

---

## THE CHARITY LAW & PRACTICE REVIEW

---

C L & P R  
Volume 8, Issue 1, 2002

### EDITORIAL BOARD

**Hubert Picarda** C, BCL MA (Oxon)  
(Managing Editor)  
**Robert Venables QC**, MA (Oxon) LLM (London)  
(Taxation Editor)  
**Fay Lau**, Solicitor, LLM  
(Assistant Editor)  
**Debra Morris**, Lecturer in Law, University of Liverpool  
(Case Note Editor)

### CONSULTING EDITORIAL BOARD

**The Right Honourable Lord Hoffmann**  
**The Right Honourable Lord Justice Mummery**  
**Sir John Knox**

*For details of the  
Advisory Editorial Board please refer over*

All editorial correspondence should be addressed to  
Hubert Picarda QC, The Managing Editor  
9 Old Square, (Third Floor North), Lincoln's Inn, London WC2A 3SR  
Facsimile (020) 7831 3584

**The Charity Law & Practice Review**  
is published by  
Key Haven Publications PLC  
Unit 6, Hurlingham Business Park  
Sullivan Road  
London SW6 3DU  
Telephone (020) 7731 7700, Facsimile (020) 7731 6622  
Visit our Website at [www.khplc.com](http://www.khplc.com)

---

## Disclaimer

# DISCLAIMER

The views contained herein are put forward for further consideration only and are not to be acted upon without independent and professional advice.

Neither the Publishers nor the Authors or Contributors can accept any responsibility for any loss occasioned to any person no matter howsoever caused or arising as a result of or in consequence of action taken or refrained from in reliance on the contents hereof.

© 2002 KEY HAVEN PUBLICATIONS PLC

### **Conditions of Sale**

All rights strictly reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior written permission of the publisher.

Any person infringing the publisher's copyright will be liable to criminal and/or civil proceedings.

Printed in England by The Book Factory, London.

---

## ADVISORY EDITORIAL BOARD

---

***Robert Venables QC***

Chairman of Advisory Editorial Board

***Lord Phillips of Sudbury***

Solicitor and Partner, Bates Wells & Braithwaite

***Michael Carpenter***

Legal Charity Commissioner

***Christopher McCall QC***

formerly Junior Counsel to the Attorney General in Charity Matters

***Professor Gareth Jones QC LLD***

Trinity College, Cambridge

***Professor Christopher Nobes***

Professor of Accountancy, University of Reading

***Lee Sheridan LLD***

formerly Professor of Law University College, Cardiff

***Harry Kidd***

Emeritus Fellow, St John's College, Oxford (European Developments)

***James Kessler***

Barrister

***Adrian Longley***

Solicitor and former legal adviser to NCVO

***Peter Mimpriss***

Solicitor and Partner, Allen & Overy

***Brian McGeough***

Solicitor and Partner, Denton Hall Burgin & Warren

***Professor Peter Luxton***

Professor of Property Law, De Montfort University, Leicester

***Jean Warburton***

Senior Lecturer in Law, University of Liverpool

***Elizabeth Cairns***

Solicitor

***Judith Hill***

Solicitor and Partner, Farrer & Co

***Jennie Gubbins***

Solicitor and Partner, Trowers & Hamlin  
(Charitable Housing Associations)

***Peter Smith***

Lecturer in Law, University of Exeter  
(Universities & Ecclesiastical Charities)

***Robert Venables***

Consultant, Bircham & Co  
formerly Legal Charity Commissioner

---

## OVERSEAS CORRESPONDENTS

---

### AUSTRALIA

*Dr Myles McGregor-Lowndes*

Associate Professor, Queensland University of Technology, Brisbane

*Gino Dal Pont*

Senior Lecturer, University of Tasmania

### CANADA

*E Blake Bromley*

Vancouver

### MAURITIUS

*Dr S Bhoushan Domah*

President, Intermediate Court, Judiciary of Mauritius

Lecturer, University of Mauritius

### RUSSIAN FEDERATION

*Nina Belyaeva*

President Interlegal, International Charitable Foundation  
for Political and Legal Research

Moscow

### SOUTH AFRICA

*Richard Rosenthal*

Director, Richard Rosenthal Consultancy, Cape Town

### USA

*Robert Atkinson*

Associate Professor of Law, Florida State University

*J Clifton Cox*

of The Florida Bar

*Professor Harvey Dale*

Program of Philanthropy and Law, New York University

*Professor Karla W Simon*

Executive Director, International Center for Not-for-profit Law  
Farmington, Connecticut

---

## Contents of Volume 8, Issue 1

---

# CONTENTS

	Page No
Editorial	vii
<b>Re-Defining “Charity” in England And Wales, Eire and Australia</b> Hubert Picarda QC	1
<b>Emerging Liability Issues in Non-Profit Organisations: an Overview</b> Mark E Chopko	17
<b>Saving for A Rainy Day: Charity Reserves</b> Charles Mitchell	35
<b>Problems of Winding Up Charities</b> Elizabeth Yates	53
Receipt of Charity Literature in Return for Gift Aid Payments James Kessler	63
<b>Virtual Philanthropy: Combining the Virtuous and the Vulgar in the New Paradigm</b> Blake Bromley	65
<b>Case Note</b> <i>His Beatitude, Archbishop Torkom Manoogian, Armenian Patriarch of Jerusalem v Yolande Sonsino &amp; Others</i> Chancery Division (Jacob J), 5th July 2002 [2002] Ewhc 1304 (Ch) Francesca Quint	81

---

## The Editorial

---

# EDITORIAL

Only a few days before the Annual Conference of the Charity Law Association fixed for 10th October 2002 was due to start in Birmingham, the long awaited Report of the Strategy Unit of the Cabinet Office Private Action, Public Benefit A Review of Charities and the Wider Not For Profit Sector (September 2002) appeared. The proceedings of the Annual Conference were quickly rejigged. The Consultation period for the Report ends on 31st December 2002. So the opportunity for further debate on the proposals contained in the Report is not great for the lawyers who will have to deal with the legislation that will inevitably follow. All in the sector will have to knuckle to, if significant input is to be achieved.

On a rather narrower gauge, the Lord Chancellor's Consultation Paper on The Rule Against Excessive Accumulations (September 2002) appeared on 11th October 2002. This too invites a rapid response.

This issue of the Charity Law and Practice Review was largely put together before the Report surfaced, rather earlier than the pessimists had begun to think it would. This delayed publication, because the wider implications of the Strategy Unit Report clearly demanded swift preliminary analysis.

### **Contents of the Review Prior to the Strategy Unit Report**

The focus of Mark Chopko's article on "Emerging Liability Issues in Non-Profit Organisations: An Overview" is eclectic in its analysis of the emergent liability claims engendered by the litigation culture in the United States. The list is long and topical: tort claims against churches as well as against other voluntary associations, claims relating to failure to reach particular standards over a broad and varied field of human activities, defamation claims and cases and claims involving sexual misconduct.

Blake Bromley, the Canadian charity law specialist and peripatetic charity law lecturer on the international scene, is well known to audiences over here and to readers of this Review. He has written for this issue on "Virtual Philanthropy", a term coined in tribute to computer technology (the title of the article is longer). He posits that in the new paradigm of charitable funding there will be much less emphasis on the "form" of charitable donations and much more emphasis on the

“effect” of a financial transaction which nets a charity a huge “profit”. Virtual philanthropy will have the quintessence of altruism but must retain broader Elizabethan roots and concern for economic efficacy. This is a well-argued case bolstered by reference to the value of the services provided.

Elizabeth Yates, an Honorary Research Fellow at Liverpool University, was awarded a PhD for her thesis *Winding Up and Insolvency (Including Rescue Mechanisms)* (1999). Her article in this issue “Problems on Winding Up of Charities” concentrates on the research carried out on particular case studies. She draws attention to the importance of the choice of vehicle to minimise risk and the drafting problems to be learned, as well as the technical support options for the future.

In her case note on *Armenian Patriarch of Jerusalem v Yolande Sonsino* [2002] EWHC 1304(Ch) Francesca Quint has provided a case note on an interesting matter involving the proper law of a settlement and the charitable status of the relevant trusts.

### **Definitional Reform in Eire, Australia and the Strategy Unit Report**

Your editor's contribution summarises the reforms mooted in Eire and Australia before turning to the vexing questions predicated by the acceptance by the Strategy Unit Report of the conclusions of the NCVO on public benefit and on the need alleged therein to rationalise the law by “strengthening” the public benefit requirement. Logical tidiness is a feeble argument for a concept which Lord Simonds identified as having grown empirically and in accordance with inevitable variations under the four heads. No other jurisdiction has gone down this path of tinkering (or worse) with the concept of public benefit, or perceived there to be such a need to strengthen it. As the article points out, there are dangers in reversing presumptions of long antiquity in favour of a public benefit test to be reviewed by the Charity Commission on a rolling basis. The delegation of what is essentially policy formulation to the Commission gives rise to worries, given some of the unrealistic and cramping arguments and conclusions already being deployed and reached in the Commission on the question of private benefit. Why should the arguments about public benefit not be equally long drawn out and costly as well as irksome to charities?

The demonstration of direct benefit in place of what was before accepted as self evident by the courts in relation to schools of learning is part of a political agenda, that has been around for a long time. “New Public Benefit”, as we should call it, is New Labour in tooth and claw. It discounts the exemplary indirect benefit to the

community of the independent schools and intends to subject them to querying on matters of fees and access rights for the benefit of state schools. These imported criteria are not deduced from case law but from some recently formulated guidelines of the Commissioners as a result of the NCVO report. Those criteria are pulled up by their own bootstraps. The “serve to exclude” test has a rhetorical flourish to it but is dangerously fuzzy at the edges, especially since there is an apparent inconsistency between the Report and the guidelines as regards numbers excluded (“a substantial proportion” in the guidelines). Careful reading and probing of the ends to which the Report is directed are necessary. This is especially so in relation to the recommendations of the Report and having due regard to the language in which it is expressed. For all the abnegation of targeting independent schools whose community spirit is identified as sufficient, the Topsy-like growing potential of policy within the Commission is an area for concern. A rolling review will run the risk of being largely unsupervised and an appellate procedure unlikely to be prayed in aid as each domino type progression takes place. A fudge is not the best basis for a field where precision and detail at the outset are needed, nor is a flexi-definition. And the likelihood of an imperceptible moving of boundary pegs or other boundary marks is not a welcome innovation. The short returns may well become more inquisitorial as the criteria are adjusted and even become more onerous (for they are not immutable).

The menace of deregistration if the schools do not cooperate is on record and the ability of remoter and poorer independent schools to deliver the strengthened public benefit is open to doubt. In my W.A. Lee Equity Lecture (2001) in Brisbane last October, I compared the gift of the reformers in the NCVO report on Public Benefit to the Trojan Horse against which Laocoon issued his pessimistic warning against Greeks bearing gifts. One emollient wit in response to that comparison has humorously described the Strategy Unit Report as a Trojan Teddy Bear. But, in the absence of lapidary or cast iron assurances, I still prefer to echo the words of Coleridge's injunction in *Kubla Khan* “And all should shout Beware! Beware!”

Hubert Picarda QC

9 Old Square (Third Floor North)  
Lincoln's Inn  
London WC2A 3SR  
e-mail: hpicarda@aol.com