Chapter 4
Legal Functions: Protection

Introduction

Ensuring protection has been a fundamental function of the law relating to charity since mediaeval times when the Crown assumed responsibility for charities, lunatics and wards. It was then recognised that a gift dedicated for the public benefit was especially vulnerable to abuse or misuse by those to whom it was entrusted for that purpose after the donor’s death. The need to supervise charities and provide protection for the value and purpose of a donor’s gift remained a prominent concern of judiciary and legislators for most of the history of charity law. Particularly in England & Wales, this concern centred on developing trust principles and on reinforcing the duties of trustees. In more recent years, as a range of administrative agencies absorbed aspects of the protection function and the exclusivity of the trust as a legal form for charity has gradually given ground to corporate structures, other legal functions have become more important. Protection, however, for gifts selflessly dedicated for the benefit of the public, continues to require enforcement.

This chapter focuses on the concern in charity law to ensure protection for a charity. It begins by examining the origins of this function in the parens patriae responsibilities of the Crown and traces its subsequent development in the context of trust law where the role of trustees played an important part in clarifying the nature of protective duties. It then considers the emergence of a contemporary protective framework in which the parens patriae responsibilities devolved to the Attorney General and assesses the extent to which that office, the High Court and the Charity Commission have been able to give effect to them. It notes the fact that the protection afforded to charities through the offices of trustees and Attorney General is tied to trusts and consequently their availability to offer protection has been linked to the prevalence of the trust in the common law world as a legal form for charities: in jurisdictions such as England & Wales where the trust form has been dominant, the reliance on protection from such sources has been strongest;

elsewhere, such as Australia, this has not been the case. The practice implications arising from this are later tracked in Part III while the resulting interpretational differences are further considered in Chap. 14.

Attention is then given to the judicial development of the protection function both in the national courts and in the European Court of Human Rights. The chapter concludes with a brief review of the charity law reform process in England & Wales, considers the outcomes and their implications for the future of the protection function and the related social policy issues.

**Origins of the Protective Function**

The roots of the protective jurisdiction of the courts in relation to charities, their property and activities, lie in the ancient *parens patriae* responsibilities of the Crown.

*Parens Patriae*

The powers of *parens patriae* are best understood as the paternal rights and duties of the King in respect of those of his subjects who, being without legal capacity and therefore unable to defend their interests, had a right to his protection. This jurisdiction, as exercised by the Lord Chancellor on behalf of the Crown, came to be administered by the Court of Chancery and was used to determine issues relating to trusts, charitable and otherwise, long before the introduction of the 1601 Act. The essentially protective nature of the *parens patriae* jurisdiction, illustrated most clearly in the exercise of wardship, has consistently characterised the judicial approach throughout many centuries and continues to colour the contemporary relationship between law and charities.

**Origins of Powers**

It seems probable that the ancient *parens patriae* powers originated as an incident of the feudal system of tenure. From perhaps the 14th century, the monarch – as ultimate landlord to whom all lords, yeomen, serfs and others owed allegiance and paid fealty – was responsible for those declared *sui juris* and who because they lacked the necessary capacity could neither protect their own interests nor fulfill their feudal duties. As Lord Somers LC in *Falkland v. Bertie* explained:\(^4\)

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\(^3\) The Statute of Charitable Uses 1601 (Statute of 43 Eliz. 1 Chap. 4.).

\(^4\) (1696) 2 Vern 333 *per* Lord Somers LC, p. 342; 23 ER 814, p. 818.
In this court there were several things that belonged to the King as *Pater patriae*, and fell under the care and direction of this court, as charities, infants, idiots, lunatics, etc., afterwards such of them as were of profit and advantage to the King, were removed to the Court of Wards by the statute; but upon the dissolution of that court came back again to the Chancery.

This assertion that the *parens patriae* powers were in time transferred to the Court of Chancery finds support in subsequent case law⁵ (see, further, Chap. 4).

**Nature of Powers**

The jurisdiction of the Crown “as *Pater Patriae*, as a Father over his Children” was noted in *Shaftesbury v. Shaftesbury*⁶ and subsequently explained by Lord Esher MR in *R v. Gyngall*:⁷

That was not a jurisdiction to determine rights as between a parent and a stranger, or as between a parent and a child. It was a paternal jurisdiction, a judicially administrative jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent.

While there has been much debate as to whether the powers of *parens patriae* were originally parental or protective in nature, it is beyond doubt that it became a protective jurisdiction with the capacity to sanction exercises of authority that can be much broader than that of a parent and can override parental authority.

*Parens patriae* is not limited to powers of protection it also provides powers of control. The wardship jurisdiction, exercised mainly in respect of children who are made wards of court, is the most common manifestation of *parens patriae*.

**Subject of Powers**

In practice it was the property rights of those defined as “charities, infants, idiots, lunatics, etc” that attracted an exercise of the *parens patriae* powers: protecting property from abuse or misuse by officials entrusted to safeguard it was the main concern.

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⁵See for example, *Eyre v. Shaftesbury* (1723) 2 P Wms. 103; 34 ER 659. Between 1540 and 1660 the Court of Wards and the Court of Chancery operated in parallel and thereafter, following the abolition of the former, it would seem that its jurisdiction was subsumed within that of the latter. In the words of Lord West “… all wardships which are beneficial for the wards must return to this Court, as to their original fountain” (*Morgan v. Dillon* (1724) 9 Mod 135, p. 139; 88 ER 361, p. 364).

⁶(1725) Gilb Rep 172, p. 173; 25 ER 121.

⁷[1893] 2 QB 232, p. 239.
Extent of Powers

The extent of the *parens patriae* powers, like its origins, are uncertain, but it is clear that they extend beyond the parental duty of care and protection to warrant the taking of positive steps to safeguard the interests at risk. Nor, it would seem, are these powers and duties limited to those of a responsible parent. This jurisdiction derives from the prerogative powers of the Crown and constitutes the court’s broad inherent jurisdiction. As Lord Mackay LC has pointed out “in the Government’s view wardship is only one use of the High Court’s inherent *parens patriae* jurisdiction.”

Inherently vested in the monarch, exercised by the Chancellor, delegated to the Court of Chancery and then administered by the High court and the Attorney General, these powers have been described as “theoretically limitless” because they “spring from the direct responsibility of the Crown for those who cannot look after themselves”.

Parens Patriae and Chancery

The *parens patriae* responsibilities of the Crown, as exercised by the Lord Chancellor, came to be administered by the Court of Chancery and were used to determine issues relating to trusts, charitable and otherwise, long before Parliament first legislated on such matters (see, also, Chap. 6). Following the abolition of the Court of Wards by the Tenures Abolition Act 1660, it would seem that the *parens patriae* powers were then wholly vested in Chancery; a fact alluded to by Lord Hardwicke LC in *Butler v. Freeman* when he noted that “this Court … has a general right delegated by the Crown as *pater patriae*, to interfere in particular cases, for the benefit of such who are incapable to protect themselves.” Probably the jurisdiction of this court in relation to trusts was an extension of its established remit over uses which it had exercised from at least the 15th century. It had also developed the administrative machinery and expertise necessary to resolve, or sometimes supervise, matters relating to financial and property disputes. By the 18th century the Court of Chancery had an established protective jurisdiction in respect of matters involving children, lunatics and fraud.

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11 *Falkland v. Bertie* (1696) 2 Vern 333 per Lord Somers LC, p. 342; 23 ER 814, p. 818. Also, see *Eyre v. Shaftesbury* (1723) 2 P Wms. 103; 34 ER 659.
12 (1756) Amb 301, p. 302; 27 ER 204.
The Law Relating to Trusts, Charitable Trusts and Trustees

Trust law is essentially concerned with the protection of rights in property or, more accurately, with protecting the simultaneous exercise of rights held by different persons in the same property.

**Origins**

Feudal England was a society based on land ownership. Established in the years following the Norman conquest, feudalism structured hierarchical social relations; determined the rights and services of citizens; and, by allowing for estates to devolve to descendants, it perpetuated that society. The orderly and predictable devolution of private property, in accordance with male primogeniture, was then essential for maintenance of public order. For centuries, land tenure underpinned feudalism and provided the basis for ordering society.

Feudalism ensured that land could not be wholly and absolutely owned by anyone; every ‘owner’ held their rights as tenant to their lord. All such ownership was vested in the King as the ultimate lord and sovereign of his people and territory. Fealty to a lord and ultimately to the King, were tied to an estate in land. Estates could be either freehold or leasehold. Several variations of the former were possible: an estate in ‘fee simple’ conferred a good title in perpetuity; a ‘life estate’ limited the title to the life of a particular person; an estate ‘*pur autre vie*’ gave title to one person ‘for the life of another; and an estate in ‘fee tail’ restricted inheritance to the linear descendants of a particular person. Leasehold estates were defined and differentiated by length of tenure; weekly, monthly, yearly etc. Estates in land formed an ascending hierarchy, consisting of gradations of title from serf to lord, with final authority of ownership and disposal being vested in the King. This feudal system of land tenure provided the basis for imposing taxes and dues.

**Mortmain**

The concept of a ‘use’ rather than an estate in land was developed in response to the rigidity of feudal land taxes. The transference of land to another for the latter’s ‘use’ was intended to avoid the liability that attached to actual ownership. It was employed not only to circumvent tax liability but also to facilitate gifts to religious bodies which, prior to the Statute of Mortmain 1391, would have been prohibited. Gifts of the latter variety were commonly made by landowners in return for masses being said for the salvation of their souls. It was a technical device, much abused and unenforceable through the common law courts, and of great concern to the
lords who saw the basis for the feudal system being eroded and for whose protection the mortmain statutes were introduced.\textsuperscript{13}

From the perspective of the rulers, the growing practice of mortmain posed a significant threat to the feudal system. This Norman French term \textit{morte meyn} or ‘dead hand’ referred to the practice whereby a donor would tie-up his lands in perpetuity by gifting them to the Church. It was customary for a penitent donor to make such a gift to the Church for a pious use coupled with a request that prayers or masses be offered for the salvation of the donor’s soul. Such gifts for pious uses were recognised as charitable gifts in the years prior to the Reformation. As Coke has explained:\textsuperscript{14}

\begin{quote}
The lands were said to come to dead hands … for … by alienation in mortmaine they lost wholly their escheats and in effect their knights services for the defence of the realme; wards, marriages, reliefes and the like; and therefore was called a dead hand, for that a dead hand yeeldeth no service.
\end{quote}

Once property passed into the ‘dead hand of the Church’ it remained there as the latter prohibited any alienation of its property. Much land came to be owned by the Church on the basis of ‘tenure by frankalmoign’; the gift of property having been made subject to a condition that it be held for the use of specified persons, usually the donor and/or his family. The fact that perpetual corporations such as the Church could hold large tracts of feudal land in perpetuity had consequences for feudalism and wealth creation and from the time of Magna Carta in 1215 had attracted State prohibition.\textsuperscript{15} Feudal rulers regarded a grant of land to the Church by a subject as incompatible with the latter’s feudal duties and sought to curtail this practice through successive statutes.\textsuperscript{16} The systematic avoidance of statutory constraints allowed the Church and particularly the religious orders to acquire power, land and political influence. The growing breach between Church and State culminated eventually in action by Henry VIII against the Catholic Church and its powerful land-owning religious orders. Among the consequences of the ensuing Reformation was the ending of any possibility of making inalienable grants of property to the Church in exchange for spiritual benefits.

\textsuperscript{13} See for example, the Statute of Mortmain 1279 (7 Edw 1, St 2), the Statute of Westminster III 1290 (18 Edw 1) and in particular the Statute of Mortmain 1391 (15 Ric 2, c 5).

\textsuperscript{14} See Coke, Co. Litt. 2B.

\textsuperscript{15} Clause 43 of Magna Carta provided:

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“It shall not be lawful from henceforth to any to give his lands to any religious house and to take the same land again to hold of the same house: nor shall it be lawful to any house of religion to take the lands of any and to have the same to him of whom he received it. If any from henceforth give his lands to any religious house, and thereupon be convict, the gift shall be utterly void, and the land shall accrue to the lord of the fee.”
\end{quote}

The Rule Against Perpetuities

The law relating to property has always sought to facilitate freedom of disposition. This emphasis has often been in conflict with the intentions of landowners to ensure that their estates are preserved intact within the family for future generations. The rule against perpetuities expresses this tension. It was formulated by the courts to constrain the practice whereby some settlors contrived to tie up their estates indefinitely by providing for gifts of property to vest at some distant time in the future.

The Rule Against Inalienability

This rule also deals with settlor attempts to circumvent the same perpetuity period. It provides that a trust comprising property which might remain inalienable for the duration of the perpetuity period will be void. It is concerned with the duration of an interest already vested rather than with the time at which vesting occurs. The common law would not tolerate any legal contrivance designed to render property inalienable from the rightful descendants of owners because “they are against the reason and policy of the law and therefore not to be endured”.

Since the Statute of Quia Emptores 1290, the judiciary set limits on the ability of property owners to impose constraints on future holders of that property. As Maudsley observed:

There was no need to ask why inalienability was evil. It had always been so treated. And it is reasonable to accept that a society in which property was inalienable would be stagnant and unproductive.

The Law Relating to Trusts and Charitable Trusts

The evolution of the feudal concept of the ‘use’ into its subsequent manifestation as a ‘trust’ was hastened by the Statute of Uses 1535 which gave statutory authority

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17 See for example, Morris, J.H.C. and Leach, W.B., The Rule Against Perpetuities (2nd ed.) and Gray, The Rule Against Perpetuities (4th ed.).
19 See Duke of Norfolk’s Case (1863) 3 Cas in Ch 1 at 31, per Lord Nottingham.
20 18 Edw. I cc.1–3.
22 It was Maitland who first remarked that ‘the modern trust developed from the ancient use’.
to the approach developed in the Court of Chancery where the transaction involved freehold land. Trust law provides the means whereby property may be held by one person for the benefit of another. As explained a century ago

“… if I give an estate to A upon condition that he shall apply the rents for the benefit of B, that is a gift in trust to all intents and purposes”

and more recently by Keeton and Sheridan:

A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit accrues, not to the trustee, but to the beneficiaries or other objects of the trust.

This recognition that property can be divided into two components – the legal ownership and the beneficial ownership – is essentially a legal device providing for two different types of ownership in the same property. The trustee is the person who legally owns the property while the beneficiary is the person who benefits from the property. Legal recognition and enforcement for such a separation – of responsibilities vested in those controlling property from the rights of those ultimately entitled to enjoy the value of that property – has become extremely important and is now extensively used in many different forms.

**The Charitable Trust**

A charitable trust is a species of trust. There are a number of different species within that genre. Each is therefore, to a greater or lesser extent, governed by characteristics common to all. A basic point of distinction between all trusts rests on a public/private division. With the exception of charitable trusts, all trusts are private in nature as they are established for the benefit of specific individuals or for small and well-defined classes of persons. Primarily, it is the fact that charitable trusts are established for purposes rather than for persons which sets them apart from other forms of trust. As has been observed:

…trusts for purposes rather than for human beings are rarely valid. They are regarded as difficult, perhaps impossible, to enforce, uncertain in their ambit and generally beyond the capacity of the court to control. In addition, they will very often contravene legal rules against creating perpetuities and inalienability … To this general doctrine the great exception is charitable trusts … the distinctive feature of the charitable trust is that it is for the public benefit.

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24 Attorney General v. Wax Chandlers Co. (1897) LR 6 HL 1, p. 21.
26 Ibid., p. 131.
The fact that charitable trusts are an exception to the rule against perpetuities, and often to the rule against inalienability, is a characteristic as old as the common law itself.27 Following the Statute of Charitable Uses 1601, Chancery adopted and applied the Preamble as its guide in determining charity law cases. If a donor’s gift or bequest could be defined as coming within the parameters of this 17th century statute then Chancery would grant it charitable exemption from the rule against perpetuities. For the next two centuries and more the courts of Chancery developed a body of charitable trust jurisprudence (see, further, Chap. 6).

Charitable Trusts and Charitable Corporations

In England the abiding suspicion with which government regarded charitable corporations, whether lay or secular, was such that for centuries trusts remained the preferred legal structure for charities. Among the consequences of this high dependency upon trusts in England & Wales, unlike other jurisdictions such as the US and Australia, was that the role and responsibilities of trustees, particularly as regards the protective function, assumed a correspondingly higher profile in charity law. Also, initially and for several centuries, the jurisdiction of the High Court and the Attorney General in respect of charities was presumed to be specific to charities in trust form. For most of its existence, therefore, charity law and the body of related jurisprudence has been governed by trust principles; pretty much exclusively so in England & Wales but also, though to a lesser extent, in jurisdictions such as the US and Australia.

Trusts and Other Non-profit Models

The commitment to the trust as the preferred legal form for charity was accompanied by judicial determination to protect the distinction between charity and other non-profit models (mutual benefit associations, co-operatives, friendly societies etc.). The ‘public benefit test’, established as the distinguishing hallmark of a charity, was rigorously applied to protect the status of ‘charity’ and confine eligibility for related tax exempt privileges (see, further, Chap. 2).

Trustees

It has long been recognised that a particular strength of the trust as a legal structure for charity is the responsibility firmly vested personally in the trustees to protect the

value and purpose of the donor’s gift. The “irreducible core of obligations owed by the trustees”, as noted in Tudor, gives confidence to donors.

**Duties of Trustees**

Honouring the terms of the trust is the fundamental responsibility resting on a trustee. This duty is placed upon the trustees but in the final instance it falls to be upheld by the courts. For centuries the courts, exercising their equity jurisdiction, have been attentive to the manner in which trustees give effect to their duties in respect of donors’ wishes. A wealth of case law exists to illustrate the principles forged in the courts of equity to govern the duties of trustees; these largely apply to all trustees including those appointed in respect of charitable gifts.

- **To execute the terms of the trust**

  In order to give effect to the purposes of the trust it is essential that the trustee first locates and becomes familiar with the trust governing instrument and all ancillary documentation. The trustee then has little scope for discretion, he or she is bound by the donor’s directions. Insofar as the directions are realisable they must be followed to the letter. Instances when the actions of trustees have failed to meet this standard include: the substitution of a more practical site for a hospital instead of the location specified by the donor; the broadening of a donor’s gift of a chapel to a school to permit the conferring of revenues upon villagers who were accustomed to the use of the chapel; and the destruction of a church the maintenance for which the donor had left funds. Where the trustee does have discretion then this must be exercised fairly. When a discretionary decision is taken jointly by a majority of trustees this will be binding on the remainder.

  Two broad principles govern all trustee duties. In executing the terms of the trust the trustee is required to demonstrate both loyalty to the objects as set out in the governing instrument and impartiality when negotiating between the interests of trust beneficiaries. These can be seen in the duties of trustees as outlined below.

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28 Charities, op. cit., p. 249.
29 See Hallows v. Lloyd (1888) 39 Ch D 686 and the judicial comment: “I think that when persons are asked to become new trustees, they are bound to inquire of what the property consists that is proposed to be handed over to them, and what are the trusts. They ought also to look into the trust documents and papers to ascertain what notices appear among them of incumbrances and other matters affecting the trust” per Kekewich, J., p. 691.
30 Re Weir Hospital [1910] 2 Ch 124.
31 Attorney-General v. Earl of Mansfield (1827) 2 Russ 501.
32 Ex parte Greenhouse (1815) 1 Madd 92; on appeal (1827) 1 Bligh NS 17.
33 Re Beloved Wilkes Charity (1851) 20 LJ Ch 588.
34 Re Whiteley [1910] 1 Ch 600, 608.
- **To manage trust assets**

The essence of a trust is that the appointed trustee should exercise good stewardship in respect of the funds or other assets entrusted to him or her. This requires, in the first instance, that the trustee gather in and account for all trust property, inspect all relevant documents, ensuring that they are in order, and ascertain whether the trust property is subject to any form of liability.\(^35\) As stated by Christian J in *Macnamara v. Carey*:\(^36\)

> The principle which stands out distinct and clear upon those authorities\(^37\) is this: that it is not enough for a trustee to keep within the four corners of the deed, and perform literally what is there set down. The very first point to which he must direct his thoughts is the placing of the trust property in security; and, above all, the making it impossible that it shall ever fall under the control of unauthorised persons. If he, even by mere inaction, suffer a state of things to exist or to continue, which, however apparently at the time natural and harmless, results in the course of future events, in the fund getting under unauthorised control, even though it be that of a co-trustee only – still more that of the settlor himself – and loss follows, the trustee must make it good.

The warning is clear, a trustee must be pro-active from the moment of taking up appointment in taking such steps as may be necessary to satisfy himself that all documents are in order, all trust property is accounted for and is secure.

Where the trustee is a replacement appointee, taking up office some time after the trust was established, then he or she should also ensure that no breach of trust occurred prior to their appointment. Thereafter, subject to any directions in the trust instrument, the trustee must conserve and manage the property in such a way as to promote the best interests of the intended beneficiaries. Trustees have a duty to manage trust funds so as to ensure an equitable distribution of proceeds among all beneficiaries. Where a fund is intended to subsist for future generations of beneficiaries, this will entail taking such measures as may be necessary to avoid first generation beneficiaries benefiting at the expense of those with a future entitlement. The duty of a trustee to give effect to the purposes for which the trust was established can sometimes conflict with the more pressing obligation to be prudent in their management of trust assets. The standard rule is that no trustee should allow a situation to develop where their personal interests are in conflict with their duties as a trustee.

The obligations of a trustee may entail investing or re-investing trust funds. The statutory framework governing trustee investments is accompanied by an onus resting on any trustee to exercise due care when investing trust funds.

- **To maintain proper records**

The courts have long recognised that a legal obligation to maintain proper accounts rests on all trustees;\(^38\) these need not be audited. A trustee is also under a more general obligation to provide the beneficiaries with such information concerning the affairs

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\(^{35}\) See for example, *Hallows v. Lloyd op. cit.*

\(^{36}\) [1867] IR 1 Eq. 9.


\(^{38}\) *Crawford v. Crawford* (1867) LR 1 Eq 436.
of the trust as may be reasonably required by them.\(^{39}\) Such a beneficiary may inspect the records relating to the management of trust assets.\(^{40}\)

However, in \textit{Re Londonderry’s Settlement}\(^{41}\) the court held that trustees were not obliged to reveal those documents, of a confidential nature, which related to the exercise of their discretionary powers. The general principle of disclosure, being applicable to all trusts, has a bearing also on a charitable trust, though in that context it may be more difficult to realise.

- **To apply trust assets for the benefit of beneficiaries**

In addition to prudent stewardship of trust assets, the trustee must also make appropriate arrangements to distribute those assets, and/or the resulting proceeds, to the intended beneficiaries. This distribution must be both in keeping with the donor’s intentions and in accordance with the law; a failure on either count will amount to a breach of trust. As noted in Tudor\(^{42}\) “it is an obvious breach of trust for trustees to occasion the destruction of the trust property,\(^{43}\) to alienate it improperly\(^{44}\) or negligently to permit others to misappropriate it”\(^{45}\).

- **Not to profit**

A characteristic feature of the office of trustee is an acceptance by the latter that the appointment is one of honour carrying an obligation to serve the interests of the trust in a selfless manner.

The equitable rule that a trustee must act gratuitously is long established: a trustee is not allowed to make any profit from that office and, unless there is an express or implied direction in the trust instrument to the contrary, or an express stipulation has been made with the beneficiaries before accepting the trust or under an express order of the court, there is no right to charge for their time and trouble.\(^{46}\) Arguably, this fiduciary duty is accentuated in the context of a charitable trust. Acceptance of appointment brings with it a duty that the trustee will not place his or her self in a position where a conflict might arise between their personal interests and those of the trust.\(^{47}\) There is a presumption that any acquisition by a trustee of benefits from

\(^{39}\) \textit{Low v. Bouverie} [1891] 3 Ch 82 and \textit{Moore v. McGlynn} [1894] 1 IR 74, 86 \textit{per} Chatterton V.C.

\(^{40}\) \textit{O’Rourke v. Darbyshire} [1920] AC 581.

\(^{41}\) [1965] Ch 918.

\(^{42}\) See \textit{Charities, op. cit.}, p. 274.

\(^{43}\) \textit{Ex parte Greenhouse} (1818) 1 Madd. 92, reversed on technical grounds, 1 Bli. (N.S.) 17, where trustees of a chapel had pulled down the chapel, sold the materials and converted a burial ground to other uses: “It is a breach of trust such as could not be expected in a Christian country”, \textit{per} Plumer, V.-C., p. 108.

\(^{44}\) \textit{Att.-Gen. v. East Retford Corporation} (1838) 3 My. & Cr. 484; \textit{Att.-Gen. v. Wisbech Corporation} (1842) 11 L.J. Ch 412.

\(^{45}\) \textit{Att.-Gen. v. Leicester Corporation} (1844) 7 Beav. 176.


\(^{47}\) See for example, \textit{Bray v. Ford} [1896] AC 44.
beneficiaries will be presumed to derive from the former exercising undue influence over the latter. However, the Charities Act 2006 does now allow trustees to be paid, under specified circumstances, for providing goods or services to a charity.

- **Not to delegate**

A delegate must not delegate or delegatus non potest delegare. It is in the nature of an appointment to the office of trustee that the latter undertake their responsibilities on the basis of trust personally vested in him or her. The trustee is honour bound to personally assume and give effect to their duties. This principle has been expressed by Lord Langdale in *Turner v. Corney* as follows:

> [T]rustees who take on themselves the management of property for the benefit of others have no right to shift their duty on to other persons; and if they employ an agent, they remain subject to the responsibility towards their cestius que trust, for whom they have undertaken the duty.

However, this principle is not inflexible and the courts have conceded that delegation may occur in circumstances of ‘legal necessity’ or ‘moral necessity’ when, as Kay J explained in *Fry v. Tapson* “trustees acting according to the ordinary course of business and employing agents, as a prudent man of business would do on his own behalf, are not liable for the default of an agent so employed”.

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### Giving Effect to the Protective Function: Bodies, Powers and Application

In general, charities in most common law jurisdictions must survive in revenue driven, fiscally oriented environments. There is seldom any special treatment for charities. The typical common law jurisdiction does not provide a naturally nurturing environment conducive to promoting a healthy charitable sector. The growth and development of charities requires the normally tax dominated, fiscal culture to be counterbalanced by agencies, principles and policies designed to safeguard their interests.

### A Protective Legal Framework for Charities

In all common law jurisdictions the protective function of the law as it relates to charity has traditionally vested in the office of Attorney General. All other bodies

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48 *Provincial Bank of Ireland v. McKeever* [1941] IR 471.
49 (1841) 5 Beav 515, p. 517 and also, see, *Re O’Flanagan and Ryan’s Contract* [1905] 1 IR 280 where a wife, appointed as trustee, was not allowed to delegate her responsibilities.
50 *Ex parte Balchier* (1754) Amb 218.
51 (1884) 28 Ch D 268, p. 270. *See, also, dicta* to similar effect in *Re Weal* (1889) 42 Ch D 674 *per* Kekewich J and in *Re Chapman* [1896] 2 Ch 763, *per* Lindley LJ, p. 776.
including the tax collection agency have at best an incidental protective role, although ultimately and in all cases this function falls to the courts. In England & Wales the presence of the Charity Commissioners lends distinctive additional weight to what is in effect a protective framework as there is in place a statutory mechanism for linking their responsibilities with those of the Inland Revenue and Attorney General and with the jurisdiction of the High Court. In other common law jurisdictions the absence of any agency vested with specific responsibility solely for charities and lack of equivalent inter-agency coordinating mechanisms means it would be inaccurate to refer to a ‘protective framework’ as such.

The Attorney General

The ancient parens patriae jurisdiction of the Crown in relation to charities, and the right to bring proceedings in respect of them, has long been vested in the Attorney General. As explained in Tudor:

The Attorney-General’s function in relation to charities is to represent the Crown as parens patriae and thus to act as the protector, both of charity in general and of particular charities. Historically, the Attorney-General’s role in this respect has been unlimited in theory and wide-ranging in practice.

Indeed, a distinguishing characteristic of charitable trusts is that because such a trust is by definition for the public benefit, it thereby acquires an entitlement to protection and enforcement by the Attorney General. The corollary of this special entitlement is that it operates to prevent any person who might benefit from such a trust from taking any action to enforce it. When so acting, the Attorney General must be separately advised from the State so as to avoid any possible conflict between the interests of the State and the specific interests of the charity.

Proceedings and the Attorney General

The Attorney General has a special locus standi in respect of proceedings: he or she may initiate proceedings; is a necessary party in certain circumstances; and has a right to intervene in any proceedings where the prerogative or statutory powers of the Crown are at issue. In keeping with the inherent powers of the parens patriae jurisdiction, the Attorney General may initiate proceedings to redress the ‘misemployment of land and money heretofore given to charitable uses’ and can do so in any circumstances where the interests of a particular charity need protection. This

52 Potts v. Turnley (1849) 1 Ir Jur (os) 57, AG v. Carlile (1850) 2 Ir Jur (os) 249 and Re Kelly’s Will Trusts (1862) 7 Ir Jur (ns) 273.
may be necessary, for example, where there is evidence that trustees have failed in their duties.\textsuperscript{54} It is most likely to be activated where direct intervention is urgently required to prevent or remedy damage to a particular charity. As noted in Tudor:\textsuperscript{55}

Such proceedings are likely to be brought in the Chancery Division of the High Court and the relief sought may include the restitution of charity property, the award of damages\textsuperscript{56} and interest for breach of trust, injunctive relief\textsuperscript{57} to prevent a breach of trust or its repetition, the appointment or removal of trustees or officers, the appointment of a receiver and manager,\textsuperscript{58} the establishment of a scheme or the determination, by means of a declaration or otherwise of questions arising in the administration of the charity or the application of its property.

In practice, throughout the common law nations, the traditional protective role of the Attorney General has faded and proceedings are now seldom initiated from this office. In England and Wales a growing proportion of the above proceedings are now likely to be instituted by the Charity Commission.

\textit{The Role of Amicus Curiae}

The ancient common law role of \textit{amicus curiae} or ‘friend of the court’ has been recognised since at least the time of Edward I.\textsuperscript{59} It has not changed with the passing of the centuries and remains essentially that of “one who assists the court, upon a case already before it, by acting as an adviser, or by calling the court’s attention to law, or to facts or circumstances that may have escaped consideration.”\textsuperscript{60} In addition to the above standing of the Attorney General in relation to proceedings he or she may also appear before the court as an \textit{amicus curiae} and may do so in respect of proceedings affecting charitable matters. In that capacity, the Attorney General would have considerable scope to draw from the experience of that office as ‘protector of charities’ and offer guidance to the court, with its leave, on matters of principle. There would be similar scope to do so on a cross-jurisdiction basis and thereby promote knowledge transfer with the ability to creatively extend, for example, the international development of charitable purposes. This potential role for the Attorney General has yet to be explored.

\textsuperscript{54}\textit{Attorney General v. Brown} (1818) 1 Swan 265, \textit{per} Lord Eldon, p. 291.
\textsuperscript{56} The word “damages” is sometimes used, but this is a misnomer and the remedy is more properly described as restitution, or equitable compensation: \textit{Bartlett v. Barclays Bank Trust Co. Ltd.} [1980] Ch. 515, \textit{Hulbert v. Avens}, The Times, February 7, 2003.
\textsuperscript{57} \textit{Baldry v. Feintuck} [1972] 1 WLR 552.
\textsuperscript{58} \textit{Attorney General v. Schonfeld} [1980] 1 WLR 1182.
\textsuperscript{59} See Pollock and Maitland, \textit{History of English Law} (2nd ed.), 1898, Bk., 1, p. 216.
Revenue and Other Agencies

While the Inland Revenue and its counterpart in other common law jurisdictions have an obligation to explicate the rulings made on contentious issues for the guidance of the charitable sector as a whole, as well as a duty to detect and protect in instances of abuse of donors’ gifts, there is no specific onus on this agency nor on others involved in regulating fiscal matters (including Customs and Excise, Land Registry, Companies Registry, Family Societies Registry, Rates etc.) to protect charities. While it may perhaps be argued that in all common law jurisdictions where the tax collecting agency has the responsibility for determining charitable status (i.e. all except England & Wales) it does so by assiduously protecting the *Pemsel* definition of charitable purposes, this may be countered by the argument that the agency is actually defensively deploying *Pemsel* as a means of policing boundaries to prevent any further erosion of the tax base.

Charity Commissioners

The assumption of primary responsibility for all legal functions by the Commissioners is of central importance to the development of charity law in England & Wales. The fact that it shares jurisdiction for charities with the High Court and Attorney General and is empowered to make rulings on charitable status that are binding on the Inland Revenue places the Commissioners at the heart of a legal framework which is unique among the common law nations. However the modern role of the Commissioners, as legislatively assigned and self-developed, no longer places a particular emphasis on protection.

Determining Charitable Status

Charitable status provides a passport to the tax exempt privileges and/or other entitlements that are vital for the growth and development of charities but its acquisition can be problematic in the revenue driven, fiscally oriented environment that typifies most common law jurisdictions. Where, as in almost all cases, status determination lies with the tax collection agency then a heavy onus rests on any organisation claiming to engage in public benefit purposes and activities if it is to displace the tax liability presumption and deflect the agency from its primary objective of maximising tax returns. In England & Wales the determination of charitable status falls to the Commissioners who are able to apply the public benefit test more flexibly and creatively that the Inland Revenue would, with regard for but without necessarily being rigorously bound by established precedents and the spirit and intendment rule. This they may do in a strategic fashion when reviewing the status of registered charities (see, further, Chap. 6).
Maintaining Charitable Status

Having acquired charitable status an organisation may require ongoing protection if its independence is not to be compromised by the interests of commerce or government and again in most common law jurisdictions it will most usually find itself left with the responsibility to protect its own interests. In England & Wales, however, the Charity Commissioners take a proactive role in protecting the integrity of the status of ‘charity’ by, for example, advising charities as to the measures they may need to adopt to safeguard their independence in the context of partnership arrangements with government (see, further, Chap. 6).

The High Court

The decline in the rate of court proceedings on charitable matters coupled with the statutory assignment of aspects of its jurisdiction to the Charity Commissioners have diminished the capacity of this court to exercise its traditional role in respect of charities. Such aspects of the protection function as are exercised by the court now occur on foot of proceedings initiated by the Charity Commissioners or, more rarely, by the Attorney General (see, also, Chap. 6). Otherwise the High Court simply responds to the random and infrequent issues presented by applicants such as charities or, most usually, on appeal by the Inland Revenue.

Judicial Development of the Protection Function

As noted above, the traditional role of the judiciary in relation to charity has been eroded in recent years. Responsibility for giving effect to the protection function, as with other functions, has largely passed to the Charity Commissioners. This, however, does not detract from the important role played in the past by the judiciary in protecting charities and does not preclude the possibility of further landmark rulings with enduring precedent value. Ultimately, it is for the judiciary to determine how particular aspects of this body of common law are to be shaped to fit contemporary circumstances.

National Courts and the Protection Function

The essentially protective parens patriae responsibilities of the Crown eventually devolved to the courts and formed the foundation for their current jurisdiction in relation to charities. The body of equitable principles cultivated by the Court of Chancery passed with the Supreme Court of Judicature Act 1873 to the unified court systems
of equity and the common law and became the basis for determining the judicial approach to charities (see, further, Chap. 6). This approach has been described as one of ‘benevolent discretion’\(^\text{61}\) whereby the judiciary would exercise flexibility rather than blindly follow precedent to achieve as fair an outcome as possible. The fact that in England & Wales the jurisdiction in respect of charities has remained consolidated in the Chancery Division of the High Court facilitated the development of a unitary and characteristically broadly protective judicial approach to charities.

**Judicial Protection of Charitable Trusts**

The law governing charitable trusts is distinctive in that it has grown up around the central concern to identify the charitable intentions of donors and then ensure legal protection for their charitable donations. Once confirmed as charitable then a trust automatically qualifies for protection from the Attorney General and may also attract the protection of the *cy-près* doctrine, neither of which would be available to other forms of trust.

**Judicial Protection of Charitable Status**

The history of charity law in England & Wales has from time to time witnessed the effects of tension between government intentions to prevent or control the misuse of charity and judicial determination to defend its status and privileges. For example, government efforts to prevent deathbed dispositions in favour of charity that disinherited the next-of-kin by using the provisions of the Mortmain and Charitable Uses Act 1736 (see, also, Chap. 5) were often undermined by “a number of cases adopting a generous interpretation of what amounted to a charitable purpose”.\(^\text{62}\) Again, the judiciary have on occasion adopted a lenient approach towards applicants who were clearly intent upon using charity primarily as a means of tax avoidance (e.g. under the Variation of Trusts Act 1958).\(^\text{63}\) The same concern to protect charitable status, by breathing new life into it by analogy\(^\text{64}\)

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\(^{64}\) *Scottish Burial Reform and Cremation Society v. Glasgow Corporation* [1968] AC 138; extension of charitable status to crematorium.
or through use of the spirit and intendment rule\textsuperscript{65} or by employing the \textit{cy-près} doctrine,\textsuperscript{66} is also evident in the case law.

\textit{Judicial Protection of Charitable Purpose}

Arguably, however, one consequence of leaving the protection function and indeed the development of charity law as a whole to the judiciary has been the failure to safeguard what might be seen as the ‘central mission of charity’ viz. to tackle the causes and effects of poverty. The many and varied judicially sanctioned ramifications of ‘charitable purpose’ have been such as to deflect from any recognition of ‘poverty’ as the primary objective of ‘charity’ and allow four centuries of precedents to accumulate fairly randomly, if loosely pinned to the public benefit principle, rather than aggregate in a coherent fashion around addressing social disadvantage. This outcome makes an interesting contrast to the fate of the other subjects of the \textit{parens patriae} jurisdiction. The wards and the lunatics, initially judged equally \textit{sui juris} as charities, subsequently attracted considerable legislative attention that has had little difficulty in parsing rights and duties in respect of identified needs, has established bodies and governing principles to ensure their protection and has produced a body of coherent jurisprudence. The protection function of the law as it relates to children is now, for example, a great deal more prominent, purposeful, focused and demonstrably beneficial than is the same function in respect of charities. Legislative intervention could account for the difference.

\textit{The European Convention and the Protection Function}

The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the ‘European Convention’), currently signed by 46 nations, is by far the most influential of the raft of international and multi-national legal instruments that now add to the legal protection available for individuals and organisations. It is automatically binding upon all 27 member States of the European Union, many of which have legislated to incorporate all or most of the rights into national law, and is enforced by the European Court of Human Rights and in the courts of the nations concerned. Other countries outside Europe have chosen to either endorse the Convention or to introduce legislation replicating its provisions. Some of the enumerated rights lend significant weight to the protection function as it

\textsuperscript{65}Re Vancouver Regional Free Net Association and Minister of National Revenue (1996) 137 DLR (4th) 206 Federal Court of Appeal; recognition of internet access as a charitable purpose.

\textsuperscript{66}Att-Gen v. City of London (1790) 3 Bro.C.C. 171; gift to convert infidels in America, but a finding of no infidels, with the result that the gift was saved to charity for a purpose in keeping with the general charitable intention of the donor.
relates to charities and have been judicially applied in rulings that serve to strengthen the bedrock of principles upon which charity law rests.

**Freedom of Association**

The Convention provides in Article 11 that:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests …

A principal hallmark of any democracy is the right of its citizens to form, join or not to join associations. The very existence of charities and all other non-government organisations is conditional upon this right. In *Sidiropoulos and Others v. Greece* the ECHR pointed out that the right to form an association is an inherent part of the right set forth in Article 11, even if that Article only makes express reference to the right to form trade unions. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is “one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning”.

Only convincing and compelling reasons can justify restrictions on the freedom of association. The ECHR does not have to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it also looks at the interference complained of in the light of the case as a whole to determine whether it was “proportionate to the legitimate aim pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient”. In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.

In *The Socialist Party of Turkey and Others v. Turkey* the ECHR ruled that Turkey had once again violated Art. 11. The ruling emphasised that freedom of speech, assembly and association, as well as pluralism, were the key elements of democracy. The protection function is strengthened by a provision in the Article requiring governments to ensure that laws and practice positively promote this right: they must ‘both permit and make possible’ opportunities for citizens to enjoy this fundamental right.

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68 Ibid., para 40.
69 See for example, *Young, James and Webster v. the United Kingdom* (1982) 4 EHRR 38 where the court stressed the importance of ensuring “the fair and proper treatment of minorities” and held that the ‘closed shop’ was a violation of Art 11.
Freedom of Expression

Article 10 of the Convention states that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers …

Again, this right is one of the hallmarks of a democratic society. In Steel and Morris v. the United Kingdom,73 which concluded the longest running court case in English history (generally referred to as the “McLibel Case”), the ECHR ruled that two environmental activists (members of London Greenpeace) convicted of defaming the McDonald’s Corporation in 1997 were denied freedom of expression (Article 10) by the British government and did not receive a fair trial (Article 6). McDonald’s had launched its libel action against the two campaigners 15 years earlier, alleging that they were involved in the production of a leaflet asserting that McDonald’s exploited children, harmed the environment, and its food was unhealthy. McDonald’s won the original verdict in 1997. In 2000, the defendants went to the European Court which upheld their complaint and expressed the view that in a democratic society even small and informal campaign groups, such as London Greenpeace, had to be able to carry on their activities effectively. There existed a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment. The free circulation of information and ideas about the activities of powerful commercial entities, and the possible “chilling” effect on others were also important factors to be considered in this context.

Freedom from Discrimination

Article 14 of the European Convention provides that:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The right not to be discriminated against, traditionally associated with religious differences, is a most important aspect of life in a democratic society and is now generally extended to afford protection from discrimination on the grounds of gender, age, race and from differences arising from other such status designations. This Article 14 provision has no independent validity as it comes into play only after a substantive Convention right has been breached.

73 (Application no. 68416/01) (2005).
The Convention now requires that any interpretation of ‘religion’ be applied objectively, have reasonable justification\textsuperscript{74} and be non-discriminatory; any differential treatment must comply with strict standards.\textsuperscript{75} This legal benchmark for non-discrimination in matters of religion is supported by Article 9 (the right to freedom of thought, conscience and religion) and by Article 1 of the First Protocol (the right to peaceful enjoyment of property). It has the effect of requiring governments and other public bodies to give parity of recognition to Christian and non-Christian religions such as Buddhism and Hinduism.

An applicant will have established direct discrimination and a breach of Article 14 if he or she can show that: other persons in a similar or analogous situation, as evidenced by the set of facts governing each situation, are being treated differently to the applicant; and there is no justification for the difference in treatment.\textsuperscript{76} The effects of indirect discrimination were examined in \textit{Thlimmenos v. Greece}\textsuperscript{77} where the ECHR considered the effect of a blanket ban, imposed by a professional body, on the employment of anyone with a criminal record. The case concerned an applicant who had such a record due to his objection, on religious and conscientious grounds, to military service. The court ruled that the ban had a disproportionate effect on the applicant and could not be justified.

\textbf{The Outcome of the Charity Law Reform Process and Implications for the Future of the Protection Function and Social Policy}

The charity law reform process in England & Wales, as in other common law jurisdictions, has involved a good deal of questioning as to ‘what is charity for?’ The outcome has been a configuration of provisions that conserve the established common law parameters while allowing room both for significant deviations from precedent and for fresh growth within specified new categories of matters statutorily defined as charitable. The new provisions in the most important charity legislation for four centuries serve mainly to licence a further expansion of charitable activity (see, Chap. 6). Apart from the strengthening of the public benefit test, there is no indication of any legislative intent to specifically reinforce or refocus the protection function.

\textsuperscript{74}See for example, \textit{Tsirlis and Kouloumpas v. Greece} (1997) 25 EHRR 198. Also, see, the \textit{Belgian Linguistic Case} (1968)(No 2) 1 EHRR 252 where the ECHR held that there must be an objective and reasonable justification for differential treatment and this will only exist where there is a ‘legitimate aim’ for the action and where the action taken is ‘proportionate’ to that aim.


\textsuperscript{76}See for example, Abdulaziz, Cabales and Balkandali v. United Kingdom (1985) 7 EHRR 471.

\textsuperscript{77}\textit{Ibid.}
The Common Law Parameters

The Charities Act 2006 clearly provides for the prevention or relief of poverty, the advancement of education and the advancement of religion. It also categorises as new charitable purposes many activities hitherto listed under the fourth Pemsel head. To that extent, it must be acknowledged that the new legislation will protect and continue the established definitional basis of charity law.

Giving Effect to Social Policy Through the Protection Function

The mandatory application of the public benefit test as determinant of charitable status, now required under the 2006 Act, will not just lend a sharp edge to the policing function (see, Chap. 5) and greatly enhance the scope for applying the adjustment/mediation function (see, Chap. 6), it may also provide a means of revitalising the protection function by allowing, over time, some of the more questionable interpretations of charitable activity to be stripped away and permit a concentration of resources on the authentic core business of charity. While diversification is a necessity for most enterprises that hope to grow and remain engaged with their constituencies in a modern constantly changing environment, there is a danger of charitable drift further threatening the coherence, purposefulness and the value base of charity. If it is to retain its distinctiveness in the field of non-profits, the protection function will need to be applied to reassert the primacy of charity’s initial and fundamental agenda. The new legislation may provide such an opportunity.

Poverty

The fact that the relief of poverty, extended to include prevention, heads the 13 charitable purposes listed in the Charities Act 2006 is an indication of a possible legislative intent to renew the historical commitment of charity to address poverty. Indeed, it will now, as a matter of law, be a requirement that charities ensure they do not deny the poor access to their services; with unavoidable implications for the charitable status of private schools and health care facilities. However, the deliberate non-inclusion of any reference to the need to also deal with the causes of poverty and absence of any reference to poverty in the developing nations gives rise to a question as to whether this is a genuine legislative reassertion of charity’s primary goal. It leaves open the possibility that this charitable purpose may continue to be treated as being of less than central importance and as justifying a continuing focus on its effects rather than warranting a more strategic approach.
Education

The advancement of education and religion has been retained in the Charities Act 2006 without any embellishment to their traditional *Pemsel* interpretation which clearly demonstrates the deployment of the protection function to preserve these core charitable purposes. In the context of education, the application of the public benefit test should in due course clarify the longstanding issues in relation to the charitable status of Eton and the other elite English fee-paying facilities. Again, there is now potential for a return to the more basic *Pemsel* interpretation of this charitable purpose.

Health Care

Although not explicitly stated as such in *Pemsel*, there can be little doubt that health care has long been a core charitable purpose and much the same observations apply in this context as above in relation to education. The new statutory purpose of ‘advancing health or the saving of lives’ may, however, signal an intention to encourage and channel charity to commit resources towards government designated priorities.

Other Core Charitable Purposes

The advancement of animal welfare, while hardly a prominent social policy theme, is a traditional magnet for donors that has over time acquired more resources than most charities dedicated to the relief of human welfare, and is now to become a charitable purpose in its own right. The statutory recognition of the importance of animal welfare again represents a falling back onto the safe ground of well-established charitable activity. Much the same could perhaps be said of the recognition now given to the advancement of amateur sport, though the absence of any reference to ‘recreation’ may signal a government intention to require charitable status in this context to be evidenced by skill and achievement.

Conclusion

In recent years the protection function, with its powerful *parens patriae* antecedents, has diminished in importance relative to the other legal functions that relate to charity. Whether this is a cause or effect of, or is otherwise related to the fading role played by the Attorney General and the High Court in charitable matters is difficult
to say. Possibly the increasingly sophisticated legal context within which charities currently operate has been a significant contributory factor. Protection is now to be found: in a spread of ancillary legislation including trust and company law, fundraising statutes, human rights and social justice provisions; among the myriad of accompanying bodies such as the Companies Registry and the Charities Commission; and in the umbrella bodies that have sprung up within the sector to provide representation and support. The government’s policy of partnership with the sector must also be taken into account: as shared responsibility for public benefit provision narrows the traditional distance between government and charity so the latter is encouraged to believe that its interests will be safeguarded by its partner. Again, and more simply, it may be that a mature charitable sector has developed a confident base where protection is now less of a priority as the emphasis shifts towards the exercise of positive legal functions.

For social policy, the diminution of the protection function in charity law has perhaps been of greater significance than is generally realised. The absence of a strong body dedicated to protecting the core business of charity, as represented in the four Pemsel heads, may help account for the fact that as the sector grows in size, wealth and spread, the effects of poverty continue to impair lives in the developed nations as well as crippling whole nations in the developing world. The modern aggrandisement of charity has seen its activities and resources spill over into areas well beyond the Pemsel heartland. It is now encouraged to penetrate further into general public benefit activity, forge alliances with private finance initiatives and is channeled by the national lottery and other proxy government bodies to spread ever more expansively into health, education and social services provision. The rate of growth and the disparate variety of charities accommodated under the fourth head has come to defy logic. The need to protect charity from the predations of government and commerce, from straying too far from its origins in dealing with poverty and from the temptation to abandon its equitable principles in favour of expertise in the marketplace has perhaps never been greater. There is little indication in the outcome of the charity law review process in England & Wales of a political will to restore the protection function in the law as it currently relates to charity.