

POLITEIA:

A Forum for Social and Economic Thinking

Politeia commissions and publishes discussions by specialists about social and economic ideas and policies. It aims to encourage public discussion on the relationship between the state and the people. Its aim is not to influence people to support any given political party, candidates for election, or position in a referendum, but to inform public discussion of policy.

The forum is independently funded, and the publications do not express a corporate opinion, but the views of their individual authors.

Patron

The Most Hon The Marquess of Salisbury DL

Director

Dr Sheila Lawlor

Advisory Council

Professor Tim Congdon CBE

Professor David Dilks

Professor Harold James

Professor Deepak Lal

Sir Geoffrey Leigh

The Rt Hon Oliver Letwin MP

The Rt Hon Francis Maude MP

Stuart Wheeler

David Willetts MP

Sir Brian Williamson CBE

Founder Directors

Maurice Cowling (d. August 2005)

Sheila Lawlor

The Reverend Canon The Lord Pilkington of Oxenford

Making Law?

Parliament v The Charity Commission

Peter Luxton

POLITEIA
2009

First published in 2009
by
Politeia
22 Charing Cross Road
London WC2H 0QP
Tel: 020 7240 5070 Fax: 020 7240 5095
E-mail: info@politeia.co.uk
Website: www.politeia.co.uk

© Politeia 2009

Policy Series No. 64

ISBN 978-1-900525-98-5

Cover design by John Marenbon

Politeia gratefully acknowledges support for this publication from

The Foundation for Social and Economic Thinking

Printed in Great Britain by:

Hobbs the Printers Ltd
Brunel Road
Totton
Hampshire
SO40 3WX

THE AUTHOR

Peter Luxton has been Professor of Law at Cardiff University since 2007, having previously been Professor of Property Law at the University of Sheffield. His books include *Charity Fund-raising and the Public Interest* (Aldershot, 1990) and *The Law of Charities* (Oxford University Press, 2001). He is a member of the advisory editorial board of the *Charity Law & Practice Review*.

The author wishes to express his thanks to Sheila Lawlor for her many detailed comments on the draft of this pamphlet that improved both its clarity and its accessibility to non-lawyers.

CONTENTS

- Introduction
- I Charity law before the Charities Act 2006
- II Has the meaning of charity changed under the 2006 Act?
- III The role of the Charity Commission
- IV The Charity Commission and public benefit: A new approach
- V Why has the Commission adopted its present view of public benefit?
- VI Political activities by charities
- VII The way forward

Charity law before the Charities Act 2006

Over the last twelve years, the Charity Commission has radically changed its approach to determining both the criteria for charitable status and a charity's permissible activities. Two key areas of controversy have emerged—the way in which the Commission applies the so-called 'public benefit' requirement and how far it allows charities to engage in political activities.

This pamphlet begins by looking at the legal meaning of charity before the Charities Act 2006 and the extent to which the meaning was changed by that Act. It considers the role of the Charity Commission, analyses the Commission's approach to public benefit and the reasons adopted by the Commission for its present approach, and suggests that the Commission's public benefit approach is not based in law.

The pamphlet then examines the extent to which the law permits charities to engage in political activities. It suggests that the Commission is now allowing charities to become involved in political activities beyond those which are permitted by law. The Commission's stance on public benefit as applied to fee-paying independent schools stands in contrast to what appears to be its progressively relaxed approach to political activities by charities.

Attention is drawn to the political influences that appear to be behind the Commission's views, and the pamphlet considers how such influences might be reduced by clarifying the role of the Charity Commission under the law.

The meaning of charity before the Charities Act 2006

A charitable purpose

For centuries, the meaning of charity in English law was not contained in any statutory definition, but in decisions of the courts. Guidance was however provided by the preamble to the Statute of Elizabeth 1601, which set out a non-exhaustive list of charitable purposes.¹ The statute provided for commissioners to tour the country to investigate the abuse of charitable trusts. This process fell into disuse with the Civil War; but the preamble itself retained its importance because the courts, over the next four hundred years, had regard to the list of purposes that it contained in developing the legal meaning of charity. The preamble sets out a list of purposes that include the relief of

¹ 43 Eliz c 4; it is also known as the Statute of Charitable Uses 1601.

poverty, the advancement of education, and what might be broadly described as public works.²

The list of purposes in the preamble was not intended to be comprehensive³; indeed, the advancement of religion, which had long been recognised as charitable, is not mentioned, except by reference to ‘the repair of churches’ – probably because religion was too sensitive a matter to be within the jurisdiction of the commissioners that the Act established. Nevertheless, this statutory list provided a useful guide or touchstone to the courts in determining what was in law charitable. In practice, analogies were made with purposes in, or intended by, the preamble so as to determine whether other purposes were charitable. For example the court could find a new purpose to be charitable by holding that it came within the ‘spirit’ or ‘intention’ of the preamble,⁴ i.e. by analogy with the purposes in the preamble. In this way, and by drawing analogies with purposes previously held analogous to those set out in the preamble, the meaning of charity was able to develop through the centuries.⁵

The preamble is not a definition of charity, but merely a list. Following a suggested classification in 1805,⁶ a four-fold classification of charitable purposes was laid down by Lord Macnaghten in the House of Lords in 1891 in the leading case of *Commissioners for Special Purposes of the Income Tax v Pemsel*⁷ (which is hereafter called *Pemsel’s case*). The judge ruled that there were four principal divisions of charity in its legal sense: 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. Why three specific types of charity only were

² The preamble lists: ‘The relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea-banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; the marriage of poor maids; the supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.’

³ *Verge v Somerville* [1924] AC 496 (Lord Wrenbury) (Privy Council); *National Anti-Vivisection Society v IRC* [1948] AC 31, 64, per Lord Simonds: ‘from the beginning it appears to have been assumed that the enumeration was not exhaustive’.

⁴ *Re Macduff* [1896] 2 Ch 451, 467, per Lindley LJ.

⁵ A classic instance is *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138, where the House of Lords held the provision by a local authority of secular cremation facilities charitable by this method: the preamble itself referred to the ‘repair of churches’; by analogy with this, the repair of the churchyard was held to be charitable (*Re Vaughan* (1886) 33 Ch D 187, 192); by analogy with that a burial ground for dissenters was held charitable (*Re Manser* [1905] 1 Ch 279); and by a further analogy a trust for the maintenance of a cemetery owned by a local authority was held charitable (*Re Eighmie* [1935] Ch 524); it was by analogy with this last case that the House of Lords in the *Scottish Burial* case held the provision of cremation facilities to be charitable.

⁶ The classification was suggested by Samuel Romilly, as counsel in *Morice v Bishop of Durham* (1805) 10 Ves 522.

⁷ [1891] AC 531.

enumerated is a matter of conjecture. The judge, Lord Macnaghten, was probably indicating three well-established and important charitable purposes in respect of which the law recognised subtle differences.⁸ The classification was generally accepted by the courts; but reference to the preamble continued to be made, especially in determining what other purposes were ‘beneficial to the community’ under the fourth head.

Public benefit

In the years following *Pemsel*’s case, it was held that, for a body to have charitable status, it was not enough that the purpose itself was charitable: the purpose had to promote a public benefit, meaning that a sufficient section of the community had to be capable of benefiting from it.

How did public benefit emerge as a second and additional requirement for charitable status?

Before *Pemsel*’s case, there were very few specific references to public benefit in the cases.⁹ It was considered self-evident that to hold that a purpose was charitable was to establish that it was for the public benefit. Professor Gareth Jones, in his classic analysis of the history of the law of charity, stated that ‘[p]ublic benefit was the key to the statute’.¹⁰ Indeed, the reason that charitable purposes have for centuries been enforced by the Crown through the office of the Attorney-General is that such purposes are for the public benefit; hence trusts for charitable purposes are sometimes referred to as ‘public trusts’. This view is supported by the first edition of a text frequently cited by the courts, Tyssen’s *Charitable Bequests*, published, three years before *Pemsel*’s case, in 1888, which indicated clearly that charitable trusts were trusts for the public benefit.¹¹

How is it, therefore, that public benefit emerged as a separate ingredient in the years after *Pemsel*’s case? The explanation seems to lie in the way that Lord Macnaghten expressed

⁸ e.g. it had already been recognised that a trust for the relief of poverty amongst a testator’s relatives was charitable: *Isaac v Defriez* (1754) Amb 595; whereas a trust for the advancement of education of a testator’s relatives was not. The advancement of religion was different from the other categories in that the courts had long declined any attempt to assess the merits of particular religions, unless they were immoral or against all religion: *Thornton v Howe* (1862) 31 Beav 14.

⁹ A relatively rare instance is *Hoare v Osborne* (1866) LR 1 Eq 585, where Kindersley V-C held a gift *inter alia* to repair the chancel of a church to be ‘for the public benefit’ and therefore charitable.

¹⁰ Jones, G, *History of the Law of Charity*, 1969, Cambridge: Cambridge University Press, at p. 27.

¹¹ The author wrote: ‘If the Court considered that it was for the public benefit that the property in question should be devoted for ever to fulfilling the purpose named, it held the purpose good. Thus it held good all trusts for promoting the established religion, also all trusts for keeping up schools and hospitals, and many other trusts. These trusts, for purposes which the law considers it for the public benefit to perpetuate for ever, are called charitable trusts. This is the only general definition which can be given of the word charity’ (Amherst D Tyssen, *Charitable Bequests*, 1888, William Clowes & Sons Ltd, London).

his fourth head. The first three heads (viz the relief of poverty, the advancement of education, and the advancement of religion) specified three particular charitable purposes. The fourth differed from the first three in that it described, not a charitable purpose, but rather a ‘quality’ (that of being beneficial to the community) that any other purpose would have to possess in order to be charitable. At the time this four-fold classification was laid down, many purposes had, over the centuries, been held charitable that could not be fitted within any of the first three heads; such purposes would, under Lord Macnaghten’s four-fold classification, be treated as falling within the fourth head. The fourth head was later likened to a portmanteau marked ‘for the public benefit’.¹² Purposes that were treated as charitable under the fourth head are too numerous to list here; but they include the promotion of public works,¹³ agriculture,¹⁴ public health¹⁵ and the defence of the realm¹⁶; the relief of unemployment;¹⁷ faith-healing in a secular context;¹⁸ and the welfare of animals.¹⁹

The fourth head also differed from the first three in that it was a head from which new charitable purposes could emerge, provided they possessed the quality of being beneficial to the community. An important clarification of the scope of the fourth head, however, was made soon after *Pemsel*’s case, in *Re Macduff*,²⁰ where the Court of Appeal said that it was not enough that a new purpose, to be charitable, should be ‘beneficial to the community’: it still had to fall within the spirit and intendment of the preamble. The decision in *Re Macduff* was to have a significant impact on the way that the courts were later to describe the requirements of charity. By indicating that being ‘beneficial to the community’ was not itself enough for a new purpose to be charitable, the Court of Appeal intended merely to limit the potential scope of the fourth head; but the way in which it expressed the limitation gave the impression that being ‘beneficial to the community’, instead of being intrinsic to any charitable purpose, was a separate and additional requirement for charitable status under the fourth head..²¹

It was not long before it was asked whether the purposes within the first three heads also had to be beneficial to the community. It was held that they did: they had to be for the public benefit. As purposes within the first three heads were necessarily for the public benefit, it was clear that ‘public benefit’ was being used in a second sense, namely the

¹² Lord Upjohn in *Scottish Burial Reform & Cremation Society Ltd v Glasgow Corporation* [1968] AC 138, 150.

¹³ *A-G v Heelis* (1824) 2 Sim & St 67.

¹⁴ *IRC v Yorkshire Agricultural Society* [1928] 1 KB 611.

¹⁵ *Re Resch* [1969] 1 AC 514 (PC).

¹⁶ *Re Driffill* [1950] Ch 92.

¹⁷ *IRC v Oldham TEC* [1996] STC 1218.

¹⁸ *Re Le Cren Clarke* [1996] 1 All ER 715.

¹⁹ *Re Wedgwood* [1915] 1 Ch 113.

²⁰ [1896] 2 Ch 451.

²¹ *Verge v Somerville* [1924] AC 496 (Privy Council).

section of the community capable of benefiting. In this sense, ‘public benefit’, meaning a benefit to a sufficient section of the public, became a requirement of all four heads,²² although there was doubt whether it applied to the relief of poverty.²³

Whilst, therefore, the advancement of education, for instance, has for centuries been considered to be a charitable purpose (and so necessarily for the public benefit), a trust for the advancement of education will be charitable only if it is for the public benefit in the additional and separate sense of benefiting a sufficient section of the community. An educational trust that restricts those capable of benefiting to an insufficient section of the public and so benefits only a private class (e.g. the relatives of one or more specified persons) is not charitable, not because the advancement of education is not itself for the public benefit, but because the trust does not benefit a sufficient section of the community. This did not in substance, however, change the position established before *Pemsel*: it was merely that the earlier case law had not expressed this restriction using the language of public benefit. Long before *Pemsel*, for instance, the courts had declined to hold as charitable a trust whose purposes benefited only a private group of persons²⁴ (sometimes called ‘private charity’). In summary, therefore, once a trust or other institution could be shown to be for a charitable purpose (and so be for public benefit in the first sense), the requirement that it also has to be for public benefit meant only that it had to benefit a sufficient section of the community (and so satisfy public benefit in the second sense).

That public benefit in the first sense (meaning public benefit within the purpose itself) was intrinsic to the first three heads of *Pemsel*, (the relief of poverty, the advancement of education, and the advancement of religion), can be seen in the case law.²⁵

²² *National Anti-Vivisection Society Ltd v IRC* [1948] AC 31, 42, per Lord Wright.

²³ See Lord Simonds in *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 305: ‘We are apt now to classify [charitable trusts] by reference to Lord Macnaghten’s division in *Income Tax Commissioners v. Pemsel*, and ... it was at one time suggested that the element of public benefit was not essential except for charities falling within the fourth class, “other purposes beneficial to the community”. This is certainly wrong except in the anomalous case of trusts for the relief of poverty ... In the case of trusts for educational purposes the condition of public benefit must be satisfied’.

²⁴ e.g. *Cocks v Manners* (1871) LR 12 Eq 574, 585, where Wickens V-C held that a trust for a Dominican convent was not charitable because it was not within either the letter or the spirit of the preamble. His Lordship did not use the words ‘public benefit’, but he said: ‘A voluntary association of women for the purpose of working out their own salvation by religious exercises and self-denial seems to me to have none of the requisites of a charitable institution’. *Cocks v Manners* was applied directly in *Gilmour v Coats* [1949] AC 426 as authority for the proposition that a trust for an enclosed order of nuns could not be shown to be for the public benefit. See also *Ommaney v Butcher* (1823) Turn & R 260 (gift in ‘private charity’ held not legally charitable).

²⁵ That public benefit was intrinsic to the first three heads of *Pemsel* is evident from Russell J’s dictum in *Re Hummeltenberg* [1923] Ch 237 that ‘no matter under which of the four classes a gift may prima facie fall, it is still, in my opinion, necessary (in order to establish that it is charitable in the legal sense) to show .. that the gift will or may be operative for the public benefit’.

During the twentieth century a specified purpose (e.g. the particular purpose set out in a testator's will) could not rank as the advancement of education unless it contained the necessary ingredient of public benefit. In a borderline case, therefore, the court would examine the merits of what was proposed to see if it contained the element of public benefit. For example, a gift by will to establish a museum for the public was held not to be charitable for the advancement of education because expert evidence showed that none of the objects was of any real merit;²⁶ Harman J declined to foist onto the public what he called 'this mass of junk'.²⁷ By contrast it was successfully argued that the promotion of chess tournaments for boys and young men resident in Portsmouth was charitable for the advancement of education because evidence presented to the court satisfied it that chess was educational.²⁸ This might be seen as distinct from a college for pickpockets,²⁹ which would not be charitable because the purpose, not possessing any public benefit, would not rank as the advancement of education.³⁰

So the case law establishes that, once a purpose is shown to be charitable, it is necessarily for the public benefit in the first sense.

It was only when it was sought to admit as charitable a new purpose under (Lord Macnaghten's) fourth head that the public benefit of that purpose needed to be assessed. The leading case establishing how public benefit was established in such circumstances was *National Anti-Vivisection Society v IRC*.³¹ In that case, their Lordships made it clear that, in determining whether a purpose was charitable under the fourth head (i.e. whether it was beneficial to the community), the court had to weigh the perceived benefits to be derived from carrying out the purpose against any perceived detriments. The House of Lords held that any benefits of anti-vivisection, which were primarily moral, were far outweighed by the tangible detriment to medical science (and therefore ultimately to human health).

Wholly and exclusively charitable

Additionally, for an institution to be charitable its purposes had to be wholly and exclusively charitable, which meant that every purpose to which its assets (including its income) could, consistently with the terms of the instrument, be applied, had to be charitable.

²⁶ *Re Pinion* [1965] 1 Ch 85.

²⁷ *Ibid.* 107.

²⁸ *Re Dupree's Deed Trusts* [1945] Ch 16.

²⁹ A hypothetical example supplied by Harman LJ in *Re Pinion* [1965] Ch 85.

³⁰ See also Rigby LJ in *Re Macduff* [1896] 2 Ch. 451: 'No one will suggest, for instance, to take only one illustration, that "education" meant the education of pickpockets in a thieves' kitchen to make them fit for their profession'.

³¹ [1948] AC 31.

This chapter has shown that, before the Charities Act 2006, in holding that an institution's purposes had to be both wholly and exclusively charitable and for the public benefit if the institution was to be a charity, the courts were using the expression 'public benefit' to refer to the need for a sufficient section of the community to be capable of benefiting.

II

Has the meaning of charity changed under the 2006 Act?

The Charities Act 2006, Part I, has, since 1 April 2008, introduced a statutory list of purposes³² grouped under 13 paragraphs in section 2(2) of the Act. The first three are the prevention or relief of poverty, the advancement of education, and the advancement of religion. They are almost identical to the first three divisions of charity indicated by Lord Macnaghten in *Pemsel's* case, except that paragraph (a) refers additionally to 'the prevention' of poverty. The final paragraph, (m), is roughly equivalent to the fourth head of *Pemsel*, as it enables new purposes to be recognised by analogy with existing charitable purposes. This leaves the nine paragraphs (d) to (l), these being (with the notable exception of paragraph (g), the advancement of amateur sport) almost all purposes that had been either held to be charitable by the courts (under the fourth head), or recognised and treated as charitable by the Charity Commission.

Public benefit

The Charities Act 2006, section 3(3), states that 'In this Part 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.' Public benefit therefore has the same meaning as it had immediately before Part I came into force (on 1 April 2008). This is clear; but a difficulty arises with section 3(2), which refers to the requirement (in section 2(1)(b)) that a purpose falling within section 2(2) must be for the public benefit if it is to be a charitable purpose. Section 3(2) states that 'In determining whether that requirement is satisfied in relation to any such purpose, it is not to be presumed that a purpose of a

³² The statutory list is as follows:

- a) the prevention or relief of poverty;
- b) the advancement of education;
- c) the advancement of religion;
- d) the advancement of health or the saving of lives;
- e) the advancement of citizenship or community development;
- f) the advancement of the arts, culture, heritage or science;
- g) the advancement of amateur sport;
- h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
- i) the advancement of environmental protection or improvement;
- j) the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;
- k) the advancement of animal welfare;
- l) the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services;
- m) any other purposes within subsection (4).

particular description is for the public benefit.’ What, then, is the effect of this subsection?

If a purpose has already been held in law to be charitable, this section does not affect its charitable status because such status is not dependent on any presumption but has been established by law.³³ All the purposes listed in paragraphs (a) to (l) in section 2(2) are therefore, as a matter of law, for the public benefit, as are all the other purposes that were held charitable under the fourth head under the old law, and which remain charitable by virtue of paragraph (m).

Parliament would not have introduced the statutory list of purposes³⁴ unless those purposes were considered to be for the public benefit. The reference to ‘a purpose of a *particular* description’³⁵ is a reference to the form of words used in the will, deed, or other governing document, and not to the purposes listed in section 2(2) of the 2006 Act. The opening words of section 2(2) refer to ‘the following descriptions of purposes’. If section 3(2) had intended to refer to the descriptions of purposes in section 2(2), it would have read: ‘it is not to be presumed that any of the descriptions of purposes in section 2(2) is for the public benefit.’ Section 3(2) does not state this, and it does not change the previous law, namely that any charitable purpose is necessarily for the public benefit.

There are therefore two possible interpretations of section 3(2).

First, it may simply put into statutory form the long-established principle that a trust or other institution is not charitable for the public benefit merely because the person setting it up believes it to be so.³⁶

If this interpretation is the correct one, the Charities Act 2006 has no effect on public benefit in the law of charity.

³³ The point was made clear by Hubert Picarda QC: ‘Mere reversal of the “presumption” of public benefit cannot change the declared law on this point’: Written Evidence to the Joint Committee on the Draft Charities Bill, DCH 297, 2004, HL Papers 167-3; HC 660-3, at para 9.

³⁴ In Charities Act 2006, s 2(2).

³⁵ *Ibid*, s 3(2); italics supplied.

³⁶ e.g. *Re Pinion* [1965] Ch 85 (Harman J). See also Russell J’s observation in *Re Hummeltenberg* [1923] 1 Ch 237: 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.

Secondly, it is possible that the sub-section is intended to reverse the effects of a statement of Lord Wright in the *National Anti-Vivisection Society* case.³⁷

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.

What Lord Wright meant by his 'prima facie assumption' of public benefit is that, once an organization's purpose has been shown to fall within one of the established categories of charitable purposes, the organization is presumed to be charitable unless its purposes are restricted to benefiting a class of persons that is not a sufficient section of the community. If, for instance, the purpose of an organisation is the advancement of education (which, as an established charitable purpose, is necessarily for the public benefit), Lord Wright's dictum means that the organisation is presumed to be charitable unless its benefits are in terms restricted to an insufficient section of the community.

However, even if section 3(2) reverses the presumption to which Lord Wright referred, there is no practical difference because, in every reported case, whether the purposes of an organization benefit a sufficient section of the community has been determined by the court either on the evidence before it, or on a rule of law³⁸, without the need to rely on any presumption.

Wholly and exclusively charitable

The requirement that the purpose be wholly and exclusively charitable is preserved by the Charities Act 2006, which provides that 'charity' means an institution which is established for charitable purposes only.³⁹ As before the Act, if one of the purposes of an institution is not charitable (e.g. if it is a political purpose), the institution cannot be a charity.

So, whilst the Charities Act 2006 makes some slight changes to the list of charitable purposes, it does not change the legal meaning of public benefit. It may have no effect on how public benefit is determined in any case, as section 3(2) may merely put into statutory form the well-established principle that a trust is not presumed to be charitable

³⁷ [1948] AC 31, 42.

³⁸ i.e. the nexus test, that precludes charitable status where the persons to benefit, however numerous, are defined by reference to a particular person or persons (such as relatives of a named person, employees of a company, or members of a club): *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297. Trusts for the relief of poverty were exempt from this nexus test (*Dingle v Turner* [1972] AC 601), and probably remain so after Part I of the Charities Act 2006, because the relieving of poverty appears to be for the public benefit, even if that benefit is indirect; but the point remains to be settled.

³⁹ Charities Act 2006, s 1(1)(a).

for the public benefit merely because the person setting it up believes it to be so. If the presumption in section 3(2) refers to the class of persons to benefit, there is in practice little change, as in every case the court has determined public benefit on the evidence before it or on a rule of law, not by reliance on any presumption. The Act also makes no change to the requirement that a charity be wholly or exclusively charitable.

Overall, it is clear that the Act has either no effect, or no practical effect, on public benefit in the law of charities.

III

The role of the Charity Commission

The maintenance of the register of charities

Under the Charities Act 2006, the body of persons formerly known as the Charity Commissioners for England and Wales (and originally established under the Charitable Trusts Act 1853) has now been replaced by a corporate body called the Charity Commission for England and Wales. The Charity Commission is a non-ministerial government department, and is composed of appointed board members with a staff of paid officials operating under their responsibility.⁴⁰ The powers of the Commissioners, originally very limited under the 1853 Act, were gradually extended by later statutes. It was not, however, until the Charities Act 1960 that the Commission was charged with the duty to keep a register of charities – a duty now contained in the main statute governing the administration of charities, the Charities Act 1993.⁴¹ The register is a public register of institutions that are registered as charities; an institution is deemed to be a charity while it is on the register of charities.⁴² The Commission must remove from the register an institution that it no longer considers is a charity, and any charity that has ceased to exist or does not operate.⁴³ Certain charitable institutions or types of charities are exempt from registration,⁴⁴ and others (including charities whose gross income does not exceed £5,000) are excepted from the duty to register.⁴⁵ The Commission's involvement with the administration of charities encompasses much more than the maintenance of the register

⁴⁰ For convenience, references in this paper to 'the Commission' are intended to include its forebears, the Charity Commissioners. The present members of the Charity Commission are:

Dame Suzi Leather (Chair)
Simon Jones
Sharma Nebhrajani
Andrew Purkis
Theo Sowa
Simon Wethered (legal member)
John Williams
John Wood (legal member)
Tess Woodcraft

For full details of members' registration and interests and other information on the body, see Charity Commission's website: <http://www.charity-commission.gov.uk/tcc/decint.asp>

⁴¹ Charities Act 1993, s 3 (as substituted by Charities Act 2006, s 9).

⁴² Charities Act 1993, s 4(1).

⁴³ Charities Act 1993, s 3(4), substituted by Charities Act 2006, s 9, but in substance similar to the original subsection that it replaced.

⁴⁴ Charities Act 1993, s 3A(2)(a) (as substituted by Charities Act 2006, s 9). The rationale is that these exempt charities are already subject to a different supervisory body, e.g. universities in England are subject to HEFCE (Higher Education Funding Council for England).

⁴⁵ Charities Act 1993, s 3A(2)(b), (c), and (d) (as substituted by Charities Act 2006, s 9).

of charities. Its roles include the preparation and approval of schemes for charitable property (as where the purposes laid down, though charitable, were vague, or where the property is applicable to similar charitable purposes). The Commission also has powers to act to protect charity property, and to suspend or remove charity trustees. It may also give advice to charity trustees. This chapter concentrates, however, on the maintenance of the register, in particular the way in which the Commission exercises its statutory responsibilities in relation to registration.

In determining whether a body is entitled to be on the register, the Commission must decide whether the body is established for wholly and exclusively charitable purposes. This determination involves an application of law to fact: in other words, the Commission has to decide if the institution's purposes (which are usually, but not always set out in a written document)⁴⁶ are charitable. In an application for registration of an institution as a charity, the Commission is therefore sometimes faced with having to determine whether a purpose not previously recognised as charitable is nevertheless in law charitable. To this extent, and whatever its decision might be, it might appear that the Commission is making new law. To some extent this resembles the judicial function. However, whereas the courts can develop charity law, the Commission, a statutory body, is given no discretion to do so. The Charity Commission is a non-ministerial government department and its decisions are therefore not judicial, but administrative in nature. The Commission cannot make new law; all it can do is to determine whether, under charity law as it stands at the date that it makes its determination, the institution's purposes are or are not charitable. If the position were otherwise, a government department would be usurping the role of Parliament and the role of the courts. It would, indeed, be a threat to the rule of law. The role of the Commission in this regard is clearly indicated in the relevant legislation, which imposes a duty on the Commission to keep a register of charities,⁴⁷ and which expressly confers on the Commission a discretion only in relation to the manner in which such register is kept.⁴⁸

The Commission's exercise of its registration function before the late 1990s

Until the late 1990s, the Commission performed its registration function broadly in accordance with the meaning of charity as established in the case law. In some instances, it departed from precedent where the legal basis underlying the case law had been changed by statute. An example is the Commission's determination in 1983⁴⁹ that the promotion of good race relations is charitable, despite a High Court decision in 1949 to

46 The document in question might be a will, a trust, a company's constitution, or the contract creating an unincorporated association.

47 Act 1993, s 3(1); s 3 was substituted for the previous s 3 by Charities Act 2006, s 9.

48 Charities Act 1993, s 3(2); s 3 was substituted for the previous s 3 by Charities Act 2006, s 9.

49 [1983] Ch Com Rep 9-11 (paras 15-20).

the contrary. This decision was *Re Strakosch*,⁵⁰ where it was held that the appeasement of racial feelings between the Dutch and English speaking sections of the South African community was not charitable both because it was considered to be a political purpose and because the court considered it too vague to fall within the spirit and intendment of the preamble. Since that decision, however, the Race Relations Act 1968 had come onto the statute book, which showed that Parliament had effectively decided that the promotion of good relations was for the public benefit. The objection based on political purpose therefore no longer applied. The Commission treated such purpose as charitable by analogy (inter alia) with the preservation of public order and the prevention of breaches of the peace.⁵¹

More controversial was the decision of the Commission in 1993 to decline to register as charities two gun and rifle clubs,⁵² despite a High Court decision⁵³ that the promotion of rifle shooting was charitable as tending to promote the efficiency of the armed forces – a purpose analogous to ‘the setting out of soldiers’ within the preamble – and despite the Commission’s having previously registered a number of such clubs. The Commission considered that the law as laid down in *Re Stephens* had become obsolete,⁵⁴ both in view of the tactical and technological developments in warfare since the Boer War, and because changes to army recruitment and training meant that it was unlikely that rifle and pistol clubs would be called on in the event of a war or national emergency.⁵⁵ The Commission’s departure from *Re Stephens* was thus based on changes in society. Given that the decision in *Re Stephens* was a hundred years old, the claim that there has been significant social change might be thought to carry more weight than if the decision had been of a more recent vintage. If social change is to justify a departure from the case law, it should be both significant and uncontroversial, otherwise it might be open to challenge as being merely a convenient means of departing from a decision of the courts that the Commission does not like.

50 [1949] 1 Ch 529.

51 The Commission also found it analogous to the mental and moral improvement of man on the basis that discrimination on grounds of colour is immoral (*Re Hood* [1931] 1 Ch 240; *Re Price* [1943] Ch 422; *Re South Place Ethical Society* [1980] 1 WLR 1565); and to the promotion of equality of women with men: *Halpin v Seear* (1976) 27 February; *Women’s Service Trust* [1977] Ch Com Rep 14-15 (paras 34-36); [1983] Ch Com Rep 9, 11 (para 19).

52 *The City of London Rifle and Pistol Club; The Burnley Rifle Club* (1993) 1 Decisions 4-13.

53 *Re Stephens* (1892) 8 TLR 792.

54 i.e. following the principle explained by Lord Simonds in *National Anti-Vivisection Society v IRC* [1948] AC 31, 74; and in *Gilmour v Coats* [1949] AC 426, 443.

55 For a defence of the charitable status of rifle clubs, see Peter Clarke, ‘The charitable status of rifle clubs: out with a bang?’ (1992-3) 1 CL&PR 137, and ‘Charitable status of rifle clubs: the explosion occurs’ (1993-4) 2 CL&PR 97.

The Commission's exercise of its registration function since the late 1990s

In the United Kingdom today, statute law is made by Parliament, and case law is developed by the courts. It would be a great threat to the rule of law if the Commission were to make new law at the behest of any government. That would mean that the Charity Commission had become merely an arm of government, with grave implications for the charitable and voluntary activities which historically have in the United Kingdom played a central role in shaping the framework of a free society. However, since the late 1990s the evidence is that this has been happening. In 1998 the Charity Commission began embarking on a number of public consultations that resulted in a series of publications under the general name, *Review of the Register*. The move has been questioned by one of the country's senior QCs, who has explained that decisions on charitable status should be determined on legally relevant evidence and well-established principles.⁵⁶

Nonetheless the Commission has even claimed new powers to interpret and develop the law and to change it.⁵⁷ It claimed its approach would be 'characterised by the use of our powers to apply and interpret the law in a way which fully recognises that what is legally charitable may change following trends in social and economic circumstances'.⁵⁸ Furthermore, it has claimed for itself the same power as the court to develop the meaning of the law of charity, stating: 'We must also consider whether the courts of today would or would not now follow a decision made many years ago and in different circumstances'.⁵⁹ It has added a further remit to its brief, to reconsider using its powers to ensure that legal principles are compatible with the rights set in the European Convention on Human Rights.⁶⁰

As a result of such claims the Commission appears to have awarded itself the task of making the law.

The *Review of the Register* set a new agenda for the Commission, one that it has been pursuing ever since, and which has shown the Commission to be ever more daring in its willingness to distort or even effectively to disregard the settled law.⁶¹ The Commission's

⁵⁶ Commenting on these exercises, Hubert Picarda QC wrote in 'Charity review is a review too far', (1998) 12 *The Lawyer*, issue 23 (9 June), p. 22: 'The suggestion that consultation processes are necessary to establish the principles that underpin charity law is bizarre. The law has already been declared in a myriad of cases. ... Decisions on charitable status must be determined on legally relevant evidence and well-established principles and not on unclear criteria or popular soundings.'

⁵⁷ *Review of the Register* (10.01 version).

⁵⁸ *Ibid.*, para 2.

⁵⁹ *Ibid.*, para 6.

⁶⁰ *Ibid.*, para 5.

⁶¹ See Mitchell, C, 'Reviewing the Register', chapter 7 in Mitchell, C and Moody, S, *Foundations of Charity*, 2000, chap 1, Oxford: Hart Publishing, at p 190: 'it may be said that the Review is obliquely the product of

agenda has manifested itself most strikingly in two specific areas: first, the requirement of public benefit; and, secondly, the extent to which charities may engage in political activities. It is to a more detailed analysis of these areas that the following chapters turn.

political pressure, insofar as the Commissioners felt obliged to justify their Parliamentary grant by undertaking to perform their quasi-judicial functions in a new way’.

The Charity Commission and public benefit: A new approach

The Commission's new approach to public benefit is contained in a series of guidance documents, beginning with the publication in 2008 of its general guidance on public benefit.⁶² Its guidance is controversial because it departs markedly from the way in which it had treated public benefit until the late 1990s, a departure signalled in its publications since then.⁶³ Most notably the change in its treatment of public benefit contained in its general guidance has become prominent on account of its perceived impact on charities that charge fees (notably, but not exclusively, the independent schools) and on religious charities.

The Commission's new general guidance has three central planks: first, that, following the coming into force of the Charities Act 2006, Part I, there is no presumption that any charitable purpose is for the public benefit, and therefore public benefit must now be proved in every case; secondly, that public benefit involves scrutinising a charity's activities; and, thirdly, that any institution that excludes the poor cannot be charitable.

The reversal of the presumption of public benefit?

In its general guidance on public benefit published in January 2008, the Charity Commission treats the Charities Act 2006, section 3(2), as having reversed the presumption that the purposes within the first three heads of *Pemsel* (the relief of poverty, the advancement of education, and the advancement of religion) are for the public benefit. The Commission contends that all institutions, regardless of the category of charity under which they fall, must positively show that their purposes are for the public benefit.

It is, however, a matter of law, not a presumption, that the purposes listed in section 2(2) of the Charities Act 2006 (or previously held in the case law to be charitable) are for the public benefit, as this paper has shown. The Commission's view that section 3(2) can change this is therefore misguided.

The Commission's error involves what might for convenience be called the 'fourth-head fallacy', by which is meant confusion between the public benefit that needs to be shown if a new purpose is to be charitable (which used to be under the fourth head of *Pemsel*'s case), and the public benefit that is inherent in every purpose that has already been held charitable. To argue that a new purpose is charitable requires showing the purpose is beneficial to the community, and such benefit must be positively proved, as was

⁶² Charity Commission, *Charities and Public Benefit: The Charity Commission's general guidance on public benefit* (January 2008).

⁶³ e.g. *The Public Character of Charity*, RR8, Charity Commission (February 2001).

established in the *National Anti-Vivisection Society* case. It follows, however, that once a purpose has been admitted as charitable it is necessarily a purpose for the public benefit. This applies to all the purposes listed in section 2(2) of the Charities Act 2006, and all the purposes previously held charitable under the fourth head. To require an institution whose purposes are charitable (e.g. for the advancement of education) to show that such purposes are for the public benefit is to apply to such institution a test that according to the law it has already passed. It is, to put it bluntly, nonsense.

Assessment of public benefit by activities?

In assessing public benefit, the Commission claims that it is entitled in every case to look at the activities that a particular institution is carrying on. In the Commission's view, each institution, to be charitable, must produce public benefit through its activities. According to the Commission, this is an ongoing requirement, and the Commission requires the trustees or directors to produce an annual statement indicating how their charity has provided public benefit.

The Commission seeks to support this approach by relying on the case law that has indicated that in determining what an existing organization's true purposes are, it is appropriate to examine its activities. The Commission's view, however, is deeply flawed and distorts well-established principles, as an analysis of the case law reveals.

It is possible that an organisation might, in order to obtain the benefits of charitable status, set out in its governing instrument a set of purposes that are undoubtedly charitable but which do not accurately state what its true purposes are. An institution intending to pursue a political purpose, for instance, might try to draft its objects so that they appear to be wholly and exclusively charitable in order to obtain the tax advantages of charitable status. The law is concerned to prevent 'political propaganda' from 'masquerading ... as education'.⁶⁴ Therefore, in determining whether an institution's purposes are charitable – where the purposes are ambiguous, or where it is suspected that they are a sham – the courts have held that they are entitled to look at the institution's activities.⁶⁵ This does not, however, entitle the courts or the Commission to look for public benefit in a charity's activities. There are serious objections to the Commission's activities-based approach.

First, there is a vital difference between a legitimate regard to activities in order to determine whether they are consistent with the body's charitable purposes and an improper attempt to require charities to show public benefit in their activities. The difference is between establishing whether an institution is charitable in the first place, and determining whether the trustees are in breach of trust in carrying out the purposes. There are, inevitably, going to be rare occasions in which the Commission removes an

⁶⁴ *Re Hopkinson* [1949] 1 All ER 346 (Vaisey J).

⁶⁵ *Southwood v A-G* [2000] WTLR 1199.

existing charity from the register because its activities show that the initial registration was a mistake.⁶⁶ The Commission's approach, however, is not based on mistake. The Commission's approach could mean that a school that has for centuries been regarded as a charity, and which has perhaps been on the register of charities for nearly fifty years, could lose its charitable status, not because the advancement of education has ceased to be a charitable purpose, but because the trustees for the time being are not carrying it on in a way which satisfies the Commission that enough public benefit is being produced. If the Commission's legal view were correct, it would mean that the trustees' very act of misapplying charitable funds (which should properly be treated as a breach of trust) would result in the institution's not being charitable, so that the court would lose its charitable jurisdiction over the organisation, and the Commission would have no jurisdiction over it.

Secondly, it involves a distortion of the legal meaning of public benefit. Public benefit must be contained in an institution's purposes. Activities might be relevant in some instances in determining what an institution's purposes are, but it is not the activities themselves that contain the public benefit. Rather by definition a charity's purposes are for the public benefit, and what a charity has to do under charity law is to carry out those purposes. Nothing in the Charities Act 2006 has changed this: section 2(1) states that 'a charitable purpose is a *purpose* which',⁶⁷ in addition to falling within section 2(2), 'is for the public benefit', and section 3 throughout refers to public benefit in relation to purposes.

Thirdly, the Commission's approach leads to uncertainty. Although the Commission (wrongly) requires charities to state how their activities produce public benefit, its guidance does not give charities any precise indication of what sorts of things rank as benefits or detriments, or any guidance on how benefits are to be weighed against detriments or how much overall benefit must be produced. In the case of independent schools, the Commission has indicated that more public benefit will be provided by bursaries (which are awarded to those who cannot afford to pay) than by scholarships (which are awarded to those who are able, regardless of their financial position). It has also suggested that there might be even more public benefit if such schools lower their entry standards for those from poor backgrounds. However, others might argue that there is no public benefit in independent schools effectively creaming off able pupils from poor backgrounds who might otherwise have enhanced the state-school system. The Commission's approach leads to a discordant free-for-all in which public benefit, instead of having a clear and distinct legal meaning, is at risk of becoming the subject of a

⁶⁶ Removal from the register on the ground that the initial registration was in error is very rare: *Re Scott Baden Commonwealth Ltd* [1967] Ch Com Rep 48, App D, Pt II.

⁶⁷ Italics supplied.

number of irreconcilable views, prejudices and ideologies, rather than set out under law.⁶⁸ To state that charities should be for the public benefit might have a populist ring and might appear to capture the sense of the law; but it has no more precise meaning in law than to express a belief in motherhood and apple pie.

Fourthly, the Commission's suggestions to independent schools on what ranks as public benefit come close to its effectively micro-managing the activities of charity trustees. However, the Commission is statutorily prohibited from becoming directly involved in the administration of a charity, except where there has been misconduct or mismanagement in the administration of a charity.⁶⁹

Fifthly, if removal from the register of charities were to occur on the ground that the institution's activities were not producing (or were producing insufficient) public benefit, such removal could only be on the ground that the institution's purposes were not charitable. It is, however, not clear what would happen to the assets in such circumstances. As an institution is conclusively presumed to have been a charity when on the register,⁷⁰ it might be thought that the assets would be applicable to other charitable purposes (under the doctrine known as *cy-près*).

It is, however, doubtful whether such conclusive presumption can apply where the Commission's registration of the institution was later shown to have been a mistake, as the act of registering a body that was not a charity would have been *ultra vires* (i.e. beyond the Commission's statutory powers). The *cy-près* doctrine cannot be applied where the property was not given for charitable purposes. There is therefore the possibility that the assets of an institution removed from the register for failing to satisfy the Commission that it was providing public benefit could either pass to the Crown as *bona vacantia* (i.e. as ownerless property), or pass into private hands (e.g. on a resulting trust for the settlor or contributors, or, in the case of an unincorporated association, for the members).

The Commission's approach on public benefit is therefore not lawful in that the Charities Act 2006 does not change the previous law that requires public benefit to be contained in a charity's purposes, not in its activities.

⁶⁸ As illustrative of an ideological, rather than a legal approach, see Education Review Group, *Public Benefit and Fee Charging*, (11 July 2008), being its response to the Charity Commission's consultation on the draft supplementary guidance on Public Benefit and Fee-charging.

⁶⁹ Charities Act 1993, s1E(2) (inserted by Charities Act 2006, s 7, and replacing a similar prohibition in the Charities Act 1993, s 1(4) (now repealed), that 'the Commissioners shall not themselves have power to act in the administration of a charity'.

⁷⁰ Section 4(1) of the Charities Act 1993 states: 'An institution shall for all purposes other than rectification of the register be conclusively presumed to be or to have been a charity at any time when it is or was on the register of charities'.

No exclusion of the poor?

The Commission's view is that a charity cannot exclude the poor, and that a charity that charges high fees (such as many independent schools) will be treated as doing so unless it makes adequate provision for the admission of the poor – hence the Commission's concern that such schools provide public benefit through adequate bursaries. According to the Commission, the indirect benefit to the public of relieving the demand on the state sector is not on its own a sufficient benefit for this purpose.

What in law is the position of charities excluding the poor?

There are some judicial statements that charity cannot exclude the poor; but the legal history of the law of charities suggests a more complex position. For example, the circumstances suggest that such statements were made only in relation to charities under the first group of purposes listed in the preamble to the Statute of Elizabeth 1601 (namely, the relief of aged, impotent and poor people); that the exclusion would have to be explicit in the charity's governing instrument, and that, in any event, indirect benefit to the poor suffices.

Nearly two and a half centuries ago, Lord Camden described charity as 'a gift to a general public use, which extends to the poor as well as to the rich';⁷¹ in the late Victorian period, Lindley LJ said that he doubted 'very much whether a trust would be declared to be charitable which excluded the poor';⁷² and nearly sixty years ago, Harman J opined that a home of rest for millionaires could not be a charity.⁷³ The sheet anchor of the Commission's proposition, however, is the advice of the Privy Council in *Re Resch*,⁷⁴ where Lord Wilberforce said that 'to limit admission to a nursing home to the rich would not be charitable'.⁷⁵

First, it is necessary to appreciate the ambit of these observations. Lord Camden's comment was made in 1767, at a time when there was reason to believe that, where individuals received direct benefit from charity, it was on the basis of poverty. To this extent, his dictum is outmoded and can hardly be treated as of general application, as it later became clear, probably even by the early nineteenth century,⁷⁶ that the relief of poverty was merely one head of charity.⁷⁷ Most of the other cases in which similar

⁷¹ *Jones v Williams* (1767) Amb 651, 652 (supply of water).

⁷² *Re Macduff* [1896] 2 Ch 451, 464 (charitable or philanthropic purposes).

⁷³ *Re White's Will Trusts* [1951] 1 All ER 528, 530 (home of rest for nurses).

⁷⁴ [1969] 1 AC 514 (PC) (for general purposes of a hospital that charged fees).

⁷⁵ *Ibid.* 544.

⁷⁶ *Morice v Bishop of Durham* (1805) 10 Ves 522.

⁷⁷ See also *R v Commissioners for Special Purposes of the Income Tax (ex parte University College of North Wales)* (1909) 5 TC 408, 408-409, per Lord Cozens-Hardy MR.

observations have been made, including *Re Resch*, have involved purposes falling within the first group listed in the preamble to the Statute of Elizabeth 1601, i.e. the relief of ‘aged, impotent and poor people’,⁷⁸ and are to be treated as applying only to such purposes. Lord Simonds, who had previously warned of the danger of trying to reason by analogy from one head of charity to another,⁷⁹ explained that the law of charities, insofar as it related to relief of poverty, had followed its own line.⁸⁰

Secondly, it appears that the poor are treated as excluded only where the exclusion is express, i.e. set out in an institution’s governing instrument. A rest-home for aged millionaires would therefore not be charitable because millionaires are by any definition not poor. Some public schools were set up to provide for the sons of gentlemen,⁸¹ or noblemen,⁸² but they do not in terms exclude the poor.

Thirdly, even if an institution charges fees, it seems that these would have to be extremely high before the poor could be said to be excluded. This raises the basic question of what is meant by the poor. Lord Camden’s comment that a charity must benefit the poor as well as the rich suggests that there is no intermediate category. It may be that, during the age in which he spoke, everybody who was not accounted rich was treated as poor.⁸³ What is clear is that poverty involves a sliding scale, and does not require destitution; even a trust for the relief of poverty can exclude the very poorest.⁸⁴ In any event, in none of the cases has it been argued that fee-charging schools exclude the poor.

Fourthly, in *Re Resch* itself, Lord Wilberforce, having referred to the principle that charity cannot exclude the poor, said that ‘indirect as well as direct benefit’ enters into account. This was in the context of a gift for the general benefit of a private fee-paying hospital: his Lordship said that there was an indirect public benefit in the relief of the pressure on the state hospital nearby. The Commission, however, takes an unjustifiably narrow view of this comment, and is not prepared to treat indirect benefit to the poor as sufficient on its own. The Commission can be accused of cherry-picking *Re Resch*. It

⁷⁸ e.g. *Re Resch* [1969] 1 AC 514 (PC) (hospital).

⁷⁹ *Gilmour v Coats* [1949] AC 426, 449.

⁸⁰ He made the following observation in *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297: ‘I am concerned only to say that the law of charity, so far as it relates to “the relief of aged, impotent and poor people” ... and to poverty in general, has followed its own line, and that it is not useful to try to harmonise decisions on that branch of the law with the broad proposition on which the determination of this case must rest.’

⁸¹ *AG v Earl of Lonsdale* (1827) 1 Sim 105 (school for the sons of gentlemen).

⁸² *Brighton College v Marriott* [1926] AC 192 (school for the sons of noblemen and gentlemen).

⁸³ A literary example illustrates that poverty is a relative concept. In Jane Austen’s novel, *Emma*, Mr Knightley scolds the eponymous heroine for being rude to Miss Bates on their visit to Box Hill, reminding Emma that Miss Bates is poor. Yet whilst Miss Bates is poor in comparison to Emma herself, by the standards of the time she appears in the novel to be reasonably comfortably off.

⁸⁴ *Re De Carteret* [1933] Ch 103.

also seems odd that, although that decision is some forty years old, it is only recently that the Commission appears to have discovered its startling impact.

In its approach to public benefit, the Charity Commission is wrong in law to treat the Charities Act 2006, section 3(2), as now requiring charities to prove public benefit; it is wrong in law to require charities to show that their activities are producing public benefit; and it is wrong in law in its application of the principle that charity cannot exclude the poor.

Why has the Commission adopted its present view of public benefit?

This paper has considered the Commission's approach to public benefit and has shown that it is adopting a view that has no legislative or judicial support, and is also contrary to long-established principles of charity law that remain unaltered by the Charities Act 2006. What can explain the Commission's remarkable change of approach since the late 1990s?

It might be argued that the Commission is attempting to give the public benefit provisions in the Charities Act 2006 a 'purposive' construction, which means interpreting legislation with regard to what Parliament intended it to achieve. A purposive construction contrasts with a 'literal' construction, in which the words of a statute are given their literal meaning, even if this sometimes produces a result that Parliament did not intend.

In this case the government's intention may not have been reflected in the Act. It is clear that the government intended that the Charities Bill (later the Charities Act 2006) would reverse the so-called presumption of public benefit. Baroness Scotland suggested in introducing the Bill's Second Reading that under the Bill all charities would have to show they were for the public benefit irrespective of their purpose.⁸⁵

It is also clear that that the government intended that public benefit should be assessed through activities, as in the same speech Baroness Scotland said:

In common with all other charities, independent schools will have to show that they provide a public benefit.

However, a purposive construction can be used only where the legislation is susceptible to it; and, as has been shown, so far as the government believed that section 3(2) would reverse a so-called presumption of public benefit, it was mistaken in that view. The interpretation of a statute depends on construing what Parliament has enacted. If, through a misunderstanding of the law, the government has failed, in a Public Bill, to achieve the legal effect that was intended, there is no scope for a purposive construction, as this would effectively give the force of law merely to the wishes of government rather than Parliament.

⁸⁵ See Baroness Scotland's summary introducing the Bill at Second Reading: 'Under the existing law, there is a presumption that charities established for the relief of poverty, the advancement of education or the advancement of religion are for the public benefit. However, charities established for all other purposes do not benefit from this presumption, and Clause 3 abolishes this presumption. Under the Bill, all charities must show that they are for the public benefit, irrespective of the purpose for which they are established' (Charities Bill, 2nd Reading, House of Lords, 20 January 2005, col 885).

In 2002, the Cabinet Office's Strategy Unit report, *Private Action, Public Benefit*, proposed that

There should be a clearer focus on public benefit. In particular charities which charge large fees for their services, thereby excluding a substantial part of the population, will need to demonstrate how their activities have a public character.⁸⁶

However, the Charities Act 2006 (in contrast to the equivalent legislation in Scotland⁸⁷) makes no provision for an activities test for public benefit, and makes no changes to the case law on whether the poor can be excluded.

The Commission also places reliance on the Human Rights Act 1998. As a public authority, the Commission must take account of Convention rights contained in the Act. However, the Commission places broad brush reliance on the impact of the European Convention on Human Rights on charity law, notably in its assertion that the law must be rational, and that this is satisfied by treating public benefit as the same across all categories of charitable purposes, so creating a 'level playing field'.

This view does not accurately reflect the impact of the European Convention. First, it contains no article requiring domestic law to be rational; but, even if it did, it cannot be assumed that the existence of differences in the nature and proof of public benefit from one category of charity to another is irrational. Secondly, the Convention comprises specific rights, many of which are qualified; and Strasbourg jurisprudence allows scope for variations in domestic laws. If human rights are to be invoked, it is necessary to point to a specific article that is allegedly infringed.

The rationale for differences in public benefit amongst the categories of charity is clear from the treatment of public benefit in the advancement of religion. The case law is unequivocal that the court cannot assess the merits of different religions, so that the only way of holding that the advancement of a particular religion is not for the public benefit is to show that it is against all religion or immoral.⁸⁸ The sense of this approach is readily apparent, since the courts are not qualified to pass judgment on matters of religious doctrine.⁸⁹ To this extent, the advancement of religion might be considered to differ from

⁸⁶ September 2002.

⁸⁷ Charities and Trustee Investment (Scotland) Act 2005; ss 7 and 8 refer to a body 'providing' public benefit.

⁸⁸ *Thornton v Howe* (1862) 31 Beav 14; *Re Watson* [1973] 1 WLR 1472.

⁸⁹ *Varsani v Jesani* [1999] Ch 219 (CA), *Craigdallie v Aikman* (1813) 1 Dow 1 (HL); *General Assembly of Free Church of Scotland v Lord Overtoun* [1904] AC 515 (HL). See also Atkinson, R, 'Problems with Presbyterians', chap 6 in Mitchell, C and Moody, S, *Foundations of Charity*, 2000, Oxford: Hart Publishing.

other categories of charity: if a trust to publish a book is to be charitable for the advancement of education, the court must be satisfied that the writing is of public benefit; whereas if the writings are of a religious nature, the trust may be upheld as charitable for the advancement of religion unless the writings are immoral or against all religion. The difference in treatment is rational.

The Commission's reliance on Convention rights is itself selective, as is evident from its approach to the advancement of religion. The right to freedom of religion is contained in article 9.1 of the Convention. If the Commission were to treat some religions less favourably than others by declining to register them as charities, there would be a prima facie breach of article 9.1. The right to freedom of religion is qualified; thus the right to manifest one's religion or beliefs can be:

subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.⁹⁰

This qualification would seem apt to cover the exclusion of religions that are immoral or are against all religion, as laid down in the case law. It would not, however, enable the Commission to use its powers to examine the tenets of different religions in order to assess whether they are for the public benefit. This appears to be an infringement by the Commission, as 'a public authority', of the right to freedom of religion in article 9.1, and potentially of other Convention rights,⁹¹ and could be challenged by religions denied charitable status on this basis.⁹² Yet this is what the Commission is intending to do.

Another instance of the Commission's inconsistent approach is that, despite its ostensible concern with rationality and with a 'level playing field',⁹³ it is willing to treat as charitable the poor relations and poor employee cases, despite the fact that the House of Lords admitted them to be anomalous.⁹⁴

⁹⁰ European Convention on Human Rights, article 9.2.

⁹¹ E.g. articles 10 (freedom of expression) and 11 (freedom of assembly and association), and these need also to be read in conjunction with article 14 (prohibition of discrimination on various grounds, including religion).

⁹² See Anne Sanders, 'The Mystery of Public Benefit', (2007) 10 CL&PR (issue 2) 33, 37, referring to articles 9 and 14 of the European Convention on Human Rights, and Human Rights Act 1998, s 13; see also Matthew Harding, 'Trusts for Religious Purposes and the Question of Public Benefit', (2008) 71 MLR 159, 177-182; Francesca Quint and Peter Hodkin, 'The Development of Tolerance and Diversity in the Treatment of Religion in Charity Law', (2007) 10 CL&PR (issue 2), 1, at p 15.

⁹³ See, e.g. CC Annual Report for 2007-08, p 12.

⁹⁴ *Dingle v Turner* [1972] AC 601. If it is regarded as being always for the public benefit to relieve the poor, this line of cases might survive the Charities Act 2006, as providing an indirect public benefit.

As already mentioned, the Commission has claimed for itself the power to develop charity law in the same way as the courts have done⁹⁵, and will consider whether a modern court would follow a decision made many years ago.⁹⁶

Whilst the Commission does often have to determine whether a new purpose should be recognised as charitable, there is a fine line between applying the law to new circumstances and making new law. As a government department, which cannot make new law, the Charity Commission seems to be crossing the line. The Charities Act 2006 has given the Commission a ‘public benefit objective’,⁹⁷ ‘to promote the awareness and understanding of the operation of the public benefit requirement’.⁹⁸ The same Act also requires the Commission to issue guidance in pursuit of its public benefit objective.⁹⁹ Neither of these provisions, however, gives the Commission any power to change the legal meaning of public benefit. It should also be borne in mind that the judicial development of the law occurs on a case by case basis, after argument by counsel, and the decision is made on the facts of the case. Yet the Commission is effectively using its guidance as a means of developing new principles of law of general application in a way that goes beyond anything that the courts can do.

The Commission’s guidance places¹⁰⁰ much emphasis on changing social attitudes. The courts have recognised social change as a factor in determining what is in law charitable, and that what is charitable in one age might not be so in another. It should be remembered, however, that charity law is centuries old, and that these comments were directed to fundamental long-term changes in society. Thus, in a leading case, Lord Simonds had said:¹⁰¹

A purpose regarded in one age as charitable may in another be regarded differently... A bequest in the will of a testator dying in 1700 might be held valid upon the evidence then before the court, but, upon different evidence, held invalid if he died in 1900.

⁹⁵ See Charity Commission, *Review of the Register* (RR1), and *Recognising New Charitable Purposes* (RR1a).

⁹⁶ The Commission has stated that, where the Commission is having to decide whether a particular purpose is charitable in the absence of a direct judicial precedent: ‘We then have to decide using fundamental legal principles whether solutions to problems thrown up by changing social and economic circumstances are legally charitable in the same sense as those already accepted by ourselves and the courts. We must also consider whether the courts of today would or would not now follow a decision made many years ago and in different circumstances’: *Review of the Register* (RR1), para 6.

⁹⁷ Charities Act 1993, s 1B(2)2, inserted by Charities Act 2006, s 7.

⁹⁸ Charities Act 1993, s 1B(3)2, inserted by Charities Act 2006, s 7.

⁹⁹ Charities Act 2006, s 4.

¹⁰⁰ See Charity Commission, *Analysis of the law underpinning Charities and Public Benefit* (January 2008), Part 1 (Modern social conditions).

¹⁰¹ *National Anti-Vivisection Society v IRC* [1948] AC 31.

Yet the Commission seems prepared to find social change over a much shorter period, and is even willing to take account of public opinion (which presumably includes public-opinion polls) as a piece of evidence in determining what social conditions are.¹⁰² In its reliance on social change to justify departing from a decision of the courts, the Commission is skating on very thin ice.

The Commission's reinterpretation of *Re Resch*, that indirect benefit to the public is not itself a sufficient public benefit, also reflects the government's view. Thus Edward Miliband MP, stated in a debate on the Charities Bill: 'we do not believe that indirect benefit – that the claim that, for example, private schools save the state money by educating pupils – is enough to justify charitable status'.¹⁰³

In the light of the foregoing, the true explanation for the Commission's approach to public benefit may be the simplest: that the Commission is effectively carrying out the government's policy with regard to charities, particularly fee-paying charities, notably the independent schools, and to religious charities, even though the legislation that was intended to carry the government's intentions into effect has been shown to be ineffective to do so. It would appear that the Commission has been given the government's agenda on charities to carry out, and that it is going to carry it out regardless of what charity law might be. In order to attempt to give what it is doing the appearance of law, the Commission has cobbled together an assortment of legal justifications which, on further analysis, do not effectively support the Commission's general stance. In short, the Commission plays fast and loose with the case law. When a *dictum* does not suit the view it is putting forward, it reinterprets it, as it did (some forty years after the case was decided) with Lord Wilberforce's observation in *Re Resch*¹⁰⁴ that indirect as well as direct benefit enters into the account. When case law clearly stands in the way of the Commission's approach, the Commission openly disregards it.¹⁰⁵ The Commission uses social and economic change to justify departing from the established law; yet, when it suits the Commission, it is happy to rely on comments made in very old cases – such as those made by Lord Camden in *Jones v Williams* in 1767.¹⁰⁶

To conclude, the Commission appears intent on making law in respect of public benefit in order to further the political intentions of the government, rather than confining itself to its duties under the relevant statutes.

¹⁰² Charity Commission, *Analysis of the law underpinning Charities and Public Benefit* (January 2008), paras 1.7-1.10.

¹⁰³ Charities Bill, 2nd Reading, HC, 26 June 2006, col.96 .

¹⁰⁴ [1969] 1 AC 514 (PC).

¹⁰⁵ e.g. the Commission's view that *Re Watson* [1973] 1WLR 1472 was wrong to hold that the only way to demonstrate that a trust for the advancement of religion is not for the public benefit is to show that it immoral or against all religion.

¹⁰⁶ *Jones v Williams* (1767) Amb 651, 652; see note 71 above.

Political Activities by Charities

Whereas the Commission's approach may appear intent on curbing the activities of charities by requiring such activities to produce public benefit, the Commission appears to do the opposite with regard to political engagement, and seems to be positively encouraging charities to engage in political activity, despite this being an area in which the case law is fairly restrictive.

Political purposes and political activity

It is necessary to distinguish between political purposes and political activity. Political purposes are not charitable. An institution which has an express object to change the law in the United Kingdom cannot be a charity, because such an object is political, and the court cannot assess whether a change in the law is for the public benefit.¹⁰⁷

An object is also political if, whilst not expressly seeking to change the law of the United Kingdom, it promotes a particular theory or attitude that might involve a change in the law or in government policy,¹⁰⁸ as by trying to influence public opinion so that the public itself is encouraged to agitate for such changes. An institution whose purpose is to promote the objects of a political party is not charitable.¹⁰⁹

It is, however, well-established that, although charities cannot have political purposes, they are allowed to engage in political activity to the extent that it is ancillary to the carrying out of their purposes. The courts have largely considered political activity in cases where, amongst an institution's wholly and exclusively charitable objects, there is another professed object of a political nature. The courts have held that the institution may nevertheless still be regarded as having wholly and exclusively charitable objects if (and only if) the apparent political object can be construed, not as a purpose in itself, but as merely a means of furthering those objects that are wholly and exclusively charitable. In order to be treated as furthering such objects, the political element must be merely

¹⁰⁷ The point was made by Lord Parker in the House of Lords in *Bowman v Secular Society Ltd* [1917] AC 406, 422: 'a trust for the attainment of political objects has always been held invalid, not because it is illegal ... but because the court has not means of judging whether a proposed change in the law will or will not be for the public benefit.'

¹⁰⁸ *McGovern v A-G* [1982] Ch 321.

¹⁰⁹ e.g. *Bonar Law Memorial Trust v IRC* (1933) 49 TLR 220 (Conservative Party); *Re Hopkinson* [1949] 1 All ER 346 (Labour Party).

ancillary to them, i.e. the political activity must be only for carrying out the charity's charitable objects.¹¹⁰

An extrapolation of this principle is that a charity can engage in political activity that relates directly to its objects and which is ancillary to the achieving of them. A charity may therefore promote a Private Member's Bill that relates to its purposes – the RSPB could, for instance, promote such a Bill dealing with the protection of birds' nests. A charity may also put forward a reasoned memorandum proposing (or indeed opposing) a change in the law so far as it affects its purposes. It has also been said that an educational charity may, in the furtherance of its educational purposes, 'encourage students to develop their political awareness or ... acquire knowledge of, and... debate, and... form views on, political issues'.¹¹¹

On the other hand, a charity may not engage in party political activity (such as making donations to a political party or to a political cause¹¹²), and it may not pursue any political activity to the extent that it becomes more than ancillary. If a charity's political activities were to become more than ancillary (e.g. if it were to devote the bulk of its funds to the political activities) it would be acting in breach of trust.

There is good reason for the law's concern both to prevent political purposes from being charitable and to prevent unlimited political activity. Charitable purposes are required to be for the public benefit, and the public benefit of political purposes cannot be determined. This important principle would be subverted were charities nevertheless able to engage substantially in political activity.

The changing approach of the Charity Commission to political activity

Until the late 1990s, the Commission's published guidance on political activity essentially reflected the law, but since then stealthy revisions to the guidance mean that the Commission's guidance is now markedly different from the law, especially in its increasingly relaxed attitude to campaigning (which under the case law is political in nature). This is not supported by any change in the law.

¹¹⁰ In *National Anti-Vivisection Society v IRC* [1948] AC 31, 76, Lord Normand said: 'A society for the prevention of cruelty to animals, for example, may include among its professed purposes amendments of the law dealing with field sports or with the taking of eggs or the like. Yet it would not, in my view, necessarily lose its right to be considered a charity, and if that right were questioned, it would become the duty of the court to decide whether the general purpose of the society was the improvement of morals by various lawful means including new legislation, all such means being subsidiary to the general charitable purpose. If the court answered this question in favour of the society, it would retain its privileges as a charity.'

¹¹¹ *A-G v Ross* [1986] 1 WLR 252, per Scott J.

¹¹² *Webb v O'Doherty* (1991) (1991) 3 Admin LR 731 (injunction granted to restrain proposed donation by the Anglia Student Union (Cambridge) to an anti-Gulf War campaign).

In February 1997 guidelines, the Commission treated ‘campaigning’ as an aspect of political activities. By ‘political activities’ the Commission meant ‘activities which are directed at securing, or opposing, changes in the law or in government policy or decisions, whether in this country or abroad.’¹¹³ It separately referred to the extent to which charities could campaign ‘to mobilise public opinion to influence government policy’.¹¹⁴ The Commission’s guidance correctly stated that political activities must be in furtherance of, ancillary to, the charity’s stated purposes;¹¹⁵ and it provided that charities could campaign provided that the same requirements were satisfied,¹¹⁶ i.e. that the campaigning was in furtherance of, and ancillary to, the charity’s stated purposes.

In the Cabinet Office’s Strategy Unit report of 2002, it was recommended:¹¹⁷

that the Charity Commission guidelines on campaigning should be revised so that the tone is less cautionary and puts greater emphasis on the campaigning and other non-party political activities that charities can undertake.

and that the Commission

should emphasise that trustees have the freedom to pursue whatever activities they judge to be in the best interests of the charity.

In the September 2004 revision of its guidance,¹¹⁸ the Commission stated that ‘trustees must ensure that these activities do not become the dominant means by which they carry out the purposes of the charity. These activities must remain incidental or ancillary to the charity’s purposes.’

Pressure on the Commission to relax further its guidance on political activities was organized by the Advisory Group on Campaigning and the Voluntary Sector, chaired by the Labour Peer, Baroness Helena Kennedy QC, which reported in 2007. The Commission hardly needed to be pushed, however, as seen in its modified guidance in March 2008.¹¹⁹

¹¹³ See Charity Commission, *Political Activities and Campaigning by Charities*, CC9 (February 1997), section 1, para 2.

¹¹⁴ *Ibid.*, section 4.

¹¹⁵ *Ibid.*, section 3, para 8.

¹¹⁶ *Ibid.*, section 4, para 15.

¹¹⁷ *Private Action, Public Benefit* (2002) para 4.56.

¹¹⁸ Charity Commission, *Campaigning and Political Activities by Charities*, CC9 (September 2004), para 23 (p 9).

¹¹⁹ Charity Commission, *Campaigning and Political Activities by Charities*, CC9 (March 2008).

The 2008 guidance continues to draw a distinction between campaigning and political activities; but whilst the Commission defines political activities in similar terms, its definition of campaigning is more widely drawn. The Commission says that campaigning refers to¹²⁰

awareness-raising and to efforts to educate or involve the public by mobilising their support on a particular issue, or to influence or change public attitudes,⁹

and also to

activity which aims to ensure that existing laws are observed.

The Commission gives several examples of what would rank as campaigning, including a human rights charity ‘calling on a government to observe certain fundamental human rights’; and ‘a charity concerned with poverty and the environment campaigning against investment by some banks in fossil fuel extraction projects’.¹²¹ The Commission states categorically that

There is no limit on the extent to which charities can engage in campaigning in furtherance of their charitable purposes.

The Commission’s increasingly relaxed attitude to campaigning (which under the case law is political in nature) is not supported by any change in the law. The fact that the Charities Act 2006, section 2(2), lists a number of purposes that might appear to be capable of being political (e.g. the ‘prevention’ of poverty, the advancement of human rights, the advancement of environmental protection or improvement, and the advancement of animal welfare) has not changed the law relating to political purposes or political activity: to be charitable, the statute still requires the purpose to be for the public benefit,¹²² and political purposes cannot be shown to be for the public benefit. This was made clear recently in the High Court in *Hanchett-Stamford v A-G*,¹²³ where Lewison J rejected the argument that a political purpose could now be charitable as a result of the Charities Act 2006.

The Commission’s latest view, that charities can, in carrying out their activities, campaign on what are on any basis political matters without any limit, therefore contravenes the law, which permits political activity only to the extent that it is ancillary to the carrying out of the charity’s purposes.

¹²⁰ *Ibid.*, C4 (p 7).

¹²¹ *Ibid.*

¹²² Charities Act 2006, s 2(1)(b)

¹²³ [2008] 2 P&CR 102.

The Commission's approach to campaigning provides a startling contrast to its approach to public benefit, where the Commission is requiring charities to prove public benefit in their activities. The Commission must therefore be prepared to treat political activity as productive of public benefit, even though the courts have consistently and unequivocally held that they have no means of assessing whether political purposes are for the public benefit. The Commission is inconsistent in its approach to different sorts of charities. With the independent fee-paying schools, it is adamant about the need for proof of public benefit, even to the extent of indicating that bursaries are likely to provide more public benefit than scholarships. That the Commission has its eye on the independent schools should, however, come as no surprise, since the government's concern with such fee-paying schools was evident from the Strategy Unit report of 2002, which stated that¹²⁴

to maintain their charitable status, independent schools which charge high fees have to make significant provision for those who cannot pay full fees and the majority probably do so already.

With charities that wish to campaign, however, the Commission appears to forget public benefit, and is effectively giving the green light to unlimited political activity.

There appears to be a serious problem with the Commission's approach to political activities. Whilst the Commission is concerned that the fee-paying schools and religious charities produce public benefit in their activities, the Commission seems to turn a blind eye to whether a charity that engages in campaigning 'without limit' in furtherance of its charitable objects is producing public benefit. The legal requirement that the political activity must be ancillary means that a charity that does nothing but campaign is not carrying out its purposes. If the Commission were to be consistent in its approach to public benefit, so as to look at activities in determining purposes, it might conclude that a body that engages in substantial campaigning, has political, not charitable, objects. The fact that the Commission does not choose to do this, but actively encourages charities to engage in campaigning, betrays the political agenda which the Commission is covertly pursuing.

¹²⁴ *Private Action, Public Benefit*, para 4.26

VII

The Way Forward

It is difficult to avoid the conclusion that, in the years since the late 1990s, the Charity Commission has, for the first time in its 150-year old history, ceased to be an independent body concerned to apply charity law. Instead, in the more important areas considered in this paper, the Commission has been reduced to an instrument for the promotion of government policy - policy which falls outside the law.

Such a change helps to explain the errors and inconsistencies in the Commission's approach. It explains the Commission's attempt to introduce an activities' test for public benefit for which there is no basis in law; it explains why, although the Commission's guidance makes reference to the European Convention on Human Rights, that guidance nevertheless clearly breaches Convention rights in seeking to examine the tenets of individual religions in order to determine whether they are for the public benefit. It also suggests why there are other inconsistencies in the Commission's approach: why the Commission claims for itself the power to depart from the case law on the ground of changes in social and economic circumstances whilst nevertheless placing selective reliance on very old cases; it explains too why the Commission is so concerned that fee-paying schools show that they are providing public benefit in carrying out their activities, and yet appears to be so unconcerned with public benefit in relation to political activities by charities that it is prepared to allow charities to engage in such activities without limit.

The last gasp of independent legal expression by the Commission on the effect of the government's public benefit proposals was contained in written evidence to the Joint Committee. Christopher McCall QC had proposed the addition of a clause to the draft Charities Bill, the first part of which provided:

‘It shall be the duty of any charity trustee so to execute the trusts of his charity as to secure the fullest public benefit consistent with the terms of his trust.’

This clause, had it been accepted into the Bill and become law, would have introduced an activities test for public benefit. It was not, however, introduced into the Bill and did not become law. In a written submission to the Joint Committee, the Charity Commission opposed the introduction of this clause. It wrote:¹²⁵

‘It is not clear what fullest public benefit means. Difficulties would arise in determining what the fullest public benefit is in any particular case. This would

¹²⁵ Briefing Paper to the Joint Committee on the Draft Charities Bill, DCH301, para 11.2 (emphasis supplied).

be over and above the level of public benefit required to be regarded as charitable in the first place’.

Furthermore, it added¹²⁶:

‘This clause would not change the existing common law rules on public benefit, including the schools cases, which determine whether the trust may be regarded as charitable. This is because the proposed clause presupposes that public benefit has already been demonstrated, having applied the existing common law rules’.

These observations by the Charity Commission are, of course, entirely consistent with charity law as expressed in this paper, that an institution that is a charity necessarily has purposes that are for the public benefit – including those (like the independent fee-paying schools) whose purposes are for the advancement of education. To require charities to show public benefit in carrying out their activities would be to require them to demonstrate a public benefit that has in law been satisfied by their having charitable purposes.

In its report, the Joint Committee observed that the interpretation of the public benefit provisions put forward in the Charity Commission’s evidence and by a number of lawyers who adopted a similar approach ‘left the draft Bill in the ludicrous position of promising to bite on the public benefit bullet without having any teeth to do so.’¹²⁷ The Home Office, on the other hand, was confident that the Bill was effectively tightening up on public benefit, so that, after its enactment, the independent schools would have to show that they were for the public benefit. A Home Office minister, Fiona Mactaggart, maintained before the Joint Committee that if the government had intended the removal of the presumption of public benefit to particular classes of charities to have no impact at all, it would not have bothered to remove it.¹²⁸ The Joint Committee described this difference of opinion between the Charity Commission and the Home Office as ‘ludicrous’, ‘deeply unsatisfactory’, and ‘nothing short of farcical’.¹²⁹ Before the Joint Committee drew up its report, however, a ‘concordat’ was reached between the Home Office and the Charity Commission on how the public benefit test would be applied.¹³⁰ The concordat was in very general terms, but it was sufficient to enable the differences between the Home Office and the Commission to be glossed over. It is, however, difficult to believe that the Commission did not feel itself under political pressure (even if only

¹²⁶ Para 13.1 (footnotes omitted).

¹²⁷ Joint Committee Report, 2004, HL Paper 167-1; HC 660-1, para 76 (p 22).

¹²⁸ Joint Committee on the Charities Bill, HL-660-2, HC-660-2, Minutes of Evidence, HL-660-2, HC-660-2, 21 July 2004, Answer to q 1071.

¹²⁹ Joint Committee Report, 2004, HL Paper 167-1; HC 660-1, para 76 (p 22)..

¹³⁰ *Ibid*, para 78 (pp 23-25).

indirectly) to retract the view that it had expressed in the written evidence. Since that time, the Commission has effectively adopted the government's wishes on public benefit.

There is of course redress to bodies affected by the Commission's decisions through appeal to the High Court, but charities are understandably reluctant to spend their funds on what might be expensive litigation. Since 2008, it has been possible for cases to be heard instead by the Charity Tribunal, for which provision was made in the Charities Act 2006. The Charity Tribunal has jurisdiction to hear appeals against, and applications for judicial review of, decisions of the Charity Commission; it also has jurisdiction to consider references from the Attorney-General or the Charity Commission on points of law. The aim is to provide a judicial forum without the cost and formality of an appeal or application to the High Court. There is provision for the Charity Tribunal to sit in two tiers, the higher of which includes a judge of the High Court. As few cases on charity law reach the High Court, it might be hoped that, with Tribunal's supposedly cheaper, speedier, and more informal procedures, the law of charities could be developed through decisions of the Tribunal. This aspiration, however, appears to be too optimistic. Without legal representation, it will be difficult for a charity or other litigant to prepare legal arguments based on charity law, and he or she can expect to be opposed by an experienced charity lawyer representing the Commission.¹³¹ There are hopes that enough lawyers will be willing to act for charity and charity trustee litigants on a *pro bono* basis,¹³² but whether that will prove to be so remains to be seen. There were attempts during the passage of the Charities Bill to introduce a suitors' fund that could be used to finance appeals by charities in cases of public interest to the Charity Tribunal or to the courts,¹³³ but these attempts were unsuccessful. At present, however, the Charity Tribunal has been little used. By early June 2009, only four cases had been brought to the Charity Tribunal,¹³⁴ and no issues had been referred to the Tribunal by the Attorney-General or the Charity Commission. It may be that, for the time being at least, many charities would rather comply with the Commission's guidance on public benefit than spend scarce resources in challenging it in the Tribunal. In Scotland, an equivalent to the Charity Tribunal, the Scottish Charity Appeals Panel, was set up in 2006; but it was announced in the Scottish Parliament in November 2008 that the Panel is to be abolished because only a tiny number of appeals to it had been lodged. England and Wales comprise a larger

¹³¹ The point was made by Lord Phillips of Sudbury during the passage of the Charities Bill (HL), Second Reading, 7 June 2005, col 794. In *Father Hudson's Society and Catholic Care (Diocese of Leeds) v Charity Commission*, in respect of which there was a preliminary ruling in March 2009, the charities and the Commission were each represented by a QC, and the Equality Commission was represented as intervener by an experienced junior counsel.

¹³² A Bar Pro Bono unit has been established: see 'Pro bono help for tribunal cases', Third Sector, 18 June 2008

¹³³ See, for example, the debate on the Charities Bill: Committee (HL), 23 February 2005, col GC340. (an amendment that would have introduced a suitors' fund for appeals to the Charity Tribunal).

¹³⁴ The Charity Tribunal is resourced to deal with 50 cases a year: see Alison McKenna (President of the Charity Tribunal), Text of speech to the Charity Law Association 5 June 2008, available at <http://www.charity.tribunals.gov.uk/documents/CharityLawAssociationTalk.pdf>

jurisdiction, and the Charity Tribunal has not been established for very long, but the small number of cases brought before the Charity Tribunal to date is not encouraging.¹³⁵ In any event, the possibility of charities' appealing to the Charity Tribunal cannot justify the Charity Commission's failure to adhere to charity law.

This paper has argued that the Charity Commission's approach to public benefit is flawed, so that the hundreds of pages that the Commission has produced on various aspects of public benefit are largely waste paper. When decisions of the courts reveal this to be so, there will inevitably be a crisis of confidence in the ability of the Charity Commission to fulfil its statutory role as an independent regulator of the charitable sector. The issues raised in this paper also illustrate a more general tendency of government in recent years to politicise the Civil Service - a broader problem beyond the scope of this paper.

What can be done to tackle the problem? Merely legislating that the Commission is not subject to the ministerial direction or control is already provided for in law,¹³⁶ and appears insufficient to ensure independence.

One option is to change the management of the Commission and its membership. The Commission describes its management structure in terms which suggest that the full-time officials take responsibility for day-to-day decisions across a broad remit (set out in rather tortuous official language) as follows:

'Governance responsibilities for strategy and future direction of the Commission rest with its Board of non-executive members of the Commission. Corporate decision making that affects the day-to-day operation of the Commission is delegated to the Executive Group. This group is chaired by the Chief Executive and includes the four Directors and key Heads of Functions. The Directors are responsible for Charity and Legal Services, Policy and Effectiveness, Corporate Services and Charity Information. The Directors' duties include implementing the programmes and policies arising from the Board and ensuring effective service delivery'.

The members of the Commission, apart from the Chair, are not full-time appointees, and have therefore a restricted involvement with the general work of the Commission. As a result, many of the important decisions are generally devolved to the full-time officials.

¹³⁵ The Charity Tribunal, with several other tribunals, will be abolished in September 2009, and its functions transferred to the General Regulatory Chamber, but cases will be heard by the specialist members.

¹³⁶ Charities Act 1993, s 1A(4) (inserted by Charities Act 2006, s 6).

Moreover, over the last few decades, the proportion of lawyers comprising what is now the board of the Charity Commission has been progressively reduced. The requirement that at least two of the Charity Commissioners be legally qualified dates back to the Charitable Trusts Act 1853.¹³⁷ The Charities Act 1993 made provision for three Commissioners, but provided that two additional Commissioners could be appointed.¹³⁸ Such additional appointments were made. Therefore, until the changes made by the Charities Act 2006, there were five Commissioners, two of whom were legally qualified. However, whilst for a few years after the Charities Act 1993 both legal Commissioners were full-time,¹³⁹ since 2001 the practice has been for both the legal appointees to be part-time. The Charities Act 2006 has enlarged the board of what is now the Charity Commission to a maximum of a Chair and eight other persons,¹⁴⁰ but the requirement for only two legally qualified members remains,¹⁴¹ and these are currently filled by part-time appointments. Thus, over the last few decades, the legally qualified membership has been reduced from a majority of two out of three to a minority of two out of nine. The legal influence within the board is therefore inevitably much reduced, especially as part-time appointments involve only a commitment of a few days each month. Originally, the Chief Charity Commissioner had to be a barrister,¹⁴² but the requirement that such person be legally qualified has long been removed, so that for many years the position of Chief Charity Commissioner (and now the Chair of the Charity Commission) has been filled by a non-legal appointee. There have been very effective non-lawyer Chief Charity Commissioners; and there are many experienced lawyers with the Commission who are not members of the board. On the other hand, the Chair (who effectively fills the role of what used to be the Chief Charity Commissioner) is in a position to have a significant influence on the Commission's approach to legal matters, especially with the current management structure in which day-to-day decisions are not made by the members of the board but by staff lawyers. It is important that the occupant is independent and not seen to be politically partisan.¹⁴³ At present, it appears that the Commission's approach is to attempt to further the government's intentions rather than to apply the law; and it seems likely that the Commission's staff lawyers have been obliged to perform legal twists and somersaults in an attempt to make it appear that those intentions have the legal basis that they lack. Such cavalier treatment of the law might be reduced were the number of

¹³⁷ Charitable Trusts Act 1853, s 2 (the legal appointees had to be barristers).

¹³⁸ Charities Act 1993, Sch 1, para 1 (since repealed by Charities Act 2006); provision for two additional Commissioners had also been made in the Charities Act 1960, s 1(2), and Sch 1, para 1(5).

¹³⁹ See Hansard, HL, 20 March 1995, WA59.

¹⁴⁰ Charities Act 1993, Sch 1A (inserted by Charities Act 2006), para 1(1).

¹⁴¹ *Ibid*, para 1(3)(b).

¹⁴² Charitable Trusts Act 1853, s 2.

¹⁴³ As on 1 June 2009, the Charity Commission's register of board members' interests (on the Charity Commission's website) indicates that the Chair and another non-legal member of the Board are members of the Labour Party, and another non-legal member of the board is a former member of the Labour Party. The register does not indicate any other party political memberships. One third of the board members, therefore, are, or have been, members of the Labour Party.

legally qualified appointments on the board increased, and a requirement introduced that at least one of the legally qualified members be a full-time appointment and therefore more fully involved in the Commission's day-to-day work. A full-time legal appointee to the board would be in a more powerful position to ensure that the Commission is applying the law than either part-time appointees (whose involvement is limited) or staff lawyers (who must act as instructed).

What other steps should be taken to ensure the operation of the Charities Act 2006 as intended? It has been the contention of this paper that the Charity Commission has become a vehicle by which the government can pursue its political objectives without the need for legislation. A fund (called a 'suitsors' fund') available in cases of public interest would facilitate appeals against the Commission's decisions and help the development of charity law through decisions of the courts or the Charity Tribunal. Attempts were made during the passage of the Charities Bill to introduce a suitsors' fund,¹⁴⁴ but such attempts failed as the government considered that the problem (of appealing against decisions of the Commission) had been solved by the introduction of the Charity Tribunal. It is clear, however, that the problem has not been solved merely by the setting up of the Tribunal. A suitsors' fund is therefore still needed. Whilst it is unlikely that such a fund could be set up in the current economic climate if funded through general taxation, a different course could be to require charities to contribute a small sum (e.g. £10) annually to such a fund. With nearly 200,000 registered charities, a suitsors' fund would be able to support several cases each year in the Charity Tribunal or the courts. By this means, the cost of litigation in cases of public importance would not be borne by any individual charity. For the present, even without such a fund, charities or groups of charities must be encouraged to challenge the current approach of the Charity Commission to public benefit so that case law can establish the true legal position.

This paper has shown that the central problem is not the legislation affecting charities but the way in which the Charity Commission is distorting charity law. Nevertheless, there is room for some pruning of the verbose sections of the Charities Act 1993 inserted by the Charities Act 2006 - those that describe the Commission's objectives, general functions and duties, which fill several pages.¹⁴⁵ Their length, however, exceeds their substance, and they add up to little that could not be more effectively expressed in fewer words. It is not the case that such a lengthy exposition adds to the Commission's powers in law. The Charities Act 1993 as originally enacted was much briefer, but set out the salient points

¹⁴⁴ e.g. Hansard, HL, Charities Bill, Committee, 23 February 2005, GC340; Hansard, HC, Charities Bill, Committee, 6 July 2005, col 144.

¹⁴⁵ Charities Act 1993, ss 1B-1D inserted by Charities Act 2006, s 7. There are, for instance, five objectives: the public confidence objective; the public benefit objective; the compliance objective; the charitable resources objective; and the accountability objective: *ibid*, s 1B(3), which are defined at length: *ibid*, s 1(B)(4). There are also expressed to be six general functions: *ibid*, s 1C(2); and six general duties: *ibid*, s 1(D).

more effectively. It is therefore suggested that the new sections inserted by the Charities Act 2006 should be replaced by shorter, simpler and less inflated, provisions.

The first objective of the Charity Commission is the ‘public confidence objective’, which requires the Commission ‘to increase public trust and confidence in charities’ as set out in the Charities Act 1993.¹⁴⁶ Public confidence in charities depends on the public’s having confidence that the regulator of charities applies the law and operates independently of political bias. Three steps are needed:

- (1) the structure and membership of the Charity Commission should be reformed on a non-partisan basis in which the legally qualified membership is strengthened;
- (2) a suitors’ fund should be set up to support cases of public importance in charity law in either the Charity Tribunal or the courts; and
- (3) the legislation should be amended so that the Commission's objectives, general functions and duties are expressed in a less verbose and inflated manner.

¹⁴⁶ Charities Act 1993, s 1B(2)1 and (3)1 (inserted by Charities Act 2006, s 7).

Bibliography

- Atkinson, R, 'Problems with Presbyterians', chap 6 in Mitchell, C and Moody, S, *Foundations of Charity*, 2000, Oxford: Hart Publishing
- Cabinet Office, Strategy Unit, *Private Action, Public Benefit* (2002)
- Charity Commission, *The Public Character of Charity*, RR8, (February 2001, no longer available)
- Charity Commission, *Review of the Register* (RR1) (version October 2001)
- Charity Commission, *Recognising New Charitable Purposes* (RR1a) (version October 2001)
- Charity Commission, *Charities and Public Benefit: The Charity Commission's general guidance on public benefit* (January 2008)
- Charity Commission, *Analysis of the law underpinning Charities and Public Benefit* (January 2008)
- Charity Commission, CC9: Speaking out: Guidance on *Campaigning and Political Activity by Charities* (latest version, March 2008)
- Charity Commission, *Public Benefit and Fee-charging* (December 2008)
- Charity Commission, *Analysis of the law underpinning Public Benefit and Fee Charging* (December 2008)
- Charity Commission, *The Advancement of Religion for the Public Benefit* (December 2008)
- Charity Commission, *Analysis of the law underpinning The Advancement of Religion for the Public Benefit* (December 2008)
- Charity Law Association, *Response to the Charity Commission's Consultation on the Draft Supplementary Guidance on Public Benefit and Fee Charging Charities* (August 2008) (available on-line)
- Clarke, P, 'The charitable status of rifle clubs: out with a bang?' (1992-3) 1 *Charity Law Practice Review* 137
- Clarke, P, 'Charitable status of rifle clubs: the explosion occurs' (1993-4) 2 *Charity Law & Practice Review* 97
- Education Review Group, *Public Benefit and Fee Charging* (11 July 2008) (available on-line)
- Hackney, J, 'Charities and public benefit' (2008) 124 *Law Quarterly Review* 347
- Harding, M, 'Trusts for Religious Purposes and the Question of Public Benefit' (2008) 71 *Modern Law Review* 159
- Joint Committee on the Charities Bill, HL-660-2, HC-660-2, Minutes of Evidence, HL-660-2, HC-660-2, 21 July 2004
- Jones, G, *History of the Law of Charity*, 1969, Cambridge: Cambridge University Press
- Luxton, P, *The Law of Charities*, 2001, Oxford: Oxford University Press
- Luxton, P, 'Re-defining charity for the Twenty-first Century' [2004] *Amicus Curiae* 22
- Luxton P, Written Evidence to the Joint Committee on the Draft Charities Bill, 2004 (HL Papers 167-2; HC 660-2), DCH270

Luxton, P, 'Public Benefit and Charities: the impact of the Charities Act 2006 on independent schools and private hospitals', chapter 10 (pp 181-202) in *Contemporary Perspectives on Property, Equity and Trusts Law*, 2007, (eds Martin Dixon and Gerwyn Griffiths), Oxford University Press, Oxford

Luxton, P, 'A three-part invention: public benefit under the Charity Commission' 11/2 [2009] *Charity Law and Practice Review* 19

McKenna, A, Speech to the Charity Law Association, 5 June 2008 (available on-line)

Mitchell, C, 'Reviewing the Register', chapter 7 in Mitchell, C and Moody, S, *Foundations of Charity*, 2000, Oxford: Hart Publishing

Morris, D, 'The Long and Winding Road to Reforming the Public Benefit Test for Charity: A Worthwhile Trip or "Is Your Journey Really Necessary"?' work in progress – not for publication (available on-line)

National Council for Voluntary Organisations, *For the public benefit? A consultation document on charity law reform*, 2001, London: NCVO

Picarda, H, QC, 'Charity review is a review too far' (1998) 12 *The Lawyer*, issue 23 (9 June), 22

Picarda, H, QC, *The Law and Practice Relating to Charities*, 3rd ed., 1999, London: Butterworths

Picarda, H, QC, Written Evidence to the Joint Committee on the Draft Charities Bill, 2004, HL Papers 167-3; HC 660-3, DCH 297

Quint, F, and Hodkin, P, 'The Development of Tolerance and Diversity in the Treatment of Religion in Charity Law' (2007) 10/2 [2007] *Charity Law & Practice Review* 1

Sanders, Anne, 'The Mystery of Public Benefit' 10/2 *Charity Law & Practice Review* 33

Sanders, A, 'German and English public benefit' 10/3 [2008] *Charity Law & Practice Review* 27

Third Sector, 'Pro bono help for tribunal cases', 18 June 2008

Tyssen, AD, *Charitable Bequests*, 1888, London: William Clowes & Sons Ltd

Warburton, J, 'Charities and public benefit – From confusion to light?' 10/3 [2008] *Charity Law and Practice Review* 1

Subscribe to Politeia's Publications!

For £40 a year (£35 by standing order) you will be sent all our pamphlets for the year covered by your subscription and, if you wish, others in print at half the cover price. You will also be notified of Politeia's conferences and events to which, whenever possible, you will be offered admission at reduced rates.

More information can be found on our website: www.politeia.co.uk
The Secretary, Politeia, 22 Charing Cross Road, London, WC2H 0QP.

info@politeia.co.uk



A Selection of Recent Publications

Clear and Accountable? Institutions for Defence and Security
Robert Salisbury, Douglas Slater, A. Buckerfield de la Roche

A Premium on Patients? Funding the Future NHS
Tony Hockley

Banking Benefit: Welfare Accounts for the Individual
Dennis Snower and Alessio Brown

A Prosperous New Year? Politeia's New Year's Message
Norman Lamont & Vito Tanzi

Regulating for the New Economic Order: The Good, the Bad and the
Damaging
Vito Tanzi

Banking on Stability: A Formula for Economic Success.
Edward George

Regulating Rail – For Whom Should Regulation Work?
Chris Bolt

Taxes in a Global Economy: Efficiency, Fairness and Incentives
Irwin Stelzer

Reviving Rail –What Strategy for Success?
Chris Green

Working to Account? Social Security Without Dependency
Peter Birch Sørensen and Arij Lans Bovenberg

Restoring Parliamentary Authority: EU Laws and British Scrutiny
Theresa May and Nicholas Timothy

Sleeping Beauty: Awakening the American Dream
Maurice Saatchi