



## Public benefit

# Analysis of the law relating to public benefit

This analysis is designed to be read in conjunction with the guidance issued by the Charity Commission under section 17 (1) of the Charities Act 2011 in pursuance of its public benefit objective.

## Contents

|   |           |
|---|-----------|
| <b>Introduction</b>   | <b>3</b>  |
| <b>Charity law prior to the Charities Act 2006</b>  | <b>3</b>  |
| <b>The Charities Acts 2006 and 2011</b>   | <b>5</b>  |
| Key concepts  | 5         |
| Continuity of the law   | 5         |
| Purposes and activities   | 6         |
| No presumption of public benefit  | 6         |
| The ‘public benefit requirement’, the ‘public benefit objective’ and the Commission’s public benefit guidance | 6         |
| The scope of the Commission’s public benefit objective  | 7         |
| Public benefit not a static concept   | 7         |
| Empirical development of the law  | 8         |
| Fiscal privileges   | 8         |
| <b>Identifying the purposes of an institution</b>   | <b>8</b>  |
| <b>Public benefit as integral to a charitable purpose</b>   | <b>9</b>  |
| The two aspects of public benefit   | 9         |
| <b>The ‘benefit’ aspect</b>   | <b>10</b> |
| A purpose must be beneficial  | 10        |
| How benefit is established  | 11        |
| Subjective beliefs of donors are not relevant   | 12        |
| Benefit and detriment   | 12        |

|  |           |
|--|-----------|
| Political purposes   | 12        |
| Some issues non-justiciable  | 13        |
| <b>The 'public' aspect</b>   | <b>13</b> |
| The benefit must be to the public in general or a sufficient section of the public   | 13        |
| Applying the rule that, to be charitable, a purpose must be for the benefit of the public in general or a sufficient section of the public | 14        |
| Differences between the descriptions of purposes   | 14        |
| The prevention or relief of poverty  | 15        |
| Capricious class   | 15        |
| Beneficial class defined by geographical area  | 16        |
| <b>Classes linked by a personal nexus</b>  | <b>16</b> |
| Mutual benefit   | 16        |
| Recreational charities   | 16        |
| Purposes outside England and Wales   | 17        |
| Purposes which discriminate  | 17        |
| A charitable purpose cannot exclude the poor   | 17        |
| Incidental personal benefits   | 18        |
| A charitable purpose may benefit individuals   | 18        |
| Benefits to individuals must be no more than incidental  | 19        |
| <b>Public benefit and running a charity</b>  | <b>19</b> |
| The duties and powers of charity trustees  | 19        |
| The duty to further the purposes of the charity for the public benefit   | 20        |
| When charity trustees are in breach of duty  | 21        |
| Altering purposes  | 21        |
| Charging for services  | 21        |
| <b>Conclusion</b>  | <b>22</b> |

## Introduction

1. The Charities Act 2011 provides that it is a requirement of a charitable purpose that it is for the public benefit. It defines this as ‘the public benefit requirement’. The Act gives the Charity Commission an objective of promoting awareness and understanding of the operation of the public benefit requirement, and requires the Commission to issue guidance in pursuance of that objective.
2. The Commission first issued guidance in pursuance of its public benefit objective in January 2008. It has now revised and re-issued its general public benefit guidance. In doing so, it has taken account of recent changes in the law and decisions of the courts and tribunals (including the consideration by the Upper Tribunal of its previous guidance in **R (Independent Schools Council) v Charity Commission**<sup>1</sup>), experience of the use of its original guidance, and the responses to a public consultation on a draft of the revised guidance.
3. This analysis of the law is intended to provide a statement of the law on which the Commission’s statutory guidance is based. It is not intended to be an exhaustive statement of the law. It does not itself form part of the Commission’s public benefit guidance (ie the guidance to which charity trustees must have regard when exercising any powers or duties to which the guidance is relevant).
4. This analysis summarises the Commission’s understanding of the law as at June 2013.

## Charity law prior to the Charities Act 2006

5. The legal meaning of the term ‘charity’ does not correspond to its popular meaning<sup>2</sup>. The origin of the modern legal concept of charity is the preamble to the Statute of Charitable Uses 1601<sup>3</sup>. The courts recognised the purposes listed in that preamble as charitable purposes. The courts also recognised as charitable other purposes which were analogous to those listed in the preamble, or which were analogous to those recognised in previous decisions of the courts, all such purposes being described as within ‘the spirit and intendment’ of the preamble. What had to be regarded was:

“not the wording of the preamble itself, but the effect of decisions given by the courts as to its scope, decisions which have endeavoured to keep the law as to charities moving according as new social needs arise or old ones become obsolete or satisfied”<sup>4</sup>.

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1 [2012] Ch 214.

2 **Commissioners for Special Purposes of Income Tax v Pemsel** [1891] AC 531; “... the words ‘charity’ and ‘charitable’ bear, for the purposes of English law and equity, meanings totally different from the senses in which they are used in ordinary educated speech or, for instance, in the Authorised Version of the Bible ...” **IRC v McMullen** [1981] AC 1 at 15 (Lord Hailsham).

3 See for example **Morice v Bishop of Durham** (1805) 10 Ves Jun 521 at 541 (Lord Eldon) “... where there is a gift to charity, in general, whether it is to be executed by individuals, selected by the testator himself, or the King, as *parens patriæ*, is to execute it ... it is the duty of such trustees, on the one hand, and of the Crown, upon the other, to apply the money to charity, in the sense, which the determinations have affixed to that word in this Court: viz. either such charitable purposes as are expressed in the Statute (stat. 43 Eliz. c. 4), or to purposes having analogy to those.”

4 **Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation** [1968] AC 138 at 154E (Lord Wilberforce).

6. In **Income Tax Commissioners v Pemsel**<sup>5</sup> Lord Macnaghten adopted the following four-part classification of charitable purposes:

“‘Charity’ in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.”

7. This classification was used as the basis for the subsequent development of the law.

8. It was always implicit in the concept of charity that, to be charitable, a purpose had to be for the public benefit. During the 20th century, decisions of the courts made clear that public benefit was an integral part of every charitable purpose, and clarified various aspects of the concept of public benefit.

9. It was not sufficient for a purpose to be charitable that it was for the public benefit. For a purpose to be charitable, it was also necessary for it to fall within the spirit and intendment of the preamble. Thus in **Attorney-General v National Provincial & Union Bank of England**<sup>6</sup> Lord Cave LC, referring to the fourth of Lord Macnaghten’s categories, said:

“... Lord Macnaghten did not mean that all trusts for purposes beneficial to the community are charitable, but that there were certain charitable trusts which fell within that category; and accordingly to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning. So here it is not enough to say that the trust in question is for public purposes beneficial to the community or for the public welfare; you must also show it to be a charitable trust.”

10. The provision of housing in circumstances not limited to the relief of charitable need<sup>7</sup> is an example of a purpose which was held not to fall within the spirit and intendment of the preamble, and hence not to be charitable.

11. In **National Anti-vivisection Society v Inland Revenue Commissioners**<sup>8</sup> Lord Wright said:

“The test of benefit to the community goes through the whole of Lord Macnaghten’s classification, though as regards the first three heads, it may be prima facie assumed unless the contrary appears.”

12. As a result it was widely considered that there was a presumption that a purpose that fell within the first three heads was for public benefit although views differed as to the nature and effect of such presumption. This aspect is considered further in paragraph 26.

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5 [1891] AC 531 at 583.

6 [1924] AC 262 at 265. See also **Williams’ Trustees v Inland Revenue Commissioners** [1947] AC 447; **Helena Partnerships Ltd v Commissioners for Her Majesty’s Revenue and Customs** [2012] EWCA (Civ) 569, [2012] PTSR 1409, and the further authorities there cited.

7 **Helena Housing Ltd v Commissioners for Her Majesty’s Revenue and Customs** [2012] EWCA (Civ) 569, [2012] PTSR 1409.

8 [1948] AC31 at 42.

## The Charities Acts 2006 and 2011

### Key concepts

13. Part 1 of the Charities Act 2006, which came into force on 1 April 2008, and was consolidated as Part 1 Chapter 1 of the Charities Act 2011, enacted a statutory definition of 'charity'. For the purposes of the law of England and Wales, the term 'charity' is defined by section 1 of the Charities Act 2011 as:

"an institution which (a) is established for charitable purposes only, and (b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities".

14. The term 'charitable purpose' is defined by section 2 (1) as:

"a purpose which (a) falls within section 3 (1), and (b) is for the public benefit".

15. By virtue of this definition, it is an integral part of every charitable purpose that it is for the public benefit.

16. Section 3 (1) provides:

"a purpose falls within this subsection if it falls within any of the following descriptions of purposes".

17. Paragraphs (a) to (l) of section 3 (1) list twelve specific descriptions of purposes, some of which are partially defined in section 3 (2). Paragraph (m) adds other purposes which are recognised as charitable by virtue of section 5, or under the law in force immediately before 1 April 2008, or which may reasonably be regarded as analogous to or within the spirit of another charitable purpose.

18. Section 5 clarifies when it is charitable to provide or assist in the provision of facilities for recreation or other leisure time occupation.

19. Section 4 (1) defines 'the public benefit requirement' as:

"the requirement in section 2 (1) (b) that a purpose falling within section 3 (1) must be for the public benefit if it is to be a charitable purpose".

20. Section 4 (2) provides:

"In determining whether the public benefit requirement is satisfied in relation to any purpose falling within section 3 (1), it is not to be presumed that a purpose of a particular description is for the public benefit".

21. Section 4 (3) (which is subject to section 4 (2)) provides that in that chapter of the Act:

"any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales".

### Continuity of the law

22. Section 3 (3) of the Charities Act 2011 provides:

"Where any of the terms used in paragraphs (a) to (l) of subsection (1), or in subsection (2), has a particular meaning under the law relating to charities in England and Wales, the term is to be taken as having the same meaning where it appears in that provision".

23. This provision, and section 4 (3), quoted above, make clear that decisions of the courts on the law of charity prior to the coming into force of Part 1 of the Charities Act 2006 continue to be relevant to the interpretation of the statutory definition of charity.

## Purposes and activities

24. By virtue of section 2 (1) of the Charities Act 2011 it is an integral part of every charitable purpose that it is for the public benefit. It is also the duty of charity trustees to administer their charity to further its purposes. Since it is inherent in every charitable purpose that it is for the public benefit, the duties of charity trustees include a duty to further its purposes for the public benefit. The concepts of the purposes of a charity and the activities undertaken to further its purposes, although closely related, are distinct.

## No presumption of public benefit

25. Section 4 (2) of the Charities Act 2011 (formerly section 3 (2) of the Charities Act 2006) provides:

“In determining whether the public benefit requirement is satisfied in relation to any purpose falling within section 3 (1), it is not to be presumed that a purpose of a particular description is for the public benefit.”

26. The decision of the Upper Tribunal in *R (Independent Schools Council) v Charity Commission*<sup>9</sup> has clarified the interpretation to be given to this statutory provision. The Upper Tribunal held that the courts had not recognised purposes falling within Lord Macnaghten’s first three heads as charitable by virtue of the operation of any presumption. The Tribunal stated that:

“ ... what the 2006 Act has done is to bring into focus what it is that the pre-existing law already required, and what the law now requires by way of the provision of benefit and to whom it must be provided.”

## The ‘public benefit requirement’, the ‘public benefit objective’ and the Commission’s public benefit guidance

27. Section 4 (1) of the Charities Act 2011 defines ‘the public benefit requirement’ as:

“the requirement in section 2 (1) (b) that a purpose falling within section 3 (1) must be for the public benefit if it is to be a charitable purpose”.

28. Section 14 of the Act gives the Commission a ‘public benefit objective’, which is:

“to promote awareness and understanding of the operation of the public benefit requirement”.

29. Section 17 (1) of the Act provides:

“The Commission must issue guidance in pursuance of its public benefit objective”; and section 17 (5) of the Act provides:

“The charity trustees of a charity must have regard to any such guidance when exercising any powers or duties to which the guidance is relevant”.

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<sup>9</sup> [2012] Ch 214 at [88].

## The scope of the Commission’s public benefit objective

30. In the Commission’s view, sections 4 (1), 14 and 17 of the Charities Act 2011 must be read together. The definition in section 4 (1) of ‘the public benefit requirement’ is concerned with what is required to establish a charitable purpose. But section 17 (5) shows that Parliament intended the Commission’s statutory public benefit guidance to be relevant to the exercise of the powers and duties of charity trustees. Guidance limited to promoting awareness and understanding of the requirement that a charitable purpose must be for the public benefit would have little relevance to the powers and duties of the trustees of a charity, once established. This shows that the Commission’s public benefit objective is not limited to promoting awareness and understanding of the requirement that a charitable purpose must be for the public benefit but extends to promoting awareness and understanding of the duty of charity trustees to further the purposes of the charity for the public benefit, and of their associated reporting obligations<sup>10</sup>.

## Public benefit not a static concept

31. The legal concept of charity, including the concept of public benefit in charity law, is not static. Charity law is not “frozen at some time in the past”<sup>11</sup>; “it must be remembered that the concept of what is and is not for the public benefit (as seen by society generally, and as reflected in judicial recognition of the views of society) changes over time. As we will see, changing social perceptions have, in the past, resulted in changes in what is seen as for the benefit of society and, accordingly, of what is properly to be accorded charitable status.”<sup>12</sup> A purpose which was formerly recognised as being for the public benefit may cease to be recognised as such, and purposes which were not formerly recognised as being for the public benefit may be recognised as such. Thus in *National Anti-vivisection Society v IRC*<sup>13</sup> Lord Simonds said:

“If to-day a testator made a bequest for the relief of the poor and required that it should be carried out in one way only and the court was satisfied by evidence that that way was injurious to the community, I should say that it was not a charitable gift, though three hundred years ago the court might upon different evidence or in the absence of any evidence have come to a different conclusion.”

<sup>10</sup> Section 14, enacting the Commission’s ‘public benefit objective’, refers to “the **operation** of the public benefit requirement” (emphasis added). The emphasised words can be read as including more than a test for the creation of a valid charitable purpose. The decision of the Upper Tribunal in **R (Independent Schools Council) v Charity Commission** [2012] Ch 214 proceeds on the footing that the Commission acted within its powers to issue statutory guidance on activities as well as purposes: see judgment of 13 October 2011 paras [224] – [235], judgment of 2 December 2011.

<sup>11</sup> **R (Independent Schools Council) v Comisiwn Elusennau** [2012] Ch 214 ynn [14].

<sup>12</sup> **R (Independent Schools Council) v Comisiwn Elusennau** [2012] Ch 214 ynn [23]

<sup>13</sup> [1947] AC 31 at 69.

## Empirical development of the law

32. The law relating to public benefit evolves on a case-by-case basis. In consequence:

“the authorities do not provide a comprehensive statement of the public benefit requirement but provide rather a series of examples of when the public benefit requirement is or is not satisfied. There is no application of some overarching, coherent, principle by which the Courts have been guided”<sup>14</sup>.

## Fiscal privileges

33. The courts have noted that charities enjoy fiscal privileges<sup>15</sup>, and it has been suggested that the availability of fiscal privileges should be regarded as relevant to whether a purpose should be accepted as charitable<sup>16</sup>. The Commission’s approach to the recognition of new charitable purposes is to examine them in the context of decisions of the courts and its own previous decisions. Fiscal privilege that flows from charitable status is a matter for legislation by Parliament and enforcement by HM Revenue and Customs.

## Identifying the purposes of an institution

34. The instrument establishing an institution may expressly and clearly state the purposes for which the institution was established. Where such purposes are not expressly and clearly stated, they may fall to be ascertained by interpreting the instrument establishing the institution<sup>17</sup> or from evidence of what the institution has done.<sup>18</sup>

35. The principles which apply to the interpretation of an instrument relating to a charity are those which apply generally to the interpretation of documents. Thus, the instrument is to be given the meaning which it would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed<sup>19</sup>.

36. Where an institution is established by an instrument with clearly stated purposes, the motives and intentions of the founders are irrelevant to the interpretation of the instrument and what the institution has done since it was established will not normally be admissible as an aid to ascertaining its interpretation<sup>20</sup>.

14 **Attorney General v Charity Commission** (The Poverty Reference) [2012] WTLR. 977 at [34].

15 See eg Lord Wright in **National Anti-vivisection Society v IRC** 1947] AC 31 at 52.

16 See Lord Cross in **Dingle v Turner** [1972] AC 601 at 624D. Lord Simon agreed with that view (at 614H), Viscount Dilhorne, Lord MacDermott and Lord Hodson doubted it (614A, E, D). In **R (Independent Schools Council) v Charity Commission** [2012] Ch 214 at [176] the Upper Tribunal stated that it shared the doubts expressed in **Dingle v Turner**, but that it did not need to resolve the issue.

17 See for example **Royal College of Surgeons v National Westminster Bank Ltd** [1952] AC 631.

18 See for example **Re Resch** [1969] 1 AC 514.

19 **Attorney General of Belize v Belize Telecom Ltd** [2009] 1 WLR 1988 at [16] – [38]; **Cherry Tree Investments Ltd v Landmain Ltd** [2013] 1 WLR 481.

20 **James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd** [1970] AC 583.



37. These principles as applied in a charity law context were rehearsed in *Helena Partnerships Ltd v HMRC*<sup>21</sup>, where it was said at page 11:

“20. In accordance with well established principle, the motives and intentions of the founders of HHL are irrelevant to the exercise of construction. Further, it is not generally relevant to consider evidence about the activities of a company in construing its memorandum and articles of association, any more than it is permissible in the case of a contract to see how the parties have in fact acted under it. However, where there is a doubt or ambiguity about whether the objects of an institution are charitable, the court may examine the activities of the institution. This is done, not for the purpose of construing its constitution, but for the purpose of assisting in assessing whether the implementation of the objects would achieve a charitable end result: see *Incorporated Society of Law Reporting for England and Wales v A-G* [1972] Ch 73 at p 99E. After pointing out that motives and intentions of the founders are irrelevant, Buckley LJ said this:

‘But in order to determine whether an object, the scope of which has been ascertained by due processes of construction, is a charitable purpose it may be necessary to have regard to evidence to discover the consequences of pursuing that object. It would be immediately evident that a body established to promote the Christian religion was established for a charitable purpose, whereas in the case of a body established to propagate a particular doctrine it might well be necessary to consider evidence about the nature of the doctrine to decide whether its propagation would be a charitable activity.’”

## Public benefit as integral to a charitable purpose

38. For a purpose to be charitable, it is necessary for it both to fall within one or more of the descriptions of purposes in section 3 (1) of the Charities Act 2011 and to be for the public benefit. As under the previous law, there will continue to be purposes which fall within the descriptions of purposes in section 3 (1) but which fail to be charitable because they are not for the public benefit, and purposes which are for the public benefit but which fail to be charitable because they do not fall within any of the descriptions of purposes in section 3 (1)<sup>22</sup>.

### The two aspects of public benefit

39. In the modern law, the concept of public benefit as integral to a charitable purpose is regarded as having two principal aspects, namely that, for a purpose to be charitable:

- a. it must be beneficial, and any detriment or harm that results from the purpose must not outweigh the benefit (‘the benefit aspect’); and
- b. it must benefit the public in general, or a sufficient section of the public (‘the public aspect’).

40. In addition, a charitable purpose may only benefit individuals or other legal entities to an extent that is no more than incidental to the furtherance of the charitable purpose. This principle can be regarded as part of one or other of the two aspects described above or as a separate requirement. The Commission’s public benefit guidance deals with it as part of the second aspect.

<sup>21</sup> Upper Tribunal (Tax and Chancery) [2011] STC 1307 [16-22]; affirmed 2012] EWCA (Civ) 569, [2012] PTSR 1409.

<sup>22</sup> See **R (Independent Schools Council) v Charity Commission** [2012] Ch 214 at [79].

41. The two aspects of public benefit as integral to a charitable purpose are separately considered in the following sections. However, it should be borne in mind that the two aspects overlap: a factor can frequently be regarded as having an impact on both aspects.

## The 'benefit' aspect

### A purpose must be beneficial

42. To be charitable, a purpose must not only fall within one of the descriptions of purposes in section 3 (1) of the Charities Act 2011: it must also be beneficial. In **National Anti-Vivisection Society v IRC**<sup>23</sup>, Lord Wright stated, with reference to Lord Macnaghten's four-fold classification:

"Even societies coming within the first three heads of Lord Macnaghten's classification would not be entitled to rank as legal charities if it was seen that their objects were not for the public benefit. Where a society has a religious object it may fail to satisfy the test if it is unlawful and the test may vary from generation to generation as the law successively grows more tolerant. ... It cannot be for the public benefit to favour trusts for objects contrary to the law. Again eleemosynary trusts may as economic ideas and conditions and ideas of social service change cease to be regarded as being for the benefit of the community, and trusts for the advancement of learning or education may fail to secure a place as charities, if it is seen that the learning or education is not of public value. The test of benefit to the community goes through the whole of Lord Macnaghten's classification, though as regards the first three heads, it may be prima facie assumed unless the contrary appears."

43. In **Attorney-General v Charity Commission** (The Poverty Reference)<sup>24</sup> the Upper Tribunal summarised the position as follows:

"the requirement that the purpose of a trust (eg relief of poverty or advancement of education) should be, of its nature and without regard to the section of the community to be benefited, beneficial to the community and within, or within the spirit of, the Preamble, is intrinsic to what was meant when it was said that a purpose was for the public benefit."

44. Thus maintenance of a school for pickpockets, or a library of pornography<sup>25</sup>, would not be charitable purposes. Even if such purposes could be described as educational, they would not be for the public benefit<sup>26</sup>.

45. In general, the benefit to the public should be a tangible and objective one, although an intangible benefit may suffice if there is "approval by the common understanding of enlightened opinion for the time being" that there is benefit to the public<sup>27</sup>.

23 [1948] AC 31 at 42.

24 [2012] WTLR. 977at [32].

25 Examples given in **Re Macduff** [1896] 2 Ch. 451 at 474 (Rigby LJ) and in **Re Pinion** [1965] Ch 85 at 106 (Harman LJ).

26 See **Attorney General v Charity Commission** (The Poverty Reference) [2012] WTLR. 977at [66] – [67].

27 **National Anti-Vivisection Society v. IRC** [1948] AC 31 at 49 (Lord Wright).

## How benefit is established

46. For a purpose to be accepted as being beneficial to the public, the benefit must be identifiable and, in principle, be capable of being proved by evidence<sup>28</sup>: "...the question whether a gift is or may be operative for the public benefit is a question to be answered by the Court by forming an opinion upon the evidence before it"<sup>29</sup>.

47. The court can have regard to the consequences of pursuing a charitable purpose in order to determine whether it is for the public benefit<sup>30</sup>.

48. The requirement for evidence is in practice tempered in a number of respects. The court will regard some benefits as being too obvious to require formal proof:

" ... there are many cases on this question of whether a bequest is 'charitable' or 'non-charitable' where the purpose is so obviously beneficial to the community that to ask for evidence would really be quite absurd"<sup>31</sup>.

The court will also take account of statute law as indicating what Parliament regards as being for the public benefit<sup>32</sup>, and will take judicial notice of some obvious facts<sup>33</sup>.

49. The court will in appropriate circumstances receive expert evidence to assist it to determine whether a purpose is for the public benefit<sup>34</sup>.

50. The courts have not been uniform in their use of language to describe the test for deciding whether a purpose is for the public benefit<sup>35</sup>. The Commission considers that the quality of the evidence which is required to satisfy this test depends on the circumstances of the particular case.

28 **Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation** [1968] AC 138 at 146E (Lord Reid).

29 **Re Hummeltenberg** [1923] 1 Ch 237 at 242, approved by Lord Wright in **National Anti-vivisection Society v IRC** [1947] AC 31 at 44.

30 See eg **Incorporated Council of Law Reporting v Attorney General** [1972] Ch 73 at 99 I(Buckley LJ); **Southwood v Attorney General** [2000] WTLR 1199.

31 **Re Shaw's Will Trusts** [1952] Ch. 163 at 169 (Vaisey J).

32 See for example **Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation** [1968] AC 138 at 146F, 151B, 156E (statutory provision for cremation relevant to the determination of whether cremation was for the public benefit).

33 **R (Independent Schools Council) v Charity Commission** [2012] Ch 214 at [70].

33 **R (Independent Schools Council) v Charity Commission** [2012] Ch 214 at [70].

34 See eg **Re Hopkins' Will Trusts** [1964] Ch 669 (whether search for "the Bacon-Shakespeare manuscripts" for the public benefit); **Re Pinion** [1965] Ch 85 (whether preservation and display of a collection of artefacts for the public benefit).

35 See eg **Re Hummeltenberg** [1923] 1 Ch 237 at 242: "the question whether a gift is or may be operative for the public benefit" (Russell J); **Re Grove-Grady** [1929] Ch 557 at 582: "a trust in perpetuity for the benefit of animals may be a valid charitable trust if in the execution of the trust there is necessarily involved benefit to the public"; **Re Pinion** [1965] Ch 85 at 110: "the crucial question is whether the evidence did sufficiently establish that the gift would tend to advance or promote education in the relevant field (Russell LJ).

## Subjective beliefs of donors are not relevant

51. A donor's belief that the purpose for which he makes a gift is for the public benefit is not relevant. In **Re Hummeltenberg**<sup>36</sup> Russell J held not charitable a gift for the training of spiritualist mediums, on the ground that the evidence had not established that spiritualism was for the public benefit. He said<sup>37</sup>:

"If a testator by stating or indicating his view that a trust is beneficial to the public can establish that fact beyond question, trusts might be established in perpetuity for the promotion of all kinds of fantastic (though not unlawful) objects, of which the training of poodles to dance might be a mild example. In my opinion the question whether a gift is or may be operative for the public benefit is a question to be answered by the Court by forming an opinion upon the evidence before it."

## Benefit and detriment

52. When deciding whether a purpose is beneficial to the public, the court will weigh any benefit which will result to the public from the pursuit of the purpose against any detriment.

"The court... has to balance the benefit and disadvantage in all cases where detriment is alleged and is supported by evidence. But great weight is to be given to a purpose which would, ordinarily, be charitable; before the alleged disadvantages can be given much weight, they need to be clearly demonstrated<sup>38</sup>."

53. Thus, in **National Anti-vivisection Society v IRC**<sup>39</sup> the House of Lords held that the question whether the promotion of a change in the law to abolish vivisection was a charitable purpose was not concluded by the assertion of the moral benefits which would flow from the cessation of vivisection, but required a comparison of those benefits with the practical benefits which were proved to flow from the practice of vivisection. Lord Wright said<sup>40</sup>:

"There is not, so far as I can see, any difficulty in weighing the relative value of what it called the material benefits of vivisection against the moral benefit which is alleged or assumed as possibly following from the success of the appellant's project. In any case the position must be judged as a whole. It is arbitrary and unreal to attempt to dissect the problem into what is said to be direct and what is said to be merely consequential. 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."

## Political purposes

54. Even if it appears to fall within section 3 (1) of the Charities Act 2011, a trust for political purpose is not regarded as being for the public benefit. In this context, trusts for political purposes include trusts of which a direct and principal purpose is either (i) to further the interests of a particular political party; or (ii) to procure changes in the laws of this country; or (iii) to procure changes in the laws of a foreign country; or (iv) to procure a reversal of government policy or of particular decisions of governmental authorities in this country; or (v) to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country<sup>41</sup>.

36 [1923] 1 Ch 237.

37 At 242, approved by Lord Wright in **National Anti-vivisection Society v IRC** [1947] AC 31 at 44.

38 **R (Independent Schools Council) v Charity Commission** [2012] Ch 214 at [106].

39 [1948] AC 31.

40 At 47.

41 **McGovern v Attorney General** [1984] Ch 321 esp at 340B.

## Some issues non-justiciable

55. If the court regards the public benefit of a purpose as incapable of proof one way or another, the court will not recognise it as a charitable purpose<sup>42</sup>.

56. Thus in **Gilmour v Coats**<sup>43</sup> the House of Lords held that a trust for the purposes of a cloistered religious order was not charitable. It was held that public benefit was not established by evidence that followers of the faith outside the order believed in the value of the prayers of members of the order, were edified by knowledge of the existence and work of the order, and were able to join it. Lord Simonds said<sup>44</sup>:

“ ... whether I affirm or deny, whether I believe or disbelieve, what has that to do with the proof which the court demands that a particular purpose satisfies the test of benefit to the community? Here is something which is manifestly not susceptible of proof. But, then it is said, this is a matter not of proof but of belief: for the value of intercessory prayer is a tenet of the Catholic faith, therefore in such prayer there is benefit to the community. But it is just at this “therefore” that I must pause. It is, no doubt, true that the advancement of religion is, generally speaking, one of the heads of charity. But it does not follow from this that the court must accept as proved whatever a particular church believes. The faithful must embrace their faith believing where they cannot prove: the court can act only on proof. A gift to two or ten or a hundred cloistered nuns in the belief that their prayers will benefit the world at large does not from that belief alone derive validity any more than does the belief of any other donor for any other purpose.”

57. Similarly, as already noted, a political purpose is not charitable. One reason for this is that the court does not have the means to determine whether changes in law or policy are beneficial, and in any event regards it as the function of Parliament or the executive to determine such matters<sup>45</sup>.

## The ‘public’ aspect

### The benefit must be to the public in general or a sufficient section of the public

58. To be charitable, a purpose must be for the benefit of the public in general or a sufficient section of the public. The word ‘community’ is often used as an alternative to ‘public’.

59. The need for public benefit in this sense was emphasised by Lord Wrenbury in **Verge v Somerville**<sup>46</sup>:

“To ascertain whether a gift constitutes 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 of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot.”

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42 **McGovern v Attorney General** [1984] Ch 321 at 334A.

43 [1949] AC 426.

44 At 446.

45 **National Anti-vivisection Society v IRC** [1948] AC 31; **McGovern v AG** [1982] Ch 321; **Southwood v Attorney General** [2000] WTLR 1199; **R (Independent Schools Council) v Charity Commission** [2012] Ch 214 at [109] – [110].

46 [1924] AC 496 yn 499

## Applying the rule that, to be charitable, a purpose must be for the benefit of the public in general or a sufficient section of the public

60. When applying the rule that, to be charitable, a purpose must be for the benefit of the public in general or a sufficient section of the public, it is first necessary to identify the class of individuals whom the purpose primarily benefits. Where the purpose primarily benefits the public in general, the rule is satisfied. Where the purpose primarily benefits individuals of a particular description, the question to be asked is whether the potential beneficiaries are a sufficient section of the public. If they are, the purpose satisfies the 'public' aspect of the requirement that, to be charitable, a purpose must be for the public benefit.

61. Conversely, if the potential beneficiaries of a purpose which primarily benefits individuals of a particular description are not a sufficient section of the public, the wider benefit that the public may receive from the advancement of the purpose may not make it charitable:

“ ... a trust established by a father for the education of his son is not a charity. The public element ... is not supplied by the fact that from that son's education all may benefit<sup>47</sup>.”

62. A purpose can be for the benefit of the public in general or a sufficient section of the public even if only a limited number of persons are capable of availing themselves of its benefits, or are likely to do so<sup>48</sup>.

63. In **Dingle v Turner**<sup>49</sup>, Lord Cross commented:

“In truth the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust”.

## Differences between the descriptions of purposes

64. For the purposes of the rule that, to be charitable, a purpose must be for the benefit of the public in general or a sufficient section of the public, the measure of what is a sufficient section of the public differs as between the descriptions of purposes in section 3 (1) of the Charities Act 2011. In **Gilmour v Coats**<sup>50</sup> Lord Simonds said:

“It is a trite saying that the law is life, not logic. But it is, I think, conspicuously true of the law of charity that it has been built up not logically but empirically. 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. To argue by a method of syllogism or analogy from the category of education to that of religion ignores the historical process of the law.”

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47 **Oppenheim v Tobacco Securities Trust Co Ltd** [1951] AC 297 at 306 (Lord Simonds).

48 See **IRC v Baddeley** [1955] AC 572 at 590 (Lord Simonds).

49 **Dingle v Turner** [1972] AC 601 at 624.

50 [1949] AC 426 at 449.

65. Similarly in **IRC v Baddeley**<sup>51</sup> Lord Somervell said:

“I cannot accept the principle submitted by the respondents 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. There might well be a valid trust for the promotion of religion benefiting a very small class. It would not at all follow that a recreation ground for the exclusive use of the same class would be a valid charity ...”.

## The prevention or relief of poverty

66. A purpose for the relief of poverty may (unlike other purposes) be charitable even if the potential beneficiaries are linked by descent from one individual, by employment by one employer or by membership of an unincorporated association<sup>52</sup>. In cases preceding the coming into force of the Charities Act 2006, it was sometimes said that, in consequence, there was no requirement for such a purpose to be for the public benefit<sup>53</sup>. It has now been established that the requirement in the Charities Act 2006, re-enacted in the Charities Act 2011, for such a purpose to be for the public benefit is satisfied if the purpose satisfies the special requirements of the law as it was preceding the coming into force of the Charities Act 2006<sup>54</sup>.

67. It is necessary for the potential beneficiaries of a purpose for the relief of poverty to be a class, as distinct from individuals:

“ ... the true question in each case [is] whether the gift was for the relief of poverty amongst a class of persons, or rather... a particular description of poor, or was merely a gift to individuals, albeit with relief of poverty amongst those individuals as the motive of the gift ...”<sup>55</sup>

68. A purpose for the prevention of poverty is unlikely to be charitable unless its potential beneficiaries are the public or a section of the public<sup>56</sup>.

## Capricious class

69. It is likely that a purpose for potential beneficiaries who are defined in a manner which, when related to the purpose, is capricious would be held not to be charitable, on the ground that the potential beneficiaries are not a section of the public<sup>57</sup>.

51 [1955] AC 572 yn 615

52 **Attorney General v Charity Commission** (The Poverty Reference) [2012] WTLR 977.

53 Gweler e.e. **McGovern v Attorney General** [1984] Ch 321 at 333.

54 **Attorney General v Comisiwn Elusennau** (The Poverty Reference) [2012] WTLR 977.

55 **Re Scarisbrick** [[1951] Ch 622 at 655; **Dingle v Turner** 1972] AC 601 at 617D, 623C; **Attorney General v Charity Commission** (The Poverty Reference) [2012] WTLR. 977at [57].

56 **Attorney General v Charity Commission** (The Poverty Reference) [2012] WTLR 977 at [69] – [82].

57 **R (Independent Schools Council) v Charity Commission** [2012] Ch 214, supplemental judgment at [9]. .

## Beneficial class defined by geographical area

70. The inhabitants of a defined area will normally constitute a sufficient section of the public, unless perhaps the area is very small. A class of inhabitants of an area may also constitute a sufficient section of the public. In **Verge v Somerville**<sup>58</sup> Lord Wrenbury said:

“To ascertain whether a gift constitutes 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 of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot.”

## Classes linked by a personal nexus

71. A fund collected for the purpose of the relief of distress among air raid victims whose potential beneficiaries were linked by employment by one employer was held not to be charitable. One ground for the decision was that the potential beneficiaries, being in common employment and not limited to the poor, were not a section of the public<sup>59</sup>. The House of Lords has assumed that all purposes falling within Lord Macnaghten’s fourth head are not charitable if the potential beneficiaries are linked by descent from one or more individuals, or by employment or former employment by one or more employers<sup>60</sup>.

## Mutual benefit

72. “The element of unselfishness is well recognised as an aspect of charity, and an important one”<sup>61</sup>. An association formed to provide benefits to its members (other than solely to relieve poverty) may or may not have a purpose which is for the public benefit. If the primary purpose of the association is self-help, its members do not constitute a sufficient section of the public (irrespective of how numerous they are) and its purpose is not for the public benefit<sup>62</sup>. But if the primary purpose of the association is altruistic, its purpose may be for the public benefit, even if benefits are only available to members of the association or subscribers<sup>63</sup>.

## Recreational charities

73. The Charities Act 2011 section 5 makes special provisions for when it is charitable to provide or assist in the provision of facilities for recreation or other leisure-time occupation. Those provisions are not to be treated as derogating from the public benefit requirement<sup>64</sup>.

58 [1924] AC 496 yn 499

59 **Re Hobourn Aero Components Ltd Air Raid Distress Fund** [1946] Ch 194 at 206, 207 - 9.

60 See **Dingle v Turner** [1972] AC 601 at 625D.

61 **Incorporated Council of Law Reporting v Attorney General** [1972] Ch 73 at 86 (Russell LJ).

62 See eg **Waterson v Hendon BC** [1959] 1 WLR 985 (friendly society with 400,000 members).

63 **Re Hobourn Aero Components Ltd Air Raid Distress Fund** [1946] Ch 194 at 202 - Lord Greene MR. .

64 Section 5 (5)



## Purposes outside England and Wales

74. A purpose may be charitable even if all its potential beneficiaries are outside England and Wales. The courts have not clarified whether such a purpose is charitable because it is for the benefit of the public in England and Wales that a charitable purpose be carried out outside England and Wales, or because the potential beneficiaries, notwithstanding that they are outside England and Wales, constitute the public in general or a sufficient section of the public<sup>65</sup>. The Commission's approach is to consider whether the purpose would be charitable if it were confined to England and Wales. If it is, the Commission will recognise it as charitable unless it would be contrary to United Kingdom public policy to do so<sup>66</sup>.

## Purposes which discriminate

75. If a charitable instrument enables the provision of benefits to persons of a class defined by reference to colour, it has effect for all purposes as if it enabled the provision of such benefits:

- a. to persons of the class which results if the reference to colour is ignored, or
- b. if the original class is defined by reference only to colour, to persons generally<sup>67</sup>.

76. Under the Equality Act 2010, in some circumstances it may be unlawful to establish a charity for purposes which discriminate on the ground of a protected characteristic. Where the Act does not make it unlawful to establish a charity for purposes which discriminate on the ground of a protected characteristic, the Commission considers that it is likely that a purpose which could not be administered in accordance with the provisions of the Act would be held not to be for the public benefit, and hence not a charitable purpose. Thus, in **Catholic Care (Diocese of Leeds) v Charity Commission** Briggs J stated (when considering legislation which preceded the Equality Act 2010)<sup>68</sup>:

"An organisation which proposes to fulfil a purpose for the public benefit will only qualify as a charity if, taking into account any disbenefit arising from its modus operandi, its activities none the less yield a net public benefit ... Thus, a charity which proposed to apply differential treatment on grounds of sexual orientation otherwise than as a proportionate means of achieving a legitimate aim might thereby fail to achieve charitable status (or lose it, if it sought to pursue such activities by amendment of its objects)".

## A charitable purpose cannot exclude the poor

77. It is not a requirement of a charitable purpose that its potential beneficiaries are confined to the poor:

"... a valid charitable trust may exist notwithstanding the fact that in its administration the benefit is not confined by the donor to the poor to the exclusion of the rich."<sup>69</sup>

78. But it is not possible to create a charitable purpose whose potential beneficiaries exclude the poor:

"a trust which excludes the poor from benefit cannot be a charity."<sup>70</sup>

65 ee **Camille & Henry Dreyfus Foundation Inc v IRC** [1954] Ch 672 at 684 – 5, 704 – 5.

66 Decisions of the Charity Commissioners 1993 Vol. 1 pages 16 –17. This approach was approved in **Manoogian v Sonsino** [2002] EWHC 1304 (Ch) at [33] – [38].

67 Equality Act 2010 section 193 (4).

68 [2010] 4 All ER 1041 at [97].

69 **Verge v Somerville** [1924] AC 496 at 504 (Lord Wrenbury).

70 **R (Independent Schools Council) v Charity Commission** [2012] Ch 214 at [178].

79. It is unclear whether the rule that a charitable purpose cannot exclude the poor is a separate rule, or is a particular application of the rule that to be charitable a purpose must be for the benefit of the public in general or a sufficient section of the public<sup>71</sup>. The Commission's public benefit guidance adopts the second approach.

80. Charity law recognises that 'the poor' is a relative term, which depends on the circumstances in individual cases. However, 'the poor' does not just mean the poorest in society, and it can include people of 'modest means'<sup>72</sup>.

## Incidental personal benefits

81. To be charitable, a purpose may only confer personal benefits (on individuals and other legal entities) to such extent as is incidental to the furtherance of the charitable purpose.

## A charitable purpose may benefit individuals

82. Although a charitable trust is a trust for purposes rather than for individuals, a charitable purpose may confer personal benefits (on individuals or other legal entities). A charity for the relief of poverty benefits those whose poverty it relieves, the pupils of a charitable school are educated, and the patients of a charitable hospital receive medical benefits.

83. If these benefits are incidental to the advancement of a charitable purpose they do not prevent the purpose being charitable. In **London Hospital Medical College v IRC**<sup>73</sup> Brightman J said:

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

84. Thus the benefits received by members of a students' union have been regarded as incidental to the charitable educational purposes of a college<sup>74</sup> and the social benefits of membership of a synagogue have been regarded as incidental to its charitable religious purposes<sup>75</sup>.

71 **R (Independent Schools Council) v Charity Commission** [2012] Ch 214 at [112].

72 See eg **Re Clarke** [1923] 2 Ch 407 (gift to institutions which provide for "persons of moderate means" charitable); **Re De Carteret** [1933] Ch 103 (gift to widows or spinsters "whose income otherwise shall not be less than eighty or more than one hundred and twenty pounds per annum" charitable); **Re Adams** [1968] Ch 80 (gift to endow "beds for paying patients" charitable); **Re Resch** [1969] 1 AC 514 (private hospital charitable: see esp. pages 543 – 5 "it would be a wrong conclusion ... that a trust for the provision of medical facilities would necessarily fail to be charitable merely because by reason of expense they could only be made use of by persons of some means ... the evidence shows that it cannot be said that the poor are excluded"); **Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney General** [1983] Ch 159 (schemes for provision of leases of housing to aged able to make capital contribution charitable). The last two cases are discussed in **R (Independent Schools Council) v Charity Commission** [2012] Ch 214 at [158] – [174].

73 [1976] 1 WLR 613 at 620E.

74 **London Hospital Medical College v IRC** [1976] 1 WLR 613.

75 **Neville Estates v Madden** [1962] Ch 832 at 851 – 2.

85. A charitable purpose may confer benefits on persons who are not in charitable need, if to do so is incidental to advancing a charitable purpose. Thus, in an extreme case, the provision of an annual dinner for aldermen was held to be incidental to the charitable purposes of a trust for the benefit of orthopaedic hospitals, as it was conducive to the efficient administration of the trust<sup>76</sup>; and the provision of a home of rest for nurses was held to be charitable, as it was conducive to the efficiency of a hospital, and so for the advancement of health<sup>77</sup>.

## Benefits to individuals must be no more than incidental

86. A purpose is not charitable if the benefits which it may confer on individuals (or other legal entities) are more than incidental to the furtherance of the charitable purpose<sup>78</sup>. Whether this is so in any particular case is a question of degree<sup>79</sup>.

## Public benefit and running a charity

### The duties and powers of charity trustees

87. There is no single legal source of the duties and powers of charity trustees. The sources from which they are derived include:

- a. the governing document of the charity
- b. the rules of the common law and equity which regulate the activities of trustees and other fiduciaries
- c. in the case of unincorporated charities, the statutory duties and powers given to trustees by statutes relating to trusts
- d. in the case of companies, the statutory duties and powers given to company directors by the Companies Act 2006
- e. in the case of charitable incorporated organisations, the statutory powers and duties given to trustees by the Charities Act 2011 and the statutory instruments made under it
- f. the statutory duties and powers given to charity trustees by the Charities Act 2011

88. The constitution of a charity may impose an express duty on the charity trustees to further its purposes. If it does not, such a duty will generally be implied. In the case of a charitable company regulated by the Companies Act 2006, the statutory duties imposed on the directors of the company include a duty to act in the way they consider, in good faith, would be most likely to achieve the purposes of the company<sup>80</sup>.

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76 **Re Coxen** [1948] Ch 747

77 **Re White's Will Trusts** [1961] 1 All ER 528. The provision of benefits to the nurses, unless for the relief of poverty, was incapable of being itself charitable as they were in common employment: **Re Drummond** [1914] Ch 290.

78 **Incorporated Council for Law Reporting for England & Wales v A-G** [1972] Ch 73 at [87].

79 **Inland Revenue Commissioners v Glasgow Police Athletics Association** [1953] AC 380.

80 Companies Act 2006 s 172.

89. The gist of the foregoing principles is contained in the following statement by Nicholls J in **Harries v Church Commissioners**<sup>81</sup>:

“It is axiomatic that charity trustees, in common with all other trustees, are concerned to further the purposes of the trust of which they have accepted the office of trustee. That is their duty. To enable them the better to discharge that duty, trustees have powers vested in them. Those powers must be exercised for the purpose for which they have been given: to further the purposes of the trust.”

## The duty to further the purposes of the charity for the public benefit

90. Since it is inherent in every charitable purpose that it is for the public benefit, the charity trustees’ duty to further the purposes of their charity includes a duty to further its purposes for the public benefit<sup>82</sup>.

91. The public benefit which is inherent in a charitable purpose differs according to the nature and terms of the purpose. The duty of charity trustees to further the purposes of the charity for the public benefit is therefore a duty to further it to provide public benefit of the kind which is inherent in the purposes of the charity.

92. For example, in the case of a charitable school, the public benefit which is inherent in the purposes of the charity will normally be that which results from the education of children. If the charity trustees allow the facilities of the school to be used for adult education in the evenings, this of itself will not contribute significantly to the discharge of the charity trustees’ duty to further the purposes of the charity for the public benefit<sup>83</sup>.

93. In **IRC v Educational Grants Association Ltd**<sup>84</sup> the objects of a charitable company were the advancement of education. Its income was derived principally from a single company, and between 75% and 85% of expenditure was applied for the education of children of employees of the company. It would not have been possible to create a charitable trust for the education solely of children of employees of the company<sup>85</sup>. The Court of Appeal held that the income applied for the education of children of employees of the company did not qualify for exemption from income tax, as it was not being applied for charitable purposes only. The case shows that charity trustees must consider the whole of the class that may benefit from their charity’s purpose, if they are to properly exercise their discretion in choosing which beneficiaries will actually benefit.

81 [1992] 1 WLR 1241 at 1246B.

82 See **R (Independent Schools Council) v Charity Commission** [2012] Ch 214 at [194] – [195]. This duty is reflected in the wording of the Charities (Accounts and Reports) Regulations 2008 (SI2008/629), regs. 40 and 41, which, in the circumstances where they apply, require charity trustees to report on ‘significant activities undertaken by the charity ... to further its charitable purposes for the public benefit’.

83 See **R (Independent Schools Council) v Charity Commission** [2012] Ch 214 at [192], [196] – [203].

84 [1967] Ch 993, discussed at **R (Independent Schools Council) v Charity Commission** [2012] Ch 214 at [148] – [154].

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

94. If a charity confines the provision of benefits to members, supporters, or subscribers, it's purposes may not be carried out for the public benefit. But it may be proper for a charity to use a membership or similar structure to further its charitable purposes for the public benefit. For example, a charity with the purpose of the advancement of an amateur sport may need to control access to its facilities for reasons of safety, or because the demand for its facilities exceeds what the charity can provide. In such a case, to confine the benefits to members may be justifiable as incidental to carrying out the charity's purposes for the public benefit. In such a case, the charity trustees should ensure that the arrangements for becoming a member are transparent and fair.

## When charity trustees are in breach of duty

95. The performance of the duties of charity trustees involves the exercise of discretions. These are given to the charity trustees in a fiduciary capacity, and hence the charity trustees must exercise them in good faith, for the purposes for which they were conferred, after taking into account all relevant considerations, and disregarding all irrelevant considerations.

96. In many situations there will be a range of decisions that the charity trustees, acting properly, can make. If the charity trustees, acting properly, make a decision within that range, they will not be in breach of duty<sup>86</sup>.

## Altering purposes

97. Section 61 of the Charities Act 2011 declares that charity trustees are under a duty, where the case permits and requires the property or some part of it to be applied *cy près*, to secure its effective use for charity by taking steps to enable it to be so applied. Section 62 sets out the circumstances when *cy près* applications are possible. The jurisdiction of the courts and the Commission to make *cy près* schemes enables charitable property to continue to be applied for the public benefit when circumstances change.

## Charging for services

98. There is no objection in principle to the charging of fees for services provided by charities. Thus in **Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation**<sup>87</sup> Lord Reid said:

“... it has never been held that objects, otherwise charitable, cease to be charitable if beneficiaries are required to make payments for what they receive”.

99. In **R (ISC) v Charity Commission**<sup>88</sup> the Upper Tribunal considered the duties of the charity trustees of charitable schools which charge fees. The following main points emerge from that decision:

- a. A pupil whose family is able to pay fees is no less a potential beneficiary of such a charity than a pupil with no-one to pay his fees. Both have a need for the education which it is the purpose of the charity to provide<sup>89</sup>.

86 See **R (Independent Schools Council) v Charity Commission** [2012] Ch 214 at [220].

87 [1968] AC 138 at 147G.

88 [2002] Ch 214.

89 Para [195]. [214].

- b. When deciding whether a charitable fee-charging school is carrying out its purposes for the public benefit, it is legitimate to take into account the extent to which the school needs to charge fees to cover its expenditure. If, as is usual, the school needs an income from fees to be viable, it is legitimate for its admissions to be weighted in favour of potential beneficiaries able to pay fees<sup>90</sup>.
- c. Where the charges made by a charitable fee-charging school are more than the poor can afford, its trustees must provide a benefit for such of the charity's potential beneficiaries as are poor which is more than minimal or tokenistic. Beyond that, the question of what provision to make for such of the potential beneficiaries as are poor is to be decided by the charity trustees in their discretion<sup>91</sup>.
- d. When deciding whether a potential beneficiary is poor, it may be appropriate to look beyond the circumstances of the beneficiary viewed in isolation: the circumstances of his family may prevent him being treated as 'poor'; his eligibility for a grant from another charitable source may not<sup>92</sup>.
- e. In the case of a charity whose charges are more than the poor can afford, there will be potential beneficiaries who are not poor but who cannot afford the full charge. The Tribunal did not prescribe any minimum level of provision for such potential beneficiaries, treating the matter as one to be decided by the trustees in their discretion<sup>93</sup>.
- f. When deciding whether a charitable fee-charging school is carrying out its purposes for the public benefit:
- the primary focus must be on the direct benefits it provides<sup>94</sup>
  - all the benefits which it provides in furtherance of its charitable purposes can be taken into account<sup>95</sup>
  - benefits which it provides which are unrelated to its charitable purposes cannot be taken into account<sup>96</sup>.
- g. If the school provides luxurious facilities, the onus of demonstrating that it is carrying out its purposes for the public benefit is increased<sup>97</sup>.

## Conclusion

100. This legal analysis is intended to provide a statement of the law on which the Commission's statutory guidance is based. It is not intended to be an exhaustive statement of the law. It does not itself form part of the Commission's public benefit guidance. Individual decisions will be based on the relevant case law.

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90 Paras [210] – [211].

91 Paras [215] – [[216], [222], [229], [233].

92 Paras [181] – [185].

93 Paras [217], [220].

94 Para [201].

95 Paras [201] – [203].

96 Para [204].

97 Para [219]. The question might arise whether the provision of such benefits was more than incidental to the advancement of a charitable purpose.