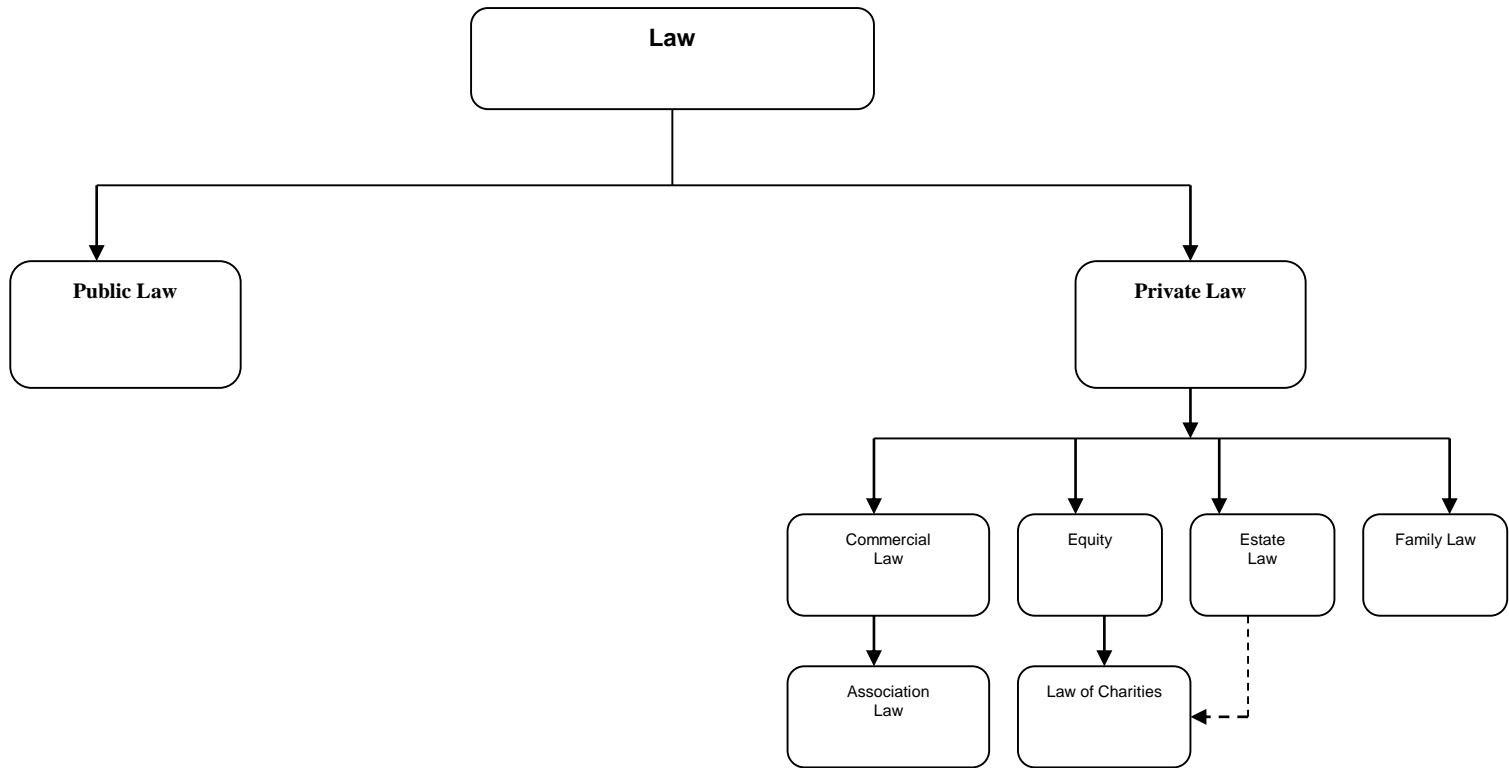
- political purposes are simply a question of public benefit or not under fourth head
- Chose not to follow the Australian lead in grounding in the constitutional freedoms
- Majority rested decision only on the removal of general exclusion of political purposes

The question

These common law developments, reinforced by statute in Australia, call for development of the theory underpinning the law of charities – at least in Australia. How is that to be done? Put differently: how is the Australian High Court's drawing from public law to be understood in the development of the law of charities internationally – is it to be confined to Australia? If so why or why not? What are the advantages and disadvantages of such an approach

What is wrong in this picture?





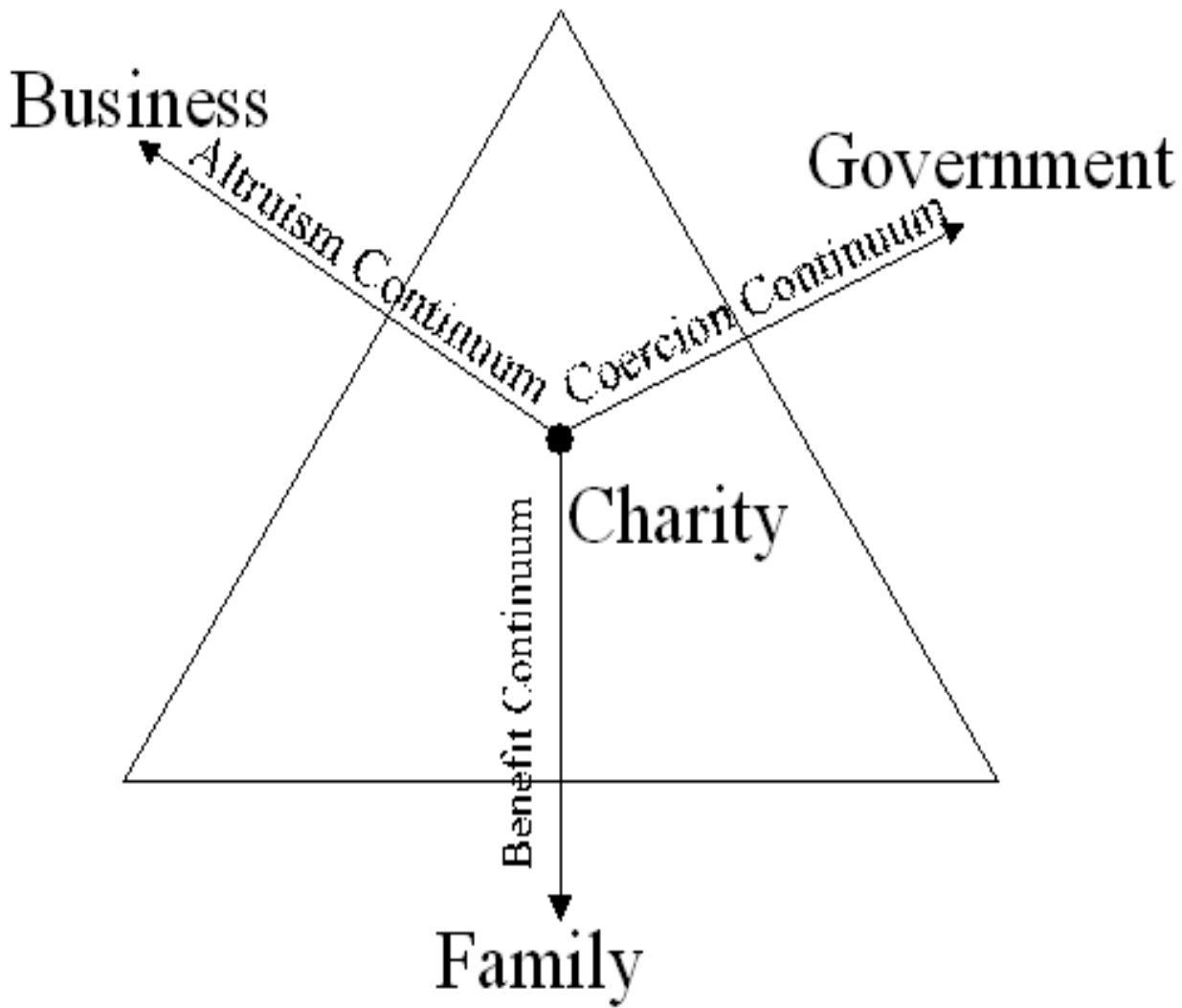
Charity is conceptualised as within private law but its essence is public benefit which is not a private law concept

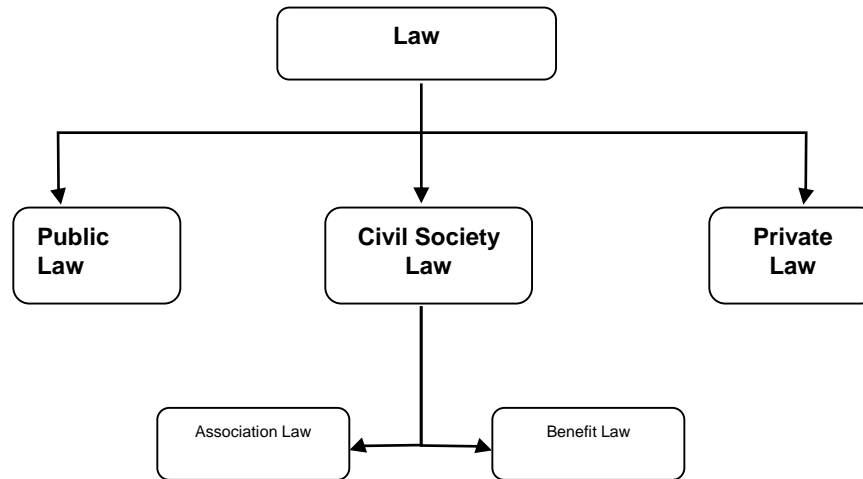
Sector No.	1		3	4
Sector Name	Business	Government	Civil Society	Family
Sector Law	Commercial law based in contract	Constitutional and administrative law based on limitation of power	?	Family law and estates based on justice within families

Conceptualising the sectors and their laws

Sector No.	1	2	3	4
Sector Name	Business	Government	Civil Society	Family
Sector Law	Commercial law based in contract	Constitutional and administrative law based on limitation of power	Civil society law based on freedom of association and public benefit/charity law	Family law and estates based on justice within families

Conceptualising the sectors with a body of law for the third sector





Reconceptualising charity law as at the centre of a third sector space

How could we get there?

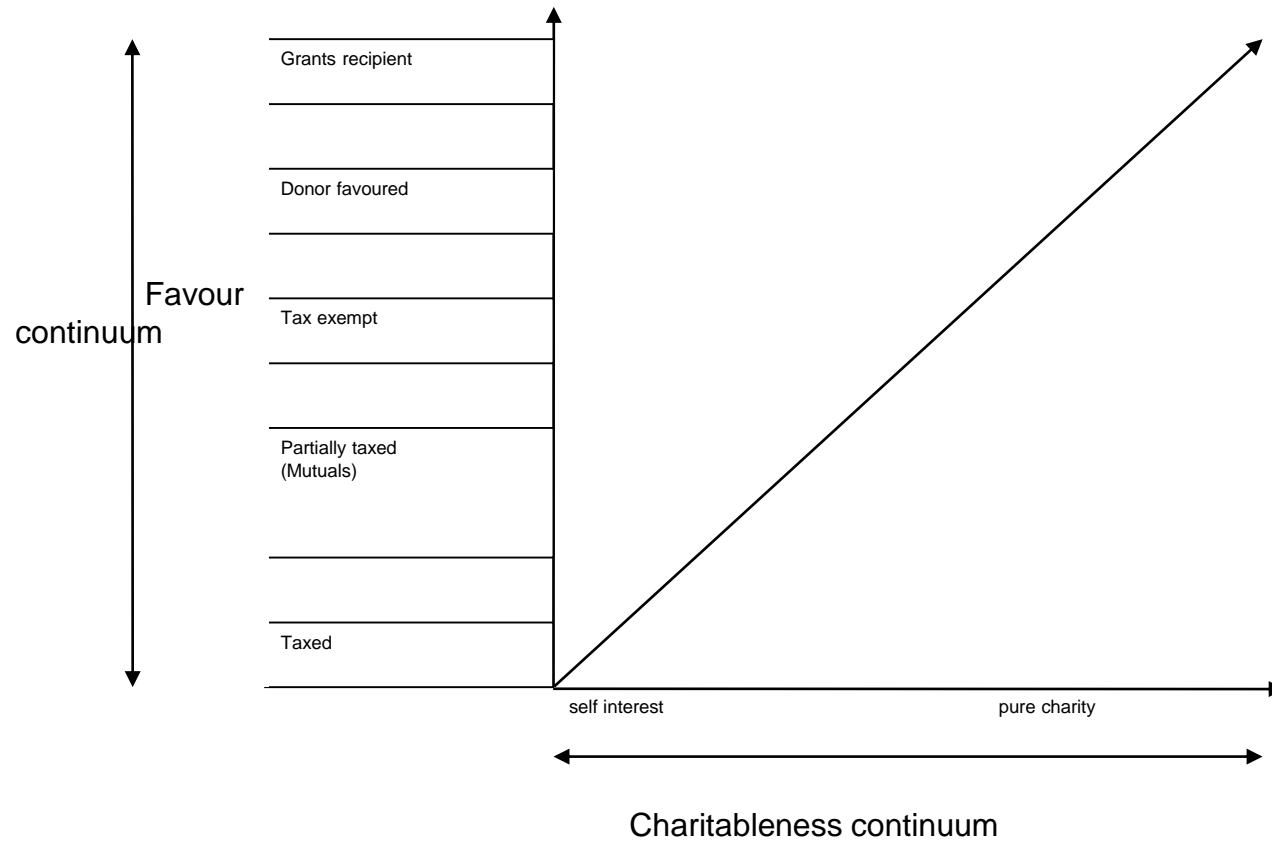
- From Advancement of religion (religio) to facilitating freedom
- The old cases cited by Picarda
 - The Law and Practice Relating to Charities* (3rd ed, 1999) 84.
 - *Holland v Peck* (1842) 37 NC 255, 258.
 - *People ex rel Seminary of Our Lady of Angels v Barber* (1886) 3 NY St Rep 367 affirmed in (1887) 13 NE 936
 - *Gass and Bonta v Wilhite* (1834) 32 Ky 170, 180.
- The Statutory extensions
 - the advancement of citizenship or community development; and
 - the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity.

The tax v regulation problem

Tax

- *Pemsel's* four heads and the need for Public benevolent institutions in Australia
- Segment the four heads and favour differently for tax, or
- Favour:
 - according to charitableness or
 - public benefit (commercial ventures)

Tax a diagram



Key issues/questions

1. Charity law is hemmed into trusts law but it is increasingly a matter for corporations that are vehicles for association how does trust law and constitutional freedom to associate intersect in a democratic society?
2. Advancement of religion is integral to Charity law and freedom of religion is fundamental to constitutional democracy but were, if anywhere is there integration and if so how?
3. Tax presses for a smaller class of charities and regulation presses for a larger. How is this to be reconciled?

A response to key issues 1

1. Charity law might become part of if not the foundation for a new body of jurisprudence which spans the public benefit dimensions of public law and the private control of trusts and corporations law.

A response to key issue 2

2. Advancement of religion might be conceptualised as an archetype of a broader class of entities that provide the substrate of democratic society. There is precedent and statutory example to platform expanding the class to include all entities that provide the substrate for society.

A response on key issue 3

Tax favours can be managed by either favouring some heads differently from others or (abandoning) in favour of a continuum of public benefit justifying favours

Questions and commencement of a discussion