

**Charities, from a Muting of Dissent to Advocates for Social Change:
the particular experience in Northern Ireland and the general lessons from the
Common Law Charity Law Reviews**

by
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Introduction

A legal framework is established to govern designated activities. In general, the capacity of that framework to either help or hinder the targeted activity will depend upon the closeness of the fit between the two. The inevitable slippage, caused not least by the passage of time, between any law and the social circumstances it was designed to address will always result in the law being inappropriate to some degree. This lack of fit has recently become a significant feature of the relationship between law and the activities of charities as evidenced by the fact that across the common law world many nations have recently found it necessary to undertake charity law reviews. For example, in Ireland a review was launched in autumn 2001, our commissioned report was submitted to the Irish government in April and its proposals for reform are expected to be published later this year. In Canada, the Ontario Law Reform Commission published its report² in 1996. More recently, in England and Wales, the NCVO launched its recommendations³ in January 2001; while the Scottish Charity Law Review Commission launched its report⁴ in the summer of 2001. A Charity Law Reform program⁵ was launched in New Zealand in autumn 2000, and in Australia the Charity Law Reform Committee submitted its report⁶ in June 2001.

In Northern Ireland the appropriate government body has also undertaken preliminary steps to institute its own charity law review. This is currently on hold pending a report from the Performance and Innovation Unit (PIU) on its UK-wide study of the legal framework for ngos⁷. Two implications may be drawn from this holding operation. Firstly, it indicates that any reform of charity law is, perhaps, to be considered on a UK-wide basis, rather than limited to either Northern Ireland or to England & Wales (Scotland may pursue its own agenda for reform). Secondly, it also implies that any such law reform is to be viewed in the overall context of reform of the legal framework for ngos,

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² See, Ontario Law Reform Commission, *Report on the Law of Charities*, 1996 (<http://www.qut.edu.au/bus/ponc/charity>).

³ See, NCVO, *For the public benefit? A consultation document on charity law reform*, London, 2001.

⁴ See, Report of the Scottish Charity Law Review Commission, *Charity Scotland*, Edinburgh, 2001.

⁵ See, The Treasury, *Working Party Report on the Registration, Reporting and Monitoring of Charities*, Wellington, 2002.

⁶ Charities Definition Inquiry, *Inquiry into the Definition of Charities and Related Organisations*, Canberra, 2001.

⁷ See, <http://www.piu.gov.uk/2001/charity/Optionsstatcomment.shtml>.

rather than as necessarily restricted to charities. That the review of charity law in Northern Ireland will go ahead in the immediate future is beyond doubt, the uncertainty relates only to its scope. A common trend is evident in all reviews. The reports tend to focus, albeit with varying emphasis, on definitional matters. What exactly is the legal definition of 'charity' in the modern world? How can it be legally differentiated from other forms of not-for-profit activity, particularly from the activities of government bodies? Is the trust the most appropriate legal form for giving effect to a charitable bequest? What should be the 'public benefit' test that determines charitable status? These issues recur in all the reviews. The commonality of a concern for definition transcends differences in cultural context.

Among the themes invariably attracting attention is the traditional common law prohibition on political activity by charities. This paper considers why advocacy has recently become such an issue in Northern Ireland and for so many other common law nations. The paper examines the different assessments of the issue in the reports and analyses the recommendations made for addressing it. The paper is in four parts.

Part 1 looks briefly at the historical record of charities acting as advocates on behalf of the socially disadvantaged. It outlines the current law governing political activity by charities in common law nations. It then considers the argument that there has been a general 'muting of dissent' in the voluntary sector in the UK over the past decade. Drawing from the work of Deakin and Knight among others, and referring to recent case law, evidence is provided to indicate a probability that criticism of government policy by charities has diminished as government bodies and ngos have become more complicit in arrangements for public service delivery provision.

Part 2 deals with the experience in Northern Ireland. As an exemplar of trends elsewhere in the modern westernised world, the experience of charities in this jurisdiction provides a particularly clear illustration of the cause and effect of increasing tension in the relationship between charities and the State. Charity dependency on public funding, often through competitive tendering for service delivery contracts, is a distinctive characteristic of that relationship. But, in addition, the point is also made that this is a jurisdiction in which there is now a pressing need to find more effective means to permit the articulation of grievance and to address the social inclusion agenda. This Part provides statistical, legislative and case law evidence that charities have now become quite constrained in their capacity to act assertively and independently as advocates for the socially disadvantaged at a time when such representation is sorely needed.

Part 3 turns to the national and international charity law reviews. It explains why so many nations are simultaneously experiencing the same problems and are seeking a solution through legislative change. It cites cases such as the Vancouver case⁸ concerning the denial of charitable status for female immigrants who wished to establish a self-support and advocacy group. It then examines the recognition given in the reports to the specific issue of political activity by charities and assesses the type of legislative change recommended by the reports. It contrasts the approach currently being suggested by UK jurisdictions with the more radical call for legislative intervention in Australia.

Part 4 concludes the paper by looking forward with an argument that UK charities already act as agents for social change; some have developed into powerful agents through using their leverage as research bodies to inform and lead change. It argues that charities in Northern Ireland, in the UK and elsewhere in the common law world should be entrusted and encouraged to pursue this role which is in keeping with the best traditions of charity.

⁸ See, *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* (1999) 169 D.I.R. (4th) 34, SC. Also, see footnote 30 below.

Part 1

Charities and Advocacy: A Brief Historical Background

Traditionally, charities have been associated with the effects of political action or inaction. They played an important role as ‘pressure groups’ working to shape social, economic and environmental policies. This they did by providing a forum for the coherent expression of such fundamental rights as freedom of assembly and speech. More recently, however, there is reason to believe that the role of charities as advocates for the disadvantaged, robustly challenging government policies, has diminished.

1.1 The traditional role of charities

The roots of charities are to be found in addressing the effects of poverty. In the UK, from at least the time of the Reformation, charities undertook responsibility for providing for the needs of the poor, the ill and disabled and those otherwise disadvantaged. Institutional facilities in the form of hospitals, asylums, homes for the poor and elderly were initially provided by religious organisations, Quakers and other charities. As Deakin has documented⁹, the Georgian era in England witnessed a consolidation of welfare oriented philanthropic provision. The founding hospital established by Thomas Coram in the early 18th century was only one of many philanthropic initiatives which have survived into modern times. In fact, the foundations for the present social and health care infrastructure were largely put in place by charities and through philanthropic effort.

Charitable activity then, in its most traditional form, was most typically associated with provision of care and shelter to the needy.

As the State assumed more comprehensive responsibility for ensuring that basic levels of social care were being met, charitable activity became more concerned with supplementing State service provision and on negotiating with the State on behalf of the socially disadvantaged. The latter activity – involving advocacy, representation and lobbying – is steadily bringing into sharp focus throughout the charity sector an underlying fault line between assertion of rights and delivery of services as appropriate methods of responding to social disadvantage.

However, it is unlikely that charities ever adopted or were required to adopt a politically neutral position in the past. In the Victorian era, many important initiatives resulting in policy changes by politicians were led by charities. The Charity Organisation Society, established in 1869, being an example of reflective philanthropy at work; mixing provision for the poor with a sociological analysis of the causes of poverty.

1.2 Charities as advocates on behalf of the socially disadvantaged

Arguably, to confine charities to an independent and politically neutral stance is to insist that they revert to a stereotypical ‘soup-kitchen’ role; treating the effects and ignoring the causes. But charities never actually conformed to this stereotype. For example, the protests against the conditions suffered by children employed in factories or as chimney sweeps etc were led by charities. They were also to

⁹ See, Deakin, N., *In Search of Civil Society*, Palgrave, London, 2001.

the fore in the rallies against the slave trade, the lobbying to halt the practice of 'baby-farming' and in support of the suffragette movement.

Charities have always seen it as part of their role to articulate the concerns of the socially disadvantaged. For some groups, which may otherwise be defined as subversive and illegal, charities lend a voice, a responsible presence and serve as witnesses to their circumstances. They provide a platform and a means whereby the grievances of the disadvantaged and disenfranchised can be legitimately aired. By so doing charities represent the interests of a diverse range of minority groups and thereby promote inclusiveness.

1.3 The legal constraints on political activity by charities

It is a long-standing legal rule that voluntary organisation seeking to acquire or retain charitable status, and all the attendant financial benefits, must avoid having political purposes and engaging in most forms of political activity. It would seem that charitable status and political activity are, in law, mutually exclusive. This is a difficult moral proposition to sustain as charitable purposes are and have always been symbiotically linked to the purposes of politicians. Political activity or inactivity often provides a particular focus for charitable activity. As has been said:

"...the existing situation needs to be reviewed, as the regulations governing charitable status and political activity are impractical, discriminatory and undemocratic¹⁰."

The accepted rationale for denying charitable status to bodies engaging in political activity rests on several related arguments. They all essentially stem from the view that such activity subverts the established democratic political process. Because a charity has not submitted to the electoral system it is not publicly accountable. Because it is not usually internally organised in a democratic fashion it is seldom in a position to proclaim that other systems are unfair. It is therefore claimed that a charity has no mandate to represent issues before the 'body politic'. It is also suggested that the social value of a charity lies in the latter's independence which would be compromised if it became politicised. A corollary being that the legitimacy conferred on a charity by virtue of its formal recognition as such would, in the eyes of the general public, be extended to the cause it chose to espouse, with corresponding disadvantages for causes not championed by charities. Allied to this is the argument that it would be illogical for the state to defray the liability of an organisation to contribute towards the 'public purse', thereby imposing a duty on others to make good the tax loss, only to find that by so doing it was subsidising the capacity of the organisation to undermine state policies. Again, by granting public monies to charities the state is channeling taxpayers' funds on a preferential basis, but it has no way of knowing which campaigns taxpayers support and which they do not¹¹. This central dilemma was acknowledged and summarised by the Charity Commissioners as follows:

"On the one hand, many people think that charities should be allowed, and indeed have a duty, to campaign freely to change public policy on any issue if it is relevant to their work and if they have direct experience to offer. On the other hand, some argue that such campaigning is

¹⁰ See, Burt, E., 'Charities and Political Activity: Time to Re-think the Rules' in *The Political Quarterly*, vol. 69, no. 1, p. 23. Also, see, Dunn, A., 'Charity Law as a Political Option for the Poor' in *Northern Ireland Legal Quarterly*, Belfast, vol. 50, no. 3, 1999, pp. 298 – 317.

¹¹ See, further, Perri 6, *Restricting the Freedom of Speech of Charities: Do the Rationales Stand Up*. Also, see, *McGovern v. Attorney General* [1982] 1 Ch 321 per Slade J at p. 336.

a misuse of charity funds, a misdirection of effort by charities and a misuse of the fiscal concessions from which charities benefit¹²."

1.4 Charities and the muting of dissent

Arguably, in Northern Ireland as elsewhere in the United Kingdom, recent years have witnessed a general muting of dissent in the voluntary sector. The argument runs that the monitoring, lobbying and advocacy roles traditionally pursued by voluntary organisations in relation to the policies of government bodies have become suppressed. In England, Deakin has spoken of a danger of losing the distinctive nature of voluntary action:

"The distinctive nature of voluntary action in our society is now in danger of being compromised as organizations move away from their original objectives and take on new roles defined for them by others¹³."

and both Deakin and Kemp fear a loss of independence:

"Short-term contracts may threaten independence and the ability to speak out or campaign. And ... may lead to unhealthy dependencies¹⁴."

Referring to the partnership between the voluntary sector and government, both stress the need for equality and equability and need to maintain an advocacy role: "voluntary bodies must be free to be advocates even where they are also partners"¹⁵.

It is suggested that the independence of voluntary organisations in general and the advocacy role of charities in particular have been compromised because of several different developments. Firstly, that the contracting/partnership strategy pursued by the statutory agencies, has had the effect of persuading their voluntary partners that 'biting the hand that feeds them' would not be conducive to a renewal of contractual arrangements. The remarks of Lord Astor of Haver, in a relatively recent House of Lords debate on the future of charities in England & Wales, apply with equal force to Northern Ireland:

"With so many of the charities' money coming from government sources, many charities lack genuine freedom of action¹⁶."

Secondly, it is argued that there has been a hardening of the judicial view that charitable status and lobbying for changes in the law are incompatible activities. Thirdly, it is suggested that at government level there has been a diverting of funds away from bodies which challenge or subvert

¹² CC9 at p. 10.

¹³ See, the Commission on the Future of the Voluntary Sector in England, *Meeting the Challenge of Change: Voluntary Action into the 21st Century*, NCVO Publications, London, 1996 (also referred to as the Deakin Report).

¹⁴ See, the Commission on the Future of the Voluntary Sector in Scotland, *Head and Heart*, SCVO, Edinburgh, 1997 (also referred to as the Kemp Report), p.47, para. 6.5.5.

¹⁵ Deakin (1996) pp.13-14.

¹⁶ See, HL Deb vol 586, col 1213 – 4, 4th March 1998.

contemporary politics. Other factors may also be playing a part: short-term funding from European sources is perhaps inducing a compliance culture in recipient bodies; the impact of the market economy on the voluntary sector, particularly competitive tendering for government contracts, is possibly fragmenting the capacity of similar organisations to co-ordinate their lobbying. It is also probable that the growth of umbrella bodies is reducing the number of independent voluntary sector voices, formalising and channeling their critical commentary, and perhaps opening up a new, direct and more discrete and internal dialogue between the voluntary sector and government policy and service providers. Further, it may be that the advocacy role traditionally borne by individual voluntary organisations is now perceived as the responsibility of other bodies such as those for the Equality Commission, the Ombudsman or Law Centres etc.

1.4.1 Charities and the events of 11th September

Although, as yet, no hard evidence exists to show that charities have been specifically adversely affected by the events of 9/11, the probability is that they have. This is likely to be occurring in two areas. Firstly, a widespread concern amounting in some places to scare-mongering is evident in relation to how charities use their funds. There is a prevalent suspicion that some charities, perhaps unwittingly, may allow themselves to be used as vehicles of convenience for the transfer of funds to groups with terrorist affiliations; that the gifts of well-intentioned donors are being used to buy guns rather than bread because of the naivety of some charities. There has been a growing demand for greater public accountability by charities and for greater transparency as regards the sources and deployment of their funds. Secondly, voices raised in dissent now attract suspicion. The events of September last triggered a widespread and wholly understandable rallying around the flag reaction in stable democracies around the world. This has been accompanied by a general feeling that 'if your not for us then your agin us' which has probably affected the capacity of charities to speak out on behalf of minority groups. Both these reverberations from the events of 9/11 can be detected in Northern Ireland, particularly in regard to charities associated with nationalist groups.

Brief Summary of Part 1

Charities have traditionally acted as advocates on behalf of the socially disadvantaged. But there are now good reasons for believing that this role has become restricted. Whatever the cause, it may be argued that the absence of a strong voice articulating the view from the voluntary sector inhibits a constructive democratic dialogue between State service providers and users. In England and Wales the related issues have generated vigorous debate¹⁷.

Part 2 Charities in Northern Ireland

A Compact for Northern Ireland, entitled *Building Real Partnership* was laid before Parliament in December 1998. In this Compact the government pledged that:

¹⁷ See, for example, the Labour Party Review of the Voluntary Sector *Building the Future Together: Labour's Policies for Partnership between Government and the Voluntary Sector*, 1997 and the Deakin and Kemp Reports each of which endorsed the contribution which voluntary organisations make to the democratic process.

"It recognises, respects and supports the independence of the sector and its right to campaign within the law, to comment on and, where appropriate, to challenge Government policy."

It remains to be seen exactly what is implied by the caveat "where appropriate". This Compact together with the revised *Strategy for the Support of the Voluntary Sector and for Community Development in Northern Ireland*¹⁸ have the potential to reshape the context within which charities and charity law have to operate; provided they are underpinned by a sound and practical programme of goals and objectives. This formal negotiating framework for managing the developing relationship between state and voluntary sector provides a new principled structure for 'proofing' emerging government policies and operational procedures/protocols to ensure they are voluntary sector compliant.

2.1 Voluntary organisations and dissent in Northern Ireland

The position of voluntary organisations in Northern Ireland is different from that of such organisations elsewhere in the United Kingdom in a number of important respects. Firstly, and most obviously, thirty years of violence has had a profoundly deleterious effect on the social infrastructure and, most importantly, on the sense of a shared community and willingness to build a civil society. Inevitably, many small local organisations are now as polarised and partisan as the communities they represent; they may well generate social capital within their constituencies but this often also serves to reinforce their separateness and to fragment overall social cohesion. The voluntary sector in Northern Ireland cannot, thus, be viewed as wholly sharing in the same collective values and strategic concerns typical of the sector elsewhere in the United Kingdom. Secondly, the absence of a local government tier of administration for two and a half decades has had a singular effect on the interface between the voluntary and statutory sectors in Northern Ireland. In particular, the reliance upon government appointed boards led to a much stronger alliance between some of the larger voluntary organisations and government bodies than would be typical of other jurisdictions of the United Kingdom. Thirdly, the voluntary sector has provided the government with a conduit through which funds from Westminster and from the EC could be channeled and an expedient vehicle for delivering social care services to communities otherwise alienated from the State. This conferred status upon and vested real negotiating power in some mediating voluntary organisations. Finally, a higher proportion of voluntary organisations in Northern Ireland than elsewhere in the UK are dependent upon direct and substantial government funding. Together these and other factors point up the distinctiveness and relative importance of the voluntary sector in Northern Ireland when compared with other jurisdictions in the United Kingdom.

2.2 Charities and the new political context of devolved government in Northern Ireland

Arguably, the business of charities is and always has been intimately related to the business of governments. Deprivation, homelessness, unemployment, civil liberties, animal rights, conservation and the myriad other issues which provide the *raison d'être* for charities are ultimately also political matters.

2.2.1 Representative and participative models of democracy

¹⁸ DHSS, 1993.

The government of the day tackles issues arising in accordance with its representative role in the political process. Voluntary organisations do so in accordance with their participative role in that process. Both are equally valid and complementary aspects of the same model of democratic politics. In Northern Ireland, normal democratic structures were suspended for many years in favour of direct rule from Westminster. During that period, participative democracy flourished in the absence of representative democracy. Charities and other large voluntary organisations played a pivotal role in mediating between the needs of the disadvantaged in Belfast and elsewhere and the resources accessed through politicians based in London. Well-established informal networks ensured that direct lines of communication were maintained between the two.

Now that local institutions of democratic government have been re-instated in Northern Ireland there is good reason to fear that formal representative politics are displacing the informal networks. Elected politicians have been heard to state that the time has come for the leaders of the voluntary sector to step aside. In this very divided community, the elected politicians may well bow to pressure and address the concerns of their constituencies to the exclusion of concerns for marginal groups. The formal political agenda is then less likely to accommodate minority group issues.

2.2.2 The role of the Voluntary and Community Unit (VCU)

In Northern Ireland the VCU is the government body with overall responsibility for encouraging, promoting and supporting an independent, vigorous and cost effective voluntary sector, for encouraging and promoting voluntary activity and for co-ordinating and enhancing the effectiveness and efficiency of Government policy on community development in Northern Ireland. Its mission is stated as:

“Building bridges between government and the voluntary and community sector”

It views the voluntary and community sector as a key social partner in the processes of government and points to the success of District Partnerships, the development of Local Strategy Partnerships, local Task Forces and area based partnerships as reflecting the increasing importance of the voluntary and community sector in Northern Ireland. The VCU is currently engaged in identifying areas of research that could inform future government policy on resourcing the voluntary and community sector.

2.3 Funding arrangements

Voluntary organisations in Northern Ireland are very dependent upon government funding. As noted by the Dept for Social Development:

"Government in its various guises is the major source of funding for organisations and the most recent analysis of government funding of the sector found that a total of £189 million was delivered through 58 programmes in 1996/97. These included 30 European Structural Funds measures with a value of £64.6m, with £44 m made available to the Special Support Programme for Peace and Reconciliation¹⁹."

¹⁹ See, Dept for Social Development, *Consultation Document on Funding for the Voluntary and Community Sector*, Belfast, the Voluntary Activity Unit, April 2, 2000, para 1.

This dependency is much greater than is the case with their counterparts in England and Wales. In Northern Ireland, a survey conducted in 1995²⁰ revealed that 84% of the income of a sample of voluntary organisations involved in delivering personal health and social care services was derived from public funding with a further 8% from the sale of goods and services. A subsequent study in 1996/7²¹, drawing from a larger sample of similar organisations, showed that 76% of such income was so sourced; 59% being in the form of direct government grants or contracts. Research in England and Wales shows comparable figures of 26% of income from grants and donations and 35% from the sale of goods and services. Most recently, the Northern Ireland Voluntary and Community Sector (NICVA) in its report *The State of the Sector* (2002), notes that for the sector as a whole the largest source of income is government funding. In various forms, this accounts for a total of 37% of all income generated by the sector compared with 29% for the UK. Of that government sourced income, the most important form remains the direct government grant; though this has decreased in real terms by 25% since 1998.

However, impending changes to funding programmes, including the ending of the Peace II and Building Sustainable Prosperity Programmes, are likely to significantly reduce available support for the sector by 2006. Attention has been drawn to this approaching crisis in the Consultation Document on Funding to the Voluntary and Community Sector, (often referred to as the Harbison Report) published in April 2000, where it was noted that achieving proper strategic management of the limited resources delivered through the voluntary and community sector would be of crucial importance.

It may well be the case that financial dependency on government is already accompanied in Northern Ireland by a greater degree of voluntary sector compliance with government policies than prevails elsewhere in the United Kingdom. That the government is actively pursuing measures to ensure a greater degree of future compliance is clear from the terms of reference of the inter-Departmental review group which produced the consultation document on funding. It firmly states its driving aim as:

" ... the need to ensure that government funding (including European funding) of the sector aligns with government priorities²²."

There must be some concern that such a policy will pose a threat to the independence of the sector and its capacity to advocate on behalf of those whose particular needs are not being met by government priorities.

2.4 Religion and the member benefit charitable activity of religious organisations

²⁰ See, Social Services Inspectorate, *Adding Value: the Contribution of Voluntary Organisations to Health and Social Welfare*, Belfast, DHSS, 1998.

²¹ See, NICVA, *The State of the Sector Two: Northern Ireland Voluntary Almanac*, Belfast, 1998.

²² *Op cit*, at p. 5. This resonates with similar long-standing policy concerns in England, see, for example: Woodfield, P., Binns, G., Hirst, R., and Neal, D., *Efficiency Scrutiny of the Supervision of Charities, Report of the Home Secretary and the Economic Secretary to the Treasury* (or 'the Woodfield Report'), London, HMSO, 1987; the National Audit Report *Monitoring and Control of Charities in England and Wales*, 1987; Report of the Public Accounts Committee, *The Monitoring and Control of Charities in England and Wales*, 1988; and the resulting White Paper, *Charities: a Framework for the Future* (Cmnd 694), 1989. In this jurisdiction, see the *Adding Value* Report.

In Northern Ireland, religion, and charitable activity for religious purposes, remain polarised around the twin monolithic blocks of Protestantism and Roman Catholicism. These two religions retain their traditional cultural and political significance for the majority of the population. The rich diversity of non-Christian culture evident elsewhere in the UK does not extend, in any comparable volume, to this jurisdiction. Arguably, the particular role of religion in Northern Ireland with its distinct political baggage carries implications for charity.

A recent research project (unpublished) at Queen's University Belfast shows that donations and bequests are still mainly made to religious organisations and that the very significant volume and pattern of such gifts has remained the same for generations. An on-going research project²³ conducted by a colleague in the University of Ulster shows that while religious organisations are currently generating a high considerable level of charitable activity this is very largely member benefit in nature. In short, as might be expected in a society where culture and politics are dominated by the divided religious affiliation of the population, much charitable activity reflects the nature of that religious split.

If we accept, as we must, that religion is part of the problem in Northern Ireland then we must also accept that the problem is embedded in the workings of charity. To a much greater extent than elsewhere in the UK, charitable activity in this jurisdiction is political activity by proxy. Given that member benefit runs counter to the public benefit principle so central to charity, there is a strong case for making gifts to and activities of religious organisations subject to a strict public benefit test if these are to be eligible for charitable status.

2.5 The social inclusion agenda in Northern Ireland

This is a jurisdiction in which there is now a pressing need to find more effective means to permit the articulation of grievance and to address the social inclusion agenda. As a corollary to the legacy of 30 years of violence, bitterness and lack of trust, the situation is compounded by a deficit in policy initiatives addressing the broader aspects of social inclusion. Whereas other modern western societies have spent some decades wrestling with issues such as - how best to respond to the problems suffered by those disadvantaged by a social perception of inadequacy due to disability, race, age, gender etc - in this jurisdiction these issues have largely been on hold. Instead, as communities coped with the more immediate pressures of direct violence and the not unrelated phenomenon of the highest level of unemployment in these islands, social inclusion policies were quietly deferred. Now, with a return to normal politics, there is a growing awareness that those such as the disabled, the travelling community, the gay and lesbian community and other minorities belonging, for example, to non-white racial groups are relatively more disadvantaged in this than in other UK jurisdictions. Arguably, a case can be made for permitting charities to act as advocates for the 'political' interests of such groups because their voice would otherwise not be readily heard. The advantages in permitting charities, particularly those dedicated to serving the interests of socially excluded groups, to campaign, lobby or otherwise engage in political activities on their behalf would surely outweigh any disadvantages. The deeply embedded culture of discrimination in Northern Ireland now needs to be addressed in all its manifestations.

There is also the problem of poverty in Northern Ireland. For many decades it has had the unenviable reputation of sustaining the highest level of scores across a range of poverty indicators (standard of housing stock, proportion of working population unemployed, numbers in receipt of welfare benefits

²³ See, Bacon, D., 'The Role of Faith Based Organisations in Promoting Social Capital in Northern Ireland'; CVAS, on-going research project.

etc) of any jurisdiction in the UK. During thirty years of violence the industrial and manufacturing foundations, underpinning the traditional social structures of this jurisdiction, have virtually disappeared. There is now a pressing need to focus the resources of charities on regenerating those communities traumatised by violence, dislocated by associated large-scale shifts in population and/or desolated by unemployment.

2.6 Peace and reconciliation etc

The fact that the existing legal framework for charities and their activities in Northern Ireland predates and therefore fails to relate to the causes and effects of thirty years of civil unrest is evident in the current lack of fit between the law, social need and charities in this jurisdiction. To take just one example, peace and reconciliation is not recognised as a charitable purpose in the existing law. Nothing could indicate more starkly the present inappropriateness of charity law in N Ireland. Not only does it fail to sensitively and flexibly address the particular characteristics of the social context but it actually obstructs any possible charitable response to the most obvious area of social need.

Brief Summary of Part 2

The experience of charities in Northern Ireland offers a useful exemplar of trends elsewhere in the modern western world. In some specific respects this experience has been more extreme than elsewhere and for that reason offers a particularly clear opportunity to see how the advocacy capacity of charities can be compromised. This is very evident in existing funding arrangements which constrain their independence but it is also apparent in the legal restrictions on lobbying and on peace and reconciliation activities. These and other constraints undermine the traditional role of charities as representatives for the socially disadvantaged.

Part 3 The Charity Law Reviews

The quattro-centennial anniversary of the Statute of Charitable Uses 1601 seemed to trigger a rash of charity law reviews across the common law world. In part this burst of legal activity may be attributable simply to the timing: the occasion warranted the stock-taking exercise of a review to establish just how well the particular national re-formulation of that initial statute was addressing current social needs. In the main, however, the reviews were prompted by similar factors coming into play in Scotland²⁴, New Zealand²⁵, Australia²⁶, Canada²⁷ and England and Wales²⁸. These modern western societies with their common law foundations shared a similar need to overcome a general problem of legal inertia and viewed legislative intervention as the means for realigning charity law with contemporary social circumstances. By reviewing the relevance of their respective common law legacies in the light of contemporary social need, they each hoped to prepare the way for such

²⁴Op cit.

²⁵Op cit.

²⁶Op cit.

²⁷Op cit.

²⁸Op cit.

statutory adjustment to charity law as may be necessary to enable charities to supplement government capacity to promote the general public benefit.

3.2 Some general themes in the charity law reviews

The reviews tend to focus on definitional matters. What exactly is the legal definition of 'charity' in the modern world? How can it be legally differentiated from other forms of not-for-profit activity, particularly from the activities of government bodies? Is the trust the most appropriate legal form for giving effect to a charitable bequest? What should be the 'public benefit' test that determines charitable status? These themes recur in all reviews; with the possible exception of New Zealand. There are other themes not readily attributable to the common law legacy such as those concerning trading, training schemes for the unemployed and community development. Other more technical concerns, to do with issues such as mechanisms for ensuring accountability and fundraising, are also often present and may even trigger the immediate need for review, but it is the commonality of a concern for definition that is most apparent. Nowhere is this more clearly demonstrated than in the report of the Ontario Law Reform Commission²⁹.

The reviews reveal that certain aspects of the common law legacy, derived from the 1601 Act and subsequent case law, remain prominent in the current approach to charity law throughout the common law world. Some of the characteristic components have proved very serviceable. For example, the public benefit test has to some extent lent itself as a means for the flexible re-interpretation of what in law can be defined as charitable in the light of changing social and economic circumstances. Also the common law approach to voluntary organisations, including charities, has always been very different from that taken by equity and statute law. The common law right to form associations has meant that charities have never required any permission to exist, need not subscribe to any particular legal form, are free to maintain their independence from government bodies and to act as advocates to such bodies on behalf of those in need. Charity law is also freighted with other common law characteristics of a less serviceable nature such as an emphasis on the rights and duties of the individual and the extension of status by analogy rather than principle. Among such characteristics is one that has traditionally exercised a restraining influence on the capacity of charities to act as independent assertive advocates on behalf of the socially disadvantaged: the common law required an almost feudal respect for king and for country and for the institutions of the land.

3.3 A particular common law theme in the charity law reviews: the advocacy role of charities

The various reviews disclose a concern with the relationship between charities and political activity. There may be a number of different reasons for this development.

3.3.1 Societies in transition

In many western cities there are now difficult tensions due to fluctuations in the balance between different and sometimes opposing cultures. We have become accustomed to viewing such tensions set within a political context in cities such as Belfast, Beirut, Sarajevo and Jerusalem. But from Quebec

²⁹ *Op cit.*

to Bradford, from Vancouver³⁰ to Paris and in many other cities similar tensions are becoming evident. Given the north/south global economic divide it is highly probable that this phenomenon will increase as the more developed nations struggle to cope with the so-called 'asylum seekers'. The influx of sizeable numbers from different ethnic groups is challenging many western societies. Assimilating new cultures while preserving those already established and in the process maintaining social equilibrium is set to become a major test for civil society across the western world. The sudden and acute awareness of a need to achieve harmony in the face of increasing diversity has prompted many governments to reflect on the potential mediating role of charities. Charity law review provided an opportunity to consider whether the legal framework should and could be adjusted to facilitate the development of a stronger advocacy role by such bodies.

3.2.2 State and third sector partnerships

Another contemporary phenomenon in societies across the western world is the rolling back of the State accompanied by an increased importance in the role played by the third sector. This has been most clearly apparent in the area of social and health care service provision where State responsibilities have been quietly devolved mainly to charities because of the latter's established dealings on behalf of the socially disadvantaged. In Northern Ireland as elsewhere in the UK and in Ireland this new complementary relationship between government and the third sector has been consolidated into a formal partnership arrangement.

Within this new partnership context, underpinned by a variety of pacts protocols and compacts, the government has formally and explicitly stated its recognition of the right of the third sector to speak for and be heard on matters concerning the sector. Again this development has brought with it a new willingness on the part of government to facilitate an advocacy role for bodies representing the interests of the sector and again it has seemed that this might be addressed within a review of charity law.

3.2.3 User representation on the board of voluntary organisations

The self-representation of user interests in decision-making forums established by both government bodies and ngos has been a recent and rapidly developing phenomenon. From thankful recipients of services many socially disadvantaged groups have now advanced to the point where they demand and achieve representation on the management boards of the bodies responsible for the design, delivery and evaluation of services.

It may well be that advocacy and its application to the 'user' agenda is now prompting many common law nations to consider a need for legislative reform.

Brief Summary of Part 3

The phenomenon of fairly simultaneous charity law reviews across the common law world has occurred because many nations are simultaneously experiencing the same problems and are seeking a solution through legislative change. The reviews particularly point up a common concern to recognise recent social developments which indicate the need to facilitate advocacy. This requires the removal of constraints embedded in the traditional common law approach to political activity by charities.

³⁰ See, *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* (1999) 169 D.I.R. (4th) 34, SC where a minority group established to provide mutual support for immigrant women failed to gain charitable status because their purposes could be construed as permitting political rather than exclusively educational activities.

Part 4

Charities as Agents for Social Change

Most charities already act as agents for social change and have long done so. In Northern Ireland, in the UK and elsewhere they should be entrusted and encouraged to pursue this role which is in keeping with the best traditions of charity.

4.1 Charities as drivers of research

Good information must underpin any strategy for planned change. Much of our information on the circumstances of the socially excluded derives from research sponsored by charities. In Northern Ireland, as elsewhere in the UK and in other countries charities drive research by funding research projects, research programmes and sometimes the running of entire research centres.

Some of the larger charities have developed into powerful agents for social change by using their leverage as research bodies to fund data collection and related policy analysis. Their independence, together with the knowledge and trust they have cultivated in respect of minority groups and their network of collaborative relationships with relevant professionals, allow charities the freedom to develop research strategies to inform change in directions desired by the disadvantaged. As free agents they are not obliged to respect the interests of those responsible for the prevailing circumstances and can bring a wholly fresh approach to planning for change.

The Rowntree Foundation, for example, has over many years built a considerable database from a sequence of funded programmes in different regions of the UK. By funding locally based thematic research programmes it has been able to assemble detailed profiles of need relating for example to children, people with learning disability and the role of the Churches. Other charities such as the Esme Fairburn Trust, the Nuffield Foundation, the Royal Irish Academy, the Family Fund and of course the Community Fund have led and funded impressive research programmes in Northern Ireland that have undoubtedly informed significant changes in the circumstances of the socially disadvantaged.

On the other hand, it must be acknowledged that some charities are powerful agents of conservatism, they do not sponsor empirical research and instead exercise their influence to maintain the status quo. Religious organisations provide the most obvious example. In countries such as Northern Ireland, where religion is part of the social problem, a good case could be made for denying charitable status to such bodies.

4.2 Charities and advocacy in the modern world

Charities know their constituencies. They are best placed to articulate the grievances of the socially disadvantaged and to know where best to direct the type of change most likely to promote the best interests of minority groups.

4.2.1 As advocates for change in a local context

They remain so close to their respective areas of need, sometimes over many generations, that the charity becomes synonymous with that need. We only have to think of Barnardos, the Hospice movement and Mencap to instantly think of the needs of children, the terminally ill and of those with learning disability respectively. For some groups, which may otherwise be defined as subversive and illegal, charities lend a voice, a responsible presence and serve as witnesses to their circumstances.

They provide a platform and a means whereby the grievances of the disadvantaged and the disenfranchised can be legitimately aired. By so doing charities represent the interests of a diverse range of minority groups and thereby promote inclusiveness.

In order to harness the resources of charities as agents for social change it is essential that the law facilitates their effective intervention. Every community in the western world has its version of the problems facing the litigants in the Vancouver case. It is important not only that no obstacles are placed in the way of charities wishing to represent the interests of such minority groups but that every effort is made to ensure that advocacy by charities is encouraged by adjusting the legal framework to direct such intervention.

4.2.2 As advocates for change in an international context

Societies in transition may need helpful intervention by outside agencies, prepared to work alongside the disadvantaged and disaffected and to articulate and negotiate on behalf of their interests. This may, ultimately, be the only way to avoid later armed intervention by other agencies that have re-defined a social inclusion problem as a social subversion problem. The targeting of charitable resources, particularly a research informed advocacy role, could be of crucial importance in preventing the slide into conflict. Again, charity law needs to be adjusted to encourage an international role for charities. This theme is further developed in my other paper for this conference.

Brief Summary of Part 4

In the UK and elsewhere, charities already act as agents for social change; some have developed into powerful agents through using their leverage as research bodies to inform and lead change. Efforts to sanitise or neuter the potential political activity of charities are probably doomed to failure as many are so long established, with the power to control and disseminate authoritative research material commanding widespread public respect, that they will simply exercise political leverage more discretely. It may also be damaging to the fabric of democratic society to dumb down those who provide a voice for the socially excluded.

Conclusion

Charity law currently militates against advocacy by charities. There are also other factors which are combining to inhibit advocacy, not least the nature of the changing relationship between State and third sector in all western democracies. This development has attracted attention in the recent charity law reviews undertaken by common law nations. Hopefully, it will shortly be addressed by the charity law review in Northern Ireland.

The lack of fit - between charity law, the resources of charities and the needs of the divided communities that constitute the jurisdiction of Northern Ireland - is instructive for our understanding of the threats facing civil society. It is instructive not only for those countries where communities are in conflict or may become so, but also for the very many societies in transition due to changes in the balance between cultural groups which, increasingly, results from economic migration. Arguably, there is now a pressing need to legally free-up and encourage charities to take on an assertive and independent advocacy role on behalf of the socially disadvantaged both locally and internationally. To do so would be to restore a key feature of the charity tradition and thereby assist the consolidation of civil society.