

THE MEANING OF ‘CHARITY’

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A. DEFINITIONS

Part 1, s 1(1) of the Charities Act 2006 defines ‘charity’ as an institution which is established for charitable purposes only and which falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities. The Charities Act 1993 contained an almost identical definition (see para 1.02 below). Despite the apparent similarity of the meaning of the term in the two Acts, there have been some cases where the essential issue under the 1993 legislation was whether or not an institution was a charity under the law of England and Wales, at all. The Charities Act 2006, s 1(1) addresses and clarifies this issue. 1.01

The issue of whether an institution was or was not a charity began with ss 96 and 97 of the 1993 Act. A charity was an institution which was established for charitable purposes and subject to the control of the High Court. A charitable purpose was a purpose which, judged according to the law of England and Wales, was one which was exclusively charitable. Historically, the problem has not lain in identifying whether the particular purposes and activities of an institution were ‘charitable’ or not, but in whether the Charity Commission and the High Court had jurisdiction to register and regulate the charity or branch of a foreign charity operating in the United Kingdom.¹ 1.02

The new s 1 changes the emphasis from judging the institution against current English law to stating what charity means ‘For the purposes of the law of England and Wales’. *Dreyfuss (Camille and Henry) Ltd v IRC*² concerned the Income Tax Act 1918, s 37. The Dreyfuss Foundation was incorporated in the state of New York and the objects of the institution were exclusively charitable according to the law of England and Wales. It was held by the Court of Appeal that the word ‘established’, which is also used in s 1 of the 2006 Act, meant bodies regulated by and subject to 1.03

¹ ‘Jurisdiction in Charity Law’, PCB 2004, Issue No 4, 240.

² [1954] Ch 672.

the law of the United Kingdom. There must be a trust taking effect and enforceable under the law of the United Kingdom which creates an obligation enforceable in the courts of the United Kingdom. In the above case the corporation would not have been 'resident' in the United Kingdom under the principles of private international law.

1.04 It is arguable that there are two limbs to jurisdiction or showing that a charity is 'established' in England and Wales. First there is a concern about securing the administration of the charity and the practical matter of enforcing the trust, if necessary, against the trustees in breach. Secondly, there is a question as to the true 'residency' of a charity under international law.

1.05 The first question—enforceability—may be the subject of proceedings, and the court may enjoy a limited jurisdiction as in *Provost of Edinburgh v Aubrey*³ and *Attorney General v Lepine*,⁴ where the court simply declared the trust charitable and directed that the gift was to be applied and administered elsewhere. In *Gaudiya Mission v Brahmachary*,⁵ Mummery LJ began his assessment of the principles and practice to be followed by citing Dicey & Morris,⁶ repeating the principle that

the English Courts will not administer a foreign charity under the supervision of the Court, nor will they settle a scheme for such a charity. It is clear that the Court cannot effectively control trustees who will probably hold property outside England, and if it appointed trustees for a charity both within and without England the English trustees would have difficulty in controlling their co-trustees.

1.06 More recently, in the Armenian Patriarch of Jerusalem⁷ case, property was held by a bank in England for certain charitable purposes in Jerusalem, where the detailed application of the income within those purposes was to be determined by the Patriarch of Jerusalem. The Charity Commission stated that the bank was a nominee only and did not fall within the definition of a charity trustee under s 96 of the Charities Act 1993. The court disagreed and stated that there was a trustee in this country, and the charitable trust was therefore subject to the supervision of the English court.

1.07 The Charities Act 2006, s 1(2) further defines 'charity' by stating that the meaning of the term in s 1(1) does not apply for the purposes of an enactment if a different definition of that term applies for those purposes by virtue of that enactment. In other words, another Act may expressly declare whether or not an institution is to be treated as a charity, eg an Education Act. If that is the case then the basic definition in s 1(1) is not to be applied. In *Construction Industry Training Board v Attorney General*,⁸ it was argued that the court did not have jurisdiction over the charity as the Act establishing it appointed the Minister as the controlling body. It was held that the relevant provision of the Charities Act 1960 dealt with

³ (1754) Ambler 256.

⁴ (1818) 2 Swan 181.

⁵ [1998] Ch 341.

⁶ *The Conflict of Laws*.

⁷ *His Beatitude Archbishop Torkum Manoogian, the Armenian Patriarch of Jerusalem v Yolande Sonsino and Others* [2002] EWHC 1304.

⁸ [1973] Ch 173.

B. The Meaning of 'Charitable Purpose'

a charitable institution established in terms which provided for control from outside the institution, such as the executive in a statutory body, and where the extent of that control was such that the jurisdiction of the court was substantially ousted, the charitable institution was not a charity within the statutory definition.

The Charities Act 2006 recognizes the principle that a charity may well fall within the definition of 'charity' in s 1(1) but be primarily regulated by some body other than the Charity Commission. The concept of a 'principal regulator' is expressly included in the 2006 Act⁹ for the first time. It has been introduced in conjunction with the power of the relevant Minister to make orders which can specify that particular institutions, or particular classes of institutions, either cease to be, or become, exempt charities. The circumstances in which this power may be used by the relevant Minister are not given. Potentially, whole classes of charities may be principally regulated by a body other than the Charity Commission. The Charity Commission may still regulate¹⁰ the charity, but in a secondary or supplementary way. 1.08

Consistent with the intention of preserving the current law and merely modernizing it, any reference to a charity within the meaning of the Charitable Uses Act 1601, or the preamble to it, is to be construed as a reference to a charity within s 1 of the Charities Act 2006. The references are to be in an enactment or document. The 1601 Act is often referred to as the 'Statute of Elizabeth I'.¹¹ In the 19th century the Statute was interpreted further¹² and four heads of charitable purposes were established. These were: 1.09

- (a) the relief of poverty;
- (b) the advancement of education;
- (c) the advancement of religion; and
- (d) other purposes beneficial to the community.

The government review took the view that the four heads of charity and the Statute of Elizabeth I produced uncertainty and confusion, and did not accurately represent the full range of different types of organization enjoying charitable status today. The intention of the Charities Act 2006 is to clarify what constitutes 'charity' in the 21st century and change the parameters of charitable status to include organizations which provide public benefit but which are currently either borderline cases or denied charitable status.

B. THE MEANING OF 'CHARITABLE PURPOSE'

The Charities Act 2006, s 2(1) defines 'charitable purpose' as being a purpose which falls within the list in s 2(2) and which is for the public benefit. The Act thus 1.10

⁹ Charities Act 2006, ss 13 and 14.

¹⁰ See para 4.08 below.

¹¹ For a longer discussion of the foundations of charitable purposes and the Statute of Elizabeth, see *Tudor, Charities*, 9th ed (Thompson, Sweet & Maxwell, 2003), chap 1.

¹² *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531, at 583.

contains a two-part test: (i) the purpose itself; and (ii) a requirement to provide public benefit. The inclusion of a specific element of public benefit in the statute is an innovation and is further defined in s 3 of the 2006 Act (see further paras 2.21 to 2.31).

- 1.11 Section (2) lists descriptions of purposes which are charitable. The first three—the prevention or relief of poverty, the advancement of education, and the advancement of religion—are familiar. Of the next three—the advancement of health or the saving of lives, the advancement of citizenship or community development, and the advancement of the arts, culture, heritage, or science—only the second is relatively new. 'Citizenship' is not defined. The seventh and new charitable purpose is the advancement of amateur sport.¹³ Human rights, conflict resolution or reconciliation, religious and racial harmony or equality and diversity are all included in the eighth charitable purpose under the Charities Act 2006. Environmental protection and improvement and animal welfare are also expressly included in the list in s 2 of the Act. The promotion of the efficiency of the armed forces of the Crown and the emergency services also appears. Section (2)(j) refers to the relief of those in need and covers such activities as the provision of care homes, facilities for the disabled, and social housing. The final charitable purpose included in the list in s 2(2) of the Charities Act 2006 is given as 'any other purpose within subsection (4)'. Section (4) states that those purposes are 'any purposes not within paragraphs (a) to (l) of subsection (2) but recognised as charitable purposes under existing charity law or by virtue of section 1 of the Recreational Charities Act 1958 ...'. Further, they include any purposes which may be 'reasonably' regarded as analogous to, or within the spirit of, any of those purposes listed in s 2(2). All these charitable purposes are discussed further in Chapter 2.

¹³ *Re Nottage* [1895] 2 Ch 649.

THE TWO-PART TEST FOR CHARITY

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A. CHARITABLE PURPOSES

1. The Prevention and Relief of Poverty

The relief of poverty as a charitable purpose is well established, and gifts as indefinite as those ‘for the good of poor people forever’¹ have been held to be valid charitable gifts. The relief of poor people appears in the Statute of Elizabeth itself and has continued to be charitable. If an institution or gift is expressly established for the relief of the poor of a class of people or geographical area, it will still be charitable. The types of classes of preferred beneficiary include the poor families of the armed forces or of a particular regiment, servants, poor pious persons, and ‘youths of merit’.² Relieving the poverty of people of a specific religious denomination is also charitable. Classes of beneficiary may be described by reference to particular places (eg a particular parish or town). Traditionally, relief of the poor has enjoyed tolerant treatment in the courts. There is no ‘test’ of what constitutes poverty.³ Orphans, widows, and almost every description of a person who may be poor, may be found in extensive case law. In the case of relieving poverty, the existence of public benefit as required under the Charities Act 2006 may easily be met. Modern examples of the Charity Commission recognizing new methods of relieving poverty can also easily be found.⁴ Although relieving poverty is obviously in the public benefit, the imposition of the statutory public benefit requirement may lead to publication of specific guidance by the Charity Commission in future. There are some cases⁵ where it has been doubted that the class of beneficiaries constitutes a sufficient section of

¹ *Att-Gen v Peacock* (1676) Rep. T. Finch 245.

² See *Tudor, Charities*, 9th ed (Thompson, Sweet & Maxwell, 2003), at para 2-011.

³ See eg *In re Coulthurst* [1951] Ch 661, at 665.

⁴ (1995) 4 Ch Com Dec, pp 1–7, *The Fairtrade Foundation*; (1994) 4 Ch Com Dec, pp 13–16.

⁵ *Dingle v Turner* [1972] AC 601; cf *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, *Re Cox* [1955] AC 627.

the public, or where the class of beneficiaries enjoys a personal nexus which excludes the benefit of the public. The current anomalous 'poor relations' cases⁶ will probably continue to enjoy charitable status, for now, as the Charities Act 2006 seeks to preserve the existing law; however, in the light of the public benefit requirement, any new registration of charities for the relief of poverty will have to satisfy the Charity Commission. It is not clear whether quantitative or qualitative judgements will be made.

- 2.02 The use of the word 'prevention' appears to be an innovation in the Charities Act 2006, but indirect means of relieving poverty have historically been recognized. Providing land, houses, and almshouses, and providing houses to be let at affordable rents, all have been recognized as charitable purposes but could equally be interpreted as methods for the prevention of poverty. Issues such as unemployment may be addressed under this head. The relief of unemployment was found to be charitable in *IRC v Oldham Training and Enterprise Council*,⁷ but under the fourth head of charity in *Pemsel* (see para 1.09 above). The Charity Commission has produced guidance since 1999 on what, in its judgement, would be charitable. It remains possible for a charity to fall within more than one of the listed charitable purposes in the Charities Act 2006, s 2(2).

2. The Advancement of Education

- 2.03 The advancement of education also features in the Statute of Elizabeth and has long been recognized as charitable. The extent of this recognition is shown by the principle, operating prior to the Charities Act 2006, that institutions established for this purpose were presumed to be for the public benefit and therefore charitable. This presumption has been removed expressly in s 3(2) of the 2006 Act. Educational purposes are similar to the relief of poverty in that the court has been tolerant towards quite widely expressed purposes and declared them charitable.⁸ 'Education' itself remains undefined, both in the law prior to the Charities Act 2006 and after it. Any guidance in the cases is vague, but it could be said that to be educational something must improve knowledge and be of some value to society. The promotion of information and knowledge should not be carried out in a campaigning or propagandist way, or be political.
- 2.04 The establishment of schools, the payment of schoolteachers, the provision of scholarships and prizes, and the provision of facilities (eg books or whole libraries) for educational purposes are all charitable.⁹ Physical education is also included.¹⁰ Aesthetic education is considered to be charitable,¹¹ as is the provision of education in institutions or societies which could not be defined as schools or colleges.

⁶ See Lord Cross in *Dingle v Turner*, above, n 5, at 623.

⁷ [1996] STC 1218.

⁸ See *Re Ward* [1941] Ch 308.

⁹ See *Tudor*, above, n 2, paras 20–21 to 20–25.

¹⁰ See *IRC v McMullen* [1981] AC 1.

¹¹ *Royal Choral Society v IRC* [1943] 2 All ER 101.

Education is not confined to educating children but may include general education of the public. Currently, independent schools enjoy charitable status; but where high fees are charged this may change, unless such institutions can prove that they provide sufficient public benefit to satisfy s 3 of the 2006 Act (see further para 2.21 below).

3. The Advancement of Religion

This purpose was presumed to be charitable prior to the Charities Act 2006. As 2.05 in the case of education, s 3(2) of the Act removes any presumption of public benefit. In s 2(3), religion is further defined as including a religion which involves belief in more than one god and a religion which does not involve belief in a god. This approach is consistent with the modernizing of charity law. In *Re South Place Ethical Society*,¹² two essential attributes of a religion were given as faith in a god and worship of that god. Other characteristics which were important before the 2006 Act included submission to the object worshipped and the veneration of it.¹³ In Australia it has been established since 1983 that belief in a supreme being is not necessary to a religion, nor even that a religion should necessarily be theistic.¹⁴ The new Act makes it clear that English law now accepts a wider view of what constitutes a religion. One element of a religion which is still undefined in the Charities Act 2006, though, and which may remain as an essential element in defining what is a religion, is 'worship'. It is clear that as currently interpreted, English law requires a form of worship within a religion, although the official recognition that belief in a deity is not essential could lead to change.¹⁵ Thus, whilst the Charities Act 2006 has modernized the law, in that it provides a statutory definition of what is not necessary in a religion, it has not attempted to define exactly what *is* necessary in a religion. It may be predicted that organizations which have been refused registration as religions may renew their attempts to become registered.¹⁶

4. The Advancement of Health or the Saving of Lives

The relief of the sick is a well-established charitable purpose, but the idea that it is 2.06 only the 'sick' who may benefit under this head is too narrow. The advancement of health is a wide term which includes the prevention of disease, whether by preventative medicine or the education of the public. The change in the expression of this head of charity reflects the modern position which is much more open and liberal. Even spiritual healing has been recognized as charitable.¹⁷ The advancement of health includes the provision of hospitals and other therapies, including those

¹² [1980] 1 WLR 1565.

¹³ *R v Registrar General, ex p Segerdal* [1970] 2 QB 697.

¹⁴ See *The Church of the New Faith v Commissioners for Payroll Tax* (1983) 154 CLR 120.

¹⁵ See the Charity Commission decision on the Church of Scientology, [1999] Ch Com Dec.

¹⁶ For a discussion concerning human rights and the freedom of religion, see *Tudor*, above, n 2, at paras 2–049 to 2–051.

¹⁷ [2002] Ch Com Dec, 15 August.

directed at mental health as well as physical health. It is also an ingredient in the recognition of the advancement of amateur sport as charitable. It is clear that the saving of lives is also charitable and long-established, eg through the recognition of organizations such as the Royal National Lifeboat Institution.

5. The Advancement of Citizenship or Community Development

- 2.07 In various framework documents the Charity Commission has argued for the recognition of new charitable purposes which were difficult to argue as being analogous to the Statute of Elizabeth. The promotion of urban and rural development and 'community' building may all be considered under this charitable purpose.¹⁸ The concept of 'citizenship' is not defined, but s 2(3) states that the promotion of 'civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities' would be included. Whilst it is clear that encouraging participation in socially or economically deprived areas produces public benefit, it may be less clear in some other circumstances, and organizations operating in well-off communities may have difficulty in showing the necessary public benefit. Included under this head are organizations such as the National Council for Voluntary Organizations, which exists as a body established for the purpose of helping other charities to run more effectively, and to provide services to them. The 'community' being developed does not have to be only a geographical community but can be a community of interest too.¹⁹

6. The Advancement of the Arts, Culture, Heritage, or Science

- 2.08 The inclusion of this charitable purpose is again uncontroversial in that all the activities listed have already been recognized as charitable. The requirement of public benefit may cause difficulties if the organization wishes to charge large amounts for access to such facilities. The Royal Opera House and other similar organizations may have to demonstrate that public access to their productions is not too restrictive and out of the reach of the majority of the public. 'Science' itself is not defined, but it is extremely unlikely that it is restricted only to natural science, being wide enough to include other previously recognized charitable purposes.²⁰ The inclusion of heritage as a charitable purpose has long been recognized in practice, with bodies such as the National Trust being familiar to all. There may be scope to argue about the quality of any heritage which some may think worth preserving but others consider worthless. The word itself is undefined in the Charities Act 2006, as is the word 'culture'.

¹⁸ See Charities for the Relief of Unemployment (1999) RR3, and also Promotion of Urban and Rural Regeneration (1999) RR2.

¹⁹ For further examples of charities of this type, see *Tudor*, above, n 2, at pp 103 and 113.

²⁰ An example of this is *Re Pleasants* (1923) 39 TLR 675, in which horticulture was advanced.

7. The Advancement of Amateur Sport

Amateur sport was recognized as a charitable purpose shortly before the Strategy Unit Report which led to the Charities Bill. It was an innovative change in the law. Previously it had been recognized that there might be some public benefit in advancing sport but that the private enjoyment of participants outweighed that public benefit.²¹ If sport was encouraged to enable organizations such as the police or the armed forces to function better, or as part of the curriculum in a school or college,²² such sport was recognized as being a charitable purpose. The inclusion of sport as a charitable object recognizes the change in society which now considers sport to be integral to a healthy lifestyle and the prevention of illness. The provision of facilities for the community, including sports facilities, was recognized as charitable in 1958 in the Recreational Charities Act of that year. It is now clear that the promotion of community participation in healthy recreation is charitable. 2.09

‘Sport’ itself is defined in s 2(3)(e) of the Act as meaning ‘sports or games which promote health by involving physical or mental skill or exertion’. Community amateur sports clubs, which are not charities, are entitled to favourable tax treatment under Sch 18 to the Finance Act 2002. There is guidance from HM Revenue & Customs which defines terms such as ‘amateur’, and it might be thought likely that these definitions might be used in the context of charities too. Some sports clubs may remain non-charitable if they consider that it would be difficult to meet the public benefit requirement, or that their subscriptions prevented them from providing sufficient public benefit. To avoid dual regulation, the Act provides that if a community amateur sports club is registered under Sch 18 to the Finance Act 2002, it is not a charity.²³ 2.10

The Recreational Charities Act 1958 is amended by s 2(4)(a) of the Charities Act 2006. The amendment is aimed at clarifying s 1 of the 1958 Act. Section 1(2) of the Recreational Charities Act now reads: 2.11

(2) The requirement in subsection 1 that the facilities are provided in the interests of social welfare cannot be satisfied if the basic conditions are not met.

(2A) The basic conditions are—

- (a) that the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended; and
- (b) that either—
 - (i) those persons have need of the facilities by reason of their youth, age, infirmity or disability, poverty or social and economic circumstances, or
 - (ii) the facilities are to be available to members of the public at large or to male, or to female, members of the public at large.

The special conditions for miners’ welfare trusts are abolished.²⁴

²¹ *Re Nottage* [1895] 2 Ch 649.

²² *IRC v McMullen* [1981] AC 1.

²³ See s 5(4), (5) of the Charities Act 2006.

²⁴ See the Miners Welfare Act 1952 and *Wynn v Skegness UDC* [1967] 1 WLR 52.

8. The Advancement of Human Rights, Conflict Resolution or Reconciliation, or the Promotion of Religious or Racial Harmony or Equality and Diversity

- 2.12 These purposes are new and represent some very modern concerns in society. The Charity Commission has already recognized the promotion of human rights as a charitable purpose.²⁵ Similar to the promotion of citizenship, the types of organization registered under this head do not have a body of case law to aid the interpretation of the statute. Most of the relevant decisions have been made by the Charity Commission.

9. The Advancement of Environmental Protection or Improvement

- 2.13 This purpose reflects the growing concern for the protection and the improvement of the environment, and may be considered to be an expanding area of activity for charitable organizations.²⁶

10. The Relief of Those in Need by Reason of Youth, Age, Ill-health, Disability, Financial Hardship, or Other Disadvantage

- 2.14 This purpose is widely drafted and will include organizations such as almshouses, hospices, hostels, etc. Section 2(3)(e) specifically provides that this purpose includes relief given by the provision of accommodation or care to the persons mentioned in this head of charity. 'Care' itself remains undefined. Although this purpose includes the provision of accommodation, it does not exclude other activities designed to aid the people described under this purpose. The provision of advice, advocacy, or day care would all be included here.

11. The Advancement of Animal Welfare

- 2.15 The inclusion of animal welfare as a directly charitable purpose is new. Prior to the Charities Act 2006, the public benefit in protecting animals was held to be charitable on the grounds that it promoted feelings of humanity and repressed brutality. The public benefit was therefore indirect. In *Re Wedgewood*,²⁷ it was stated that gifts for animal welfare

tend to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race.

²⁵ There are currently 28 registered charities concerning human rights.

²⁶ See, eg, Agriforestry and Environmental Protection, registered in 1996. Also see the National Society for Clean Air and Environmental Protection, which was registered in 1963.

²⁷ [1915] 1 Ch 113, at 122.

Animals' usefulness to mankind is also recognized, and therefore their utility provides another reason justifying the protection of animals being considered charitable.²⁸ Many of the most publicly recognized charities exist for this purpose. Not all organizations which could be formed for this purpose have been held to be charitable, though, and there were some notable exceptions prior to the Charities Act 2006.²⁹ Sanctuaries for the protection of wild animals against man have been held not charitable;³⁰ however, in practice many charities provide nature reserves, and it is arguable that the protection of wildlife may be included in the advancement of environmental protection or improvement (see para 2.13 above). 2.16

12. The Promotion of the Efficiency of the Armed Forces of the Crown, the Police, Fire, and Rescue Services

The promotion of the efficiency of the armed forces of the Crown has traditionally been recognized as charitable.³¹ It has been held that sport, if designed to improve the fitness of forces personnel and therefore their efficiency, does provide public benefit. Any gift designed to encourage boys (or girls) to become officers within the forces would have been charitable. Whilst assessments of which activities promote efficiency in the forces have been liberal, there are limits to what is acceptable. Learning to shoot alone is now not enough to produce sufficient public benefit³² as, in some circumstances, the activity was recreational and produced insufficient public benefit. 2.17

The specific inclusion of the police, fire, and rescue services under this head is new. However, the provision of fire services was recognized as charitable in 1951.³³ Whilst the inclusion of the rescue services under this head is also new, it is possible to foresee that some organizations will be able to qualify as organizations for the 'saving of lives' and also promote the efficiency of the rescue services. 2.18

13. Any Other Purposes within Subsection (4)

This charitable purpose is inclusive and is intended to cover all institutions and purposes which are currently recognized as charitable. Anything already recognized but not included in the list set out in s 2(2) or under the Recreational Charities Act 1958 remains a charitable purpose. Further, any purposes which could be regarded as analogous to the purposes listed in s 2(2)(a)–(l) will be charitable purposes. The wording of s 2(4)(b) states that such a purpose should 'reasonably be regarded as analogous'. This suggests that an objective test will be applied in deciding whether there is sufficient analogy to a purpose listed in s 2(2)(a)–(l). Initially, such a test will be applied by the Charity Commission when a charity applies for registration. If 2.19

²⁸ *London University v Yarrow* (1857) 1 De G&J 72.

²⁹ See eg *National Anti-Vivisection Society v IRC* [1948] AC 31.

³⁰ *Re Grove-Grady* [1929] 1 Ch 557. ³¹ *Re Driffill* [1950] Ch 92.

³² See gun clubs at (1993) 1 Ch Comm Rep, App A.

³³ *Re Wokingham Fire Brigade Trusts* [1951] Ch 373.

either a body or the potential trustees of a charity are refused registration, an appeal may be brought to the Charity Tribunal.³⁴ If a purpose has been recognized as being charitable as it is for the public benefit, but it is not included in (or analogous to) the listed charitable purposes in s 2(2)(a)–(l), it will still be charitable under the Charities Act 2006.

- 2.20 The interpretation of the charitable purposes and words used to describe the listed charitable purposes is to remain the same as prior to the 2006 Act.³⁵ This interpretation effectively means that any words having a particular definition in charity law will continue to have that definition and be interpreted accordingly. Charities established by statute (which declares them to be charitable) will remain charitable.³⁶ Some charities may be established by Act of Parliament or by Royal Charter,³⁷ and those continue to enjoy charitable status. In s 2(6), ‘documents’ referring to charitable purposes are to be interpreted as referring to a charity within s 2(1). Only documents or enactments made before the 2006 Act fall into this category. If a will is made which refers to charitable purposes, and that will was made prior to the Act coming into force, it will be construed as referring to charitable purposes after the Act comes into force.

B. PUBLIC BENEFIT

- 2.21 The requirement that charitable purposes should be for the public benefit is set out in s 2(1)(b) of the Charities Act 2006. Section 3 applies a public benefit ‘test’. However, the Act does not contain any new definition of ‘public benefit’ or suggest how charities should demonstrate public benefit. Decisions on how the public benefit test will operate will rest with the Commission as the independent regulator for charities in England and Wales, based on underlying case law.
- 2.22 The document reproduced in Appendix 2 sets out the Charity Commission’s approach to the public benefit test in more detail, including the process for consultation and issues concerning fee-charging charities.
- 2.23 The public benefit test not only applies at the time of registration but also represents a continuing obligation which must be demonstrated by all existing charities in their day-to-day activities and their reporting arrangements. Generally, all existing charities should already be operating for the public benefit in order to take advantage of tax exemptions granted to charities.³⁸ However, this is the first time such a requirement has been codified in statute.
- 2.24 The difference is in emphasis. The removal of the presumption of public benefit³⁹ and the commitment to testing the actual activities of an organization represent a radical change. It is clear that benefits to specific individuals would not qualify;

³⁴ See Sch 4, Charities Act 2006.

³⁵ Section 2(5).

³⁶ Section 2(6).

³⁷ However, see s 15 of the Charities Act 1993, allowing amendments by the court, and also s 16 of the Charities Act 1993.

³⁸ See *Jones v Williams* (1767) Amb 651.

³⁹ Charities Act 2006, s 3(2).

but the quantity of benefits may not be the only measure, and it is expected that qualitative judgements will be made and that indirect types of benefit will be taken into account.

Charities which may be affected include those which need to charge substantial fees. For example, independent schools, private hospitals and homes, and perhaps institutions such as opera houses. The substantial fees charged by this type of organization have the effect of excluding the less well-off. It is likely that if an institution is charging such fees, it will be found to be unduly restrictive. 2.25

Section 3(3) states that references to public benefit are references to public benefit 'as that term is understood for the purpose of the law relating to charities in England and Wales'. It is therefore necessary to assess some of the cases when there has been an issue relating to the value to the public of various activities. Generally, charities should be for the benefit of the public or a sufficiently large proportion of the public. It has been the function of the court to assess whether or not there is sufficient public benefit to be found.⁴⁰ The motive or views of the founder are irrelevant in assessing public benefit.⁴¹ If there was a potential disbenefit to the public, the court would weigh the benefit against the disbenefit in deciding whether or not an organization or body was charitable.⁴² Equally public benefit as against private benefit was also measured.⁴³ 2.26

Prior to the Charities Act 2006, charitable purposes were divided into four heads.⁴⁴ Trusts for the relief of poverty, for the advancement of education, for the advancement of religion, and for other purposes beneficial to the public, were all charitable. The first three purposes could be said to enjoy a presumption that they were established for the public benefit. The court would assess the value or utility to the public of the activity in question and the section of the public who would benefit from that activity. The judgments made involved some qualitative testing and also a quantitative test. It might be thought that there could be a threshold in monetary terms or as to the numbers benefited, but the requisite public benefit often varied according to the type of organization involved. In *IRC v Baddeley*⁴⁵ Lord Samervell of Harrow stated that 2.27

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. ... There might well be a valid trust for the promotion of religion benefiting a very small class. It would not follow that a recreation ground for the exclusive use of the same class would be a valid charity.

Charity law has developed incrementally by analogy, and it would be surprising to find that there was already a definitive test of public benefit to be applied in 2.28

⁴⁰ *Re Hummeltenberg* [1923] 1 Ch 237; *Gilmour v Coates* [1949] AC 426.

⁴¹ *Hoare v Osborne* (1866) LR 1 Eq 585.

⁴² *National Anti-Vivisection Society v IRC* [1948] AC 31; and see para 1.09 above.

⁴³ *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

⁴⁴ *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531.

⁴⁵ [1955] AC 572, at 615.

every situation.⁴⁶ It is clear that the Charity Commission intends to follow the approach taken by the court in assessing the presence or absence of public benefit. Particular regard will be paid to the social and economic context within which an organization operates, as well as to the relevant charitable purposes and activities of the organization. An example of changing social contexts can be seen in the case of the General Medical Council, which originally existed as an organization to recover the fees of doctors but which has evolved into a regulatory body. The public benefit in regulating medical education and the standards of medical practice had increased sufficiently to allow a change of status from a private organization to a charity.

- 2.29 It is possible to foresee that there will be disagreements between the promoters of a potential charity and the Charity Commission as to what is in the public benefit. Lacking public benefit is, of course, grounds for the refusal of registered status.⁴⁷ The arts, heritage, and other similar bodies where matters of taste may be important, may have to attempt to show the value of their activities to the public. The type of evidence required to satisfy the Charity Commission is unknown. It is equally foreseeable that 'expert' evidence will be relied on by advisers in seeking to persuade the Charity Commission. The potential for organizations to be innovative or original may be reduced significantly, and there is a danger that innovation will be replaced by the prevailing public opinion at any one time. The removal of the presumption of public benefit combined with the statutory requirement to show public benefit places a positive burden on promoters of potential charities.
- 2.30 The Charity Commission will be undertaking reviews of various types of charity with a view to assessing public benefit. It is not clear what the consequences will be for charities currently registered but judged to provide inadequate public benefit. The possibility is that they may be regarded as having been included on the register by mistake,⁴⁸ and as such as never having been charities. Alternatively, it might appear that an institution was charitable at its inception but has since ceased to be regarded as such. If that happens then there will be a *cy-près* situation⁴⁹ and the assets of the former charity could be applied to some other purpose which is clearly charitable. The Charity Commission is highly likely to encourage and help trustees to remedy the situation and increase the public benefit provided by the charity threatened with de-registration. Potentially, a charity may increase the public benefit it provides by merging with another charity, thus diluting any perceived disproportionate private benefit.

⁴⁶ The 'poor relations' cases are an example of an anomaly created by this approach which would now fail to satisfy the public benefit test. See *Dingle v Turner* [1972] AC 601.

⁴⁷ Disagreement on this issue is not novel; see *Re Pinion* [1965] Ch 85, where it was stated that there was no public utility in 'foisting on the public this mass of junk'.

⁴⁸ This happened in 1965 when the Eclusive Bretheren was registered by mistake when registration first began.

⁴⁹ See Chapter 10.

Section 4 of the Charities Act 2006 provides that the Charity Commission must provide guidance in pursuance of its public benefit objective.⁵⁰ That objective is described in the Act as being to promote awareness and understanding of the public benefit test in s 3. The guidance may be revised from time to time, and the Charity Commission is required to carry out public consultations or 'other' consultations before issuing any guidance or revising such guidance. Any guidance must be published, but the manner of such publication is as the Charity Commission considers appropriate. It seems likely that the guidance will be available on the website of the Charity Commission.⁵¹ There is an obligation on charity trustees, when exercising any powers or duties to which the guidance is relevant, to have regard to it. On making decisions in board meetings trustees may wish expressly to consider the issue of public benefit and state whether or how the current guidance might affect their decisions. 2.31

⁵⁰ See Chapter 3 and s 7 of the Charities Act 2006 for a complete list of the Charity Commission's objectives.

⁵¹ See <<http://www.charity-commission.gov.uk>>.

<http://www.pbookshop.com>