

IT'S JUST NOT CRICKET – CHARITABLE TRUSTS OUGHT TO BE MORE SPORTING.

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In the field of law concerning charitable trusts for sports, New Zealand lags behind the United Kingdom and even Tasmania in terms of recognising the charitable status of trusts for the advancement of sport. New Zealand's charity laws are tired and out of touch with societal change and legislative developments abroad, warranting a substitution. In recognition of the benefits that trusts for the advancement of sport bring to the community, New Zealand's charity laws ought to be more sporting to reflect the role that sport plays in today's society and to encourage and reward trusts aiming to advance sports.

Introduction

Since the seminal decision of the English Court of Appeal in *Re Nottage, Jones v Palmer*,¹ trusts for 'mere sport' have not been considered charitable. But times have changed and sport is generally no longer seen as being 'primarily calculated to amuse individuals apart from the community at large'² – just ask any New Zealander or Australian who followed the 2007 Rugby World Cup. Most sports would no longer be considered 'mere sport' due to the many and varied ways in which sports benefit society today. The law has evolved to recognise numerous exceptions to the general rule that trusts for 'mere sport' are not charitable, through a mixture of statutory and common law developments, such that there is now much uncertainty and inconsistency in the law concerning trusts for the advancement of sports. A trust with an ancillary purpose of promoting sport can be granted charitable status if its primary purpose falls under one of the charitable heads recognisable at law and it is of benefit to the public.

Whilst New Zealand prides itself on its sporting prowess, it is nevertheless off the pace set by the United Kingdom and Tasmania in the field of the law on charitable trusts for sports. If New Zealand wants to compete on the world's sporting stage, its charity laws need to be more sporting to allow for more testamentary freedom and to enable more investment and development in sports from willing benefactors. It is time for the New Zealand Parliament to recognise the societal importance of sport by acknowledging the advancement of sport and recreation as an independent charitable purpose. It is just not cricket to deny the advantages that charitable status would bring to sports which benefit New Zealand society.

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¹ [1895] 2 Ch 649 (hereafter 'Re Nottage').

² Ibid 656 (Lopes LJ).

The meaning of 'sport'

The reluctance of the courts to extend charitable trusts to the advancement of sport can be partly explained by the traditional definition of 'sport'. *The Concise Oxford Dictionary of Current English* defines 'sport' as: '1. Amusement, diversion, fun; ... 2. Divert oneself, take part in pastime...'.³ Historically, sport was not taken seriously, but nowadays, the physical component of sport is well recognised, as the *Heinemann New Zealand Dictionary* describes 'sport' as: '1. [A]ny activity for exercise or enjoyment, especially one involving physical skill and organized with a set form, rules, etc. 2. ...an athletic competition between several teams...'.⁴ The recognition of the physical element of sport is key to the ways in which charity law has been extended to cover some trusts advancing sport.

The meaning of 'charitable purpose'

Also key to the development of the law relating to charitable trusts for the advancement of sport is the meaning of 'charitable purpose'. Each trust, whether created by will, statute or trust deed, should 'clearly state the charitable purpose of the trust'.⁵ 'Charitable purpose' is based on the concept of 'charity'. The legal meaning of 'charity' is, as Elizabeth Cairns notes, wider than the popular usage of the word which is limited to little more than 'generosity to the poor and needy'.⁶ Hubert Picarda observed that the meaning came from the French word 'charité', derived from the ecclesiastical Latin word 'caritas' which meant 'love in its perfect sense'.⁷ Looking at the original Latin meaning, it could be argued that the love of sport should have a charitable quality.

However, it has not been that simple because for centuries the courts have engaged in an exercise in reasoning by analogy involving considerable mental gymnastics when confronted with cases concerning the charitable nature of trusts for the advancement of sport. Changes in the way that 'charitable purpose' has been viewed by the courts and defined in various enactments have been central to the development of charitable trusts for sports. The starting point when considering what comprises a 'charitable purpose' is the Preamble of the *Charitable Uses Act 1601* (UK), otherwise known as the Statute of Elizabeth,⁸ which sets out the following list of purposes considered charitable:

The relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free

³ *The Concise Oxford Dictionary of Current English* (5th ed, 1964) 1241.

⁴ *Heinemann New Zealand Dictionary* (1979) 1061.

⁵ LexisNexis NZ, *Law of Trusts*, (looseleaf, current as at 23 July 2009), 'Chapter 8 Charitable Trusts: A Guide to Formation and Administration', 'Part III Legal Issues', '8.20.5: The Trust Deed', [84,461].

⁶ Elizabeth Cairns, *Charities: Law and Practice* (3rd ed, 1997) 1.

⁷ Hubert Picarda, *The Law and Practice Relating to Charities* (3rd ed, 1999) 3.

⁸ 43 Eliz 1 c 4.

schools and scholars of universities; the repair of bridges, ports, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; the marriages of poor maids; the supportation, aid and help of young tradesmen; handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes.

The courts adopted a practice of considering as charitable not only the objects listed in the Preamble, but also other purposes 'which by analogies are deemed within its spirit and intendment'.⁹ In *Income Tax Special Purposes Commissioners v Pemsel* ('*Pemsel*'),¹⁰ Lord MacNaghten categorised the list of objects in the Preamble into a classification of four charitable heads which form the cornerstones of the law of charities today: 'Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community not falling under any of the preceding heads.'¹¹

Neither the Preamble nor Lord MacNaghten's classifications contained any references to sport or recreation being charitable. This is the underlying problem of trusts for the advancement of sport. Although the *Charitable Uses Act 1601* (UK) was repealed by the *Mortmain and Charitable Uses Act 1888* (UK), the courts continued to look to the Preamble for guidance to the extent that, as Picarda notes, 'this practice became an inflexible rule of law.'¹² Early recognition of the charitable nature of land dedicated to public recreation came in the *Recreations Grounds Act 1859* (UK) and the *Mortmain and Charitable Uses Act 1888* (UK).¹³ Picarda agreed that the 'provision of recreational facilities' should be a charitable purpose, including it in his expanded classification of 12 charitable purposes.¹⁴

New Zealand's legislation concerning charitable purposes is founded on Lord MacNaghten's classification of the charitable uses recognised by the Preamble and on the charitable nature of land dedicated to public recreation. Section 61A of the *Charitable Trusts Act 1957* (NZ) recognises as charitable the provision of 'facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare: Provided that nothing in this section shall be taken to derogate from the principle that a trust or institution to be charitable must be for the public benefit.'

⁹ *Morice v Bishop of Durham* (1804) 9 Ves 399, 405 (hereafter '*Morice*').

¹⁰ [1891] AC 531.

¹¹ *Ibid* 583.

¹² Picarda, above n 7, 10.

¹³ *Ibid* 135.

¹⁴ *Ibid* 13.

The word ‘facilities’ is not further defined, but guidance from the Charity Commission for England and Wales¹⁵ indicates that ‘facilities’ would refer to ‘not just land, buildings and equipment, but also the organising of sporting activity.’¹⁶ The interpretation section of the *Charitable Trusts Act 1957* (NZ), s 2, provides little further guidance on what is charitable, giving a general definition which necessitates recourse to the common law. It states that ‘charitable purpose’ means ‘every purpose which in accordance with the law of New Zealand is charitable’. However, in Part 4, which relates to ‘Schemes in respect of charitable funds raised by voluntary contribution’, ‘charitable purpose’ is extended to also include: ‘The promotion of athletic sports and wholesome recreations and amusements’.¹⁷ David Brown criticises this for being ‘anachronistic’.¹⁸ He stresses that it is illogical that sport is not accepted as a charitable object per se, considering that sport and leisure can qualify as being charitable under this Part, even when the criteria of s 61A are not met.¹⁹

Section 2 of the *Income Tax Act 2007* (NZ) recalls Lord MacNaghten’s classification, defining ‘charitable purpose’ as including ‘every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community’, so long as the purpose also meets ‘the public benefit requirement.’ This definition is a verbatim repetition of the previous versions of the Act, dating back to the *Income Tax Act 1976* (NZ). The New Zealand Parliament had an opportunity to expand and clarify this definition when it enacted the *Charities Act 2005* (NZ). However, s 5(1) of that Act merely restates this definition, codifying the traditional four heads of charity at common law.²⁰ In the first case to consider the *Charities Act 2005* (NZ), *Travis Trust v Charities Commission* (‘*Travis Trust*’), Williams J lamented that the ‘definition rather unhelpfully repeats the four heads of charity...’.²¹ Brown described the definitions of charitable purpose as ‘overlapping’ and ‘anachronistic’, concluding that the 2005 Act was ‘a missed opportunity to deal comprehensively with the definitions’.²² The Charities Commission, established under the 2005 Act to register and monitor charities in New Zealand,²³ uses

¹⁵ The Charity Commission for England and Wales was established by the *Charities Act 2006* (UK), s 6. The objectives, general functions, general duties and incidental powers of the Charity Commission are set out in s 7 of the Act. The Charity Commission is charged with various general functions under s 7(1C) of the Act including: Determining whether institutions are charities, encouraging, facilitating and investigating the administration of charities, maintaining an up-to-date register of charities and advising Ministers of the Crown on any matters relating to its functions or objectives.

¹⁶ Charity Commission, RR11 – *Charitable Status and Sport* (April 2003) <<http://www.charity-commission.gov.uk/publications/rr11.asp>> at 16 October 2009, [1].

¹⁷ *Charitable Trusts Act 1957* (NZ), s 38(g).

¹⁸ David Brown, ‘The Charities Act 2005 and the Definition of Charitable Purposes’ (2005) 21 *New Zealand Universities Law Review* 598, 599.

¹⁹ *Ibid.*

²⁰ *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 [20] (hereafter ‘*Travis Trust*’).

²¹ *Ibid* [18].

²² Brown, above n 18, 598.

²³ *Charities Act 2005* (NZ), ss 8 and 10(1).

the four head classification together with the public benefit test, an approach referred to as ‘the well-established common law test for charitable purposes.’²⁴

The Importance of Charitable Status

The Charities Commission is charged with receiving, considering and processing applications from organisations seeking charitable status through registration as charitable entities.²⁵ As of 1 July 2008, only charities registered with the Charities Commission are eligible for tax exemptions which entail exemptions for charities from income tax relating to donations and business income²⁶ and exemptions for donors from gift duty.²⁷ However, Ken Lord notes that tax exempt status does not provide an exemption from: ‘Goods and Services Tax, PAYE, Fringe Benefit Tax or Accident Compensation Corporation levies.’²⁸ Whilst sports organisations may choose to register as a charitable entity under the *Charities Act 2005* (NZ) if they qualify under the s 5(1) definition, organisations promoting amateur sport need not register under the Act to gain a tax exemption.²⁹ The *Income Tax Act 2007* (NZ) provides specific tax exemptions for bodies which are ‘established mainly to promote an amateur game or sport’ and are ‘conducted for the recreation or entertainment of the general public’.³⁰ Yet, there are additional benefits to be gained from acquiring charitable status, such as the attainment of quasi-corporate status, online access to the information in the organisation for current and potential donors and increased public confidence in the entity.³¹ These and other benefits should not be denied from trusts for the advancement of sport.

One other benefit of gaining charitable status is that a trust may continue in perpetuity, as an exception to the rule that ‘a trust for an indefinite period is void for perpetuity.’³² The bequest in *Re Nottage*, for instance, to provide a yachting cup annually in perpetuity, breached the perpetuity rules; hence the attempt to argue that it was a valid charitable trust. Thus, it is advantageous for a trust to be deemed charitable, rather than merely valid as a non-charitable purpose trust. At common law, non-charitable purpose trusts are generally invalid, following the leading decision of *Morice v Bishop of Durham*.³³ As an exception to this,

²⁴ Charities Commission Komihana Kaupapa Atawhai, *A Guide to the Charities Act 2005* (February 2009) <<http://www.charities.govt.nz/guidance/Legal/PR-GUI-FEB09.pdf>> at 16 October 2009, 3.

²⁵ *Charities Act 2005* (NZ), s 10(1)(e).

²⁶ *Income Tax Act 2007* (NZ), ss CW 41 and CW 42.

²⁷ Charities Commission, above n 24, 2. The exemption from gift duty for donors of gifts to charitable trusts is provided for under s 73(1) of the *Estate and Gift Duties Act 1968* (NZ).

²⁸ Ken Lord and David McLay, *New Zealand Law Society Seminar: Charities Act 2005 – The New Deal* (June 2006) 4.

²⁹ Richard, Pigeon, ‘Charitable Entities other than Trusts’ (Apr 2008) *New Zealand Law Journal* 105, 106.

³⁰ *Income Tax Act 2007* (NZ), s CW 46.

³¹ Pigeon, above n 29, 106.

³² Cairns, above n 6, 81.

³³ *Morice*, above n 9.

however, trusts for the advancement of sport have been considered valid where a gift was for a sporting or recreational purpose that was sufficiently defined and did not exceed the perpetuity period. Such exceptions include a legacy to be applied to the furtherance and promotion of fox-hunting (*Re Thompson*),³⁴ and a gift of land for the purpose of a sports or recreation ground to be used by company employees or such other persons as the trustees would allow (*Re Denley's Trust Deed* (*Re Denley*)).³⁵

One of the suggested rationales for the validity of these cases is not based on the trusts being purpose trusts as such, but on the existence of residuary legatees,³⁶ or indirect beneficiaries,³⁷ who could enforce the trusts, thereby ensuring that they did not fail for uncertainty of objects. In *Re Grant's Will Trusts*, Vinelott J considered that the *Re Denley* decision had fallen outside the category of purpose trusts.³⁸ This approach has received academic support from Dr Nicky Richardson who suggested that 'the better interpretation of *Denley* is that ... it is a trust for individuals and not a purpose trust at all.'³⁹ Thus, whilst it is possible for trusts for the advancement of sport to be declared valid as non-charitable purpose trusts, it is unclear whether it is the purpose which is in fact being recognised as valid. Considering this uncertainty and the disadvantageous requirement to meet the perpetuity rules, it would be preferable instead for trusts for the advancement of sport to be able to qualify as charitable trusts.

The Evolution of the Law of Charities

At common law and in statute, what is considered a charitable purpose has evolved well beyond the Preamble and Lord MacNaghten's classifications. Indeed, the Australian Charities Definition Inquiry ('CDI') noted that: 'The process of determining charitable purposes by analogy has led to the inclusion of many purposes not considered charitable in 1601.'⁴⁰ The scope of charitable purposes has also been extended by legislative changes recognising the charitable status of trusts for recreational facilities⁴¹ and trusts which include a non-charitable purpose (which may advance a sport) that is incidental or ancillary to a primary charitable object.⁴² Societal change has been identified as the catalyst for this evolution as Williams J stated in *Travis Trust* that 'the concept

³⁴ [1934] Ch 342 (hereafter '*Re Thompson*').

³⁵ [1969] 1 Ch 373; [1968] 3 All ER 65 (hereafter '*Re Denley*'). This case was followed by *Re Lipinski's Will Trusts* [1976] Ch 235.

³⁶ In the case of *Re Thompson*, above n 34.

³⁷ In the case of *Re Denley*, above n 35.

³⁸ Philip H. Pettit, *Equity and the Law of Trusts* (10th ed, 2006) 57.

³⁹ N. Richardson, 'Creation of an Express Trust' in Andrew Butler (ed), *Equity and Trusts in New Zealand* (2003) 73, 111-2.

⁴⁰ Charities Definition Inquiry, 'The Preamble to the Statute of Elizabeth' in *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001), 137.

⁴¹ The *Charitable Trusts Act 1957* (NZ), s 61A, and the *Recreational Charities Act 1958* (UK), s 1(1).

⁴² *Charities Act 2005* (NZ), s 5(3).

of charitable purpose is evolving in response to changing social circumstances and the steady development of a more unique New Zealand legal culture.⁴³ He further observed that ‘the Courts (including those in New Zealand) have shown a willingness to develop new categories of charitable purpose and to develop or extend established ones.’⁴⁴ Nevertheless, trusts for ‘mere sport’ have not as yet been recognised as being charitable. But this is not conclusive as Williams J commented: ‘While the cases tend to suggest that mere sport is not a charitable purpose ... there is no New Zealand case directly deciding the point.’⁴⁵ In *Travis Trust*, Williams J found that ‘the promotion of a horse race is not a charitable purpose in and of itself. Nor is the promotion of horse racing generally’.⁴⁶ However, he cautioned that ‘contrary to the line of cases suggesting that trusts or gifts for the promotion of sport and leisure are not charitable, it cannot be said that such purposes are never charitable.’⁴⁷ Whilst not definitively ruling out the potential charitable status of trusts for the advancement of sport, Williams J concluded that ‘the general principle appears to be that sport, leisure and entertainment for its own sake is not charitable but that where these purposes are expressed to be and are in fact the means by which other valid charitable purposes will be achieved, they will be held to be charitable.’⁴⁸

The advancement of sport as a charitable purpose in the United Kingdom

The prospects of trusts for the advancement of sport attaining charitable status are greatly improved in the United Kingdom following the enactment of the *Charities Act 2006* (UK). In addition to restating the requirement that a trust must serve a public benefit in order to be charitable,⁴⁹ the *Charities Act 2006* (UK) builds on the charitable purposes espoused by the Preamble to the *Charitable Uses Act 1601* (UK) and other purposes previously recognised as charitable, either by analogy or under existing law,⁵⁰ to expand the scope of purposes considered charitable. The 2006 Act provides an expanded list of 13 charitable purposes which, by including ‘the advancement of amateur sport’,⁵¹ does more than merely codify the existing law. This enactment may not, however, have settled the law in this area. As Mitchell McInnes cautions: ‘English courts may yet be asked to decide whether sport or fitness falls within the traditional common law conception.’⁵² The *Charities Act 2006* (UK) clarifies the public benefit element that must be satisfied alongside the charitable purpose of ‘the

⁴³ *Travis Trust*, above n 20, [45].

⁴⁴ *Ibid* [52].

⁴⁵ *Ibid* [45].

⁴⁶ *Ibid* [59].

⁴⁷ *Ibid* [48].

⁴⁸ *Ibid* [52].

⁴⁹ *Charities Act 2006* (UK), ss 2(1)(b) and 3.

⁵⁰ *Charities Act 2006* (UK), ss 1 and 2.

⁵¹ *Charities Act 2006* (UK), s 2(2)(g).

⁵² Mitchell McInnes, ‘Charity and Sport: A Canadian Perspective’ (2008) 124(Apr) *Law Quarterly Review* 202, 205.

advancement of amateur sport', by stating that: "'sport" means sports or games which promote health by involving physical or mental skill or exertion'.⁵³

In the United Kingdom, therefore, no longer are there, as Jean Dolimore recognised, just 'four heads of charity stemming from the Statute of Elizabeth 1601 by way of the Pemsel case ... There are now 13 "descriptions of purposes" listed at s 2(2) of the Act'.⁵⁴ Although the legislation in the United Kingdom has moved on from the founding four heads of charity to recognise that the advancement of sport can serve a charitable purpose, the legislation in New Zealand has not. Since the land that developed the original four heads of charity has seen fit to expand them to include amateur sport, why should New Zealand not do likewise, especially considering the importance of sport in New Zealand? The United Kingdom has stepped up to answer Brown's question that 'given the importance of sport in New Zealand society, if sport cannot be a separate charitable purpose in New Zealand, where can it?'.⁵⁵ The United Kingdom is on the ball in the field of the advancement of sport through charity law.

Societal Change

The *Charities Act 2006* (UK) is evidence of the evolution of the law of charities, reflecting societal changes since the end of the Tudor dynasty. Corresponding recognition of this evolution by the New Zealand Parliament is now called for. It is time for a more liberal view of sport being beneficial to society. *Re Nottage* was decided towards the end of the 19th century during the Victorian Era, the age of the Industrial Revolution which had no doubt shaped views of the place of sport in society. Guy Osborn commented that at that time 'work and recreation could be seen to represent opposite ends of a spectrum of social usefulness, ... often the pursuit of recreation would act to impede the progress that industrialization had fostered ...'.⁵⁶ R. Malcomson observed that 'many of the traditional diversions were apt to appear scandalously self-indulgent and dissipated – wasteful of time, energy and money'.⁵⁷ This view was reflected in the view of Lopes LJ in *Re Nottage*, as noted above.⁵⁸

A Canadian court recognised 'the sedentary nature of modern society' in contrast with society in 1895 when most people exercised daily as part of their way of life and it was the wealthy people, the ones who could afford yachts, who were in need of healthy exercise.⁵⁹ Based on this observation, the court in *Re*

⁵³ *Charities Act 2006* (UK), s 2(3)(d).

⁵⁴ Jean Dollimore, 'Legislative Comment – The Charities Act 2006: Part 1' (2007) 2 *Private Client Business* 153, 154.

⁵⁵ Brown, above n 18, 617.

⁵⁶ Guy Osborn, 'Football's Legal Legacy: Recreation, Protest and Disorder' in Steve Greenfield and Guy Osborn (eds), *Law and Sport in Contemporary Society* (2000) 51, 57.

⁵⁷ R. Malcomson, *Popular Recreations in English Society* (1973) 89.

⁵⁸ *Re Nottage*, above n 1, 656 (Lopes LJ).

⁵⁹ Pettit, above n 38, 273-4.

Laidlaw Foundation ('*Re Laidlaw*') held that the promotion of amateur athletic sports in controlled conditions was charitable on the grounds that it promoted health.⁶⁰ This decision found favour with academics, including John Hopkins who proposed that 'a wider range of trusts promoting any physical exercise be regarded as charitable'.⁶¹ He noted that the House of Lords' decision in *Guild v IRC*⁶² was 'a step in the right direction'.⁶³ It recognised as valid a bequest 'for the use in connection with the sports centre in North Berwick or some similar purpose in connection with sport'.⁶⁴ But Hopkins suggested that 'a few more energetic steps are necessary'.⁶⁵

Time for a new statutory definition of 'Charitable Purpose'

The *Charities Act 2006* (UK) answered the call of many who had recognised the changes in society and who had called for the law to move with the times. Allan Hutchinson had recommended that the law continue to grow, rather than continue to apply rigorously the doctrine of *stare decisis* taking 'an inflexible and anachronistic approach' based on *Re Nottage*.⁶⁶ In the House of Lords, when referring to *Pemsel's* case, Lord Wilberforce had observed that 'the law of charity is a moving subject which may well have evolved even since 1891'.⁶⁷ In New Zealand, noting Lord Wilberforce's comments, Brown argued that: 'The definition [of charitable purposes] has to move with the times'.⁶⁸ In Australia, P. C. Hemphill opined: 'the charade of pretending to find a body of law in the interpretation by analogy on analogy of a long-since repealed preamble to a statute of 1601 form[s] ... a blot on our jurisprudence'.⁶⁹ Hemphill proposed that trusts with a purpose beneficial to society ought to be *prima facie* charitable.⁷⁰ In Canada, McInnes commented that he was not surprised that 'many think it strange that the common law's definition of charity – a concept inextricably tied to social values – is governed by an ancient statute and antiquated beliefs'.⁷¹ Accordingly, he considered that 'the authority of *Re Nottage* is undermined by the fact that the judgment is informed by outdated Victorian attitudes regarding

⁶⁰ (1985) 48 OR (2d) 549.

⁶¹ John Hopkins, 'Trusts for the advancement of sport – Recreational Charities Act 1958' (1992) 51(3) *Cambridge Law Journal* 429, 432.

⁶² [1992] 2 AC 310 (hereafter '*Guild*').

⁶³ Hopkins, above n 61, 432.

⁶⁴ *Guild*, above n 62, 310.

⁶⁵ Hopkins, above n 61, 432.

⁶⁶ Allan C. Hutchinson, 'Recreational Charities – A Change of Tactics Required' (1978) 42 *The Conveyancer and Property Lawyer* 355, 361.

⁶⁷ *Scottish Burial Reform & Cremation Soc Ltd v Glasgow Corporation* [1968] AC 138 at 154; [1967] 3 All ER 215 at 223.

⁶⁸ Brown, above n 18, 602.

⁶⁹ P. C. Hemphill, 'The Civil-law Foundation as a Model for the Reform of Charitable Trusts Law' (July 1990) 64 *The Australian Law Journal*, 409, 409.

⁷⁰ *Ibid.*

⁷¹ McInnes, above n 52, 202-3.

recreation.⁷² In England, the 1976 *Report of the Goodman Committee on Charity Law and Voluntary Organisations* had recommended that ‘the encouragement of sport and recreation should be recognized as an independent charitable object provided the necessary element of altruism and benefit to a sufficient section of the community are present. In so far as the existing law does not make this clear it should be amended’.⁷³ Yet, prior to the *Charities Act 2006* (UK), the only common law jurisdiction to enact a comprehensive definition of charitable purpose in response to this report was Barbados.⁷⁴

New Zealand and Australia have both considered and, as yet, dismissed the idea of implementing statutory definitions. Following the English enactment, it is time to take a fresh look at implementing a more clear and concise statutory definition of ‘charitable purpose’. The Australian government set up the CDI which reported in June 2001 that: ‘the Preamble, valuable though it has been, has outlived its usefulness. It is time to move on. We need to ensure that those things relevant and beneficial to today’s circumstances are retained, but they need to find their place in a more modern statute enacted for our time.’⁷⁵

With regard to a statutory definition recognising the encouragement of sport and recreation, the CDI recommended in 2001 that ‘the encouragement of sport and recreation to advance health, education, social and community welfare, religion, culture or the environment be a charitable purpose.’⁷⁶ This maintained the ‘distinction between “mere” sport and recreation and sport and recreation to advance a recognised charitable purpose.’⁷⁷ Whilst this stopped short of calling for the encouragement of sport to be recognised as a charitable purpose per se, it would nonetheless have been an improvement by clarifying that sport is charitable in those circumstances. However, despite initiating the Charities Bill 2003 to implement *inter alia* a statutory definition, the Australian government decided not to depart from the common law in such a radical way.⁷⁸

In New Zealand, a Working Party on Charities and Sporting Bodies, set up in 1989 to report to the Ministers of Finance and Social Welfare, rejected the idea of implementing a statutory definition of charitable purposes.⁷⁹ Yet there were still calls for change. The need for charities law to respond to changes in social values was recognised by Hammond J who stated: ‘It would be unfortunate if charities law were to stand still: this body of law must keep abreast of changing institutions and societal values. And, it is to New Zealand institutions and values

⁷² Ibid 203.

⁷³ National Council of Social Service, *Report of the Goodman Committee: Charity Law and Voluntary Organisations* (1976) 38.

⁷⁴ Brown, above n 18, 603.

⁷⁵ Charities Definition Inquiry, above n 40, 137-8.

⁷⁶ Charities Definition Inquiry, ‘Sporting and Recreational Purposes’ in *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001), 195.

⁷⁷ Ibid 200.

⁷⁸ Brown, above n 18, 605.

⁷⁹ Ibid 604 and Picarda, above n 7, 14.

that regard should be had.⁸⁰ Kerry Ayers also noted the relevance of societal values, commenting: 'Trusts do not exist in a social vacuum. Their uses are determined by the needs of the members of the community within which they operate.'⁸¹ The Australian CDI report prompted further debate in New Zealand. On 14 June 2001, the Hon Dr Michael Cullen (Minister of Revenue) announced in a media statement the release of a discussion document on 'Tax and Charities'⁸² stating: 'The current definition which determines whether an organisation is entitled to tax concessions on charitable grounds is based on English law which is 400 years old – The Charitable Uses Act 1601. There is a real question about whether it is still appropriate to New Zealand in the 21st century.'⁸³

Despite recognising the possibility that New Zealand's charity law is outdated, on 16 October 2001, Dr Cullen announced that no substantial alterations would be made to the definition of 'charitable purposes'.⁸⁴ A month later, the Working Party on Registration, Reporting and Monitoring of Charities was appointed by the government. It recommended that a statutory definition modelled on the CDI report be implemented.⁸⁵ On 12 June 2002, in response to the Working Party's recommendation, Dr Cullen announced that the government 'should not make any changes in this important and complex area until we have seen the results of similar work being done in other commonwealth countries.'⁸⁶ The Social Services Select Committee appointed to report on the Charities Bill in 2004 received submissions expressing concern that the definition of 'charitable purpose' was 'too narrow, excluding sporting groups'.⁸⁷ Although recognising the 'public benefits of improved physical fitness', the Committee declined to make any changes for the benefit of sports, noting that: 'Amateur sports organisations are provided with a statutory tax exemption separate from that for charities, and this bill does not impact on the application of that exemption.'⁸⁸

⁸⁰ *D V Bryant Trust Board v Hamilton CC* [1997] 3 NZLR 343, 348.

⁸¹ Kerry Ayers, 'Gaming Proceeds and Sports Club Beneficiaries' (1998) *New Zealand Law Journal* 63, 63.

⁸² Michael Cullen, Paul Swain and John Wright, 'Tax and Charities: A government discussion document on taxation issues relating to charities and non-profit bodies' (June 2001) *The Policy Advice Division of the Inland Revenue Department* <<http://www.taxpolicy.ird.govt.nz/publications/files/html/ddcharities/index.html>> at 16 October 2009.

⁸³ Michael Cullen, 'Discussion document on tax and charities released' (Media Statement, 14 June 2001) *The Policy Advice Division of the Inland Revenue Department* <<http://www.taxpolicy.ird.govt.nz/news/archive.php?year=2001&view=100>> at 16 October 2009.

⁸⁴ Michael Cullen, 'Charities Package Should Boost Donations' (Media Statement, 16 October 2001) *The Policy Advice Division of the Inland Revenue Department* <<http://www.taxpolicy.ird.govt.nz/index.php?view=127>> at 16 October 2009.

⁸⁵ Brown, above n 18, 604.

⁸⁶ Michael Cullen, 'Charities Working Party Delivers 2nd Report' (Media Statement, 12 June 2002) *The Policy Advice Division of the Inland Revenue Department* <<http://www.taxpolicy.ird.govt.nz/index.php?view=192>> at 16 October 2009.

⁸⁷ Social Services Committee, *Charities Bill* (20 December 2004) <http://www.parliament.nz/NR/rdonlyres/0DF2C3D0-17D2-4899-8DD6-4B2717227758/48082/DBSCH_SCR_2973_3096.pdf> at 16 October 2009, 3.

⁸⁸ *Ibid* 4.

Unfortunately, the New Zealand Parliament paid less attention to the ‘substance of charity law’⁸⁹ when enacting the *Charities Act 2005* (NZ), than the United Kingdom Parliament did when enacting the *Charities Act 2006* (UK). The New Zealand Parliament was focused more on other factors, which Matthew Conaglen identified as the efficiency of the creation of a Charities Commission and the prevention of people with criminal records from running charities.⁹⁰ In comparison, the United Kingdom Parliament took the opportunity to ‘provide a modern re-statement of the legal concept of charity’.⁹¹ Michael Gousmett observed that the rationales behind the two Acts were quite different: ‘The whole rationale behind the English charity bill, in particular, is that it was designed to encourage philanthropy and charitable activity. The rationale behind the New Zealand Charities Act is quite the opposite: It’s just a tax [A]ct.’⁹² This helps explain why Brown described the 2005 Act as ‘a missed opportunity to deal comprehensively with the definitions’.⁹³

The *Income Tax Act 2007* (NZ) has not improved the uncertainty, lack of consistency and lack of clarity of the law relating to charitable trusts for the advancement of sport in New Zealand. In order to increase public confidence in charities, a broadened statutory definition of ‘charitable purpose’ which specifically includes sporting purposes, would help by bringing clarity, consistency and certainty into the law. Prior to the enactment of the *Charities Act 2006* (UK), Della Evans had observed that ‘the law is in an unsatisfactory state of uncertainty’, noting that as regards the charitable status of the encouragement of sport, ‘the law draws some fine, arbitrary and indefensible distinctions’.⁹⁴

The current state of the law in New Zealand and Australia is no different. Brown noted that because the New Zealand government chose not to amend the definition of ‘charitable purposes’ when enacting the *Charities Act 2005* (NZ), New Zealand is now ‘left with fine legislative distinctions based on outmoded phraseology’.⁹⁵ As part of its reasoning for recommending a statutory definition, the Australian CDI acknowledged that: ‘The process of determining charitable purposes by analogy ... is ambiguous and could lead to inconsistencies.’⁹⁶ Enacting a statutory definition which defines sport as charitable per se, or at least in a wide range of circumstances as was suggested by the Australian CDI, would certainly add clarity to New Zealand’s charity law. Having witnessed the legislative revision of the definition of charitable purposes in the United Kingdom, the New Zealand government need wait no longer to make similar changes.

⁸⁹ Matthew Conaglen, ‘English Charity Reform’ (Apr 2008) *New Zealand Law Journal* 115, 115.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² John McNeil, ‘Charities in for Nasty Surprises’ (2006) 64(2) *Challenge Weekly: New Zealand’s Christian Newspaper* 1, <<http://www.challengeweekly.co.nz/stories/~d/post/Vol-64-Issue-No-2/id/159/>> at 16 October 2009.

⁹³ Brown, above n 18, 598.

⁹⁴ Della Evans, ‘Sport and Charitable Status’ (1986) 1 *Trust Law and Practice* 22, 25.

⁹⁵ Brown, above n 18, 600.

⁹⁶ Charities Definition Inquiry, above n 40, 137.

Following recent confusion amongst gaming machine societies in New Zealand over whether they can continue to fund sport, the government has recognised that it is time for a review of the *Charities Act 2005* (NZ). Minister of Internal Affairs, Nathan Guy, and Minister for the Community and Voluntary Sector, Tariana Turia, announced in a joint media statement on 24 September 2009 that ‘a planned review of the Charities Act was timely and would consider if it was necessary to clarify the circumstances in which “sports purposes” were “charitable purposes”.’⁹⁷ The statement sought to clarify the confusion which had arisen after the Department of Internal Affairs had warned amateur sports clubs and gaming machine societies that following the High Court decision in *Travis Trust*, amateur sport may not qualify as a charitable purpose.⁹⁸ The Ministers affirmed that ‘gaming machine societies set up to support “charitable purposes” could still give money to sport as long as that sporting activity was being used to achieve a charitable purpose, for example, promoting health, fitness, education, or physical or social wellbeing through sport.’⁹⁹ This confusion highlights the need for a statutory definition.

Comparison of New Zealand’s charity law with that of Tasmania

New Zealand requires a broader definition of what constitutes a charitable purpose since New Zealand’s charity law is more restrictive than that of the United Kingdom and Tasmania. The extension to the law in s 61A of the *Charitable Trusts Act 1957* (NZ), recognising that the provision of ‘facilities for recreation or other leisure-time occupation’ is charitable if ‘provided in the interests of social welfare’ and for ‘the public benefit’, is narrower than similar Tasmanian legislation. In Tasmania, s 4(1) of the *Variation of Trusts Act 1994* provides that: ‘A gift of property to provide opportunities or facilities for sport, recreation or other activities associated with leisure is taken to be, and to have always been, a gift for charitable purposes.’ Gino Evan Dal Pont identified four features of the Tasmanian provision which make it more sporting than the New Zealand equivalent: ‘...*first*, it prescribes no superadded requirement of social welfare, *secondly*, it applies in respect of “sport” in addition to recreation or leisure activities, *thirdly*, it extends beyond the provision of “facilities” to the provision of “opportunities”, and *fourthly*, it requires no proof of public benefit.’¹⁰⁰ As it does not require proof of a public benefit, this provision is a virtual recognition of the charitable nature of sport per se.

Aside from the element of public benefit, there is little perceivable difference between the provision of recreational facilities and the promotion of sport

⁹⁷ Nathan Guy, ‘Sport can still receive gaming society funding’ (Media Statement, 24 September 2009) <<http://www.national.org.nz/Article.aspx?articleId=30931>> at 7 October 2009.

⁹⁸ Jacqueline Smith, ‘Sports clubs to be given clarity’ (25 September 2009) *The New Zealand Herald* <http://www.nzherald.co.nz/nz-government/news/article.cfm?c_id=144&objectid=10599495> at 7 October 2009.

⁹⁹ Guy, above n 97.

¹⁰⁰ Gino Evan Dal Pont, *Charity Law in Australia and New Zealand* (2000) 197.

per se. Following the decision in *Oxford Ice Staking*,¹⁰¹ which recognised the charitable nature of an ice skating rink open to the public on the grounds of the promotion of health,¹⁰² Evans asked: ‘If the provision of an ice skating rink can be charitable, then why not the promotion of ice skating generally?’¹⁰³ She concluded: ‘Obviously, it would be more difficult in the latter case to prove the degree of public benefit required, but that is insufficient reason to explain why, in principle, one, but not the other, is worthy of the title “charity”.’¹⁰⁴ In *Bath and North-East Somerset Council v Attorney-General*, Hart J also noted that: ‘It is ... difficult satisfactorily to distinguish between trusts for the encouragement of sport on the one hand and trusts to provide facilities for public recreation on the other hand.’¹⁰⁵ Brown also questioned why the facilities for recreational pursuits but not the pursuits themselves are charitable, asking: ‘Since the fourth head has been extended to cover mental, moral or spiritual improvement of mankind, why can it not be acknowledged that facilitation of team games, or improved standards in any pursuit, contributes to the quality of community life as much as provision of a village hall within which such activities might take place?’¹⁰⁶

The Tasmanian legislative provision helps to validate these arguments. A simple amendment of s 61A of the *Charitable Trusts Act 1957* (NZ) adopting the wording of this Tasmanian provision would be an effective way to broaden the scope of the charitable nature of gifts for the advancement of sport in New Zealand.

Judicial inaction calls for legislative action

The need for a broad statutory definition of ‘charitable purpose’ in New Zealand is all the more important considering the unlikelihood of the courts expanding the definition much beyond what it is at common law. Although the common law has evolved considerably since the Preamble and Lord MacNaghten’s classifications, Brown identified a practical difficulty of the lack of opportunity for the courts to further develop the law. He noted: ‘Courts have shown themselves capable of taking into account this evolutionary process; but in a country the size of New Zealand, few cases get to court.’¹⁰⁷ The fact that the first case on the *Charities Act 2005*, *Travis Trust*,¹⁰⁸ was not considered by the courts until December 2008 is a reflection of the paucity of cases.

¹⁰¹ [1984] Ch Com Rep 11.

¹⁰² Picarda, above n 7, 133.

¹⁰³ Evans, above n 94, 23.

¹⁰⁴ Ibid.

¹⁰⁵ [2002] EWCA 1623.

¹⁰⁶ Brown, above n 18, 616-7.

¹⁰⁷ Ibid 603.

¹⁰⁸ Penny Pepperwell (ed), ‘Charities – Charitable Status’ (2009) 32 *The Capital Letter* 4, 2; Charities Commission Komihana Kaupapa Atawhai, *News: Charities Act Test Case Finds In Commission’s Favour* <<http://www.charities.govt.nz/news/news.htm>> at 16 October 2009.

Not only is there a lack of opportunity for further development within the courts, but there may also be a reluctance by the courts to expand the definition much further, given the recent experience in the Canadian courts. After the decision of the High Court of Ontario in *Re Laidlaw*, it appeared as though the Canadian courts were moving towards recognising the charitable nature of sport in certain circumstances, having taken what Evans described as ‘such an enlightened view of the aims of charity law.’¹⁰⁹ However, the recent decision of the Supreme Court of Canada in *AYSA Amateur Youth Soccer Association v Canada* (*‘AYSA’*)¹¹⁰ distinguished *Re Laidlaw* and affirmed the traditional common law position wherein sport is not a charitable purpose. In *AYSA*, the Supreme Court considered that recognising youth amateur fitness sports as charitable would be ‘closer to wholesale reform than incremental change, and is best left to Parliament.’¹¹¹ The Court sent a strong signal to Parliament that change in charity laws was called for. The majority concurred with Rothstein J who stated: ‘While it may be desirable as a matter of policy to give sports associations the tax advantages of charitable status, it is a task better suited to Parliament than the courts.’¹¹² He observed that recognition of the charitable status of ‘the advancement of amateur sport’ in the United Kingdom had been achieved through statute.¹¹³ In support, he cited the majority view in *Vancouver Society of Immigrant & Visible Minority Women*,¹¹⁴ that ‘substantial change in the definition of charity must come from the legislature rather than the courts.’¹¹⁵

The New Zealand Parliament should take heed of Rothstein J’s comments and recognise the charitable status of sport, since it is unlikely that the courts will. In *Travis Trust*, Williams J declined to extend the categories of charitable purpose to cover a trust which was merely to support a sport (the promotion of a horse race) and which had neither a public benefit nor a charitable purpose ‘within the spirit and intendment of the statute of Elizabeth’ that ‘might have satisfied the test.’¹¹⁶ As this case indicates, the courts in New Zealand have not yet been willing to extend charitable status to trusts merely for the advancement of a sport.

The public health benefits of sport

By analogy with the *Charitable Uses Act 1601* which recognised as charitable ‘trusts for the maintenance of sick and maimed soldiers and mariners and trusts for the relief of the aged or impotent’, Picarda noted that at common

¹⁰⁹ Evans, above n 94, 24.

¹¹⁰ 2007 SCC 42 (hereafter ‘*AYSA*’).

¹¹¹ *Ibid* [44] (Rothstein J).

¹¹² *Ibid*.

¹¹³ *Charities Act 2006* (UK), s 2(2)(g).

¹¹⁴ [1999] SCR 10.

¹¹⁵ *AYSA*, above n 110, [44] (Rothstein J).

¹¹⁶ *Travis Trust*, above n 20, [59].

law: 'A trust for the promotion of health is charitable.'¹¹⁷ The *Charities Act 2006* (UK) codified this by declaring 'the advancement of health or the saving of lives' a charitable purpose.¹¹⁸ The Australian CDI recognised that this charitable head could be extended to cover the advancement of sport, as it recommended that: 'Encouraging sport to promote the health of participants would be charitable under the proposed head of charity "the advancement of health".'¹¹⁹ The decision of Williams J in *Travis Trust* indicates a willingness of the New Zealand courts to accept as charitable, trusts for the advancement of sport which can show that 'the true intention' for their establishment was 'the promotion of health'.¹²⁰ Yet the health benefits of sport have not been translated into New Zealand charity legislation, despite government initiatives to promote health.

Long before the decision in *AYSA*, Dal Pont argued that to dispute the proposition in *Re Laidlaw* that mere sport should be charitable 'flies in the face of governmental initiatives to encourage participation in amateur sport so to improve community health.'¹²¹ This criticism is still valid. In Australia, Deborah Healey observed that there is 'a general recognition that sports participation is beneficial at all levels, and this has led to increased government funding at both elite and grassroots levels.'¹²² The New Zealand Parliament recognised the benefits of sport by establishing Sport and Recreation New Zealand ('SPARC'),¹²³ a Crown Agency¹²⁴ charged with various functions including developing 'policies and strategies for physical recreation and sport',¹²⁵ and promoting 'the importance of participation in physical activity by all New Zealanders for their health and well-being'.¹²⁶ SPARC introduced such initiatives as 'Push Play', a nationwide campaign which 'aimed to inspire New Zealanders to become more active, and to value sport and recreation as integral to their day.'¹²⁷ SPARC identified that: 'Potential benefits derived from sport include economic, health, social, cultural, identity and environmental benefits.'¹²⁸ The health benefits of sport are widely recognised. Dr Dave Gerrard, Associate Professor at the University of Otago Medical School, predicted that: 'A 10 percent increase in the number of

¹¹⁷ Picarda, above n 7, 117.

¹¹⁸ *Charities Act 2006* (UK), s 2(2)(d).

¹¹⁹ Charities Definition Inquiry, above n 76, 200.

¹²⁰ *Travis Trust*, above n 20, [59].

¹²¹ Dal Pont, above n 100, 196.

¹²² Deborah Healey, *Sport and the Law* (2005) 15.

¹²³ *Sport and Recreation New Zealand Act 2002*, s 7.

¹²⁴ A Crown Entity for the purposes of the *Crown Entity Act 2004*, s 7(1)(a), which must give effect to government policy when directed by the responsible Minister.

¹²⁵ *Sport and Recreation New Zealand Act 2002*, s 8(a).

¹²⁶ *Sport and Recreation New Zealand Act 2002*, s 8(c).

¹²⁷ Sport and Recreation New Zealand (SPARC), *Push Play*, <<http://pushplay.sparc.org.nz/about-push-play/overview>> at 16 October 2009. Following on from nationwide campaigns in 2005, 2006 and 2007, the 2008-09 campaign 'Feel Greatness' continues to inspire many regional Push Play activities, although no national Push Play day was planned for 2009.

¹²⁸ Sport and Recreation New Zealand (SPARC), *Value of Sport*, <<http://www.sparc.org.nz/research-policy/research/value-of-sport>> at 16 October 2009.

physically active adults would save around 300 lives each year – and five times this number could be saved if every adult was sufficiently active.¹²⁹

Considering the health benefits of sport, it is little wonder, therefore, that as McInnes noted, ‘the decision in AYSA has met with concern and criticism in the popular press.’¹³⁰ With increased activity needed to combat ‘the burden of obesity’,¹³¹ McInnes opined that: ‘Organisations enjoying the tax benefits available to charities might well provide effective encouragement.’¹³² Healey recognised that the ‘affluence of our society and increased leisure time’ have contributed to sport becoming ‘an industry in itself’.¹³³ With ‘[i]ncreased funds available to sport at all levels’¹³⁴ and the recognised need to counter obesity, it seems nonsensical not to allow organisations which seek to encourage sport to benefit from the advantages of charitable status. Allowing trusts for the advancement of sport would increase funding for organisations that encourage physical activity, bringing health benefits to society.

Although, as Brown noted, ‘the health benefits of physical exercise are widely recognised and capable of proof in court’,¹³⁵ not all sports would necessarily be advantageous to the health of society. The merits of boxing and full-contact martial arts have been queried as being inherently dangerous.¹³⁶ Brown noted that this ‘might be an issue in New Zealand’.¹³⁷ However, a review of the Charities Register in New Zealand reveals that the Charities Commission has registered such organisations as the Waikuku Youth Development Boxing Club Incorporated, the Commission for Taekwondo Athletes Trust, Phoenix Taekwon-do Gisborne Incorporated and the Waikato Martial Arts Centre Society Incorporated.¹³⁸ The charitable purpose of each organisation is represented on the Charities Register by three categories: the sectors (areas) that the organisation works in, the activities carried out by the organisation for the benefit of the beneficiaries and the beneficiaries who benefit from the organisation’s activities.¹³⁹ The application form for registration as a charitable entity requires applicant organisations to select the options that apply under each category.¹⁴⁰ All four organisations are listed in the ‘education/training/research’ and ‘community development’ sectors

¹²⁹ Dave Gerrard, *Push Play Research*, Sport and Recreation New Zealand (SPARC) <<http://www.sparc.org.nz/getting-active/push-play/push-play-research>> at 16 October 2009.

¹³⁰ McInnes, above n 52, 205.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Healey, above n 122, 15.

¹³⁴ Ibid.

¹³⁵ Brown, above n 18, 618.

¹³⁶ Michael Gunn and David Ormerod, ‘Despite the Law: Prize-fighting and Professional Boxing’ in Steve Greenfield and Guy Osborn (eds), *Law and Sport in Contemporary Society* (2000) 21, 33.

¹³⁷ Brown, above n 18, 618.

¹³⁸ Charities Commission Komihana Kaupapa Atawhai, *Charities Register* <www.register.charities.govt.nz> at 16 October 2009.

¹³⁹ Ibid.

¹⁴⁰ Charities Commission Komihana Kaupapa Atawhai, *Registration Forms* <http://www.charities.govt.nz/news/forms/Form_1_JUNE08.pdf> at 16 October 2009.

and, with the exception of the Waikato Martial Arts Centre, are also listed in the 'sport/recreation' sector. Aside from Phoenix Taekwon-do Gisborne, the other three organisations all include the provision of 'buildings/facilities/open space' amongst their stipulated activities.

The provision of education and facilities for the community fits within the recognised charitable heads of education and the provision of recreational facilities, attracting charitable status. The advancement of health is also a charitable consideration and three of the organisations work in the 'health' sector. The fourth, Phoenix Taekwon-do, also promotes the health benefits of sport as it lists as its main activity: 'Provides fitness and personal development, confidence and self defense education'. The registration of the health and fitness purposes of these organisations reveals that there is recognition of the advancement of health through even potentially dangerous sports. As long as a link to a recognised head of charity can be made out and the required public benefit exists, it would appear that organisations promoting sports, even potentially dangerous sports, can achieve charitable status in New Zealand.

Nevertheless, the question remains as to why the advancement of a sport cannot be deemed charitable in itself. Sport benefits society in many ways such that it could qualify as charitable under the fourth head of Lord MacNaghten's classification: other purposes beneficial to the community. Societal benefits that qualified under this fourth head, such as 'the advancement of health or the saving of lives'¹⁴¹ and 'the advancement of animal welfare',¹⁴² have now been deemed charitable in their own right under the *Charities Act 2006* (UK). In recognition of the United Kingdom's expanded legislative definition of charitable purposes, the Court in *Travis Trust* has indicated that it might be possible for trusts for the promotion of health or even animal welfare to satisfy the test of charitable purpose in New Zealand.¹⁴³

Analogies can be drawn between the reasons for the designation of the promotion of health and animal welfare as charitable heads and for why the advancement of sport should likewise be charitable. Picarda had classified 'the protection of animals' as one of his 12 charitable heads.¹⁴⁴ Consequently, Dal Pont commented: '... if the protection of animals is charitable in raising the moral tone of society, it is anomalous that activities that improve the physical health and fitness of society are not charitable.'¹⁴⁵ HAJ Ford and WA Lee agreed, stating: 'If the spiritual and moral well-being of the community at large is accepted as charitable, as it is in a wide variety of forms, its physical well-being should likewise ...'.¹⁴⁶

¹⁴¹ *Charities Act 2006* (UK), s 2(2)(d).

¹⁴² *Charities Act 2006* (UK), s 2(2)(k).

¹⁴³ *Travis Trust*, above n 20, [59].

¹⁴⁴ Picarda, above n 7, 13.

¹⁴⁵ Dal Pont, above n 100, 196.

¹⁴⁶ H. A. J. Ford and W. A. Lee, *Principles of the Law of Trusts* (2nd edition, 1990) 867-868.

Sport does not only improve the health and fitness of the individual participants, but also society in general. As such, it should be charitable as an other purpose beneficial to society. Michael Gunn and David Ormerod pointed out the societal benefits of boxing, which the British Medical Association recognised apply to all sports, specifically: ‘The training undertaken by participants in boxing increases their general level of fitness and health. Training for boxing discourages drinking, smoking and drug-taking. Fit and healthy people are conducive to a healthy society and such an objective is in the public interest.’¹⁴⁷ The self-discipline instilled in many sportspeople is also beneficial to society as Gunn and Ormerod noted: ‘Some boxers claim that they would have led lives of crime without the self-discipline instilled in them by boxing.’¹⁴⁸ They observed that ‘boxing is not the only sport promoting self-discipline’, recognising that: ‘Many of the oriental martial arts are regarded as the paradigm sports in which self-discipline is essential.’¹⁴⁹ By reason of promoting a physically and morally healthy society, the advancement of sport should be charitable per se.

The educational benefits of sport

Where a sport has the purposes of promoting discipline, loyalty and mental and physical character training, it is arguable that trusts for the advancement of such a sport should be charitable by analogy with other associations with similar purposes that have been deemed charitable under the head of education. Education includes ‘not only academic training but more generally the wider development of the character and personality.’¹⁵⁰ The purposes of the Boy Scouts Association, namely discipline and loyalty, and of the Outward Bound Trust Ltd, namely mental and physical character training, have been deemed charitable.¹⁵¹ By reason of analogy with these organisations, sports such as certain martial arts that promote these purposes should also be considered charitable.

Sport has also been likened to the charitable nature of cultural education and the arts, purposes which were identified as charitable in the *Charities Act 2006* (UK) under the head of ‘the advancement of the arts, culture, heritage or science’.¹⁵² At common law, there is no doubt that trusts for the advancement of sport can be considered charitable where they can be deemed educational, based on the principle of *mens sana in corpore sano* (a healthy mind in a healthy body).¹⁵³ This is so even where the sport is not associated with a particular educational institution.¹⁵⁴ In *IRC v McMullen*, education was interpreted in ‘its widest

¹⁴⁷ Gunn and Ormerod, above n 136, 33.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Cairns, above n 6, 9.

¹⁵¹ Ibid.

¹⁵² *Charities Act 2006* (UK), s 2(2)(f).

¹⁵³ *Re Mariette, Mariette v Aldenham School Governing Body* [1915] 2 Ch 284 and *Kearins v Kearins* (1957) SR (NSW) 286. See Edward Grayson (ed), *Sport and the Law* (3rd ed, 2000) 151.

¹⁵⁴ *IRC v McMullen* [1981] AC 1 (hereafter ‘*McMullen*’).

possible sense' in order to 'open the door to a much wider class of recreational charities.'¹⁵⁵ But this did not extend to the recognition of an educational value of sport per se because Lord Hailsham refrained from finding that 'a gift for physical education per se and not associated with persons of school age or just above would necessarily be a good charitable gift.'¹⁵⁶ Nor will educational value be found in sporting purposes such as studying the form of participants in racing or football which are considered 'too frivolous',¹⁵⁷ nor purposes which are deemed to be merely for amusement or entertainment.¹⁵⁸

The objection in *Re Nottage* to gifts for 'mere sport' based on the view that they are 'primarily calculated to amuse individuals apart from the community at large'¹⁵⁹ can be contrasted with the treatment of trusts for the advancement of music, art and culture. Evans noted that: 'The view of sport is in stark, and disappointing, contrast to the recognition of the intrinsic educational value of other, more aesthetic, pursuits, such as the "encouragement and advancement of choral singing".'¹⁶⁰ In *Royal Choral Society v IRC*,¹⁶¹ it was held that the pleasure gained from teaching or participating in choral music was incidental to the main educational purpose of promoting music to the public as a form of art. By contrast, in *IRC v City of Glasgow Police Athletic Association*,¹⁶² the enjoyment and personal benefits gained by the participants in utilising facilities provided for relaxation and keeping fit were deemed non-charitable purposes. Comparing these two cases, Picarda expressed 'regret that their Lordships did not classify the enjoyment of the participants in the sports concerned as incidental.'¹⁶³ It is curious that there was such divergent treatment of sport and the arts in these cases, considering that historically sport and the arts gained much support from patronage.¹⁶⁴ A trust could be seen as a type of patronage, given that 'a gift of money or equipment to a struggling association' has been described as 'a kind of patronage'.¹⁶⁵ In this sense, it seems unduly restrictive to deny the benefits of charitable status to trusts purportedly for the advancement of sport.

Recognition of testamentary freedom

Denying testamentary bequests of trusts for the advancement of sport on the grounds that they are not charitable also limits the principle of testamentary freedom. Since the *Testators Family Maintenance Act 1900* (NZ), which constrained the ability of will-makers to dispose of their property in the manner

¹⁵⁵ Hutchinson, above n 66, 357.

¹⁵⁶ *McMullen*, above n 154, 15.

¹⁵⁷ Picarda, above n 7, 48.

¹⁵⁸ *Re Nottage*, above n 1.

¹⁵⁹ *Re Nottage*, above n 1, 656 (Lopes LJ).

¹⁶⁰ Evans, above n 94, 23.

¹⁶¹ [1942] 2 All ER 101.

¹⁶² *IRC v City of Glasgow Police Athletic Association* [1953] AC 380.

¹⁶³ Picarda, above n 7, 133.

¹⁶⁴ Grayson, above n 153, 446.

¹⁶⁵ Healey, above n 122, 57.

of their choosing upon their death, there has not been absolute testamentary freedom in New Zealand, but society still places a high premium on notions of individual autonomy. O. R. Marshall noted that ‘philanthropists...desire to make gifts or create trusts for the development of the sport or recreation in which their interests lie. The desire to give is, however, ...easier to form than its fulfilment is to achieve.’¹⁶⁶ Considering the increasing importance of sport and recreation in society, it is surprising that it is so difficult for would be philanthropists to create a testamentary trust for the advancement of sport. The High Court of Australia recognised that testamentary freedom had been compromised by ‘an unnecessary restriction imposed by law upon the capacity of a testator to support with his bounty purposes which seem good to him and do not offend against the law.’¹⁶⁷ The Court further noted: ‘That the next of kin whom the testator chose not to make the objects of his bounty should benefit at the expense of an activity which he enjoyed and wished to prosper may well be thought out of keeping with sentiments prevailing in the days of the second Elizabeth. Perhaps the law is in need of reform.’¹⁶⁸ Undoubtedly, the law in New Zealand could be updated to allow more freedom to bequest testamentary charitable trusts for the advancement of sport.

Conclusion

It is simply not sporting to deny willing benefactors the right to choose to benefit a sporting purpose which benefits the community. Nor is it sporting to deny the charitable status of trusts which advance sports for the benefit of the community. Society stands to benefit in innumerable ways from sporting organisations which can be seen as charitable by reason of analogy with the traditional charitable heads or other purposes analogous to these heads. But society could benefit even more if the New Zealand Parliament expanded upon the traditional heads to recognise new ones that better reflect today’s society in which sport and recreation play an increasingly important role in the physical, mental and moral health of the community. Granting charitable status to sporting organisations which encourage healthy activity would complement government initiatives to get people active. Parliament should take heed of English and Tasmanian legislative developments and Canadian experience indicating that legislative action is required to modernise antiquated charity laws that unduly limit the charitable nature of trusts for the advancement of sport. The New Zealand courts have begun to look towards the expanded UK legislative definition for guidance concerning what is a charitable purpose; it is time that Parliament provided that further guidance. Parliament may not be able to restore New Zealand’s pride on the sports field, but it can and should restore it in the field of charitable trusts for the advancement of sport.

¹⁶⁶ O. R. Marshall, ‘Gifts in Favour of Sport and Recreation’ (1956) 9 *Current Legal Problems* 39, 39.

¹⁶⁷ *Royal National Agricultural and Industrial Association v Chester* [1974] ALJR 304, 306.

¹⁶⁸ *Ibid.*