

# Charity Law and Religion—A Dinosaur in the Modern World?

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## 1. Introduction

Many of the functions and principles of charity law recognised in contemporary times in jurisdictions including Australasia, the United Kingdom and Canada, are rooted in history. Records dating back to Roman times reflect complex forms of charitable activities, and Plutarch noted, in his will, that Julius Caesar left ‘the gardens beyond the river’ (Luxton 2001, 4) to the people. Pious gifts, before the Reformation, whilst they tended to honour God and the Church, also included gifts to relief distress and suffering on earth; gifts to assist the poor; and gifts to repair hospitals, bridges, roads and dykes (Jones 1969, 3-4). Therefore many of the common law and statutory provisions that exist today take ‘their meaning from the social and economic situations of the time they were decided’. (Poirier 2013, 78; Chevalier-Watts 2014, 3-4)

If therefore we recognise the historical influences on modern day charity law, the question arises then as to its applicability in a world with social, political and economic demands that could not have been envisaged in eons past, which include, for instance, the requirement to protect a wide variety of civil and animal rights, and the demand to protect a plethora of religious freedoms. To assess whether modern day charity law is responding appropriately to such demands, and indeed whether religion is still an appropriate head of charity, this article concentrates on one heads of charity law, that of the advancement of religion. The question set by this article had the propensity to be a monumental undertaking because of the very broad scope of charity law, which unfortunately is beyond the capacity of such an article, hence, focusing on just one key aspect of charity law.

As a brief aside, in order to provide a brief explanation as to the meaning of the aforementioned heads of charity, modern day law derived much of its momentum (Picarda 2010, 11-16) from 1 key statute and 1 key case. The key statute was the Statute

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of Charitable Purposes 1601 (43 Eliz I, c-4), or otherwise known as the Statute of Elizabeth, and in particular, its preamble. This preamble set out recognised charitable purposes, and although the Statute has long since been repealed, its preamble lives on through the heads of charity that were classified by Lord Macnaghten in the key case of *Commissioners for Special Purposes of Income Tax v Pemsel*<sup>1</sup>. His Lordship stated that charity ‘in its legal sense comprises four principle divisions,’<sup>2</sup> which are recognised as four heads of charity:

Trusts for the relief of poverty; trusts for the advancement of religion; trusts for the advancement of education; and trusts for other purposes beneficial to the community, not fall under any of the preceding heads.<sup>3</sup>

This classification of charity law is the foundation of charity law that is recognised in such jurisdictions as Australasia, England and Wales, and Canada (Chevalier-Watts 2014, 39) and it is the head of advancement of religion that is the focus of this article.

## 2. The advancement of religion

To assess the contemporary issues associated with charity law, our starting point is the head of charity recognised as the advancement of religion. This head is of particular relevance in today’s world because in a number of jurisdictions, the ‘law of charities is very much the child of Judeaean-Christian traditions’ (Picarda 2010, 3), with its history reflecting changes in the focus on the Church, to the Protestant movement, and then to more liberal influences (Ibid.). The contemporary religious world however is one that is unlikely to have been conceived by those who influenced the principles and traditions of ancient charity law, therefore it is a useful indicator as to the relevance of charity law in modern times.

It is also pertinent at this stage to ask why religion is still a fundamental part of charity law, even in the face of increasing numbers of atheists and religious critics worldwide. There is no one reason that can be cited, but some answer may be found in the historical context of religion and charity. The contribution to society by religion, in a variety of guises, for example, in terms of building infrastructure and underpinning civilised values, cannot be underestimated. For instance, many of common law jurisdictions, including England and Wales, Ireland, New Zealand and Canada ‘are indebted to the religious organizations that laid much of the foundations for their present health and education systems, and that often provided the staff and resources for their functioning and maintenance’ (O’Halloran 2011, 30, cited in Chevalier-Watts 2014-2015, 170). Many of these infrastructures and influences remain today thus making the relevance of religion in contemporary society hard to ignore.

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1 *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 583.

2 Ibid.

3 Ibid.

On the other hand, religious charitable trusts have been subject to criticism. For instance:

[...] given the very considerable concessions made to charities, and given much contemporary agnosticism and even seeming indifference in many quarters to religion, what is it that today supports the concession in favour of religious charities, and more particularly, where are the edges of this head of charity to be drawn?<sup>4</sup>

In the New Zealand case of *Liberty Trust*, Mallon J observes ‘whether there is social utility in the advancement of religion is “a very much more doubtful proposition” because the ‘effect of religion is difficult to define and measure and any effect is “usually of a very personal nature”’.<sup>5</sup>

Nonetheless, what is apparent is that charity law has always accepted the advancement of religion as charitable at law<sup>6</sup> and ‘[a]s between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none.’<sup>7</sup> Further evidence of the relevance of religion in contemporary society may be found in each of our specific jurisdictions where freedom of religion is a fundamental human right.<sup>8</sup>

As a result, therefore, regardless of the views of believers or non-believers, advancement of religion as a head of charity is here to stay, and as a result, this article can consider how the law responds to such ethereal beliefs in a contemporary society.

Before we explore charity law in the context of the advancement of religion, it is pertinent to consider firstly what is meant by the advancement of religion in charity law terms. It is notable that in spite of the ‘antiquity of trusts for the advancement of religion, judicial attempts to define religion for these purposes are scarce’ (Garton 2013, 167). Indeed, in *Bowman v Secular Society*,<sup>9</sup> Lord Parker could cite no prior judicial definition of the meaning of religion. The English case *South Place Ethical Society* is cited as being the first English case to provide an explicit definition of religion,<sup>10</sup> where Dillon J asserted that religion for charity law purposes means:

[T]wo of the essential attributes of religion are faith and worship; faith in a god and worship of that god.<sup>11</sup>

4 *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 (CA), [6].

5 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68, [54], citing *Centrepoin Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673 (HL); see also Lockhart 1984-1987.

6 *Ibid.*, [55].

7 *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 (CA), [6], citing *Neville Estates Ltd v Madden* [1962] Ch, 832, 853.

8 Human Rights Act 1998, s 13 (UK); New Zealand Bill of Rights Act 1990, s 13 (New Zealand); Commonwealth of Australia Constitution Act, s 116 (Australia).

9 Garton 2013, 167, referring to *Bowman v Secular Society* [1917] AC 406 (HL), 448.

10 *Id.*, referring to *South Place Ethical Society* [1980] 1 WLR 1565 (Ch).

11 *South Place Ethical Society* [1980] 1 WLR 1565 (Ch), 1573.

In other words, a monotheistic view. However, this of course would rule out Buddhism as a religion at charity law, to which Dillon J responded by noting:

It is said that religion cannot be necessarily theist or dependent on belief in a god, a supernatural or supreme being, because Buddhism does not have any such belief.<sup>12</sup>

Whilst his Honour chose not to pursue that consideration further, because he did ‘not know enough about Buddhism’, he believed that the answer could be found with Lord Denning MR’s opinion in *R v Registrar General, ex parte Segerdal*.<sup>13</sup> In this case, his Lordship sought to find Buddhism as an exception to the monotheist view, asserting:

It need not be the God which the Christians worship. It may be another God, or an unknown God, but it must be reverence to a deity. There may be exceptions. For instance, Buddhist temples are properly described as places of meeting for religious worship.<sup>14</sup>

According to Dillon J in *South Place Ethical Society*:

It seems to me that two of the essential attributes of religion are faith and worship; faith in a god and worship of that god.<sup>15</sup>

This was echoed by Mallon J in the New Zealand case *Liberty Trust v Charities Commission*,<sup>16</sup> where her Honour noted that ‘[b]elief or faith in a supreme being and worship of that being is accepted as being religion in the context of charity law’,<sup>17</sup> although Mallon J did not discuss further the definition of religion.

The Australian courts have also addressed the meaning of ‘religion’ in the context of charity law and have agreed that an ‘endeavour to define religion for legal purposes gives rise to peculiar difficulties’,<sup>18</sup> one of which would be:

It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed in the world.<sup>19</sup>

Therefore, in the views of Mason ACJ and Brennan J, delivering the judgment in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (‘*Scientology case*’), the very absence of a universally-acceptable definition of religion, in reality, points

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid., referring to *R v Registrar General, ex parte Segerdal* [1970] 2 QB 697 (CA).

<sup>14</sup> Ibid., referring to *R v Registrar General, ex parte Segerdal* [1970] 2 QB 697 (CA), 707; see also Chevalier-Watts 2014, 176-177.

<sup>15</sup> *South Place Ethical Society* [1980] 1 WLR 1565 (Ch), 1572.

<sup>16</sup> *Liberty Trust v Charities Commission* [2011] 3 NZLR 68, [57].

<sup>17</sup> Ibid.

<sup>18</sup> *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (‘*Scientology case*’) [1983] HCA 40, [8].

<sup>19</sup> Ibid., citing *Jehovah’s Witnesses Inc* (1943) 67 CLR, 123.

to the fundamental difficulty of adopting a definition, because a definition cannot be adopted merely because the majority of a community would be satisfied. Nor simply because it corresponds with a current view point of a majority. If that were so, then this would exclude minority beliefs. Whilst then a universally acceptable definition of religion is undoubtedly impossible, their Honours' view was that freedom of religion should be equally conferred on everyone,<sup>20</sup> and 'the variety of religious beliefs which are within the area of legal immunity is not restricted'.<sup>21</sup>

Therefore the criteria of religion, according to the courts in Australia, is wider than that of the English judicial criteria, as stated in the *Scientology* case, where the Court noted:

[T]he criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief [...] Those criteria may vary in their comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion.<sup>22</sup>

What this reticence of the courts to provide a universal definition of religion speaks to, in part, is the complexities of human belief systems and the difficulties of being able to apply charity law to historical, and indeed, evolving beliefs. The focus of our discussions, however, will be on the advancement of religion itself, as the gift must contribute to the advancement of religion (Warburton 2003, 73). It is this requirement of this head of charity that fundamentally illustrates the challenges facing international courts, and provides some answers to our earlier question as to whether charity law is responding appropriately to the demands of modern society, or whether indeed its ancient seams are straining under those pressures. Whilst we will inevitably see tensions between the historical context of the advancement of religion and its modern day context, what will also become apparent is that the tension is not as we might immediately presume. Our immediate presumptions may be that courts might find the requirement of assessing the advancement of religion in contemporary circumstances to be more challenging than would have been faced by historical courts. What this analysis will show, however, is that this not always the case. As a result, what we see is the relevance still today of religion in a charity law context.

Religion, as might be imagined, has long been associated with charity, with many of its roots being found in the traditional Judeo-Christian notion of religion, where salvation for the soul was purported for generous charitable gifts. Indeed, from the Middle Ages, the Church was key in providing support and succour to the needy (O'Connell and Chia 2013, 370, referring to Bird 1982, 149). What is perhaps striking then is the distinct absence from the preamble of the Statute of Elizabeth of the advancement of religion explicitly. All that is mentioned is the purpose of the

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20 Ibid., [8].

21 Ibid., referring to *Jehovah's Witnesses Inc* (1943) 67 CLR, 132.

22 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* ('*Scientology case*') [1983] HCA 40, [17].

repair of churches.

This move away from explicit recognition of the advancement of religion as a charitable purpose can best be explained by looking to the secular position of Elizabeth I ‘and the desire of the Puritans to have a religion free of state interference’ (Dal Pont 2000,147; Chevalier-Watts 2014, 168). Therefore the preamble set out a list of purposes that were deemed, at the time, to be of benefit to the society of the time, thus the absence of the advancement of religion was ‘a powerful expression of the increasing secularisation of charity’ (O’Connell and Chia 2013, 375; Chevalier-Watts 2014, 170).

However, even with this overt recognition of the secularisation of charity, instead of religion becoming less important in society, and therefore in relation to charitable works, it continued to play an important function in society because a number of Western societies, including New Zealand and Canada:

[...] are indebted to the religious organizations that laid much of the foundations for their present health and education systems, and that often provided the staff and resources for their functioning and maintenance. (O’Halloran 2011, 32, cited in Chevalier-Watts 2014, 170.)

So whilst very early statutory references preferred to enhance the secularisation of charity law, society itself still recognised the value of religion, thus illustrating an uneasy tension between the two concepts, suggesting that charity law was, *prima facie*, not a true reflection of the role of charity in society. However, as will be demonstrated, the courts were able to recognise the ultimate value of religion in relation to charity, meaning that religion as a head of charity was of relevance in society.

One controversial, and early example of this, is to be found in *Thornton v Howe*.<sup>23</sup> Whilst this case may need little in the way of introduction, it is worthwhile just taking a moment to set out the issue before the Court because it illustrates clearly the ability of a court to acknowledge the value of religion within charity law, thus indicating that charity law is not necessarily an inflexible relic.

The case concerned the printing and propagating of the works of Joanna Southcote, who:<sup>24</sup>

[...] labored under the delusion that she was to be made the medium of the miraculous birth of a child at an advanced period of her life, and that thereby the advancement of the Christian religion on earth would be occasioned.

Whilst Sir John Romilly MR was of no doubt that she was a foolish and ignorant woman, and that her writings were largely ‘incoherent and confused’,<sup>25</sup> this bequest did not actually undermine the charitable nature of the gift. This decision therefore

<sup>23</sup> *Thornton v Howe* (1862) 31 Beav 1042.

<sup>24</sup> *Ibid.*, 1044.

<sup>25</sup> *Id.*

shows that whilst a gift to advance religion may be untoward, a court can interpret the meaning of ‘advancement of religion’ in an extensive manner, thus providing an early reflection of not only the flexibility of this head of charity, but also of its apparent relevance in society, in spite of its controversial nature.<sup>26</sup>

More contemporary cases also show how courts are willing to demonstrate that charity law, under the head of advancement of religion, is a concept that can adapt alongside the transformation of society, which in turn reflects the relevance still today of religion within the constructs of charity law.

### 3. Australia and the advancement of religion

The Australian High Court *Scientology case* reflects the challenges facing courts with regard to novel belief systems, and whether or not such matters can fall within the rubric of charity law. Indeed, the majority of the Court referred to the ‘inherent difficulties in the case.’<sup>27</sup> The Court answered the question of whether or not the beliefs of Scientology met the criterion of religion relatively easily, however, ‘the second criterion [was] more troublesome.’<sup>28</sup> To satisfy the second criterion, the Court had to be able to determine that there was ‘acceptance of canons of conduct in order to give effect to a supernatural belief, not being canons of conduct which offend against the ordinary laws.’<sup>29</sup> The lower Court found Scientology’s appearance of religion to be a sham, however the High Court found the opposite to be true. Their interpretation of the codes of conduct, as set out in the Handbook for Scientologists, and the rites and ceremonies performed by Scientologists, echoed other recognised religious bodies. Whilst there was some question as to the motivation of the corporation behind Scientology, this aspect was not litigated, therefore it was material instead to focus whether the conduct of the believers gave effect to their supernatural beliefs. There was some discussion as to whether the commercial motivation to follow the advice of the leader was of paramount importance to believers, but even if that were true, the Court was of the view that that was not sufficient to draw the conclusion ‘that a desire to give effect to supernatural beliefs is not a substantial motive for accepting the practices and observances contained in [the] writings.’<sup>30</sup>

Therefore the High Court was of the view that Scientology, in spite of the possible commercial motivations, was analogous to other recognised religions, and that meant that it should be recognised as being a religious entity under the rubric of charity law. What this reflects then is whilst contemporary belief systems may, at first sight, appear at odds with ancient religious ideologies, charity law is more than capable of finding sufficient connections with traditional beliefs to give effect to

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26 It should be noted that because the gift was a testamentary disposition of land, it was void under the Statute of Mortmain 9 Geo 2, c 36, as opposed to being given out of pure personalty, where it would have been enforced and regulated.

27 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) (‘Scientology case’)* [1983] HCA 40 [48].

28 *Ibid.*, [31].

29 *Id.*.

30 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) (‘Scientology case’)* [1983] HCA 40, [45].

modern day belief systems that have evolved with society, and as a result, this in turn gives full effect to freedom of religion for individuals in a contemporary context. As noted earlier, such freedoms have been given authority by statute in a number of jurisdictions, including our specific jurisdictions. Thus religion in charity law is, by association, given support by such authority.

The Australian High Court, in the later case of *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited*,<sup>31</sup> were again required to address issues pertaining to religion and charity, and again, their decision illustrated the flexibility of charity law in a modern day context. This case echoes the notions of secular focus, even in the context of religion, to which was alluded in the preamble of the Statute of Elizabeth. What this case therefore tells us is that historical concepts, such as the secularisation of charity, can still incorporate religious activities in a contemporary context!

In this case, Word was established by Wycliffe Translators Australia, with the intention of generating funds for Wycliffe, which is an evangelical organisation that spreads the word of God through its missionary activities. The issues on appeal centred around the fact that whilst Word paid Wycliffe to carry out its bible translation on its behalf, Word does not directly carry out training, or the dispatching of missionaries overseas, nor publishing the Bible, nor the preaching of the gospel. Instead, it gives its profits to Wycliffe, and to other similar Christian organisations to enable them to conduct those activities. So in other words, can an entity be charitable where it engages in commercial, secular activities, which are then directed to the carrying out of charitable activities via other entities?<sup>32</sup> To answer this, the High Court relied on *Baptist Union of Ireland (Northern) Corporation Ltd v Commissioners of Inland Revenue*,<sup>33</sup> where MacDermott J stated:

[T]he charitable purpose of a trust is often, and perhaps more often than not, to be found in the natural and probable consequences of the trust rather than its immediate and expressed objects.

By analogy then, the High Court in the *Word* case asserted that the charitable purposes of Word Investments were to be found in the 'purpose of bringing about the natural and probable consequence of its immediate and expressed purposes'.<sup>34</sup> As a result, this meant that it was charitable because its charity could be found in the 'natural and probable consequence of its immediate activities',<sup>35</sup> albeit secular ones. So it could be argued that because the profits were being funneled, eventually, in to charitable activities, this advanced religion, despite the manner in which the income was being raised (Chevalier-Watts 2014, 214, referring to O'Halloran 2011,

31 *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2008] HCA 55 (3 December 2008).

32 *Ibid.*, [34].

33 *Ibid.*, [38], citing *Baptist Union of Ireland (Northern) Corporation Ltd v Commissioners of Inland Revenue* (1945) 26 TC 335, 348.

34 *Ibid.*.

35 *Ibid.*.

35). The manner of raising the money was irrelevant, as the probable and natural consequence of the purpose of the trust was to advance religion at some stage. The advancement of religion was therefore recognised in modern secular activities, which echoes both the notion of secularising charity by the Elizabethans, as well as reflecting the adaptability of charity law over time.

Such abilities of the Court however to find charitable purpose in rather ambiguous activities is not without criticism. Kerry O'Halloran asserted that the *Word* decision:

[M]ay be used for abusive tax behaviour, as it would seem to open the floodgates for all manner of creative business ventures by religious charities and others, which in future will not need to relate to their charitable purpose. (O'Halloran 2011, 36.)

O'Halloran's views that such a case may open floodgates for a range of creative business ventures to abuse the tax benefits afforded to registered charities may indeed be supported by the New Zealand High Court decision of *Liberty Trust v Charities Commission*,<sup>36</sup> where, again, a Court was able to find the advancement of religion in unusual circumstances.

#### 4. New Zealand and the advancement of religion

Liberty Trust's main activity is a mortgage lending scheme, mainly funded by donors, and it made interest-free loans to its donors, and others. The Trust contended that its lending scheme advanced religion by teaching, through its activities, financial principles derived from the Bible.

One of the key issues for Mallon J in this case was whether this loan scheme could advance religion, which was said by Liberty Trust to be a practical outworking of the Christian faith. It was highlighted that a difficulty with acknowledging practical outworkings as advancing religions is that 'they may embrace activities that are carried out by non-religious organisations which do not enjoy the legal and fiscal benefits that apply to charities'.<sup>37</sup> In response to this, Mallon J referred to the Australia case *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council*.<sup>38</sup> This case was concerned with whether land owned by a trust was entitled to rating exemption. The rating exemption was dependent on whether the land belonged to a public charity, and was being used for charitable purposes; a retirement home was being operated on the said land.

Mahoney JA, upholding the result of the trial Judge, 'grappled with the issue of activities which may have some connection with religion but which might not

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36 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68.

37 *Ibid.*, [80].

38 *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1977] 1 NSWLR 620 (NSWLVCt); *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1978] 2 NSWLR 387 (NSWCA).

constitute advancement of religion.<sup>39</sup> His Honour confirmed that activities of a church, which can include the formulation of doctrine, its propagation and the persuasion of adherents to that doctrine, as well as the building of churches, the employment of ministers, and the holding of public services and ceremonies, can indeed extend beyond those activities.<sup>40</sup> This then raised the question ‘as to why those works are charitable if carried out by a church but which may not have that status if carried out by a secular organisation.’<sup>41</sup>

In response to this, Mahoney JA asserted that where a church does have a direct connection with, or direct influence on the advancement of religion such that it is charitable, then ‘even though its property may be applied to some purposes which, were they purposes of bodies of a different kind, would not be seen as charitable purposes.’<sup>42</sup> Thus:

Where a church or analogous body has as one of the purposes to which its property may be applied a purpose which is not a mere ulterior secular purpose, but one directed at able to be seen as assisting in the advancement of its religious purpose, then the purpose of that religion will be held to be religious for present purposes.<sup>43</sup>

He concluded therefore that the trust was intimately connected with the Presbyterian Church, and so fell within that principle.

Returning then to the *Liberty Trust* case, it was argued by the respondents that the *Ryde* case should be distinguished because, inter alia, the Liberty Trust is not a church, and it does not have a congregation. Mallon J, however, asserted that the respondent provided no convincing basis for distinguishing this case, and indeed, its principles could be applied to the instant case. For instance, the *Ryde* case was concerned with whether the carrying out of religious activities through secular bodies could advance religion. Mallon J confirmed that whilst the Liberty Trust is not a church, it was set up to undertake social welfare and outreach Christian ministries through two churches. It makes numerous references to its religious principles on its website, brochures, application forms, and newsletters. In *Ryde*, eligibility for the rest home did not depend on religious belief, nor were residents required to remain active or constant believers, although religious instruction was available. Likewise,

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39 Ibid., [84], referring to *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1977] 1 NSWLR 620 (NSWLVct); *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1978] 2 NSWLR 387 (NSWCA).

40 Ibid., referring to *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1977] 1 NSWLR 620 (NSWLVct); *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1978] 2 NSWLR 387 (NSWCA), 403.

41 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 [85], referring to *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1977] 1 NSWLR 620 (NSWLVct); *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1978] 2 NSWLR 387 (NSWCA).

42 Ibid., [86], referring to *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1977] 1 NSWLR 620 (NSWLVct); *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1978] 2 NSWLR 387 (NSWCA), 408.

43 Ibid.

in *Liberty Trust*, whilst Christian principles are espoused, belief in those principles is not a prerequisite to receive the benefits of the loan scheme.<sup>44</sup>

Therefore, in Mallon J's view, if 'charitable status is appropriate for churches and their public ceremonies or rituals it seems logical that this status should also apply to their other activities which are carried out as part of the faith to which the church subscribes'.<sup>45</sup> Indeed, the 'mere fact that others may carry out the same activities without ascribing to the religion, does not mean that those that are doing the activities for religious purposes are not advancing religion by carrying out that activity'.<sup>46</sup>

In application therefore to the matter of a mortgage scheme, her Honour did acknowledge that such a scheme would not necessarily be an obvious candidate for the advancement of religion because it might be construed as merely being conducive to religion, which is not charitable. To advance religion, the scheme must be seen as doing more than having a connection to religion. It was argued that the scheme was more than conducive because it teaches Biblical principles, which operated in accordance with Scripture. Mallon J concluded that as a result, the scheme spread the message of religion, or took positive steps to sustain and increase religious beliefs. In other words, it advanced religion.<sup>47</sup>

I noted earlier that, in O'Halloran's view, the *Word* case may open floodgates for a range of creative business ventures to abuse the tax benefits afforded to registered charities, and that the *Liberty Trust* case may equally fall in to the same category because it was able to find the advancement of religion in such unusual circumstances, in other words, a mortgage lending scheme. My assertion lies not, however, in the recognition of the advancement of religion in those circumstances, as I am of the view that Mallon J set out a logical and rational argument in favour of finding the scheme charitable on that point. What I recognise on that point is echoes of the Elizabethan notion of the secularisation of the State, and the ability of charity law to adapt to the requirements and demands of contemporary society, rather than stultifying the development of this area of law.

Rather, my issue lies in the matter of public benefit with regard to the scheme. As a result of the scheme being found to advance religion, the starting point for a Court, certainly in New Zealand, is to presume public benefit. However, this presumption may be rebutted if, for instance, the purpose is 'too narrowly focused on its adherents'.<sup>48</sup> Mallon J was certainly aware of the issue of extending the bounds of doctrine of advancement of religion and public policy too far, as she made reference to the New Zealand case of *Hester v Commissioner of Inland Revenue*, where the Court of Appeal, in reference to the earlier case of *Presbyterian Church of New Zealand Beneficiary Fund v Commissioner of Inland Revenue*, asserted that the findings of the

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44 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68, [88].

45 *Ibid.*, [90].

46 *Id.*

47 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68, [93]-[94], [98].

48 *Ibid.*, [100], citing Warburton et al 2003.

*Presbyterian Church* case were at the ‘outermost limits of the existing doctrine.’<sup>49</sup> It might be argued however, that any cautions expounded in *Hester*, were set to one side by Mallon J in *Liberty Trust* in relation to the doctrine of public benefit. The purpose of the lending scheme was to alleviate financial hardship, in the hope that Christian principles would be expounded as a result of having that hardship lifted. This is certainly a laudable notion, although it was established in New Zealand, in the case of *Canterbury Development Corporation v Charities Commission*,<sup>50</sup> that purposes must be more than hopeful, in other words, the public benefit must not be too remote.

It is acknowledged that this notion of the remoteness of public benefit was not discussed in relation to the advancement of religion in the *Canterbury Development Corporation* case cited, although I would argue that the principles enunciated are analogous to the instant case, because, as *Tudor* highlights, and was mentioned earlier, the presumption of public benefit may be rebutted if the purpose is too focused on its adherents. My argument is supported by considering the fact that it is not explained in any satisfactory terms, in *Liberty Trust*, how those who benefit from the lending scheme will expound the Will of God, or specifically advance religion when the loan is granted. Further, it is not clear in fact that all loans are indeed repaid, because the Trust had only undertaken a limited survey on this point. As it stands, it appears that the private benefits available to individuals benefiting from the loan scheme outweigh the public benefit. One might say that the private benefits are far from incidental to the purpose of the Trust, which would therefore negate its charitable purpose (Chevalier-Watts 2014-2015, 191 and 2012, 413).

Nonetheless, Mallon J asserted that any private benefit afforded by the loan scheme was merely ‘part and parcel of Christian living’<sup>51</sup> thus the private benefits were incidental to the overall purpose of the Trust. It is not clear to the author however that the arguments of Mallon J are fully made out, as they were so eloquently made out with regard to the finding of the scheme as advancing religion because whilst the loanees may be unburdened by financial worries, which is a Christian recommendation as espoused by the Trust, the Trust only hopes that the loanees will service God more effectively as a result of being unburdened financially. Therefore, I am of the view that the limit to the existing doctrine that had been reached in *Hester* has been over reached in *Liberty Trust*, which may raise ‘very real issues both of doctrine, and public policy’.<sup>52</sup>

Regardless, however, of the author’s own misgivings with regard to the extension of the doctrine of advancement of religion, what this case really speaks to is the fact that whilst modern day society places challenges at the feet of charity law, which

49 *Ibid.*, [55], referring to *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 (CA) [8] and *Presbyterian Church of New Zealand Beneficiary Fund v Commissioner of Inland Revenue* [1994] 3 NZLR 363 (HC); see also Chevalier-Watts 2014-2015, 188-189.

50 *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 [67].

51 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 [121].

52 *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 (CA), [8].

is rooted in ancient principles, this case illustrates that the courts recognise that charity law is equally at home in the new millennium as it was in the 1600s, with the courts ability to respond, through analogy and interpretation, to ensure that society benefits overall from charity law. This surely then is the underlying ethos of charity—to be available and to benefit society in as flexible manner as possible to ensure the greatest benefit available. In this regard, religion as a contemporary phenomenon is equally at home in contemporary charitable times, and its benefits are being felt in novel circumstances to assist a wide range of beneficiaries. Thus religion achieves one of its many purposes—to provide succor to those in need.

Interestingly, whilst Australasia highlights that the originally archaic principles charity law are equally as appropriate today as they were in Elizabethan times, we return now to the concept of Scientology, as considered by the Charity Commission for England and Wales, which may reflect a more conservative approach to that of its Tasman cousins. This suggests, *prima facie*, that jurisprudence in England and Wales may reflect a more limited development of charity law with regard to the advancement of religion, and that the notion of religion within charity law may be limited in a contemporary context.

## 5. England and Wales and the advancement of religion

It is acknowledged that the *Decision of the Charity Commission for England and Wales of the Application for Registration as a Charity by the Church of Scientology (England and Wales)*<sup>53</sup> is not binding law, however, what this Decision graphically demonstrates is a contemporary judicial consideration of the advancement of religion. The Commissioners determined that the English legal authorities were neither clear nor unambiguous as to the definition of religion in English charity law. At best, the authorities were persuasive, with the result that ‘a positive and constructive approach’,<sup>54</sup> and one that conforms to the requirements of the European Convention on Human Rights (ECHR) principles,<sup>55</sup> to identify what is meant by ‘religion’ at charity law, could, and should be adopted.<sup>56</sup>

In order, therefore, to determine the meaning of religion in a manner that reflected the principles of the ECHR, the Commissioners thought it appropriate to refer to expert opinions and international authorities. The Commissioners, probably unsurprisingly, took account of the Australian *Scientology* case, amongst others, to assess the meaning of a belief in a supreme being. The Commissioners noted that the foreign legal authorities had adopted a broad approach to question of a supreme being, and that the expert opinions concluded that Scientology believes in a supreme being, although the place and nature of that being is not the same as the Christian

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53 *Decision of the Charity Commission for England and Wales of the Application for Registration as a Charity by the Church of Scientology (England and Wales)* 17 November 1999.

54 *Ibid.*, 19.

55 Specifically Art 9, concerning the right to freedom of thought, conscience and religion.

56 *Decision of the Charity Commission for England and Wales of the Application for Registration as a Charity by the Church of Scientology (England and Wales)* 17 November 1999, 19.

or Jewish God. Overall, the Commissioners concluded that a belief in a supreme being remained a necessary characteristic for the purposes of English charity law. However, very interestingly, they also noted:

It would not [...] be proper to specify the nature of that supreme being or to require it to be analogous to the deity or supreme being of a particular religion.<sup>57</sup>

Nonetheless, the Commissioners did not find it necessary to conclude that the requirement of a supreme being was no longer necessary to the concept of religion in charity law. In addition, they did not find it necessary to reject the notion of theism entirely, as was evidenced in Indian law,<sup>58</sup> ‘nor to dilute the concept to the extent of the Australian case’.<sup>59</sup>

At first sight, this analysis appears equally as ambiguous and unclear as the Charity Commissioners themselves noted with regard to the English authorities, and suggests that charity law, in this context in England and Wales, may not be as flexible as international authorities. However, on closer inspection, the opposite might be said to be true. Whilst the Commissioners are undoubtedly correct as to the ambiguity of religion in charity law in English jurisprudence, this did not prevent the Commissioners seeking alternative considerations. Their conclusion that a belief in a supreme being was a requirement does not necessarily stultify the law, because they did not require a specification as to the nature of that being, nor that it be analogous to a deity or supreme being of a particular religion. What this suggests therefore is that the concept of a supreme being, whilst still being required, is undoubtedly broader than would have been envisaged in historical times, where religious beliefs were strongly monotheistic-based. Although the Commissioners did not believe it was appropriate to adopt the diluted Australian concept, nor to reject the theistic Indian approach, their more subtle interpretation of the meaning of religion still embraces the shape shifting nature of charity law, where society might determine that which is appropriate for the time.

As a result of this quietly expansive interpretation of religion, the Commissioners concluded that, for the purposes of English law, Scientology did profess a belief in a supreme being. As to the requirement of the worship of the supreme being, the Commissioners, however, were not so accepting of a broader construal. The core religious services of Scientology involve auditing and training, that Scientology submitted constituted worship. The High Court in the Australian *Scientology* case drew inferences that the general group of adherents practicing auditing, and accepting the observances and practices of Scientology because they are bid to do so

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<sup>57</sup> Ibid., 21.

<sup>58</sup> Ibid., referring to *The Commissioner Hindu Religious Endowment Madras v Sri Lakshmindra Thirthra Swamiar of Sri Shirur Mutt* (1952) Indian Supreme Court [1954] SCR 1005.

<sup>59</sup> Ibid., referring to *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (*‘Scientology case’*) [1983] HCA 40.

by L R Hubbard enabled the adherents to give effect to their supernatural beliefs.<sup>60</sup>

In contrast, the Commissioners in the English *Scientology Decision* concluded that auditing and training, whether taken separately, or together, did not constitute the required veneration and reverence of a supreme being that they considered necessary to meet the requirements of worship in English charity law. As a result therefore, the Commissioners determined that Scientology was not a religion for the purposes of English charity law, and it did not advance religion. Whilst the Commissioners may have adopted a more narrow approach with regard to the notion of worship, this does not mean that charity law in England and Wales is less progressive than that of Australasia, nor indeed, that religion in charity law is any less relevant. Indeed, it should be noted that Mason ACJ and Brenna J, delivering a judgment for the High Court *Scientology* case, observed, that whilst they did draw positive inferences regarding the practicing of auditing and training, the material to support that inference was, in reality, not compelling.

Perhaps then, the more austere English approach on the concept of worship should be welcomed. Austerity does not mean that adaptability of the law is ruled out. Rather it means that the jurisprudence can evolve where it is appropriate to do so. In support of this consideration, the Commissioners noted that Scientology is a new religion, having emerged in the 1950s. This in itself does not mean that a new religion is less 'beneficial than one derived from antiquity',<sup>61</sup> but it does raise some important issues with regard to charity law. When one has to determine the principle of religion and worship in a new belief system, there is little basis upon which a legal authority can form any judgment because of the lack of analogous authorities, as might be present if the belief system was simply an off shoot of an established religion.<sup>62</sup> Therefore it was perhaps unsurprising that England adopted a more conservative approach overall in this Decision. However, whilst the overall impact was that of conservatism, it is evident from the considerations of the Commissioners that the advancement of religion is able to embrace contemporary principles without adversely extending the doctrine of the advancement of religion.

This theory is borne out if one considers the later Charity Commission decision with regard to The Druid Network.<sup>63</sup> Druidry is an ancient concept, and is thought to have been recognised in pre-Christian, and pre-Roman cultures, in the British Isles. Today, druidry has a diverse following, with some followers joining orders, whilst others prefer more solitary studies and practices (Owen 2013, 6). It has been described generally as being a native religious tradition of the British Isles that is 'an expression of reverence and the search for the wisdom of the natural world'.<sup>64</sup> The Charity Commission had to determine the charitable nature of this ancient religion,

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60 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* ('*Scientology case*') [1983] HCA 45.

61 *Decision of the Charity Commission for England and Wales of the Application for Registration as a Charity by the Church of Scientology (England and Wales)* 17 November 1999, 42.

62 *Ibid.*

63 *Decision of the Charity Commission for England and Wales of the Application for Registration as a Charity by The Druid Network* 21 September 2010.

64 *Ibid.*

and similarly to that of Scientology, there was no real comparison to be made with other acknowledged religions to assess its charitability. One might presume therefore that the Commission would be limited in this undertaking, taking in to consideration its deliberations in the Scientology application. It certainly appears that the Commission followed its previous conservative rhetoric, however, in relation to the notion of worship of, or reverence for, a supreme being or entity, where Scientology failed, The Druid Network met the criteria.

The Druid Network asserted that druidry involved a relationship with a supreme being or entity, and that did entail, inter alia, qualities of homage and devotion, and indeed, that all druid practices focus on worship, reverence and veneration of nature, its spirits and deities. Thus there was a recognisable centrality of reverence. As a result the Board of the Commission recognised that The Druid Network facilitated and encouraged worship, or similar of a supreme being or entity.<sup>65</sup> The Commission applied, inter alia, its more conservative requirements of advancement of religion to a novel situation, and was able to determine the religious nature of this entity at charity law, which then distinguished druidry from Scientology. What this speaks to then is that even the most ancient of religions may still find a footing and be relevant in modern day times, and charity law underpins that fundamental need in so many humans to express a form of religious outreach. Whilst the concepts of religion may be antediluvian, those concepts can, and do, stretch across millennia, and are given effect by charity law. Certainly, charity law has its limitations, as evidenced to a certain degree by the Scientology decision in England and Wales, but ultimately what the Charity Commission reflects in that decision is that there are some limitations within the law in some circumstances, and where criteria is met, then the law can give a religion its full effect.

## 6. Conclusion

This article began with recognising that many of the common law and statutory provisions regarding charity law take their meaning, or standing, from the social and economic contexts of their time, and questioned therefore the relevance of ancient legal concepts in modern day society, in relation to the head of advancement of religion. It was evident that whilst religion is an ancient concept, its relevance in contemporary times is underpinned by fundamental human rights, and also more obliquely within infrastructures and social culture. As a result, whilst there is no real answer as to why religion appears equally important today as it was in millennia past, the article highlights why it is unlikely that religion will lose its value, and thus charity law reflects that same recognition of the value of religion. Indeed, perhaps charity law is the obvious vehicle to represent the value of religion, as surely one of the key aspects of religion is to provide succor to those in need—the very essence of charity itself.

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<sup>65</sup> *Decision of the Charity Commission for England and Wales of the Application for Registration as a Charity by The Druid Network 21 September 2010*, [33]-[37].

In considering that issue, this article critically reviewed some key cases from across three jurisdictions—Australia, New Zealand, and England and Wales. Australasia reflected similar expansive interpretations of the meaning of the advancement of religion, even when the religious activities were so closely connected to contemporary secular activities. However, the decisions emanating from that jurisdiction, whilst certainly novel, did not appear to strain the ancient seams of charity law. Rather the courts appeared to recognise the significance of religion in contemporary society and utilised valuable analogies to ensure that charity law met the demands of modern day. As a result it was evident that the very ability of the courts to interpret religion so broadly reflects the absolute relevance of religion as a head of charity in modern times.

England and Wales jurisprudence certainly reflects a more reticent approach than that of its Tasman cousins, and the Charity Commissioners explicitly acknowledged that they would not adopt the Australian or Indian approaches, and in doing so, appeared to limit the applicability of charity law in the present day context within the *Scientology* case. However, I would argue that the Commissioners' decision is not a reflection of English and Welsh charity law failing to adapt to contemporary requirements, nor to devaluing religion within charity. Instead, it merely speaks to a differing interpretation that is a reflection instead of society in that jurisdiction. Indeed, when one considers the Commission's approach in the *The Druid Network* case, the conservative analysis of the requirement of worship that defeated the *Scientology* application ensured that the criteria was fully met in the later religious case. This suggests that whilst England and Wales may follow a more cautious path, the law is applied rigorously, and is still able to recognise the value of even one of the most ancient of religions in modern day times. Thus charity law gives effect to a wide range of religious beliefs, which is surely a reflection of a progressive culture, highlighting the importance of the head of religion within charity law.

Overall therefore, and in conclusion, whilst charity law is rooted in history, the head of advancement of religion, whilst providing many challenges for the courts, illustrates that charity law is far from being seen as the ancient relic struggling to adapt to modern day demands. Alongside fundamental human rights, and the recognition of human diversity of beliefs and faiths, what is actually apparent is the courts' willingness to recognise the appropriateness, and the benefits, of religion in a charitable context, and adapt charity law where it is relevant to do so. Thus the advancement of religion within charity law underpins the very ethos of charity—that of providing succor and support to those that desire or need it. As a result, religion, as a part of charity law, is still just as relevant today as it was when man first began his journey on a religious path in ancient times.

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