



Analysis of the law underpinning  
**Charities and Public Benefit**



## **PUBLIC BENEFIT: STATEMENT OF THE BASIS FOR THE CHARITY COMMISSION'S ROLE AND ACTIONS**

In 2006, Parliament passed new legislation for charities which, amongst other provisions, gave fresh emphasis to the requirement for all charities' aims to be, demonstrably, for the public benefit. It is in both our interests, as the regulator of charities in England and Wales, and the interests of the charities that we regulate, that our approach to public benefit maintains and, if possible, increases the public's trust and confidence in charities.

Our approach to assessing public benefit comes from the statutory objective set for us by Parliament in the Charities Act 2006, 'To promote awareness and understanding of the operation of the public benefit requirement', and our corresponding duty to produce statutory guidance to help fulfil this objective.

We believe that the statutory objective and the requirement to issue guidance, together with our responsibilities as regulator, mean that we have an obligation to set out a coherent set of principles on public benefit derived from our interpretation of the underlying case law which already exists.

We interpret this case law in the context of modern circumstances, taking into consideration the new framework for charitable status set out in the Act, the existing case law, and the fact that the presumption of public benefit for some types of charities has been removed.

We also consider the impact of the Human Rights Act, which requires fair and equal treatment of the application of the public benefit principles to different types of charity, and that any differences in treatment are necessary, proportionate and legitimate.

Our role is to bring all these elements together and, where necessary, interpret the law to deal with areas that lack clarity. Our interpretation of our new responsibilities is underpinned by our general guidance on the principles of public benefit which we published on our website at the start of 2008.

We will be transparent about the basis on which we take decisions about public benefit and proportionate in the actions we take. Where our decisions affect whether a charity remains as a charity, or indeed whether the way in which it operates is for the public benefit, the charity, or anyone affected by our decision, who disagrees with the regulatory action that we take, can challenge that action with the Charity Tribunal or the Courts where appropriate.

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This legal analysis is designed to be read in conjunction with *Charities and Public Benefit: The Charity Commission's general guidance under s.4(1) Charities Act 2006 on public benefit*.

## Introduction

1. The Commission's statutory guidance sets out the key principles of public benefit in language as clear as it can be to ensure that as many people as possible can follow and understand it. This document is intended to be a summary of the Commission's view of the law underpinning the public benefit requirement and necessarily uses more technical language. The Commission's statutory guidance is based on this legal analysis and the cases referred to in it.
2. This analysis is not intended to be a comprehensive legal digest, but a useful reference point for trustees, their advisers and the public. It reflects law and practice at January 2008. It is not binding in law and does not affect any rights to challenge decisions either through the courts, the Charity Tribunal or the Commission's internal Decision Review process. It should be borne in mind that it offers a general analysis of the law, but whether the analysis is appropriate in a particular case will depend on all the facts of that case. In deciding individual cases we will apply the law.
3. To be a charity, an organisation has to be established for a purpose recognised by the law as capable of being charitable, and for the public benefit. Previously, under charity law, purposes for the relief of poverty, the advancement of education and the advancement of religion were presumed to be for the public benefit, unless the presumption was rebutted by evidence to the contrary.<sup>1</sup> In all other cases public benefit had to be shown. Part 1 of the Charities Act 2006 removes this presumption of public benefit for poverty, education and religious purposes. Apart from this removal of the presumption the law on public benefit is unaltered by this Act.<sup>2</sup>
4. This analysis starts with a section exploring the Commission's approach to interpreting public benefit in the light of modern social conditions (Part 1). It then addresses the legal underpinning for Public Benefit Principle 1 in *Charities and Public Benefit* – There must be identifiable benefit or benefits (Part 2). Next it addresses the legal underpinning for Public Benefit Principle 2 – Benefit must be to the public, or a sufficient section of the public (Part 3).
5. The test for public benefit in the Charities Act 2006 is essentially a 'purpose' test. This does not mean, however, that a charity's activities have no relevance in assessing public benefit. Part 4 analyses the legal relevance of activities.
6. Although there are many references to cases in the legal analysis itself, this analysis includes further references by way of endnotes in Part 5.
7. The Commission will take the same approach as the courts and the Charity Tribunal in applying the law.

# Part 1 Modern social conditions

## Introduction

1.1 The courts recognise that there is a need for a flexible legal framework by which new charitable purposes for the public benefit can be recognised in the light of changing social and economic circumstances. The Commission has adopted this approach in exercising its statutory function to register charities under s.3(1) of the Charities Act 1993, as amended by Charities Act 2006.<sup>3</sup> For example the Commission has over the years recognised a number of new purposes.<sup>4</sup> This approach mirrors that of the courts in recognising charitable purposes.

## Benefit is assessed in light of modern conditions

1.2 Similarly, what is accepted and recognised as a benefit at one time may in the light of changing conditions not be accepted as a benefit in another. What is for the benefit of the public “may vary from generation to generation”.<sup>5</sup>

1.3 However, this does not provide an unfettered discretion to extend or overturn the law. The courts have indicated that determining that something that was charitable is now no longer to be recognised as charitable, is a radical decision and that only a radical change of circumstances, established by sufficient evidence, should justify this.<sup>6</sup>

1.4 The legal authorities do provide some indicators as to what factors might be taken into account in assessing modern conditions and how they may impact on what is a benefit. These indicators include where:

- “economic ideas and conditions and ideas of social service change”;<sup>7</sup>
- “the habits of society have changed, and not only men’s ideas have changed, but men’s practices have changed, and in consequence of the change of ideas there has been a change of legislation; laws have become obsolete or have been absolutely repealed, and habits have become obsolete and have fallen into disuse, which were prevalent at the times when these wills were made”;<sup>8</sup>

- “by a change in the law, the purposes of an established charity may become superfluous or even illegal”;<sup>9</sup> and
- “with increasing knowledge it appears that a purpose once thought beneficial is truly detrimental to the community”.<sup>10</sup>

1.5 By analogy with the case law that recognises the impact of modern social conditions on what is a benefit, it would seem to us that what is a sufficient section of the public, or what are reasonable restrictions on a class related to purpose, may also vary from generation to generation.

1.6 For instance, in European law the principle of equal treatment between men and women means that there should be no discrimination based on gender. The provision of services exclusively or primarily to one gender is not prohibited if it is “justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”.<sup>11</sup> Although there is a specific exemption for charities, a restriction of the beneficial class to one gender might not be for the public benefit unless it is linked to the charity’s aim, and is necessary and appropriate.

## Public opinion

1.7 The courts have explained that the legal meaning of charity does not necessarily correspond with the popular meaning of charity. In a Canadian case in 1988, **Everywoman’s Health Centre Society (1988) v Minister of National Revenue**,<sup>12</sup> the court said that:

*“to define charity through public consensus would be a most imprudent thing to do. Charity and public opinion do not always go hand in hand ... Courts are not well equipped to assess public consensus, which is a fragile and volatile concept. The determination of the charitable character of an activity should not become a battle between pollsters.”*

1.8 It explained that the courts are asked to decide whether there is an advantage for the public, not whether the public agrees that there is such an advantage.

- 1.9 However, when the courts reach decisions generally on what is of benefit to the public, they will have proper regard to public opinion in so far as is appropriate. Public opinion might be relevant, for example, when considering whether there is an intangible benefit, such as the general appreciation of a beautiful landscape or building. In these cases the courts can and will take into account any general consensus of objective and informed opinion, although that opinion alone would not necessarily decide the matter.
- 1.10 In addition, the courts develop charity law to keep the law's view of what is charitable reasonably in line with modern social needs and conditions. In this way, charity law continues to change and those changes are influenced by social values. Court decisions reflect ordinary life, taking into account generally accepted views on the nature and usefulness of what an organisation aims to achieve and its benefit to the public. So, whilst public opinion cannot decide what is or is not charitable, it is an important factor to be taken into account in helping us to understand what modern social conditions are, and which in turn can enable us to shape the legal understanding of what is charitable in a way that is relevant for modern society.

## Part 2 Public Benefit - Principle 1: There must be an identifiable benefit or benefits

### Introduction – what is a benefit?

- 2.1 A benefit must be beneficial in a way that the law recognises, must be identifiable, and where necessary be demonstrated as fact.
- 2.2 A benefit is something which produces ‘demonstrable impact on the community’ or a sufficient section of the community<sup>13</sup> and it is something that is beneficial in a way that the law regards as charitable.<sup>14</sup> Whether or not there is a benefit is a question of fact and must be answered by the courts in the same manner as other questions of fact, by means of evidence cognisable by the courts.<sup>15</sup>

### Principle 1a – It must be clear what the benefits are

#### ▪ SECTION E2 OF CHARITIES AND PUBLIC BENEFIT

- 2.3 It is well established that the courts have recognised on numerous occasions that whether there is a benefit:
- “is a question to be answered by the court on forming an opinion upon the evidence before it”.*<sup>16</sup>

### The benefit must be capable of proof, by evidence where necessary

- 2.4 The benefit must be capable of proof, through factual and positive evidence where necessary. Expressions of opinions and beliefs are not enough.<sup>17</sup> Factual evidence produced must be sufficient so that the courts are capable of evaluating it. The courts must evaluate it even though there may be a wide divergence of opinion which exists as to the expediency or utility of what is generally accepted as beneficial.<sup>18</sup>
- 2.5 For example, in the context of educational and arts purposes, unless it is obvious,<sup>19</sup> the courts must receive evidence to support or negate the presence of educational value and public benefit.<sup>20</sup> The courts have recognised that in some circumstances that may not be easy, especially in the art and aesthetics fields where there are great differences in taste and fashion and where educated taste is a complex process which differs between individuals.

- 2.6 If the benefit is not capable of proof, the benefit cannot be recognised. For instance, the courts have held that they cannot assess the benefit of a change to the law or government policy,<sup>21</sup> and that the value of intercessory prayers of a religious order is “manifestly not susceptible of proof”.<sup>22</sup> In both cases, as the courts could only act on proof, these benefits could not be recognised as a benefit and the purposes of the organisations could not be accepted as charitable.

- 2.7 In some cases the benefit may be obvious and it would not then be necessary to call for proof, as was the case in **Incorporated Council of Law Reporting for England and Wales v AG**:-

*“There are some matters which require no proof. ... It cannot be doubted that dissemination by publication of accurate copies of statutory enactments is beneficial to the community as a whole: and this is not the less so because at least in many instances the ordinary member of the public either does not attempt to, or cannot by study, arrive at a true consideration of their import.”*<sup>23</sup>

- 2.8 In other cases, the lack of benefit may be supported by expert evidence such as in a case where evidence was given that a collection of proposed exhibits “was worthless as a means of education, and no useful purpose could be served by foisting on the public a ‘mass of junk’”<sup>24</sup> and the court concluded there was no public benefit in the collection.
- 2.9 Where it is something which is too vague, indescribable or uncertain, or incapable of proof, such as the promotion of a new alphabet<sup>25</sup> then this cannot be recognised as a benefit.<sup>26</sup> Another example is the proposed benefit to the public from the example set by the members of a religious order by devoting their lives to prayer. The court commented that it would be rash to define precisely or exhaustively what the content of a benefit must be but it did consider that it did not include something “so indirect, remote, imponderable or ... controversial” as that which could be derived by others from the example of pious lives.<sup>27</sup>

- 2.10 If there is simply no benefit or the benefit cannot materialise in the particular circumstances, the purpose cannot be accepted as providing benefit. It is the role of the courts to determine in each case whether the benefit to the public necessarily results from the way in which the purpose is being carried out.<sup>28</sup> *“An assumed prospect or possibility of gain which is vague, intangible or remote could not justly be treated”*<sup>29</sup> by the courts as establishing that the purpose is actually of benefit.
- 2.11 Where particular purposes are against the law then they will not be capable of being regarded as beneficial.<sup>30</sup> Purposes which are contrary to public policy equally cannot be regarded as beneficial.
- 2.12 The law is sufficiently flexible to enable different types of benefits which show themselves in different ways to be recognised. The law applies different measures for different types of purposes and so what a benefit looks like for one purpose may be very different from how a benefit shows itself in another.<sup>31</sup> The courts have to look at and assess the evidence which is before them on the issue of whether or not there is a benefit. The courts cannot stand neutral and not decide on the question of whether or not a purpose is for the public benefit.<sup>32</sup>
- 2.13 However, there are some circumstances where the courts are not in a position to be able to determine whether something is or is not for the public benefit. The most obvious of these will be the benefits of changing the law or government policy.<sup>33</sup> However, the courts have on occasion applied this approach to other areas.<sup>34</sup> The courts reached this view on two grounds. First that the courts have no means of judging whether a proposed change in the law will or will not be for the public benefit. Second to make such an assessment is the role of Parliament and not of the courts.<sup>35</sup> Where the element of public benefit is so debatable that the courts regard it as being incapable of proof one way or the other, the courts would inevitably decline to recognise the particular organisation as charitable.<sup>36</sup>

### The intention of the donors and the promoters

- 2.14 The intention of the donors or the promoters in establishing public benefit is not enough to determine that question. Otherwise, the courts suggested that there would be lots of fanciful purposes which were established as charitable.<sup>37</sup>

### Not everything which is of benefit to the public will be regarded as charitable

- 2.15 The courts have concluded that not every purpose which can be said to be of benefit to the public will be regarded as charitable. This is because the meaning of charity has a particular legal significance which is narrower than the ordinary, popular meaning of charity.<sup>38</sup> What is important is that the benefit is something that is beneficial in a way that the law regards as charitable.<sup>39</sup>

### The nature of the public benefit may take different forms

- 2.16 The nature of the benefit can take a number of forms; it can be an intangible or tangible benefit, direct or indirect.<sup>40</sup> For example, the courts have indicated that the tendency for purposes that previously fell under the former fourth head (benefit to the community), is towards tangible and objective benefits. Further, at least *“approval by the common understanding of enlightened opinion for the time being is necessary before an intangible benefit could be taken to justify and constitute a sufficient benefit to the community to justify admission of the object into the fourth head”*.<sup>41</sup>

### Principle 1b – The benefits must be related to the aims

#### ■ SECTION E3 OF CHARITIES AND PUBLIC BENEFIT

#### The statutory framework

- 2.17 S.2(1) of the Charities Act 2006 defines a charitable purpose as a purpose which:
- falls within the descriptions of purposes in s.2(2), and
  - is for the public benefit.
- 2.18 Thus the public benefit is to be derived from the purpose of the individual organisation.
- 2.19 S.3(2) provides that the public benefit requirement is to be satisfied in relation to *“any such purpose”*. From this it follows that in assessing public benefit what is to be considered is the public benefit that is related to each of an organisation’s purposes.

- 2.20 There is authority both in case law and now also, since the introduction of the Charities Act 2006, in statute, that the benefit must be related to purposes and that the remoter benefits of having a charitable purpose are not enough. It is sometimes argued that a general benefit arises from the inclusion by Parliament of a purpose within the descriptions of purposes in s.2 Charities Act 2006 and that this is sufficient. This is clearly not the case. There is a separate requirement that the purpose falling within the list is also for the public benefit.<sup>42</sup> The inclusion of a purpose within the list of the descriptions merely indicates that purposes falling within the classification have the potential of being for the public benefit.
- 2.21 There is also authority in the common law that broad, general benefits to the public at large which are not related to the particular purposes of any charity will not count as they are too remote. In **Oppenheim v Tobacco Securities Trust Co Ltd** the fact that society generally may benefit from a well educated person did not save what was otherwise an insufficient section of the public.<sup>43</sup>

### Exclusively charitable – a charity cannot have a purpose that is not for the public benefit

- 2.22 A charity must have only charitable purposes.<sup>44</sup> The requirement in law *“for a valid charitable trust is that each and every object or purpose designated must be of a charitable nature”*. Even if an organisation has a number of charitable purposes, if it has one non-charitable purpose, it cannot be a charity. In consequence, public benefit needs to be demonstrated in relation to each of an organisation’s purposes.<sup>45</sup> Following on from this principle, assessing public benefit is not an exercise whereby the public benefit that is related to one purpose can impact on the public benefit assessment in relation to another purpose and in particular a large amount of public benefit in relation to one aim cannot make up for deficit in public benefit in relation to another.
- 2.23 The purposes in question are the principal or main purposes of the organisation rather than the means or consequences of carrying out these principal purposes.<sup>46</sup>

### The role of the courts is to look at whether the benefit to the public results from the way the purpose is carried out

- 2.24 This has been considered by the courts in many cases and these are some examples:
- 2.25 In **Incorporated Law Reporting for England & Wales v AG**<sup>47</sup> Sachs LJ in considering whether the courts could look at extrinsic evidence to construe a memorandum commented *“it is yet plain from the course adopted by the courts in many cases that they are entitled to and do look at the circumstances in which the institution came into existence and at the sphere in which it operates to enable a conclusion to be reached on whether its purposes are charitable”*. Slade J in **McGovern v AG**<sup>48</sup> commented *“The question whether a purpose will or may operate for the public benefit is to be answered by the court forming an opinion on the evidence before it”*.
- 2.26 Lord Wright commenting on the decision in **In Re Grove-Grady** said,  
*“The principle of the decision was that there could not be a legal charitable trust unless its execution involved a benefit to the community”*.<sup>49</sup>
- 2.27 Lord Normand endorsed the *“principle that a trust purpose must be directed to the benefit of the community”*<sup>50</sup> that had been articulated in Tudor on Charities<sup>51</sup> which Lord Greene MR had approved in **In Re Compton**.
- 2.28 In **Re Pinion**,<sup>52</sup> the courts took note of expert evidence as to quality and artistic or aesthetic merit of the proposed exhibits in assessing public benefit.

### The benefit from accidental and unplanned activities will not count towards the assessment of benefit

- 2.29 Lord Normand in **Oppenheim v Tobacco Securities** considered the situation where in order to counteract the fact that the beneficial class an organisation was intended to benefit was not a sufficient section of the public, claims of various wider benefits were being made. He stated:

*“If there is no public element to be found in the bare nexus of common employment all attempts to build up the public element out of circumstances which have no necessary relation to it but are adventitious, accidental and variable must be unavailing when the trustor has chosen to define the selected class solely by the attribute of common employment.”<sup>53</sup>*

### **The benefit from incidental or other activities not related to the charity’s purpose will not count**

2.30 It follows that any incidental activity carried out by a charity however beneficial, which is not directly or indirectly related or connected with furthering its expressed purposes, equally cannot count towards meeting the public benefit requirement to be a charity.<sup>54</sup>

### **Principle 1c – Benefits must be balanced against any detriment or harm**

#### ▪ SECTION E4 OF CHARITIES AND PUBLIC BENEFIT

2.31 An overall or net benefit must be shown. This means that the courts must weigh up the detriments on the one hand and the benefits that are provided in the other. Where the detriments are so significant, such as physical harm, then they are more likely not to result in an overall benefit to the public. This balancing exercise takes place even though the types of benefits and detriment may be of a very different nature and quality. For example in the case of **National Anti-Vivisection Society v IRC**,<sup>55</sup> the court concluded that the value of the material benefits of vivisection outweighed the moral benefits of anti-vivisection. The court considered that the position must be judged as a whole and:

*“the whole complex of resulting circumstances of whatever kind must be foreseen or imagined in order to estimate whether the change advocated would or would not be beneficial to the community.”<sup>56</sup>*

## Part 3 Public Benefit - Principle 2: Benefit must be to the public, or a section of the public

### Introduction

- 3.1 Every charity must provide a benefit which is available to either the public as a whole, or a sufficient section of the public.<sup>57</sup> In every charity, the elements of public benefit must be present, but it is not the case that the measure or standard is uniform across the entire range of charitable purposes. What is a sufficient section of the public may depend on the particular charitable purpose being pursued. The courts have looked at what a sufficient section of the public is on a number of occasions. This analysis looks at four key areas: the beneficiaries must be appropriate to the purposes; where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted; people in poverty must not be excluded from the opportunity to benefit; and any private benefits must be incidental.
- 3.2 The cases that address these areas do so in a way that overlap. To avoid unnecessary repetition and confusion, the legal underpinning for Principles F2 and F3 of *Charities and Public Benefit* has been explained together. It is also for this reason that there are no specific references to sections F4 –F9 of *Charities and Public Benefit*, which flow from the principles in F2 and F3 and the case law underpinning them. We have given a relatively more detailed treatment of **Re Resch** as the impact of the case was the subject of much comment in the consultation.

### Principles 2a and 2b – The beneficiaries must be appropriate to the aims and Where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted

- SECTION F2 OF CHARITIES AND PUBLIC BENEFIT
- SECTION F3 OF CHARITIES AND PUBLIC BENEFIT

- 3.3 If the beneficiaries are the public at large, this is self-evidently a sufficient class to support any purpose.
- 3.4 If the beneficiaries are not the public at large, to be a charity a trust must be for the benefit of the community or of an “appreciably important class of the community”.<sup>58</sup>

- 3.5 In considering what an appreciably important class of the community might be, case law indicates that there is a link between what is a sufficient section of the community and the nature of the charitable purpose. The nature and extent of public benefit that must be shown in a particular case depends on the purpose being promoted and, within a particular purpose, may vary.<sup>59</sup>

- 3.6 In **Dingle v Turner**, Lord Cross commented:

*“In truth the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot itself be said to be decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust. It may well be that, on the one hand, a trust to promote some purpose, prima facie charitable will constitute a charity even though the potential beneficiaries might fairly be called a private class and that, on the other hand, a trust to promote another purpose, also prima facie charitable, will not constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public.”<sup>60</sup>*

- 3.7 In **Gilmour v Coats**<sup>61</sup> Lord Simonds indicated how public benefit was relevant to all charities but varied according to the purpose:

*“It would not, therefore, be surprising to find that, while in every category of legal charity some element of public benefit must be present, the court had not adopted the same measure in regard to different categories, but had accepted one standard in regard to those gifts which are alleged to be for the advancement of education and another for those which are alleged to be for the advancement of religion, and it may be yet another in regard to the relief of poverty.”*

- 3.8 In **IRC v Baddeley**<sup>62</sup> Lord Somervell of Harrow stated:

*“The cases do indicate that the words ‘beneficial to the community’ may be satisfied by the purpose being beneficial to a sufficient section of the community, albeit that what constitutes a sufficient section of the community depends on the nature of the purpose.”*

3.9 The principles above will therefore apply differently in different circumstances depending on the charitable purposes, the law which applies to that purpose, the particular circumstances of the organisation and modern social and economic conditions in which the organisation operates.<sup>63</sup> The Commission has applied this approach both in recognising new purposes<sup>64</sup> and in cases it has considered.<sup>65</sup>

### Rational link, correlation or nexus between purpose and public benefit

3.10 Case law recognises that where the link between purpose and beneficial class is irrational, the restrictions on the beneficial class will not be acceptable. For instance, in **IRC v Baddeley**,<sup>66</sup> Viscount Simonds referred to the concept of “*a bridge to be crossed only by impecunious Methodists*”,<sup>67</sup> to show the danger of conceding the quality of charity to a purpose which is not a public purpose. However, where the purpose and the class of the public have a more rational connection than in this example, a restricted beneficial class may be acceptable.

3.11 The decision of the House of Lords in **IRC v Baddeley** has been understood to demonstrate that a class within a class cannot be a sufficient section of the public. It would appear, however, that the concept of a bridge for impecunious Methodists is not acceptable not because it is a class within a class but because there is no rational link, correlation or nexus, between the purpose and the restriction on the beneficial class.

3.12 It is significant that in **IRC v Baddeley** only two of the five law lords, Lord Simonds and Lord Somervell, specifically considered that a class within a class would not be a sufficient section of the public. Two of the law lords, Lord Porter and Lord Tucker, specifically declined to express an opinion on this issue. Lord Reid considered that a class of the community defined otherwise than by reference to all the inhabitants of a particular area could be charitable depending on the nature of the class.

3.13 The comments of Lord Somervell point to the interdependence of the purpose and what is a sufficient section of the public:

*“I cannot accept the principle ... that a section of the public sufficient to support a valid trust in one category must as a matter of law be sufficient to support a trust in any other category. I think that difficulties are apt to arise if one seeks to consider the class apart from the particular nature of the charitable purpose. They are in my opinion interdependent”.*<sup>68</sup>

3.14 The approach of Lord Cross in **Dingle v Turner**,<sup>69</sup> echoing the comments of Lord Somervell in **IRC v Baddeley** and those of Lord Simonds in **Gilmour v Coats** represents a proper basis for considering public benefit and what constitutes a sufficient section of the public.

3.15 Referring to a “*class within a class*” not being a sufficient section of the public is unhelpful, has not been generally endorsed by the judiciary, has been applied selectively, and is not considered a good basis for analysis in this area.

3.16 Statute law has also recognised that a class can be sufficient where it is defined by a rational link. The Recreational Charities Act 1958 provides that a class made up of those people in need of recreational facilities by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances is sufficient.<sup>70</sup>

### Some purposes require a beneficial class of the whole community (ie the public generally), or all the inhabitants of a particular area (eg public amenities such as libraries, museums, public water supply and sanitation provision, etc).

3.17 Benefit must be to a sufficient section of the public. Once it is established who is intended to benefit, the issue becomes whether those people benefit and whether they are a sufficient section of the public.

3.18 In **Jones v Williams**<sup>71</sup> the Lord Chancellor defined charity in the following words:

*“Definition of charity; a gift to a general public use, which extends to the poor as well as to the rich: many instances in the statute 43 Eliz. carrying this idea, as for building bridges, & c. The supplying of water is necessary as well as convenient for the poor and the rich.”*

- 3.19 In **Morice v Bishop of Durham**,<sup>72</sup> Sir Samuel Romilly (Mr Romilly as he then was) in presenting the case, characterised the former fourth head as *"the advancement of objects of general public utility"*. This has been quoted in a number of cases such as **Re Macduff**.<sup>73</sup>
- 3.20 In **Commissioners for Special Purposes of Income Tax v Pemsel**,<sup>74</sup> Lord Macnaghten described the former fourth head as:
- "trusts for other purposes beneficial to the community, not falling under any of the preceding heads."*
- 3.21 In **IRC v Baddeley**,<sup>75</sup> Viscount Simonds referred to Lord Greene MR's statement in **Re Strakosch**<sup>76</sup> that former fourth head purposes are *"represented in the preamble [to the statute of Elizabeth] by the repair of bridges etc and possibly by the maintenance of houses of correction"*, and went on to discuss the argument that consequently the class of beneficiaries for fourth head purposes must be for the benefit of the whole community, or at least of all the inhabitants of a sufficient area.<sup>77</sup>

### For other purposes a class smaller than the public at large may be appropriate

- 3.22 Case law establishes that it is possible for an organisation to be for the benefit of a more restricted section of the public and still be a charity.
- 3.23 Lord Reid, in his judgment (*dissenting*) in **IRC v Baddeley**,<sup>78</sup> found the distinction between Lord Macnaghten's words in **Pemsel** and Sir Samuel Romilly's in **Morice** particularly significant:
- "...it is said that Lord Macnaghten took his classification from the argument of Mr Romilly in Morice v Bishop of Durham<sup>79</sup>... But Lord Macnaghten did not merely copy the words of Mr Romilly ... he omitted the word 'general' in the description of the fourth class. I cannot believe that this was due to inadvertence. It seems to me much more likely that he was not satisfied that it should be included."*
- 3.24 The suggestion here is that while 'general' benefit suggests the whole of the community, benefit of the community without use of the word 'general' more easily accommodates a less inclusive class as a sufficient section of the community for former

fourth head purposes. A charitable purpose of general public utility would certainly meet the public benefit requirement. This will apply in the cases, for example, of purposes for museums, bridges, and public water supply or lighting. In other cases, such as libraries or cemeteries, the circumstances could be such that the charitable intent is one of general public utility, or it may be that a more restricted section of the public is permissible. For instance a library may be focused on a class with particular needs such as people with restricted sight, or a cemetery may be provided for people of a particular faith. The following principles set out the basis on which a more restricted section of the public can, in certain cases, be a sufficient section of the public to meet the public benefit requirement.

- 3.25 Statute law has also recognised that a class smaller than the public at large can be sufficient. The Recreational Charities Act 1958 recognised that a class made up of those people who have a need of recreational facilities by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances is sufficient.<sup>80</sup> The Commission recognised that an ethnic minority group might be a class defined by their social and economic circumstances for this purpose provided that the group in question is in special need of the recreational facilities provided by the organisation because of the group's social and economic circumstances.<sup>81</sup>

### It is sufficient if the benefits of the charity are open to the public generally, even if, by their nature, they are only of value to those members of the public who need them (eg a trust for relief of a rare disease)

- 3.26 Lord Somervell took the view in **Baddeley** that a former fourth head purpose would *"normally be for the public or all members of the public who needed the help or facilities which the trust was to provide"*.
- 3.27 This could be considered the basis on which charities for the relief of any special need or disadvantage are for the benefit of the public. However, it is considered that the following principle is in practice frequently more useful.

**A more limited beneficial class than the public as a whole is acceptable where it is of a public character, and there is a public benefit in providing the charitable benefits to that group**

3.28 In **Verge v Somerville**<sup>82</sup> Lord Wrenbury considered the meaning of 'benefit of the community':

*"To ascertain whether a gift constitute a valid charitable trust so as to escape being void on the ground of perpetuity, a first inquiry must be whether it is public – whether it is for the benefit of the community or an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot."*

3.29 In **Hall v Derby Urban Sanitary Authority**,<sup>83</sup> Manisty J stated:

*"On the one hand it is said that whether the charity is 'public' depends on whether it is universal, and that if the objects are confined to a particular class the charity is deprived of its public character. I cannot accept that argument. If that were so, what would become of charities unquestionably public, as the many institutions for the deaf, dumb, and blind?"*

3.30 In the case of religion in **Gilmour v Coats**, Lord Simonds stated:

*"... if it can be imagined that it was made a condition of a gift for the advancement of education that its beneficiaries should lead a cloistered life and communicate to no one, and leave no record of, the fruits of their study, I do not think that the charitable character of the gift could be sustained."*

3.31 Here the fact that there is no impact on the wider community by the limited beneficial class is considered fatal to the issue of public benefit. Accordingly, part of the consideration of public character is the extent to which the charity is beneficial to the wider community.

3.32 The nature of advancing religion may be such that the appropriate beneficial class is the public at large, albeit that this benefit may be delivered via the practice and worship of the adherents of a particular religion.<sup>84</sup>

3.33 The courts considered whether a sufficient section of the public was present in several cases, including **Re Compton**,<sup>85</sup> **Oppenheim v Tobacco Securities Trust Co Ltd**<sup>86</sup> and **Dingle v Turner**.<sup>87</sup>

3.34 For a long time the question of whether any particular group was either public in character or no more than a collection of private individuals was considered to be one of degree. It was determined after a general survey of the circumstances and other considerations regarded as relevant.

3.35 Then the courts, in the case of **Re Compton**,<sup>88</sup> considered and formulated a more precise test focusing on the connecting link (or the common quality) which unites the people intended to benefit. The trust, to provide scholarships to educate the relatives of three named people, was held not to be charitable.

3.36 The test asks whether that connecting link is essentially impersonal or essentially personal. If the connecting link is impersonal, the class or group may be a section of the public. But, if the connecting link is a personal one, the trust will be private and not charitable.<sup>89</sup> Family ties or a common employer have been held to be essentially personal connections.

3.37 Lord Simonds expressed these legal principles in the House of Lords' decision in **Oppenheim v Tobacco Securities Trust Co Ltd**,<sup>90</sup> which considered a trust to educate the children of employees and former employees of a tobacco company. He concluded that the words 'section of the public' have no special sanctity. They indicate that:

- *"the possible ... beneficiaries must not be numerically negligible";* and
- *"the quality which distinguishes them from other members of the community ... must be a quality which does not depend on their relationship to a particular individual".*

3.38 It is for this reason that a trust for the education of members of a family or families or the employees of a company cannot be regarded as charitable. A group of persons may be numerous, but, if the connection between them is their personal relationship to a given person or persons, they are neither the public nor a section of the public for charitable purposes.

- 3.39 The following are cases where the courts considered that there was a sufficient section of the community. In **Verge v Somerville**<sup>91</sup> the court considered a trust to benefit men from New South Wales who served in the war and were returned or to be returned to their native land. The Privy Council had no difficulty in deciding that this was a charitable trust and did not consider that, to do so, they had to find that need of assistance was a qualification for benefit, or that the gift assisted the needy (although they did so find). In **Mitford v Reynolds**<sup>92</sup> a trust for the benefit of the indigenous inhabitants of a town in India was held to be charitable. It may be that a more limited class may be appropriate for a purpose that is akin to that of relief of poverty, such as the relief of returning soldiers, or the victims of a disaster, or of old age or sickness (where there is no necessary element of living in poverty).<sup>93</sup>
- 3.40 Another example in the area of education is **Koepler's Will Trusts**,<sup>94</sup> where it was not the narrow class of people who attended the seminars who benefited but the public at large as they were highly influential people.
- "As to the element of public benefit, the participants in the courses appear to have been selected from widely drawn categories, as persons likely to influence opinion in their own country. Like the judge, I find little difficulty in inferring that not only they themselves are likely to benefit from the courses, but are likely to pass on such benefits to others".*<sup>95</sup>
- 3.41 Further, despite the education for a particular family not being charitable (**Re Compton**), trusts which give preference for the education of founder's kin have been held as charitable (See **Spencer v All Souls College**<sup>96</sup> and **Re Christ's Hospital**<sup>97</sup>).
- 3.42 In addition, it is possible for preference to be given to relations or other groups of people if the beneficiaries are not confined to that group. See **Re Koettgen's Will Trusts**,<sup>98</sup> **Caffoor v Commissioner of Income Tax**,<sup>99</sup> **IRC v Educational Grants Association**<sup>100</sup> and **Re Martin**.<sup>101</sup>
- 3.43 The **Compton** test has been the subject of some criticism<sup>102</sup> not least in more recent opinions expressed in the House of Lords in **Dingle v Turner**.<sup>103</sup>
- 3.44 Critics of the **Compton** test point out that categorising people is rarely as easy as a division between 'personal' and 'impersonal'. Many inconsistencies can result from an arbitrary or artificial application of the test. Anomalies arise and give rise to confusion and doubt. But the test does have its merits. Both the Nathan<sup>104</sup> and Goodman.<sup>105</sup> Reports thought that the rule should be retained because otherwise a precedent would be set ultimately over-enlarging the scope of charity, undermining it and increasing doubts and uncertainties<sup>106</sup> and because trusts such as those set up by employers for employees are not altruistic.<sup>107</sup> The practical benefit of the test is charitable status and its benefits can be denied to organisations which are, for example, no more than private family trusts or a means whereby fringe benefits (eg school fee payments for children of employees) are conferred by employers (or landlords).
- 3.45 The Commission's approach is that it should be both cautious and flexible in the application of the Compton test.
- 3.46 It would appear that a class whose distinguishing feature is an impersonal quality may be a sufficient section of the public even though its constituent members also happen to share some personal characteristic (eg being tenants or related to tenants of a single landlord).<sup>108</sup> This means that:
- on this view<sup>109</sup> there may be a sufficient section of the public in a case where (even though all potential beneficiaries might actually be connected by kin or contract):
    - on a general survey of the circumstances and considerations regarded as relevant<sup>110</sup> it is clear that a public class is suggested; and
    - that class can be (and, as a rule, is in fact) described otherwise than by reference to kin or contractual relationship;<sup>111</sup>
  - if it is difficult to describe a class using objective and impersonal terms, that would suggest that the body concerned is established for private rather than public benefit; and

- in those cases where the conclusion is that private benefits are intended for a group of individuals who are not together fairly describable as a section of the public or a section of the public, the Compton rule applies to deny the benefits of charitable status.

3.47 The Commission considers that the approach, outlined in the paragraphs above, addresses undoubted anomalies, such as those outlined by Lord Simonds in the following extract from his speech in the **Oppenheim** case:

*"... Admittedly those who follow a profession or calling – clergymen, lawyers, colliers, tobacco-workers and so on – are a section of the public, and how strange then it would be if, as in the case of railwaymen, those who follow a particular calling are all employed by one employer. Would a trust for the education of railwaymen be charitable, but a trust for the education of men employed on the railways by the Transport Board not be charitable? And what of service of the Crown, whether in the civil service or the armed forces? Is there a difference between soldiers and soldiers of the King?"<sup>112</sup>*

3.48 This also provides the basis of a justification for the different treatment in charity law of bodies serving the same section of people, where on the one hand the group is described by reference to common employment, and on the other the same section of people is described by reference to some more public quality (such as profession or place of residence). It may be that different treatment (and indeed, the **Compton** decision upon which it is based) would be amenable to challenge under the Human Rights Act 1998 if it leads to an outcome which is not justifiable relationally in the public interest in terms of charity law.

### A very small class may be sufficient depending on the nature of the purpose<sup>113</sup>

3.49 The rationale for this is derived from the very nature of the purpose to relieve (which is now also to prevent) poverty and the nature of the relief sought which has led the courts to accept that even a very narrowly defined class is sufficient for public benefit.<sup>114</sup> It may be that a very narrowly defined class, although perhaps not as narrow as one having a personal family connection, would be sufficient for other purposes which may include the relief of the needs of the aged, or people with a disability or the prevention of social exclusion.

3.50 The question whether or not the potential beneficiaries can fairly be said together to constitute a section of the public is a question to be answered on the facts of each case. A conclusion should be reached after a general survey of all the circumstances. There are limited circumstances in which a large group may not be a sufficient section of the public. For instance a large group where the beneficiaries are determined only by reference to a personal relationship, family connections or contract with an individual(s) or company(ies), or where the qualities used to define the group are irrational and unrelated to the organisation's purpose. Some groups are such that people will naturally describe them as sections of the public rather than as private groups. Other classes are more naturally describable as private groups than as sections of the public.

### Arbitrary links

3.51 It is not acceptable to limit arbitrarily a beneficial class by reference to criteria which are unrelated to its charitable purpose (except possibly in the case of relief of poverty due to the anomalous nature of the previous case law). A class defined by an arbitrary factor, for example hair colour, is not likely to be a sufficient section of the community.

3.52 Consideration has been given to issues such as organisations wishing to limit the benefits it provides to a particular gender, race or ethnic origin. Such limitations are only likely to be acceptable where the charitable purpose is addressing a particular charitable need of the group in question, or is pursuing a legitimate aim for the benefit of the whole community.

### Principle 2b continued – Where the benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted:

Restrictions based on ability to pay any fees charged

▪ SECTION F10 OF CHARITIES AND PUBLIC BENEFIT

### Charities charging for services

3.53 It is well established that the fact that a charity charges for its services does not prevent it from being regarded as charitable - **Scottish Burial Reform and Cremation Society Limited v Glasgow Corporation**,<sup>115</sup> **Incorporated Council of Law Reporting for England and Wales**<sup>116</sup> and

**Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney General.**<sup>117</sup> In the **Rowntree** case, Peter Gibson J. referred to Lord Wilberforce's judgment in **Re Resch**,<sup>118</sup> a Privy Council case, where the courts specifically considered the impact of charging on the public benefit requirement.

3.54 **Re Resch**, concerned a gift to a private (or independent) hospital which charged fees. The hospital had an association with a public general hospital. Although the private hospital did not have a constitution or rules of its own, the court concluded that its purposes were essentially for a certain type of medical and nursing care and treatment for which there was a need and which the public general hospital, which was located next to it, did not give.

3.55 The case examined the argument that a hospital set up to provide "facilities for the well-to-do" and which excluded the poor from participating could not meet the public benefit requirement. Although the hospital in this case did not expressly exclude any particular person or group of people, in practice, many people could not afford to pay the fees it charged. The fees charged were referred to as "substantial", although at approximately cost price. The argument put to the court was therefore that poor people were excluded as a practical consequence of the way in which the hospital was conducted. The inference was benefits were intended to be, and in reality were, only provided to those in relatively affluent circumstances who could afford the fees.

3.56 The court confirmed<sup>119</sup> the principle that charges could be raised by a charity for the services it provides, even if the charges produce a profit. The judgment also gives some indication as to how public benefit may be assessed in any particular case.

3.57 Lord Wilberforce,<sup>120</sup> confirmed that expensive services and facilities could be charitable but that limiting services to the rich, excluding those who could not afford the fees, could not be charitable:

*"The test is essentially one of public benefit, and indirect as well as direct benefit enters into the account. In the present case, the element of public benefit is strongly present. It is not disputed that a need exists to provide accommodation and medical treatment in conditions of greater privacy and relaxation than would be possible in a general hospital and as a supplement to the facilities of a*

*general hospital. This is what the private hospital does and it does so at, approximately, cost price. The service is needed by all, not only by the well-to-do. So far as its nature permits it is open to all: the charges are not low, but the evidence shows that it cannot be said that the poor are excluded: such exclusion as there is, is of some of the poor - namely, those who have (a) not contributed sufficiently to a medical benefit scheme or (b) need to stay longer in the hospital than their benefit will cover or (c) cannot get a reduction of or exemption from the charges. The general benefit to the community of such facilities results from the relief to the beds and medical staff of the general hospital, the availability of a particular type of nursing and treatment which supplements that provided by the general hospital and the benefit to the standard of medical care in the general hospital which arises from the juxtaposition of the two institutions."*

3.58 In **Re Resch** the court concluded that it was only 'some' of the poor that were excluded from the service for which a charge was made in the case of that hospital, namely those who had (a) not contributed sufficiently to a medical benefit scheme or (b) needed to stay longer in the hospital than their benefit would cover or (c) could not get a reduction of, or exemption from, the charges. Further, the court heard that poor patients had been treated free of charge or at reduced rates. Although not explicitly analysed in the case, as the benefits in **Re Resch** were considered in totality, the access to those not able to afford the fees was clearly more than minimal or nominal access or access that occurred merely by chance. It was therefore clear that there were sufficient benefits to poorer people who could not afford the fees in this case.

3.59 The principles which appear to emerge from this case are:

- the fact that the charitable facilities or services will be charged for, and will be provided mainly to people who can afford to pay the charges, does not necessarily mean that the organisation is not set up for, and does not operate for, the benefit of the public; however
- an organisation which wholly excluded poor people from any benefits, direct or indirect, would not be set up, and operate, for the benefit of the public and therefore would not be a charity;

- both direct and indirect benefits to the public, or a sufficient section of the public, may be taken into account in deciding whether an organisation is set up, and operates, for the benefit of the public.
- 3.60 The second principle in paragraph 3.59 above is also supported by statements in previous cases where the courts have said that although the rich can be included as beneficiaries, poorer people cannot be excluded. See **Jones v Williams, Commissioners for Special Purposes of the Income Tax v Pemsel, Oppenheim v Tobacco Securities Trust Co Ltd, re Macduff and Taylor v Taylor**.<sup>121</sup>
- 3.61 Having considered some of these cases in **Re Resch** Lord Wilberforce expressly confirmed that they were correct. He then stressed that they needed to be “*rightly understood*” and explained he was not saying (and nor were these cases) that facilities could not be charitable “*merely because by reason of expense they could only be made use of by persons of some means*”.<sup>122</sup>
- 3.62 He confirmed that it could be charitable to provide, in response to a public need, medical treatment that otherwise people could not access, even where that service was, by its very nature, expensive.
- 3.63 However, crucially, he stated “*on the other hand to limit admission to a nursing home to the rich would not be [charitable]*”.<sup>123</sup> He then went on to explain how the test was the public benefit, the totality of the benefits were relevant and why in that case it was met.
- 3.64 **Re Resch** and the wider context of the previous cases provide support for the proposition that a restriction based on someone’s ability to pay fees charged by a charity affects public benefit.<sup>123a</sup>
- 3.65 The test in **Re Resch** is not simply confined to whether the organisation limits itself to providing services to the rich. A charity’s purposes and its operation of those purposes must not be so as to help only those who by reason of their wealth are able to afford the fees. The Commission’s interpretation of the case is that if an organisation was limited to benefit only those who could afford the fees, then those people would not be a sufficient section of the public.
- 3.66 As regards indirect benefit, Counsel for the trustees of the hospital raised the issue specifically but the question of whether indirect benefit alone was sufficient was not addressed by the court. The facts of **Re Resch** demonstrate that both direct and indirect benefits were taken into account. The case indicates that direct benefits were clearly acceptable and are looked for first:<sup>123b</sup> “*indirect as well as direct benefit enters into account*” [emphasis added]. In this case the ‘indirect’ benefit was particularly prominent given the ‘*juxtaposition of the two institutions*’.
- 3.67 Furthermore, if indirect benefit alone were sufficient in this context, in practice this would render the public benefit test ineffectual. This is because in the case of most, if not all purposes some element of indirect wider benefit to society could be shown. This would have meant, for example, that the nursing home for the rich, which Lord Wilberforce referred to in **Re Resch** could be charitable, whereas he confirmed it would not be.<sup>124</sup>
- 3.68 In summary, therefore, **Re Resch** and other relevant cases<sup>125</sup> suggest that the extent to which charitable services and facilities should be made available to those who cannot otherwise afford to pay for them (including the poor) to satisfy the test of public benefit will depend on a variety of factors. These will include:
- the charitable purpose;
  - the need for and nature of the services and facilities provided;
  - the extent and level of the charges or fees which need to be paid to access them; and consequently the exclusory nature of the charge;
  - the extent to which those charges are moderated in whole or in part to permit access to those who cannot otherwise afford the charges or fees or to give them other access (direct or indirect) to the benefits of the charity arising to such persons;
  - the nature of the benefit, including whether it is of a singular or longer term benefit; as well as the general circumstances and modern context in which the charity operates.

## Principle 2c - People in poverty must not be excluded from the opportunity to benefit

### ■ SECTION F11 OF CHARITIES AND PUBLIC BENEFIT

3.69 The courts have resisted defining the expressions poor and poverty. In **Re Coulthurst**,<sup>126</sup> Evershed MR commented:

*"It is quite clearly established that poverty does not mean destitution; it is a word of wide and somewhat indefinite import; it may not unfairly be paraphrased for the present purposes as meaning persons who 'go short' in the ordinary acceptance of that term, due regard being had to their status in life, and so forth."*

What people in poverty means clearly must be considered in light of modern social conditions, the context, the purpose of an organisation, and the nature of the benefits.

3.70 As set out at paragraph 3.59 above, the second principle that appears to emerge from **Re Resch** is that an organisation which wholly excluded poorer people from any benefits, direct or indirect, would not be set up, and operate, for the benefit of the public and therefore would not be a charity. This principle is supported by the court's approach in previous cases:

3.71 For example, in **Jones v Williams**<sup>127</sup> in 1767 the court reported:

*"Definition of charity; a gift to a general public use, which extends to the poor as well as to the rich"*.

3.72 In **Commissioners for Special Purposes of the Income Tax v Pemsel**,<sup>128</sup> Lord Macnaghton said:

*"The trusts last referred to are not the less charitable in the eyes of the law, because incidentally they benefit rich as well as the poor, as, indeed every charity that deserves the name must do either directly or indirectly."*

3.73 This is also supported in the case of **Oppenheim v Tobacco Securities Trust Co Ltd and Others**.<sup>129</sup>

3.74 In **Re Macduff**<sup>130</sup> Lindley L.J. said:

*"I am quite aware that a trust may be charitable though not confined to the poor; but I doubt very much whether a trust would be declared to be charitable which excluded the poor."*

3.75 In **Taylor v Taylor**<sup>131</sup> Griffith C.J. said:

*"The prima facie impression that the words convey to my mind is that the testator intended the establishment of what may be called private lunatic asylums for the benefit of well-to-do persons who could pay for their treatment, or at any rate to include institutions for the exclusive benefit of such persons. If this were the true construction I doubt very much whether the gift could be supported..."*

3.76 Accordingly whatever restrictions there are on those who can benefit, charities must in all cases ensure that poorer people are not excluded from the opportunity to benefit from each of their purposes.

## Principle 2d - Any private benefit must be incidental

### ■ SECTION F12 OF CHARITIES AND PUBLIC BENEFIT

#### Legitimately incidental

3.77 In **IRC v City of Glasgow Police Athletic Association** Lord Normand said:

*"The question is what are the purposes for which the association is established, as shown by the rules, its activities and its relation to the police force and the public. And what the respondents must show in the circumstances of this case is that, so viewed objectively, the association is established for a public purpose, and that the private benefits to members are the unsought consequences of the pursuit of the public purpose, and can therefore be disregarded as incidental."*<sup>132</sup>

3.78 Accordingly, an individual can benefit privately from a charity only where that benefit arises directly through, and/or is legitimately incidental to, the pursuit of the charity's objects. There are special rules for charity trustees.<sup>133</sup>

3.79 It is not always easy to tell what is 'legitimately incidental' to the pursuit of the charity's objects. This is a matter which has to be considered in the individual circumstances of each case. However, the following factors have been identified by the courts as being relevant.

**The private benefit must come about either in the direct delivery of some reasonable and appropriate benefit to a properly chosen beneficiary or in, or as a result of, an action by charity trustees directed to some main charitable aim. Objectively viewed, it must not be an independent benefit.**

3.80 In **Commissioners of Inland Revenue v Yorkshire Agricultural Society** Lord Justice Atkin stated:

*“There can be no doubt that a society formed for the purpose of benefiting its own members, though it may be to the public advantage that its members should be benefited by being educated or having their aesthetic tastes improved or whatever the object may be, would not be for a charitable purpose, and if it were a substantial part of the object that it should benefit its members I should think it would not be established for a charitable purpose only. But, on the other hand, if the benefit given to its members is only given to them with a view of giving encouragement and carrying out the main purpose which is a charitable purpose, then I think the mere fact that the members are benefited in the course of promoting the charitable purpose would not prevent the Society being established for charitable purposes only.”<sup>134</sup>*

3.81 In **Neville Estates v Madden** Cross J considering social activities organised by a synagogue stated:

*“The chief purposes which a synagogue exists to achieve are the holding of religious services and the giving of religious instruction to the younger members of the congregation. But just as today church activity overflows from the church itself to the parochial hall, with its whist drives, dances and bazaars, so many synagogues organise social activities among the members ... Here the social activities are merely ancillary to the strictly religious activities ... In my judgment the purposes of the trust with which I am concerned are religious purposes – the social aspect is merely ancillary.”<sup>135</sup>*

**The action of the charity trustees giving rise to the private benefit (and the course of action of which it is a part) must be one which furthers the charitable object. The purpose must not be to promote some collateral object.**

3.82 In his dissenting judgment in **IRC v City of Glasgow Police Athletic Association**<sup>136</sup> Lord Oaksey stated:

*“Now, it is clear that ‘purposes’ are not the same as ‘results’ and there is ample authority that a body of persons or trust may be established for charitable purposes only although its establishment has results which are not charitable, for instance the benefits derived by the officers in the case of **Re Good**,<sup>137</sup> in **Re Gray**,<sup>138</sup> and by the surgeons in the **Royal College of Surgeons of England v National Provincial Bank Ltd.**”<sup>139</sup>*

3.83 In **IRC v City of Glasgow Police Athletic Association** Lord Reid stated:

*“In some cases where the end is a charitable purpose the fact that the means to the end confer non-charitable benefits may not matter; but in the present case I have come to the conclusion that conferring such benefits on its members bulks so largely in the purposes and activities of this association that it cannot properly be said to be established for charitable purposes only.”<sup>140</sup>*

**The private benefit must be a necessary or integral part of a course of action which is determined by the trustees to be an effective and efficient way of furthering the charity’s purposes, or it must result from such a course of action**

3.84 In **Inland Revenue Commissioners v Forrest** Lord Macnaghten said:

*“It cannot I think be doubted that the institution has raised the standard of the profession, and that to a civil engineer it is of advantage and probably of pecuniary advantage to be a member. But is that result the purpose of the society, or is it an incidental, though an important and perhaps a necessary consequence of the way in which the institution does its work in the pursuit of science.”<sup>141</sup>*

3.85 In **Incorporated Council of Law Reporting for England and Wales v A-G** Lord Justice Russell considering the private benefit to lawyers of a non-profit making business providing law reports stated:

*“It seems to me that if the publication of reliable reports of decisions of the courts is for the benefit of the community and of general public utility in the charitable sense, it is an inevitable and indeed necessary step in the achievement of that benefit that the members of the legal profession are supplied with the tools of their trade. I do not see how the benefit to the public, assuming it to be a charitable object, could otherwise be achieved.”<sup>142</sup>*

3.86 Lord Justice Russell also considered the running of a business by a charity:

*“The fact that the association carries on a trade or business is admittedly not inconsistent with a charitable character in its objects. The difference between the two cases is in my view a vital distinction. The element of unselfishness is well recognised as an aspect of charity, and an important one. Suppose on the one hand a company which publishes the Bible for the profit of its directors and shareholders: plainly the company would not be established for charitable purposes. But suppose an association or company which is non-profit-making, whose members or directors are forbidden to benefit from its activities, and whose object is to publish the Bible; equally plainly it would seem to me that the main object of the association or company would be charitable - the advancement or promotion of religion.”*

### **The private benefit to be conferred must be justifiable in terms of the duty of charity trustees to act solely in the interests of their charity**

3.87 Many charities are membership organisations. The Court of Appeal has considered issues of private benefit in membership organisations on a number of occasions. In **The Geologists’ Association v The Commissioners of Inland Revenue** Lord Justice Greer states:

*“If you come to the conclusion, as you may in many cases, that one of the ways in which the public objects of an association can be served is by giving special advantages to the members of the association, then the association does not cease to be an association with a charitable object because incidentally and in order to carry out the charitable object it is both necessary and desirable to confer special benefits upon the members.”<sup>143</sup>*

3.88 Lord Justice Greer contrasted this with a situation where the opposite was true:

*“It may be on the other hand that the main object is the advantage of the individuals composing the association, and it is only incidentally to that main object that the association confers benefits which are in the nature of charitable benefits upon the public.”*

3.89 In **Commissioners of Inland Revenue v Yorkshire Agricultural Society** Lord Justice Atkin considered an agricultural society was established for the charitable purpose of promoting agriculture for the public benefit and not for the benefit of the members. He stated:

*“There is plenty of evidence that the operations of the Society are general and extend to the promotion of agriculture generally. I attach no importance at all, therefore, to the mere fact that the members of the Society are induced to become members by receiving advantages at the show by being charged a smaller fee or that in respect of their membership they get perhaps a copy of the ‘Journal’ or that they get facilities for having their products analysed, and so forth. It appears to me as a matter of fact which is accepted and found by the Commissioners that all those matters are not inconsistent with the Society being established for charitable purposes.”<sup>144</sup>*

3.90 In **The Geologists’ Association v The Commissioners of Inland Revenue** the Court of Appeal considered on the facts of the case that a professional association was established for the benefit of its members and not for the benefit of the public.

### **Private benefits received as a beneficiary**

3.91 Every benefit for individuals in the course of actually promoting the charitable purpose is, in some sense, a private or personal benefit. This is obviously legitimate in the direct pursuit of objects (eg where assistance is given directed to relieving need in areas of social or economic deprivation, or facilities provided for the relief of disability) provided that it is for the benefit of the public. In **London Hospital Medical College v IRC**<sup>145</sup> Brightman J looked at the personal benefits to students from the provision of a students’ union. He stated:

*“I would suppose that most schools of learning confer a personal benefit on the individual scholars who are admitted thereto. X, an individual scholar, is not per se an object of charity. The school of learning that X attends is nevertheless charitable if the school exists for the benefit of the community. The fact that X receives a personal benefit is incidental to the implementation of the purposes of the charity.”*

3.92 Charitable status will be affected if the benefit either goes beyond the reasonable meeting of a charitable need or is of a type which does not directly relate to such a need. In **Joseph Rowntree Memorial Trust Housing Association Ltd v A-G**<sup>146</sup> Peter Gibson J looked at whether a scheme to sell houses to the elderly would relieve their disabilities and cater for their requirements due to their age.

*"I have already discussed the cases which show that the charging of an economic consideration for a charitable service that is provided does not make the purpose in providing the service non-charitable, provided of course that no profits accrue to the provider of the service. It is true that a tenant under the schemes may recover more than he or she has put in, but that is at most incidental to the charitable purpose. It is not a primary objective. The profit - if it be right to call the increased value of the equity a profit as distinct from a mere increase avoiding the effects of inflation, as was intended - is not a profit at the expense of the charity, and indeed it might be thought improper, if there be a profit, that it should accrue to the charity which has provided no capital and not to the tenant which has provided most if not all the capital. Again, I cannot see that this objection defeats the charitable character of the schemes."*

3.93 Individual benefits should be both appropriate and reasonably proportional to the need. The means used and the amount involved must be limited and determined by the charitable purpose.

### **Private benefits received for providing goods and services in the course of running the charity**

3.94 In general there is little difficulty about payments (or other benefits) to individuals received for providing goods and services to the charity. The expenditure of funds in a way that secures the effective and efficient operation of a charity in the achievement of its purposes (provided it goes no further than that) is obviously necessary. A charity can employ and pay agents and staff, and have other administrative expenses relating to the acquisition, management and disposal of assets. This will include wages of employees, reasonable expenses of volunteers and contractual payments and will not in any way affect the charitable status of the body concerned.

3.95 There are, however, special considerations with regard to remuneration, payments or benefits to charity trustees.<sup>147</sup>

## Part 4 The relevance of charities' activities and other background information in assessing public benefit

### The public benefit requirement

- 4.1 The Charities Act 2006 provides that a 'charity' is an institution established 'for charitable purposes only' and one that is subject to the charity jurisdiction of the High Court. This essentially imports a 'purpose test' for determining charitable status in English and Welsh law. The purpose test is set out in s.2 of the Act: "*a charitable purpose is a purpose which (a) falls within [a list of descriptions of purposes], and (b) is for the public benefit*". Any reference to the public benefit is a reference to public benefit as that term is understood for the purposes of the law relating to charities in England and Wales.<sup>148</sup> Thus the 'public benefit' requirement of charity is specifically tied to the nature of an organisation's purpose(s).
- 4.2 Public benefit must be considered in relation to the purpose as an essential element (and where there is more than one purpose, in relation to each of them severally and individually) in determining an organisation's charitable status. The issues are:
- in applying the purpose test, to what extent (in determining charitable status) can its activities and other factual background information, and whether that organisation is actually being conducted for charitable purposes for the public benefit, be taken into account;
  - at what point should the purpose test be applied (for example, at the point of registration or when purposes are amended), and is that application completely determinative (or does charitable status fall to be assessed on a continuing or ongoing basis);
  - if the charity's purposes can be carried out in different ways, of which some would satisfy the public benefit requirement and others (in the light of modern conditions) would not, are the trustees under a fiduciary duty to adopt those ways which would satisfy the requirement.
- 4.3 An organisation cannot be a charity unless it has purposes all of which are exclusively charitable. In order to determine whether an organisation is charitable, it is necessary to establish:
- (a) what the purposes of the organisation are; and
  - (b) the nature of those purposes - whether those purposes are charitable ie:
    - whether each one falls within one or more of the descriptions of charitable purposes in the Charities Act 2006; and
    - whether each one is 'for the public benefit' - that is: is each of its individual main purposes beneficial, and is the benefit to the public or a section of the public.
- 4.4 Activities (and other background information) can be relevant in determining (a) and all of the elements of (b).
- 4.5 The only way a charity can achieve its purposes are by its activities. Normally, the only activities which are relevant are those which an organisation is allowed, on a proper construction, to pursue under its governing document. Activities which are already being undertaken, and those known to be proposed, will be part of the factual background information and it is in the context of these, that the purposes of an organisation fall to be understood. What is determinative is not what is actually being proposed but what the purposes objectively must be taken to be, and whatever can reasonably be taken to be within the ambit of those purposes as a main aim (whether actually being proposed or not).<sup>149</sup>
- 4.6 Occasionally, an organisation will not have a highly formulated written statement of its purposes. In order to clarify what its purposes are, and whether those purposes are to be pursued in a way that is consistent with a claim to charitable status, close attention will need to be paid to the detail of its actual activities, and relevant factual background information. It is more usual for a written

statement of purposes to be contained in the organisation's governing document. Even here, the written expression of purposes (of itself) does not always conclude the matter of charitable status. The courts can look at background information:

- as part of the factual circumstances in which the objective meaning of the words used in the governing document to express the purposes falls to be determined. The words will bear the meaning they would signify to a reasonable person circumstanced as the parties who established the governing document were;
- as part of the evidence (showing circumstances in which the organisation came into existence, what it does and the sphere in which it operates, and the consequences of pursuing its purposes) needed to determine whether the ascertained purposes are, in fact, charitable within the descriptions of charitable purposes in the Charities Act 2006; and
- in respect of the question of whether the purposes and each of them will, or may, operate or be carried out for the public benefit.

4.7 Having determined what the purposes are, and whether the purposes thus ascertained are charitable (in the sense of falling within the specified descriptions of charitable purposes), the remaining questions are:

- Is the court, on the evidence before it, able to form the opinion that each of those purposes will, or may, operate or be carried out for the public benefit?<sup>150</sup> *"The question whether a purpose will or may operate for the public benefit is to be answered by the court forming an opinion on the evidence before it"*<sup>151</sup> ie:
  - Is there identifiable benefit?
  - Is the benefit to the public or a section of the public?
- At what point should the purpose test be applied and is that application completely determinative (or does charitable status fall to be assessed on a continuing or ongoing basis)?

## What are the true purposes? How do you determine whether they fall within the descriptions in the Charities Act 2006?

4.8 The meaning of the words used in an organisation's governing document to express its intended purposes are ascertained in accordance with the principles laid down by the courts. This is a matter of what the intentions of the parties, as disclosed in the words used in the governing document, must *objectively* be taken to signify (what those specific words would have been understood to mean by a reasonable person circumstanced as the parties were).<sup>152</sup> The background knowledge is known as the 'matrix of fact' or factual matrix (and can extend to anything that would have affected the way in which the language of the document would have been understood by a reasonable person).<sup>153</sup>

4.9 That meaning is to be gathered from (i) the text and (ii) the relevant contextual scene. Lord Steyn described this process as *"The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene"*.<sup>154</sup>

4.10 Within these principles, the courts can always have regard to the background knowledge actually available to the parties (including their knowledge of the circumstances as they exist at the time the governing document is executed) and the factual matrix or relevant factual background information. Then, in order to determine whether the purpose thus disclosed is charitable, for example where the meaning of the words used to express the purposes can be appreciated but it is not plain whether these purposes are intended to be exclusively confined within those that are legally charitable, it may be necessary to have regard to evidence – including evidence of the background in which the organisation is created and intended to operate. In such cases, the courts look at circumstances in which the organisation came into

existence, what it does and the sphere in which it operates, and the consequences of pursuing the ascertained purposes (all of which requires consideration of activities and other relevant factual background information).

*“To determine whether the object, the scope of which has been ascertained by due process of construction, is a charitable purpose it may be necessary to have regard to evidence to discover the consequences of pursuing that object”.*<sup>155</sup>

- 4.11 There are a number of instances, not limited to ambiguity of objects, where the courts have confirmed that it may consider surrounding facts (including the actual and intended activities of an organisation) before and after it is established in order to determine charitable status.
- 4.12 In **Incorporated Council of Law Reporting v AG** the Court of Appeal considered a registered company with objects to publish reports of judicial decisions in clause 3 of its memorandum, *“there came in time a question as to what material we were entitled to look at to determine whether the purpose of the council were charitable. (Counsel for the revenue) contended that in substance the court could and should only look at clause 3 of the memorandum ... This contention involved the proposition that we could neither look at any facts [in the historical background] not at any available evidence as to what at any time since July 1870 [the incorporation of the company] had been the use to which The Law Reports are put. That in effect would mean looking at clause 3(1) as if it were situate in a vacuum. That cannot be right.”*<sup>156</sup>
- 4.13 Intra-vires activities of probative value on the question of whether the main purpose for which an organisation is formed is charitable or non-charitable may be admitted because *“(t)he skill of Chancery draftsmen is well able to produce a constitution of charitable flavour to allow the pursuit of aims of a non-charitable or dubiously charitable flavour. In a case where the real purpose for which an organisation is formed is in doubt, it may be legitimate to take into account the nature of the activities which the organisation since its formation carried on”*. In the same case, Scott J also said *“... the question whether (the institution) is or is not charitable must, in my view, by answered by reference to the content of its*

*constitution, construed and assessed in the context of the factual background to its formation...”* (including post-formation **intra vires** activities of probative value). Ultra vires activities are entirely irrelevant. We can consider where expressed purposes will lead and the consequences of their pursuit.<sup>157</sup>

### **On the evidence before it, is the Commission able to form the opinion that those purposes will, or may, operate for the public benefit?**

- 4.14 Even if it is indicated that the purposes fall within the very character of the descriptions of charitable purposes in the Charities Act 2006,<sup>158</sup> it is still necessary to consider whether the purposes are beneficial to the public. It is the responsibility of the trustees positively to demonstrate that the purposes are directed to benefiting the public in a way recognised as charitable.

*“a trust must always be shown to promote a public benefit of a nature recognised by the court as being such, if it is to qualify as being charitable. The question whether a purpose will or may operate for the public benefit is to be answered by the court forming an opinion on the evidence before it ... No doubt in some cases a purpose may be so manifestly beneficial to the public that it would be absurd to call evidence on this point. In many other instances, however, the element of public benefit may be much more debatable. Indeed, in some cases the court will regard this element [as] being incapable of proof one way or the other and thus will inevitably decline to recognise the trust as being of a charitable nature.”*<sup>159</sup>

- 4.15 The question which must be addressed in each case, in respect of which the trustees must provide evidence and information where this is necessary, is whether the purposes to be pursued, although expressed to be of a charitable nature, should be recognised as being for the public benefit in accordance with the principles of public benefit, ie:
- is there an identifiable net benefit flowing from each of the objects or purposes; and
  - is such benefit to the public, or to a section of the public?

4.16 The overriding question of public benefit is one for the courts' opinion on the evidence before it.<sup>160</sup> Evidence conveying the background information relating to the organisation will be material in any and all of these respects. Evidence of activities and proposed activities (as well as other relevant factual background information) will be central to this consideration since this is a matter of determining the potential consequences of the organisation's actual pursuit of what it is established and authorised to do.

*"The question which the court must address in each case is whether the objects to be pursued, although expressed to be of a charitable nature within the spirit and intendment of the preamble ... should be recognised as being for the public benefit in the sense in which that concept has come to be understood in the light of the many decision in this area of law. It is not enough that the objects should be expressed to be the advancement of education; it is necessary that the advancement of education in the manner intended should promote the public benefit. In the present case therefore the relevant question is whether the advancement of the education of the public in the subject of militarism and disarmament and related fields promotes the public benefit. If it does, the trust can be recognised as charitable. If it does not – or if, after investigation of the evidence, the court is satisfied that there is no means of determining whether it does or not – the trust cannot be regarded as charitable".<sup>161</sup>*

*"... the question whether a trust is beneficial to the public is an entirely different one from the question whether a trust is for the advancement of religion.. When... the question is whether a particular gift for the advancement of religion satisfies the requirement of public benefit, a question of fact arises which must be answered by the court in the same manner as any other question of fact, ie by means of evidence cognisable by the court".<sup>162</sup>*

### **At what point should the purpose test be applied and is that application completely determinative (or does charitable status fall to be assessed on a continuing or ongoing basis)?**

4.17 Registration as a charity by the Charity Commission is recognition of an organisation's charitable status, but registration itself does not confer charitable status; that is a question of fact determined by

whether the organisation meets the legal requirements to be a charity. According to the law in England and Wales, a charity is a body which is established for exclusively charitable purposes and is subject to the charity jurisdiction of the courts. Charitable status is determined by reference to the organisation's establishment and imports continuing obligations. Charitable purposes must fall within the list of descriptions of charitable purposes in the Charities Act 2006 and be for the public benefit (as that term is already understood for the purpose of the law relating to charities).<sup>163</sup> Apart from the removal of the presumption of public benefit, which previously existed for purposes concerned with the relief of poverty or the advancement of education or religion (and the articulation of currently recognised charitable purposes in the descriptions of purposes in the Act), it is intended by the Charities Act 2006 that existing case law regarding public benefit will continue to apply.

4.18 In general, the purpose test is applied at the point that an organisation is established. The Charity Commission will determine whether or not the organisation's purposes meet the public benefit requirement when the organisation seeks recognition of its charitable status by applying for registration as a charity. However, the need for a review of the extent to which a charity continues to meet the public benefit requirement following registration may arise because of:

- (a) changes in modern social conditions, which may give rise to altered perceptions of the beneficial nature of the charity's purposes or of how those purposes need to be carried out if they are to be for the public benefit; or
- (b) changes in the charity's governing document permitting different purposes or application of assets; or, without any such changes
- (c) changes in how the charity's trustees actually go about achieving its stated purposes.

4.19 Such changes may be in any area of public benefit (whether any benefit can be identified; whether that benefit is public).

4.20 The circumstances in which considerations of public benefit may impact upon the determination of the charitable status of an organisation's purposes were considered in the **National Anti-Vivisection** case. In that case, Lord Simonds<sup>164</sup> said:

*“A purpose regarded in one age as charitable may in another be regarded differently ... A bequest in the will of a testator dying in 1700 might be held valid upon the evidence then before the court, but, upon different evidence, held invalid if he died in 1900... But this is not to say that a charitable trust, when it has once been established, can ever fail. If, by a change in social habits and needs, or, it may be, by a change in the law, the purpose of an established charity becomes superfluous or even illegal, or if, with increasing knowledge, it appears that a purpose once thought beneficial is truly detrimental to the community, it is the duty of trustees of an established charity to apply ... and ask that a cy-pres scheme may be established... A charity once established does not die, though its nature may be changed. But it is wholly consistent with this that in a later age the court should decline to regard as charitable a purpose, to which in an earlier age that quality would have been ascribed, with the result that (unless a general charitable intention could be found) a gift for that purpose would fail.”*

4.21 The Commission’s powers (other than rectification of the register) to remove organisations from the register of charities are limited under the Charities Act 2006 to removing ‘any institution which it no longer considers is a charity’ and ‘any charity which has ceased to exist or does not operate’. In reaching this view, the Commission can only use the same system and rationale as the courts. The words of Part 1, on one interpretation, seem to make the Commission acting in good faith the sole judge. But as Lord Nathan commented on similar provisions in the Charities Act 1960<sup>165</sup> “whether an institution is a charity or not is a pure question of law, and provision is made for an appeal to the High Court against any decision of the commissioners to remove an institution from the register. On such an appeal, it seems unlikely that the view of the commissioners that the institution had ceased to be a charity would have any influence on the court, which would be bound to give a decision on the legal question whether the institution was a charity.” Under the Charities Act 2006, there is similarly an appeal to the Tribunal and from the Tribunal to the High Court on points of law.

4.22 To this extent the law in England and Wales may differ from that in Scotland. The application of the Scottish ‘charity test’ may, it seems, ultimately result in the removal of an organisation from the Scottish Charity Register if it no longer meets the second part of the test relating to public benefit.<sup>166</sup>

4.23 This means that where the circumstances set out in paragraph 4.18 above trigger a review of a charity’s public benefit, this will not normally affect the organisation’s charitable status. Charities do not have the right to opt out of the charitable sector if they consider the public benefit requirement imposes on them onerous responsibilities. If it was found that the charity’s purposes no longer satisfied the public benefit requirement, they would need to be changed. Alternatively, if the purposes could still be carried out in a way which satisfies the requirement, but the trustees were exercising their powers in a way which failed to do so, that would indicate a breach of their fiduciary duties. There is a duty to carry out a purpose legally understood to be a charitable purpose solely in ways that further the purpose for the public benefit, all non-charitable methods being excluded.<sup>167</sup>

4.24 In such circumstances, we would normally expect the trustees to cooperate in resolving the problem. If necessary, we could use regulatory action, including the appointment of new trustees.

4.25 In extreme cases, a review of a charity’s public benefit may provide evidence that it was **never** established as a charity and thus trigger its removal from the register where it is not capable of being, or where it would not be appropriate to be, reconstructed as a charity. The consequences for organisations where removal is necessary as a result of the circumstances mentioned in (a) and (b) of paragraph 4.18 above are set out in our separate publication *The Maintenance of an Accurate Register*.<sup>168</sup>

## Part 5 Endnotes

### Introduction endnotes

- (1) **National Anti-Vivisection Society v IRC** [1948] AC 31, 42 per Lord Wright
- (2) S3(3) Charities Act 2006

### Part 1 endnotes

- (3) RR1a – Recognising New Charitable Purposes on the Commission’s website
- (4) See Commission website
- (5) **National Anti-Vivisection Society v IR** [1948] AC 31 Lord Wright
- (6) **Gilmour v Coats** [1949] AC 426, 443
- (7) **National Anti-Vivisection Society v IR** supra 42 per Lord Wright
- (8) **In Re Campden Charities** 18 Ch 310, 324, per Jessel MR as quoted by Lord Simonds in **National Anti-Vivisection Society** supra
- (9) **National Anti-Vivisection Society** ibid 74 per Lord Simonds
- (10) Ibid 74 per Lord Simonds
- (11) Article 4(5) of the Gender Directive EU Council Directive 2004/113/EC of 13 December 2004. A legitimate aim is one founded in law but the limitation should be both necessary and appropriate as this is understood by EC law. Where a legitimate aim is pursued other than the promotion of gender equality or the interests of men or women, in general the restriction would not be lawful Education is an exception.
- (12) [1992] 2 F C 52, 68-69
- (13) **In Re Coats’ Trust v Gilmour** [1948] Ch 340, 347 per Lord Greene MR

### Part 2 endnotes

- (14) **Sir Howel Jones Williams Trustees v IRC** [1947] AC 447, 455 (HL)
- (15) **In Re Pinion Decd Westminster Bank Ltd v Pinion and another** [1965] Ch 85, **In Re Coats’ Trust v Gilmour** supra
- (16) **Re Hummeltenberg** [1923] 1 Ch 237, 242 per Russell J. See also **In Re Coats’ Trust v Gilmour** supra 347 per Lord Greene
- (17) **Re Hummeltenberg** supra 241
- (18) **In Re Grove-Grady** [1929] 1 Ch 557, 572
- (19) **In Re Pinion** supra 108 CA
- (20) **In Re Shaw’s Will Trust** [1952] Ch 163, 169 which concerned a gift for bringing masterpieces of fine art to the people of Ireland
- (21) **McGovern v AG** [1981] 3 All ER 493 – “*or of particular decisions of governmental authorities*”
- (22) **Gilmour v Coats** supra, 446 HL

- (23) [1972] Ch 73
- (24) **In Re Pinion** supra, 107
- (25) **In Re Shaw decd** [1957] 1 WLR 729
- (26) **Gilmour v Coats** supra, 446 per Lord Simonds
- (27) **Gilmour v Coats** supra 447 per Lord Simonds
- (28) **Re Grove Grady** [1929] 1 Ch 557, 572
- (29) **National Anti-Vivisection Society v IRC** [1948] Ch 31, 49 per Lord Wright
- (30) **National Anti-Vivisection Society v IRC** [1948] Ch 31, 42 per Lord Wright
- (31) **Gilmour v Coats** supra 449 per Lord Simonds
- (32) **National Anti-Vivisection Society v IR** supra 47 per Lord Wright
- (33) **Bowman v Secular Society** [1917] AC 406, 442
- (34) **In Re Shaw Decd** [1947] 1 WLR 729, 743 when Harman J considered that a trust to promote a phonetic alphabet was analogous to a political purpose
- (35) **National Anti-Vivisection Society v IR** supra per Lord Wright
- (36) **McGovern v AG** [1981] 3 All ER 493, Slade J
- (37) **Re Hummultenberg** approved by Lord Wright in **National Anti-Vivisection Society v IR** supra
- (38) **National Anti Vivisection Society v IRC** supra 41 per Lord Wright
- (39) **Sir Howell Jones Williams Trustees v IRC** supra 455
- (40) **Commissioners for Special Purposes of the Income Tax v Pemsel** [1891] AC 531, 583
- (41) **National Anti-Vivisection Society v IRC** supra, 47 per Lord Wright
- (42) S.3(1) Charities Act 2006
- (43) [1951] AC 297, 306; **IRC v Educational Grants Association Ltd** [1967] Ch 993
- (44) S.1(1)(a) Charities Act 2006
- (45) **McGovern v AG** [1981] 3 All ER 493, 509 “charitable nature” being a reference to Lord Wilberforce in Scottish Burial Reform case – ie the purposes in question to be charitable must be shown to be for the benefit of the public, or the community, in a sense or manner within the intendment to the preamble – now effectively within s.2 Charities Act 2006
- (46) **AG v McGovern** [1982] Ch 321
- (47) [1972] Ch 73
- (48) [1982] Ch 321, 333
- (49) **National Anti-Vivisection Society v IR** [1948] AC 31, 44
- (50) **Oppenheim v Tobacco Securities Trust Co Ltd** [1951] AC 297 Lord Normand endorsing Lord Greene in **In Re Compton**
- (51) 5th Edn p11
- (52) [1965] Ch 85
- (53) [1951] ac 297, 310
- (54) [1928] 1 KB 611, 631

- (55) [1948] Ch 31
- (56) **National Anti Vivisection Society v IRC** [1948] Ch 31, 47

### Part 3 endnotes

- (57) **Verge v Somerville** [1924] AC 496
- (58) **Verge v Somerville** [1924] AC 496, 499
- (59) **Gilmour v Coats** [1949] AC 426, 449
- (60) [1972] AC 601, 624
- (61) [1949] AC 426, 449
- (62) [1955] AC 572
- (63) See Part 1 of this analysis
- (64) Community capacity building where a class comprised of socially and socially or economically deprived people is sufficient to support public benefit for this purpose. RR5 available on the Commission's website.
- (65) Community Security Trust – Decisions of the Commissioners Vol 4 pages 8-12
- (66) [1955] AC 572
- (67) Ibid 592
- (68) Ibid 615
- (69) See Para 3.6
- (70) S2 RCA 1958
- (71) (1767) 2 Amb. 651
- (72) [1805] 10 Ves. 522
- (73) [1896] 2 Ch 451
- (74) [1891] AC 531
- (75) [1955] AC 572
- (76) [1949] Ch 529
- (77) **Verge v Somerville** [1924] AC 496
- (78) [1955] 1 All ER 525, 543
- (79) Which can be found quoted by Lindley LJ in **Re Macduff** [1896] Ch at p 466
- (80) S.2 RCA 1958
- (81) Decisions of the Commissioners Vol 4 page 17
- (82) [1924] AC 496, 499
- (83) (1885-86) LR 16 QBD
- (84) **Neville Estates v Madden** [1962] Ch 832
- (85) [1945] Ch 123
- (86) [1951] AC 297
- (87) [1972] AC 601
- (88) [1945] Ch 123

- (89) The nature of the link between members of the class should be distinguished from the defining quality of the individual members of the class, which may obviously be personal (eg in cases of similar incapacity say, or of some shared learning difficulty) – see PS Atiyah Public Benefit in Charities (1958) 21 MLR 138
- (90) [1951] AC 297, 306
- (91) [1924] AC 496
- (92) (1841) 1 Ph. 185
- (93) See also **Dingle v Turner** [1972] AC 601, 624
- (94) [1984] 2 WLR 973
- (95) Cf compare the different position for education in schools in **Oppenheim** [1951] AC 297
- (96) (1762) Wilm 163
- (97) (1889) 15 App Cas 172
- (98) [1954] Ch 252
- (99) [1961] AC 584
- (100) [1967] Ch 91, 93
- (101) The Times, 17 November 1977
- (102) As it was the dissenting judgement of Lord MacDermott in **Oppenheim**. See also PS Atiyah Public Benefit in Charities supra
- (103) [1972] AC 601
- (104) Report of the Committee on the Law and Practice relating to Charitable Trusts, 1952 Cmd 8710
- (105) Charity Law and Voluntary Organisations, NCSS 1976
- (106) Nathan para 136
- (107) Goodman paras 28 and 38
- (108) **Re Tree** [1945] Ch 325
- (109) Subject to the other criteria of charitable status being met
- (110) In particular a consideration of the objects as they relate to the facts of each case
- (111) See **Springhill Housing Action Committee v Commissioner of Valuation** [1983] NI 184
- (112) [1951] AC 297, 307
- (113) **Dingle v Turner** [1972] AC 601
- (114) **Re Scarisbrook** [1951] Ch 622 is the principal authority establishing that charities for the relief of poverty, are excepted from the general principle that there must not be a personal family connection or tie. This was confirmed in **Dingle v Turner** where Lord Cross reviewed the poor relations cases as well as those on poor employees. These exceptions have been accepted by the courts since.
- (115) [1968] AC 138
- (116) [1972] Ch 73
- (117) [1983] Ch 159
- (118) **Re Resch's Will Trusts [Le Cras v the Perpetual Trustee Company Limited and Others]** [1969] 1 AC 514
- (119) See **Scottish Burial Reform and Cremation Society Limited v Glasgow City Corporation** [1968] AC 138, see also **Incorporated Council of Law Reporting for England and Wales** [1972] Ch 73, CA and **Joseph Rowntree Memorial Housing Association Ltd v AG** [1983] 1 Ch 159
- (120) [1969] 1 AC 544

- (121) **Jones v Williams** [1767] Amb1 651, 652; **Commissioners for Special Purposes of Income Tax v Pemsel** [1891] AC 531; **Oppenheim v Tobacco Securities Trust Co Ltd and others** [1951] 1 All ER 31 [Lord Simonds]; **Re McDuff** [1896] 2 Ch 451,464; **Taylor v Taylor** 10 CLR 218
- (122) [1969] *ibid* 544
- (123) [1969] *ibid* 544
- (123a) Although there was no constitution in **Re Resch**, the general principles are set out in paras 2.24 – 2.28 and in Part 4 of this Analysis.
- (123b) This is the approach Lord Wilberforce took in **Re Resch**.
- (124) 1 AC 541, 543; See also **Oppenheim v Tobacco Securities Trust Co Ltd** [1951] AC 297, 299 where the fact that society generally may benefit from a select educated few did not save what was otherwise an insufficient section of the public “*The public element, as I will call it, is not supplied by the fact that from a son’s education all may benefit*”
- (125) **Jones v Williams** (1767) Amb. 651, 652; **Commissioners for Special Purposes of the Income Tax v Pemsel** [1891] AC 531; **Oppenheim v Tobacco Securities Trust Co Ltd** [1951] 1 All ER 31, **Re Macduff** [1896] 2 Ch 451; **Taylor v Taylor** 10 CLR 218 and **In Re Clarke** [1923] 2 Ch 407. See also other references in those cases, and those cases relating to specific charitable purposes, including for example **The Attorney-General v The Earl of Lonsdale** [1827] 1 Sim 105; **Brighton College v Marriott** [1926] AC 192; **The Abbey Malvern Wells Ltd v Ministry of Local Government and Planning** [1951] 1 Ch 728]; and **Smith v Kerr** [1902] 1 Ch 774 CA.
- (126) [1951] Ch 661, 666
- (127) [1767] Amb1 651, 652
- (128) [1891] AC 531
- (129) [1951] 1 All ER 31 (Lord Simonds)
- (130) [1896] 2 Ch 451, 464
- (131) 10 CLR 218
- (132) [1953] 1 All ER 747, 752
- (133) See the Commission’s Guidance
- (134) [1928] 1 KB 611, 631
- (135) [1961] 3 WLR 999, 1012
- (136) [1953] 1 All ER 747, 753
- (137) [1905] 2 Ch 60 – **Re Good** – a gift of residue to maintain a library and to purchase plate for the officers’ mess was held to be a good charitable bequest as tending to increase the efficiency of the army
- (138) [1925] Ch 362 – **Re Gray** – a gift to a regiment of a fund “*for the promotion of sport (including in that term only shooting fishing cricket football and polo)*” was held to be charitable as it promoted the physical efficiency of the army
- (139) [1952] AC 631 – **Royal College of Surgeons of England v National Provincial Bank Ltd** a gift for the general purposes of the Royal College of Surgeons was charitable as the Royal College was established for charitable purposes
- (140) [1953] 1 All ER 747, 756 -
- (141) 15 App Cas 354
- (142) [1972] Ch 73, 87 & 86
- (143) 14 TC 271, 283
- (144) [1928] 1 KB 611, 631
- (145) [1976] 1 WLR 613, 620
- (146) [1983] Ch 159, 171
- (147) See Commission Guidance *Payment of Charity Trustees*

## Part 4 endnotes

- (148) S.3(3) Charities Act 1993
- (149) Tudor on Charities 9th Edn 2003 Para 3-015
- (150) **National Anti-Vivisection Society v IRC** [1947] 2 All ER 217, at 221; [1948] AC 31, 44 per Lord Wright
- (151) **Lord Wright in National Anti-Vivisection Society v IRC** [1947] 2 All ER 217, 221, [1948] AC 31, 44
- (152) **Prenn v Simmonds** [1971] 3 All ER 237
- (153) Lord Wilberforce in **Prenn v Simmonds** [1971] 3 All ER 237, 240-242, [1971] 1 WLR 1381, 1384-1386
- (154) **Sirius International Insurance Company (Publ) v FAI General Insurance Limited and others** (2 December 2004 House of Lords)
- (155) **Lightman J in IRC v Oldham Training and Enterprise Council** [1996] S.T.C. 1218 – see Buckley J in **Incorporated Council of Law Reporting v AG** [1972] Ch 73, 91
- (156) [1971] 3 WLR 853, at 864B onwards per Sachs LJ
- (157) **AG v Ross** [1986] 1 WLR 252, 263 per Scott J. See also **Baptist Union of Ireland (Northern) v IRC** 26 T.C. 335
- (158) See **Williams' Trustees v IRC** [1947] AC 447 – Lord Simonds in considering the nature of the beneficiary class and whether it was public
- (159) **McGovern v AG** [1981] 3 All ER 493, 504 per Slade J
- (160) **National Anti-Vivisection Society v IRC** [1948] AC 31 (approving **Hummultenberg**)
- (161) **Southwood v AG** (28/6/2000) Chadwick LJ
- (162) **Re Coat's Trusts v Gilmour** [1948] 1 Ch 340
- (163) S.3(4) Charities Act 2006
- (164) [1947] 2 All ER 217, 238
- (165) Butterworths 1962 p 51
- (166) Meeting the Charity Test – para 8.2 – [www.oscr.org.uk](http://www.oscr.org.uk)
- (167) **Townsend V Carus** (1843) 3 Hare 257; **Re White** [1893] 2 Ch 41; **Re Ward** [1941] 2 All ER 125; **Re Hetherington** [1989] 2 All ER 129
- (168) RR6

## Notes

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