

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



The Charity Commission is the independent regulator of charities in England and Wales. Its aim is to provide the best possible regulation of charities in England and Wales in order to increase charities' effectiveness and public confidence and trust. Most charities must register with the Commission, although some special types of charity do not have to register. There are some 190,000 registered charities in England and Wales. In Scotland the framework is different, and the Commission does not regulate Scottish charities.

The Commission provides a wide range of advice and guidance to charities and their trustees, and can often help with problems. Registered charities with an annual income or expenditure over £10,000 must provide annual information and accounts to the Commission. The Commission has wide powers to intervene in the affairs of a charity where things have gone wrong.

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This legal analysis needs to be read in conjunction with our Consultation on Draft Public Benefit Guidance.

The following sections explain the legal underpinning for the principles of public benefit set out in *Charities and Public Benefit*

A. Principle 1: What is meant by 'There must be an identifiable benefit'?

A1. Summary



1. A number of general principles can be drawn from the case law to provide guidance when applying the public benefit requirement on the principle that there must be an identifiable benefit.

2. In summary:

- **a benefit may be recognised where it is capable of having demonstrable effect and is regarded by the law as charitable;**

- **the benefit need not be obvious;**

In such cases, this must be determined by a court (and therefore the Commission) on the basis of evidence which is capable of being evaluated, even though in some circumstances, there may be a wide divergence of opinion as to whether or not a benefit exists.

- **the form of the benefit can take many different shapes and forms;**

Benefits can be direct and/or tangible benefits or they can be intangible (providing that they can be said to be approved by a common understanding of enlightened opinion that there is a benefit). Equally, indirect benefits can be taken into account.

- **what is capable of being recognised as a benefit must be assessed in light of modern conditions;**

This includes taking account of the current general law, social habits and social and economic circumstances.

- **A benefit cannot be recognised:**

- **where the overall or net benefit cannot be established** because, for example, the purposes are unlawful or against public policy or otherwise not beneficial and where detriment outweighs any benefits;

- **where it simply relies on the intention, opinions or beliefs of the promoters or donors where they are not capable of proof by evidence before the court; and**

- **simply because they may be of some benefit to the community.**

Not every purpose which is of benefit to the community can be recognised as charitable eg political purposes.

A2. What is a benefit? – The general principles



3. Currently, under charity law, purposes for the relief of poverty, the advancement of education and the advancement of religion are presumed to be for the public benefit, unless the presumption is rebutted by evidence to the contrary⁽¹⁾. In all other cases public benefit must be shown. When the provisions in the Charities Act 2006 regarding public benefit come into force, the presumption of public benefit for poverty, education and religious purposes will be removed.

4. Whether or not there is a benefit is a question of fact and must be answered by the court in the same manner as other questions of fact, by means of evidence cognisable by the court⁽²⁾. A benefit is something which produces 'demonstrable impact' on the community or a sufficient section of the community⁽³⁾ and it is something that is beneficial in a way that the law regards as charitable⁽⁴⁾.

5. 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"⁽⁵⁾.

6. The benefit to the world from the value of intercessory prayers of a religious order was held to be "manifestly not susceptible of proof" and as the court could only act on proof, it could not be recognised as a benefit and the order could not be accepted as charitable⁽⁶⁾.

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..."⁽⁷⁾

8. Where, however, it is something which is too vague or intangible, such as the proposed benefit to the public from the example set by the members of the religious order by devoting their lives to prayer, then this cannot be recognised as a benefit⁽⁸⁾. The court commented that it should not 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⁽⁹⁾.
9. The law however 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 to how a benefit shows itself in another⁽¹⁰⁾. The court has to look at and assess the evidence which is before it on the issue of whether or not there is a benefit. The court cannot stand neutral and not decide on the question of whether or not a purpose is or is not for the public benefit⁽¹¹⁾.
10. However, there are some circumstances where the court is not in a position to be able to decide whether something is or is not for the public benefit. The most obvious of these will be the benefits of changing the law or public policy⁽¹²⁾. However, the courts have on occasion applied this approach to other areas⁽¹³⁾.

A3. What factors can be considered in assessing benefit?

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11. Various factors may be considered in assessing and determining whether or not a benefit is shown.
 - **A purpose cannot be accepted as providing a benefit if there is simply no benefit or where the benefit cannot materialise in the particular circumstances**

A purpose cannot be accepted as providing a benefit if there is simply no benefit or where the benefit cannot materialise in the particular circumstances. It is the role of the court to determine in each case whether or not the benefit to the public necessarily results from the way that the purpose is being carried out⁽¹⁴⁾.

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

The benefit must be capable of proof, through factual and positive evidence where necessary. Vague expressions of opinions and beliefs do not count⁽¹⁵⁾. The evidence produced must be sufficient so that the court is capable of evaluating it. The court 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⁽¹⁶⁾.

For example, in the context of educational and arts purposes, unless it is obvious⁽¹⁷⁾, the court must receive evidence to support or negate the presence of educational value and public benefit⁽¹⁸⁾. 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.

- **Unlawful purposes, purposes which are contrary to public policy and other harm issues**

Where particular purposes are against the law then they will not be capable of being regarded as beneficial⁽¹⁹⁾. Purposes which are contrary to public policy and morality, equally cannot be regarded as beneficial.

For example, a school to teach pick-pockets or prostitutes⁽²⁰⁾ would not be charitable.

An overall or net benefit must be shown. This means that the court 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 “disbenefits” may be of a very different nature and quality. For example in the case of **National Anti-Vivisection Society v IRC**⁽²¹⁾, the court had no difficulty in weighing the value of the material benefits of vivisection against the moral benefits of anti-vivisection. The court concluded 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”⁽²²⁾.

- **The intention of the donors and the promoters**

The intention of the donors or the promoters in establishing public benefit cannot be taken into account. Otherwise, the court suggested that there would be lots of fantastic purposes which were established as charitable.

For example, trusts to support dancing poodles⁽²³⁾.

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

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⁽²⁴⁾. What is important is that the benefit is something that is beneficial in a way that the law regards as charitable⁽²⁵⁾.

- **The nature of the benefit can take a number of forms**

The nature of the benefit can take a number of forms; it can be an intangible or tangible benefit, direct or indirect⁽²⁶⁾. The courts have indicated that the

tendency at least, under the current law, for purposes other than for the advancement of education, the relief of poverty or the advancement of religion, is to tangible and objective benefits. Lord Wright in **National Anti-Vivisection Society v IRC** considered that, at least approval by:

“the common understanding of enlightened opinion for the time being was necessary before an intangible benefit could be taken to justify and constitute a sufficient benefit to the community to justify admission of the purpose into the fourth class”⁽²⁷⁾.

He went on to remark that an assumed prospect of possibility or gain which was so vague, intangible or removed could not justly be treated as a benefit.

A4. Benefit is assessed in light of modern conditions

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12. What is accepted and recognised as a benefit at one time may in light of changing conditions not be accepted as a benefit in another.

The most famous example of this concerns anti-vivisection purposes where in 1895 in **Re Foveaux**⁽²⁸⁾ the Court of Appeal upheld an anti-vivisection trust as charitable. Later, in 1948, in **National Anti-Vivisection Society v IRC**⁽²⁹⁾, the House of Lords denied the anti-vivisection cause charitable status. Lord Wright, in the **National Anti-Vivisection Society** case indicated that the test of public benefit could vary from generation to generation as the law successively grew more tolerant⁽³⁰⁾.

13. However, this does not provide an unfettered discretion to extend or overturn the law. The courts have indicated that determining something that was charitable is now no longer to be recognised as charitable, was a radical decision and that only a radical change of circumstances which is established by sufficient evidence should justify this⁽³¹⁾.

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

- *“economic ideas and conditions and ideas of social service change”⁽³²⁾;*
- *“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”⁽³³⁾;*
- by a change in the law, the purposes of an established charity may become superfluous or even illegal⁽³⁴⁾; and
- *“with increasing knowledge it appears that a purpose once thought beneficial is truly detrimental to the community”⁽³⁵⁾.*

A5. Public Opinion



15. Charitable status is not decided on the basis of popularity. There is clear legal authority for this. 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**⁽³⁶⁾, 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.”

It explained that the courts (and so the Commission) are asked to decide whether there is an advantage for the public, not whether the public agrees that there is such an advantage.

16. However, when the courts and the Commission 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 Commission and court can and will take into account any general consensus of objective and reasoned opinion, although that opinion alone would not necessarily decide the matter.

17. 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.

B. Principle 2: What is meant by 'Benefit must be to the public, or a section of the public'?

B1. Summary



1. Every charity must provide a benefit which is available to either the public as a whole, or a sufficient section of the public⁽¹⁾. 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. Different sections of the public may support as charitable, purposes falling within different categories. (See section A2, paragraph 9 above). The court has looked at what a sufficient section of the public is on a number of occasions. Three key areas are worth looking at in greater detail: 1) what is a 'sufficient section of the public'; 2) connecting links and ties and 3) the exception for charities with purposes for the relief of poverty.

What is a sufficient section of the public?

B2. 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 bridges, ports, highways, etc)



2. In **Jones v Williams**⁽²⁾ 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. In **Morice v Bishop of Durham**⁽³⁾, Sir Samuel Romilly (Mr Romilly as he then was) in presenting the case, characterised the fourth head as *"the advancement of objects of general public utility"*. This has been quoted in a number of cases such as **re Macduff**⁽⁴⁾.

4. In **Commissioners for Special Purposes of Income Tax v Pemsel**⁽⁵⁾, Lord MacNaghten described the fourth head thus:

"trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

5. In **IRC v Baddeley**⁽⁶⁾, Viscount Simonds referred to Lord Greene MR's statement in **re Strakosch**⁽⁷⁾ that 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.

6. In September 1995, the Commissioners characterised the position of fourth head charities thus:

*"The position at common law is that for charities established under the fourth head of charity, as classified in **Income Tax Commissioners v Pemsel**⁽⁸⁾ (other purposes beneficial to the community not falling within the first three heads), charitable objects must normally be for the benefit of the whole community, or at least the inhabitants of a sufficient geographical area."*⁽⁹⁾

7. However, it is established in case law 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.

8. Lord Reid, in his judgment (*dissenting*) in **IRC v Baddeley**⁽¹⁰⁾, 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**⁽¹¹⁾... 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."*

9. 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 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 highways, 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. 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.

B3. 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)



10. Lord Somervell took the view in **Baddeley** that a 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."*
11. 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.

B4. A more limited beneficial class is acceptable where it is more than a fluctuating group of private individuals⁽¹²⁾, and there is a public benefit in providing the charitable benefits to that group

12. In **Verge v Somerville**⁽¹³⁾ 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."

13. In **Oppenheim v Tobacco Securities**⁽¹⁴⁾, Lord Simonds stated as follows:

"These words 'section of the community' have no special sanctity, but they conveniently indicate first, that the possible (I emphasize the word 'possible') beneficiaries must not be numerically negligible, and secondly, the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual."

For example, a body for the advancement of education must have a purpose directed to benefiting a **class** of people which, taken as a whole, is not numerically negligible, and whose constituent members are not interconnected by personal ties of family or contractual relationship.

14. The view might be taken that these may be the only requirements for public benefit in cases where only the advancement of education is involved, and the educational value and benefits are clear. Alternatively, the view could be taken that such a limited class is a sufficient section of the public on the basis that education benefits not just the individuals who are educated but also, indirectly, the community as a whole. (See quote from *Gilmour v Coates* at section B4 paragraph 17 below)

15. In **Hall v Derby Urban Sanitary Authority**⁽¹⁵⁾, 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?”

16. In **IRC v Baddeley**, Lord Reid, considering the basis on which a trust having as its object some form of child welfare would satisfy the test of general public utility, stated:

“It may be said that it would satisfy the test because the indirect benefit of such a charity would extend far beyond its direct beneficiaries, and that aspect of the matter has probably not been out of sight.”

17. Similarly, 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.”

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.

18. In the Commissioners’ decision on **Community Security Trust**⁽¹⁶⁾, the Commissioners recognised the principle that what is a sufficient section of the community for a particular purpose to be charitable depends not only on what head of charity it falls within, but also the particular nature of the purpose.

Thus, a trust to preserve law and order in relation to one sector of the community would not be charitable, but a trust for protecting life and property which focused specifically on the Jewish community, but which had an impact on the wider community in terms of reducing crime and racially motivated conduct, was capable of being charitable.

19. In the case of the community capacity building purpose, the implication is that building the capacity of a section of the community suffering social or financial disadvantage benefits the whole community.

20. In **Koepler’s Will Trusts**⁽¹⁷⁾, Slade LJ, in discussing whether a charity providing courses was charitable, stated:

“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.”

21. In **Verge v Somerville** 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**⁽¹⁸⁾ a trust for the benefit of the native inhabitants of a town in India was held to be charitable. These decisions can be accommodated very easily within the principle that the benefit extends beyond the limited beneficial class to the whole community. In both cases, the addressing of the social or economic disadvantage of the limited community in question is of benefit to the whole community.

B5. The definition of a sufficient section of the community must have a rational relationship to the charitable purpose in question



22. In **Gilmour v Coats**⁽¹⁹⁾ 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."

23. In **IRC v Baddeley**⁽²⁰⁾ 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."

24. In the same case, Viscount Simonds referred to the concept of "a bridge to be crossed only by impecunious Methodists", to show the danger of conceding the quality of charity to a purpose which is not a public purpose. This may well indicate that a bridge for impecunious Methodists would be a nonsense. However, where the purpose and the class of the public have a more rational connection, the issue may be more open to question.

25. The comments of Lord Somervell certainly 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."

26. In **Dingle v Turner**⁽²¹⁾, Lord Cross also considered the issue:

"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 be by itself 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 class of 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."

27. A charity with a particular class of beneficiaries who are socially and/or economically disadvantaged will be acceptable where the charitable purpose addresses that disadvantage to the benefit of the whole community.

28. It is not acceptable to arbitrarily limit 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 caselaw). Thus having a beneficial class defined by colour of hair or some other arbitrary factor is not likely to be a sufficient section of the community.

29. Consideration has been given to issues such as organisations wishing to limit the benefits it provides to a particular sex or race. Such limitations are not acceptable, unless 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.

B6. A sufficient section of the community must include people on low incomes

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30. This is a fundamental principle of public benefit and is considered at section C below.

Connecting links and ties

B7. The law

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31. The court considered whether a sufficient section of the public was present in several cases, including **Re Compton**⁽²²⁾, **Oppenheim v Tobacco Securities Trust Co Ltd**⁽²³⁾ and **Dingle v Turner**⁽²⁴⁾.
32. 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.
33. Then the court, in the case of **Re Compton**⁽²⁵⁾, 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.
34. 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⁽²⁶⁾. Family ties or a common employer have been held to be essentially personal connections.
35. Lord Simonds expressed these legal principles in the House of Lords' decision in **Oppenheim v Tobacco Securities Trust Co Ltd**⁽²⁷⁾, 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:
- (i) the **possible** beneficiaries must not be numerically negligible; and
 - (ii) the quality which distinguishes those beneficiaries from other members of the public must be a quality which does not depend on their relationship to a particular person.

36. 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.

37. 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**⁽²⁸⁾ and **Re Christ's Hospital**⁽²⁹⁾).

38. 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**⁽³⁰⁾, **Caffoor v Commissioner of Income Tax**⁽³¹⁾ **IRC v Educational Grants Association**⁽³²⁾ and **Re Martin**⁽³³⁾.

B8. Criticism of the Law

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39. The **Compton** test has been the subject of some criticism⁽³⁴⁾ not least in more recent opinions expressed in the House of Lords in **Dingle v Turner**⁽³⁵⁾.
40. 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⁽³⁶⁾ and Goodman⁽³⁷⁾ 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⁽³⁸⁾ and because trusts such as those set up by employers for employees are not altruistic⁽³⁹⁾. 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).

B9. The Commission's approach and application of the law

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41. It therefore seems that, whilst the Commission must apply the law as set out in the **Oppenheim** decision unless and until it is over-ruled, it should be both cautious and flexible in the application of the test.
42. 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 is not a sufficient section of the public [ie where 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]. Beyond that there are no criteria of general application. 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. Numbers should not be over-emphasised.
43. 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)⁽⁴⁰⁾. This means that:
- on this view⁽⁴¹⁾ 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⁽⁴²⁾ it is clear that a public class is intended; and
 - that class can be (and, as a rule, is in fact) described otherwise than by reference to kin or contractual relationship⁽⁴³⁾;
 - if it is difficult to describe a class using objective and impersonal terms, that would indicate 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.
44. 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?"*
45. 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. For this reason too, the Commission considers the above approach should be adopted.

B10. Exceptions for the relief of poverty

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46. In the case of charities for the relief of poverty, the pool from which the intended beneficiaries may be chosen may be more narrowly drawn than for other charitable purposes.
47. The case of **Re Scarisbrick**⁽⁴⁴⁾ 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 within the definition for the pool from which the beneficiaries may be drawn.

48. The court concluded that the exception was established by a series of long standing authorities which must accept as valid, notwithstanding the general principle that applied to the other heads of charity, that a personal connection or tie would affect public benefit.
49. This was confirmed in **Dingle v Turner**⁽⁴⁵⁾, concerning a gift to pay pensions to poor employees of a family company, where Lord Cross reviewed and confirmed the poor relations cases as well as cases on poor employees. The 'poor relations' and 'poor employees' exceptions

are well established and have been confirmed and applied by the court and by the Commission.

50. Our provisional view is that the legal position will not be affected by the provisions in the Charities Act 2006, with its statutory requirement for public benefit. This is on the basis that **Dingle v Turner** still regards 'poor relations' and 'poor employees' charities as providing **some** public benefit. We shall return to this issue in more detail when we prepare and consult on the sub-sector guidance about public benefit and the relief of poverty.

C. Principle 3: What is meant by 'People on low incomes must be able to benefit'?

C1. Charities charging for services



1. 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**⁽¹⁾ **Incorporated Council of Law Reporting for England and Wales**⁽²⁾ and **Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney General**⁽³⁾.
2. The authority for the impact on public benefit of charging for services relies principally on the case of **Re Resch**⁽⁴⁾, a Privy Council case concerning 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. The court confirmed⁽⁵⁾ the principle that charges could be raised by a charity for the services it provides, even if the charges produce a profit. It also gives some indication as to how public benefit may be assessed in any particular case.
4. Lord Wilberforce⁽⁶⁾, having said that in assessing public benefit indirect as well as direct benefit enters into the account, went on to say:

"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."
5. The principles which appear to emerge from this case are:
 - 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;
 - 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 people on low incomes 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.
6. This last principle is also supported by statements in previous cases where the courts have referred to charity extending to the rich but that the poor cannot be excluded. For example, in **Jones v Williams**⁽⁷⁾ 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".
7. This is also supported in the case of **Re Macduff**⁽⁸⁾ and **Oppenheim v Tobacco Securities Trust Co Ltd and Others**⁽⁹⁾.
8. In **Commissioners for Special Purposes of the Income Tax v Pemsel**⁽¹⁰⁾, 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."
9. In **Re Resch** the court concluded that it was only 'some' of the poor that were excluded in that case, 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. Although not explicitly analysed in the case, as the benefits in **Re Resch** were considered in totality, the access to the less well off was clearly more than minimal or nominal access or access that occurred merely by chance.

D. Principle 4: What is meant by 'Any private benefit must be incidental'?

D1. Legitimately incidental

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1. 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.
2. 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 may be relevant.
 - **The benefit should 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 should not be an independent benefit.**

For example, a synagogue, church, temple or mosque is charitable because it holds public religious services and gives religious instruction and pastoral help. Frequently, activity overflows from the place of worship itself to a hall and this often involves personal benefits for members of the congregation in the form of social activities. These social activities in themselves are rarely directed predominantly to the social well-being of the members. Normally they will be merely ancillary to the strictly religious activities.

3. Issues to consider here might include:
 - what is the nature and effect of the benefit?;
 - what is the real end towards which assets are allocated?;
 - is the private benefit a main (or predominant) purpose?;
 - is the promotion of private interests an incidental consequence of carrying out a main charitable object?

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

For example, the promotion of industry and commerce generally for the public benefit is charitable. However, if an organisation has additional or independent aims to develop and provide support services and advice to particular local businesses, then that predominantly promotes the private interests of individuals engaged in enterprises rather than furthering a purpose for the public benefit. Any benefit to the wider community would be too remote.

4. Issues to consider here might include:
 - does the private benefit comprise simply a way of serving the public objects?
 - is any ultimate achievement of a charitable purpose too remote a consequence of the immediate private benefits?
 - **The benefit should 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 should result from such a course of action.**

For example, a charity can be set up to publish law reports and can run a business printing and selling those publications for end users in the community. Plainly that will also benefit professional lawyers. However the publication of reliable reports of decisions of the courts is charitable for the benefit of the public. It is an inevitable and indeed necessary step in the achievement of that benefit that the lawyers will be supplied with some of the tools of their trade. In this example, the benefit to the public could not otherwise be achieved.

5. Issues to consider here might include:

- is there a sufficiently close connection between authorised benefits and the achievement of the charitable purposes?;
- is the private benefit a necessary step in the achievement of a charitable purpose?
- **It should be desirable for the benefit to be conferred. The line of action or strategy, of which it is a necessary part or consequence, should be justifiable in terms of the duty of charity trustees to act solely in the interests of their charity.**

For example, many charities are membership organisations. Sometimes members will be entitled to special benefits including reduced admission charges. Charity trustees will have to determine the question of desirability of giving the benefits. If they are only given to encourage members and to carry out the main charitable purpose, then they may be legitimate.

6. Issues to consider here might include:

- is the private benefit conducive to the achievement of the charitable purpose?;
- is the provision made with a view to giving encouragement to and carrying out the main charitable purpose?
- **The amount of benefit should be reasonable, given its purpose.**

For example, providing a person who is unemployed with transport costs to enable them to travel to job interviews would be reasonable. Buying them a luxury car for the same purpose would not be reasonable.

7. Issues to consider here might include:

- are the trustees acting in accordance with general trust principles in a way which is reasonable and prudent?;
- are they being guided solely by the interests of the charity and thus its charitable purposes?;
- viewed objectively, is the organisation established for a public purpose (with private benefits being an incidental by-product of its pursuit and with a view only to promoting the charitable objects)?

D2. Benefits received as a beneficiary

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8. 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⁽¹⁾.
9. 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⁽²⁾. 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.

D3. Benefits received for providing goods and services in the course of running the charity

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10. 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.
11. There are, however, special considerations with regard to remuneration, payments or benefits to charity trustees⁽³⁾.

D4. Benefits to individuals or businesses as a result of the management of a charity

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12. Greatest difficulty arises when a group of charity trustees are engaged in doing charitable things as a result of which people, who are not beneficiaries, happen to reap some benefits.
13. The fact that every charity's main objects must be exclusively charitable does not mean that the sole effect of the activities of the body must be to promote charitable purposes. It does mean that any benefits to individuals of a non-charitable character, which result from its activities, must be of a subsidiary or incidental character⁽⁴⁾.
14. If there is a mixture of aims, some charitable and some not, or if the main aim or structure⁽⁵⁾ of an organisation is such as to provide some non-charitable benefit, occasioning only consequential or indirect public benefit, then the organisation is not a charity⁽⁶⁾.
15. The problem is to identify what is the predominant object and what is subsidiary or incidental. Benefits usually arise on, or as a result of, decisions made by those controlling an organisation's administration or assets. Charity trustees must exercise their discretions in a manner consistent with their general primary duty to act solely in the best interests of the charity's purposes. If there is scope or provision for taking decisions which authorise benefits furthering private purposes in a way not incidental to a main charitable aim, this would point to a main or predominant private object and so the institution would not be set up for exclusively charitable purposes. To answer the question whether the primary object is itself charitable, it is legitimate to look at the effect of the provisions in the governing document⁽⁷⁾.
16. The court has applied various formulations to determine the question of what is acceptable incidental benefit. The phrases *ancillary and subsidiary and incidental* are often used in this context.
17. There is a distinction to be made between a private benefit which is a substantial part of the object on the one hand, and one which is given or promoted only with a view to carrying out a main charitable purpose on the other. This involves a question of degree and a question of fact. These, of their nature, must be answered in the particular circumstances of each case. What the benefit is, and its amount, will be the determining factors: is there so much personal benefit as to be incapable of being disregarded?⁽⁸⁾

E. The relevance of charities' activities and other background information in assessing public benefit

E1. The public benefit requirement

1. Under the provisions of the Charities Act 2006, a 'charity' is an institution established 'for charitable purposes only' and subject to the charity jurisdiction of the High Court. This essentially imports a 'purpose test' for the determination of charitable status under English and Welsh law. The purpose test is set out in s2 of the Act in terms: "*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. The 'public benefit' requirement of charity is specifically tied to the nature of an organisation's purpose(s).
2. Public benefit must be considered in relation to the purpose as an essential element in determining an organisation's charitable status⁽¹⁾. 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?
3. An organisation cannot be a charity unless it has purposes 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 it falls within one or more of the descriptions of charitable purposes in the Charities Act; and
 - whether it is 'for the public benefit' - that is: beneficial, accessible by a sufficient section of the community (including people on low incomes) and public rather than private.
4. Activities (and other background information) can be relevant in determining (a) and all of the elements of (b).
5. Purposes can only be sought to be achieved by carrying out activities. Normally, the only activities which are relevant are those which the organisation is allowed to pursue under its governing document, properly construed. Activities already being undertaken, and known to be proposed, will be part of the factual background information in the context of which the purposes of any particular organisation fall to be understood.
6. Occasionally, an organisation will not have any highly formulated written statement of its purposes. It will then become a question of paying close attention to the detail of its actual activities, and relevant factual background information, 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. More usually, a written statement

of purposes will 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 Commission 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; and
 - in respect of the question of whether the purposes will, or may, operate for the public benefit.
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 Commission, on the evidence before it, able to form the opinion that those purposes will, or may, operate for the public benefit?⁽²⁾, ie:
 - are the purposes beneficial?;
 - are their benefits accessible by the public generally or a sufficient section of the community (including people on low incomes)?;
 - are they directed to the benefit of the public rather than to private interests?;
 - 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)?

E2. What are the purposes? Do they fall within the descriptions in the Charities Act?

8. The meaning of the words used in an organisation's governing document to express its intended purposes should be ascertained by the Commission 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⁽³⁾). That meaning is to be gathered from (i) the text and (ii) the relevant contextual scene⁽⁴⁾.
9. Within these principles, one 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, it may be necessary to have regard to evidence - including evidence of the background in which the organisation is created and intended to operate - where, for example, the meaning of the words used to express the purposes can be clearly appreciated but it is not plain whether or not those purposes are intended to be exclusively confined within those held legally charitable. In such cases, the court looks 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⁽⁵⁾ (all of which requires consideration of activities and other relevant factual background information).

E3. On the evidence before it, is the Commission able to form the opinion that those purposes will, or may, operate for the public benefit?

10. Even if it is indicated that the purposes fall within the very character of the descriptions of charitable purposes in the Charities Act⁽⁶⁾, 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⁽⁷⁾.

11. 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 benefit?;
- is the benefit available to the public, or to a section of the public?;
- are people on low incomes able to benefit?;
- is any private benefit incidental?

12. Evidence conveying the background information relating to the organisation will be material in any and all of these respects⁽⁸⁾. 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.

E4. 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)?

13. 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 court. 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 and be for the public benefit (as that term is already understood for the purpose of the law relating to charities⁽⁹⁾). 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.

14. In general, the purpose test is applied at the point that an organisation is established⁽¹⁰⁾. 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.

15. Such changes may be in any area of public benefit (whether any benefit can be identified; whether that benefit is public; whether people on low incomes are able to benefit; and whether any private or non-charitable benefit is in fact truly incidental to the carrying out of the charitable purposes).

16. 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⁽¹¹⁾ 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."

17. 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⁽¹²⁾' and 'any charity which has ceased to exist or does not operate'.

18. This means that where the circumstances set out in paragraph 14 above trigger a review of a charity's public benefit, this will not normally affect the organisation's charitable status. 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⁽¹³⁾. One example might be if a charity was established to provide a school, but it was being run in a way which provided no, (or insufficient) benefit to people on low incomes.

19. 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.

20. 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 14 above are set out in our separate publication *The Maintenance of an Accurate Register*.

F. Footnotes

Section A footnotes

- (1) **National Anti-Vivisection Society v IRC** [1948] AC 31, 56 per Lord Simonds
- (2) In **Re Coats' Trust v Gilmour** 1948] Ch. 340, 347 per Lord Greene MR (CA)
- (3) *Ibid.* 347 per Lord Greene MR
- (4) **Sir Howel Jones Williams Trustees v IRC** [1947] AC 447, 455 (HL)
- (5) **Re Hummeltenberg** [1923] 1 Ch 237, 242 per Russell J. See also in **Re Coats' Trust v Gilmour** [1948] Ch 340, 347 per Lord Greene MR
- (6) **Gilmour v Coats** [1949] AC 426, 446 (HL)
- (7) [1972] Ch. 73
- (8) **Gilmour v Coats** *Supra* *Ibid.* 446 per Lord Simonds
- (9) *Ibid.* 447 per Lord Simonds
- (10) *Ibid.* 449 per Lord Simonds
- (11) **National Anti-Vivisection Society v IRC** *Supra.* 47 per Lord Wright
- (12) **Bowman v Secular Society** [1917] AC 406, 442
- (13) In **re Shaw Decd** [1957] 1 WLR 729, 743 when Harman J. considered that a trust to promote a phonetic alphabet was analogous to a political purpose
- (14) In **re Grove-Grady** [1929] 1 Ch 557, 558 per Russell LJ
- (15) **Re Hummeltenberg** [1923] 1 Ch 237, 241
- (16) In **re Grove-Grady** [1929] 1 Ch 557, 572
- (17) In **re Pinion Decd Westminster Bank Ltd v Pinion and another** [1965] Ch 85, 108 (CA)
- (18) In **re Shaw's Will Trust** 1952 Ch 163, 169 which concerned a gift for bringing master-pieces of fine art to the people of Ireland
- (19) **National Anti-Vivisection Society v IRC** [1948] Ch 31, 41 per Lord Wright
- (20) In **re Pinion Decd, Westminster Bank Ltd v Pinion and another** [1965] Ch 85, 105 (CA)
- (21) [1948] Ch 85
- (22) **National Anti-Vivisection Society v IRC** [1948] Ch 31, 47
- (23) **Re Hummeltenberg** [1923] 1 Ch 237, 242. See also **National Anti-Vivisection Society v IRC** [1948] Ch 31, 46 per Lord Wright
- (24) *Ibid.* 41 per Lord Wright
- (25) **Sir Howel Jones Williams Trustees v IRC** [1947] 1 All ER 513
- (26) **Re Resch's Will Trusts [Le Cras v the Perpetual Trustee Company Limited and Others]** [1969] 1 AC 514, 543 per Lord Wilberforce *"The test is essentially one of public benefit, and indirect as well as direct benefit enters into account"*
- (27) **National Anti-Vivisection Society v IRC** [1948] Ch 31, 47 per Lord Wright
- (28) [1895] 2 Ch 501
- (29) *Supra*
- (30) *Ibid.* 42

- (31) **Gilmour v Coats** [1949] AC 426, 443
- (32) **National Anti-Vivisection Society v IRC** Supra 42 per Lord Wright
- (33) In **re Campden Charities** 18 Ch 310 at 324, per Jessel MR as quoted by Lord Simonds in **National Anti-Vivisection Society v IRC** Supra 69
- (34) Ibid. 74 per Lord Simonds
- (35) Ibid. 74 per Lord Simonds
- (36) [1992] 2 FC 52 at 68-69

Section B footnotes

- (1) **Verge v Somerville** [1924] AC 497
- (2) (1767) 2 Amb. 651
- (3) [1805] 10 Ves. 522
- (4) [1896] 2 Ch 451
- (5) [1891] AC 531
- (6) [1955] 1 All ER 525
- (7) [1949] Ch 529
- (8) [1891] AC 531
- (9) Decisions of the Charity Commissioners Vol 4 page 17
- (10) [1955] 1 All ER 525 at 543
- (11) which can be found quoted by Lindley LJ in **Re MacDuff** [1896] 2 Ch at p 466
- (12) para 53, vol 5(2) Halsbury's Laws (1993 re-issue)
- (13) [1924] AC at 499
- (14) [1951] AC 297
- (15) (1885-86) LR 16 QBD
- (16) Decisions of the Charity Commissioners Vol 4 pages 8-12
- (17) [1984] 2 WLR 973
- (18) (1841) 1 Ph. 185
- (19) [1949] AC 426 at 449
- (20) [1955] 1 All ER 525
- (21) [1972] 2 WLR 523 at 624
- (22) [1945] Ch 123
- (23) [1951] AC 297
- (24) [1972] AC 601
- (25) [1945] Ch 123

- (26) 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
- (27) [1951] AC 297, 306
- (28) (1762) Wilm 163
- (29) (1889) 15 App Cas 172
- (30) [1954] Ch 252
- (31) [1961] AC 584
- (32) [1967] Ch 123
- (33) The Times, 17 November 1977
- (34) as it was the dissenting judgement of Lord MacDermitt in **Oppenheim**. See also PS Atiyah Public Benefit in Charities (1958) 21 MLR 138
- (35) [1972] AC 601
- (36) Report of the Committee on the Law and Practice relating to Charitable Trusts, 1952 Cmd 8710
- (37) Charity Law and Voluntary Organisations, NCSS 1976
- (38) Nathan paragraph 136
- (39) Goodman paragraphs 28 and 38
- (40) **Re Tree** [1945] Ch 325
- (41) Subject to the other criteria of charitable status being met
- (42) in particular a consideration of the objects as they relate to the facts of each case
- (43) See **Springhill Housing Action Committee v Commissioner of Valuation** [1983] NI 184
- (44) [1951] Ch 622
- (45) [1972] AC 601

Section C footnotes

- (1) [1968] AC 138
- (2) [1972] Ch 73
- (3) [1983] Ch 159
- (4) **Re Resch's Will Trusts [Le Cras v the Perpetual Trustee Company Limited and Others]** [1969] 1 AC 514
- (5) 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 Trust Housing Association Ltd v Attorney General** [1983] 1 Ch 159
- (6) at page 544
- (7) [1767] Amb1 651, 652
- (8) [1896] 2 Ch 451, 464
- (9) [1951] 1 All ER 31 (Ld Simonds)
- (10) [1891] AC 531

Section D footnotes

- (1) See **London Hospital v IRC** [1976] 1 WLR 613, 620 E per Brightman J
- (2) **Joseph Rowntree Memorial Trust Housing Association v AG** [1983] Ch 159, 171 per Peter Gibson J
- (3) See the Commission guidance *Payment of Charity Trustees*
- (4) **IRC v City of Glasgow Police Athletic Association** [1953] 1 All ER 747
- (5) It should also be noted that evidence of such a collateral or independent purpose can in some circumstances, in accordance with the rules of construction, be gleaned from activities undertaken under provisions which appear to relate to administrative matters only (and not just the objects clause) **AG v Ross** [1985] 3 All ER 334. And so a substantial non-charitable activity, having no connection with the apparently charitable purposes of the body in question, gives rise to an assumption that the activity is not simply a means of fund-raising but is an object in its own right. The most graphic example would be an apparent charity running a public house. "*Tenant Plays v IRC carried on a substantial non-charitable purpose, for instance ... if it took power permanently to run a public-house in order to produce funds for its charitable purpose.*" Per Cohen LJ. See Maurice C Cullity op cit. Intended activities can be evidence that the benefits to be provided do not further a charitable purpose because acting in the manner intended does not promote a public benefit: **Southwood v AG** (CA, 28 June 2000).
- (6) **Midland Counties Institution of Engineers v IRC** (1928) 14 TC 285; **General Nursing Council for England and Wales v St Marylebone Borough Council** [1959] AC 540; **NZ Society of Accountants v CIR** [1986] 1 NZLR 147
- (7) **Keren Kayemeth le Jisroel Ltd v IRC** [1932] AC 650
- (8) **The Midland Counties Institute of Engineers v IRC** (1928) 14 TC 285, 293 per Rowlatt J

Section E footnotes

- (1) 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). It must be clear that every possible main object is charitable within the legal meaning (cf *Tudor on Charities* 9th ed, 2003 para 3-015).
- (2) **National Anti-Vivisection Society v Inland Revenue Comrs** [1947] 2 All ER 217 at 221, [1948] AC 31 at 44 per Lord Wright: 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.
- (3) **Prenn v Simmonds** [1971] 3 All ER 237, 240-242, [1971] 1 WLR 1381 at 1384-1386, HL, per Lord Wilberforce: The background knowledge is known as the 'matrix of fact' or factual matrix (and can extend to anything which would have affected the way in which the language of the document would have been understood by a reasonable person).
- (4) **Sirius International Insurance Company(Publ) v FAI General Insurance Limited and others** (2 December 2004, the House of Lords) Lord Steyn was concerned to construe a settlement (in a commercial context). He said: "*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.*"

- (5) **IRC v Oldham Training and Enterprise Council** [1996] S.T.C. 1218 Lightman J in that case went on to say:
"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: see Buckley LJ in Council of Law Reporting v AG [1972] Ch 73 at 79."
- There are a number of instances – not limited to ambiguity of objects – where the court has confirmed that the court may consider surrounding facts (including actual and intended activities of an organisation) before and after it is established in order to determine charitable status:
- **Incorporated Council of Law Reporting v AG** [1971] 3 WLR 853. The court of appeal considered a registered company with objects in clause 3 of its memorandum to publish reports of judicial decisions. Sachs LJ said (p 864 B and following) *"... there came in time the 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) nor 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 as if it were situate in a vacuum. That cannot be right."*
 - **Incorporated Council of Law Reporting v AG** [1972] 1 Ch 73, at p 91 per Sachs LJ: The court may admit extrinsic evidence as to construction (courts look at 'circumstances in which the institution came into existence and the sphere in which it operates' to determine whether its purposes are charitable).
 - **AG v Ross** [1968] 1 WLR 252, 263 per Scott J: 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 has since its formation carried on"* He also said, *"... the question whether (the institution) is or is not charitable must, in my view, be 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 whether expressed purposes will lead and the consequences of their pursuit. See also **Baptist Union of Ireland (Northern) v IRC** 26 TC 335
- (6) c.f **Williams' Trustees v IRC** [1947] AC 457 - Lord Simonds in considering the nature of the beneficiary class and whether it was 'public'
- (7) **McGovern v AG** [1981] 3 All ER 493, 504 per Slade J *"... a trust must always be shown to promote a public benefit of a nature recognised by the courts 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."*

- (8) **National Anti-Vivisection Society v IRC** [1947] 2 All ER 217 settled that the overriding question of public benefit was one for the court's opinion on the evidence before it (approving **Hummeltenberg**).
- Southwood v AG** (28 June 2000) Chadwick LJ delivering the judgment of the court of appeal on an object directed in terms to the ostensible second head purpose of the advancement of the education of the public in the subject of militarism and disarmament said:
- "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 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 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."*
- The principle is the same as that expressed by the Court of Appeal in **Re Coats' Trusts** [1948] 1 Ch 340 relating to a third head body (appealed to the House of Lords where the speeches did not overturn the principle) upon which we rely in part in the Scientology decision:
- "...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 cognizable by the court."*
- (9) s3(4) Charities Act 2006
- (10) The situation in England and Wales may differ from that in Scotland. The application of the Scottish 'charity test' may, it seems, ultimately result in removal of an organisation from the Scottish Charity Register if it no longer meets the second part of the test relating to public benefit. *Meeting the Charity Test* paragraph 8.2 page 19 – this does not say that failure to meet public benefit expectations will occasion a removal from the Scottish Charity Register but that exceptionally it might.
- (11) at [1947] 2 All ER 217, 238
- (12) In the determination of whether any particular body is established for charitable purposes and thus entitled to be on the register, the Commission has to use the same system and rationale as the court. There is no other method available to us to determine whether or not any particular purpose is exclusively charitable according to the law of England and Wales. Equally when removing an organisation from the register. The words of the new section, 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** (Butterworths 1962 at page 51): *"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 with 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 High Court against Tribunal decisions.
- (13) **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

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