# THE CHARITIES ACT 2006: CONSOLIDATION OR REFORM?

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Prior to the passing of the Charities Act 2006 there was no single legal definition of charity in England and Wales. However it was generally accepted[2] in the case-law that in order for an institution[3] to be charitable it must satisfy three requirements: it must have purposes of a 'charitable character', meaning it must fall within the 'spirit and intendment' of the preamble to the Statute of Charitable Uses 1601; the institution must be of a 'public character', in other words its purposes must exist for the public benefit, and; the institution must be established for charitable purposes only, that is to say the purposes must be exclusively charitable.

As to the first requirement, an institution must have charitable aims or objects, in other words, it must be established for charitable purposes. In order to decide what constitutes a charitable purpose it was the traditional practice of the courts and the Charity Commission[4] to look for guidance from the 'index or chart' provided by the preamble to the Statute of Charitable Uses 1601. By a process of analogy, according to the 'spirit and intendment' of the preamble, the courts developed an extensive body of case-law on what is, and what is not, charitable. This led Lord Macnaghten in *Commissioners of Income Tax v Pemsel*[5] to classify the following four recognised 'heads' of charity:

> *"…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."*

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2 As stated in Warburton, J., *Tudor on Charities* (2003), p. 2-3, para. 1-002-3

3 To adopt the terminology used in the Charities Act 1993 and 2006

4 Previously known as the Charity Commissioners

5 [1891] A.C. 531

Despite providing a helpful modern starting-point, *Pemsel* is not definitive.[6] In order to decide whether a novel purpose, or a purpose falling to be considered under the fourth *Pemsel* head, was legally charitable the courts and the Charity Commission continued to use a process of analogy built up from the 'spirit and intendment' of the preamble. However the courts and the Charity Commission have always been conscious of the potential limiting factor of an over-zealous application of the preamble,[7] and have stressed that the meaning of charity is not a static and immutable concept, but is subject to continual evolution according to changing social and economic needs.[8]

In *Scottish Burial Reform and Cremation Society v Glasgow Corporation*[9] a non-profit making society was accepted as charitable - in respect of its primary purpose to encourage and provide facilities for cremation services. Lord Wilberforce stated it was at least "tolerably clear" that for purposes to be charitable they must be for the public benefit: "in a sense or manner within the intendment of the preamble" as subsequently interpreted and developed by the courts. The courts have, according to his lordship, "endeavoured to keep the law as to charities moving according as new social needs arise or old ones become obsolete or satisfied."[10] On this basis the House of Lords stated that it was permissible for the "pioneering venture" of the Cremation Society to be recognised as legally charitable. The House of Lords was able to reach this conclusion by way of a process of protracted analogising dating back to "the repair of … churches" – as stated in the preamble.

Lord Wilberforce came to this conclusion not without reservation on the legal test of charitable purposes, which, in his learned opinion, was "not very satisfactory and in need of rationalising."[11] Furthermore, while Lord Macnaghten's heads of charity offered a 'valuable' and 'convenient' grouping, it was considered *Pemsel's* case was not without its limitations. Firstly Lord Wilberforce stated that some charitable purposes may defy tidy categorisation, an observation pertinent to the instant case, where the purposes of the Cremation Society did not "fit neatly under one or other of

6 Charity Commission, *RR 1A - Recognising New Charitable Purposes*, (October 2001) http://www.charity-commission.gov.uk/publications/rr1a.asp

7 See *Morice v Bishop of Durham* (1804) 9 Ves 399 at 405 per Sir William Grant MR; *Williams' Trustees v IRC* [1947] AC 447 at 455, per Lord Simonds

8 See *ICLR for England and Wales v Att-Gen* [1972] Ch. 73 at 87, per Russell LJ; see also, generally, guidance by the Charity Commission, including a strong emphasis in its new guidance, *Charities and Public Benefit – The Charity Commission's general guidance on public benefit* (January 2008), p 11, para D7

9 [1968] A.C. 138

10 *Ibid.* at 154

11 *Ibid.*

the headings."[12] Secondly, Lord Wilberforce stated that *Pemsel* "must not be given the force of a statute."[13] Finally, his lordship recognised that "the law of charity is a moving subject which may well have evolved even since 1891."[14] Lord Wilberforce's observations give rise to the question as to how far the preamble could continue to be stretched to meet modern needs. In addition the use of analogy has been said to disguise the true value judgments being made by the courts and the Charity Commission.[15]

In *Gilmour v Coats* Lord Simonds criticised the long established system of classification of charitable purposes as often appearing "illogical or even capricious."[16] Although, his lordship hastened to add, "It could hardly be otherwise when its guiding principle is so vaguely stated and is liable to be so differently interpreted in different ages."[17]

The law of charity has historically lacked an independent existence; rather, questions as to the charitable credentials of an institution have arisen in specific contexts. Lord Simonds mentions three aspects of the law of charity that have influenced judicial decisions: "The law of mortmain, the law of perpetuity and in latter days the revenue law"[18] – yet the Statute of Charitable Uses 1601 has proved important throughout.

The Statute itself, far from being directed at laying down a legal definition of charity,[19] was remedial in the sense that it sought to address the misuse of the trust in the Court of Chancery. Its substantive provisions, now repealed,[20] were measures forming part of a state system of poor relief to overcome the impact of the Reformation, and the sweeping away of "church-centred welfare."[21] It was from out of this context that the preamble arose, as can be noted by the emphasis on purposes

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12 Either the advancement of religion, or other purposes beneficial to the community falling under the fourth *Pemsel* head

13 Though, it is not clear whether his lordship felt the lack of a statutory definition was itself a shortcoming of the law.

14 *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] A.C. 138 at 154 - 1891 being the date of the decision in *Pemsel's* Case.

15 See Hayton and Mitchell, *The Law of Trusts and Equitable Remedies*, (2005), p 430.

16 [1949] AC 426 at 443

17 *Ibid.*

18 *Ibid.*

19 *Gilmour v Coats* [1949] AC 426 at 442 per Lord Simonds

20 Repealed by the Mortmain and Charitable Uses Act 1888

21 See Gladstone, F., *Charity, Law and Social Justice* (1982), p 38

for "the relief of poverty and public works."[22] In addition the examples given in the preamble reflect typical Tudor expressions of philanthropy.[23] Although the categories of charitable purposes have evolved from these historical roots, it is arguable that the courts, to date, have found it difficult to disentangle themselves from the grasp of the preamble.

## Charitable Purposes

The Charities Act 2006 provides for a comprehensive definition of charity, which includes a new statutory list of charitable purposes and also, for the first time, the integral requirement for public benefit. Insofar as the Act provides a clear compound definition as to the legal meaning of charity it is hoped that it can combat the lack of direction in the case-law to provide a modern and coherent definition of charity.

In *Gilmour v Coats*, Lord Simonds invited the court to accept that: "only a radical change of circumstances, established by sufficient evidence" accompanied by some "novel and compelling reasons," on grounds of public benefit, would move the courts to admit such [ which ? ] purposes to "the house of charity."[24] Thus, there would be good grounds to suggest that the law as to charity has been plagued by stagnation, probably on account of the importance of analogy. The case-law on public benefit is to be contrasted with the Charity Commission, where, on an everyday basis, there is a hive of activity as to the determination of valid charitable purposes.[25] In comparison to the courts, the Charity Commission takes a constructive or broad approach to defining new charitable purposes in accordance with the "constantly evolving needs of society."[26]

Section 2 (2) of the Act sets out a consolidated list of thirteen descriptions of recognised charitable purposes. According to Alastair Hudson[27] the new list of charitable purposes gives validity to purposes which the courts had previously refused to recognise as charitable, or some new purposes "as part of governmental policy."[28] It is important to appreciate the extent to which government policy can

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22 Charity Law Association (CLA), *For the Public Benefit: Essays written following the Charity Law Association's conference on the Charities Act 2006 public benefit requirement* (2007), p 11 [henceforth *For the Public Benefit*]

23 F. Gladstone, *op cit*, p 40

24 *Gilmour v Coats* [1949] AC 426 at 443

25 Tudor, *op cit*, p 6, para 1-006, see also p 25, para 1-028 - reporting on practice up until 2003

26 Charity Commission, *RR 1A- Recognising New Charitable Purposes, op cit*

27 Hudson, A., *Equity and Trusts* (2007), p1014, para 25.1.4

28 The emphasis is my own

potentially shape the concept of charity in order to understand the nature and direction of charity law.

The newly formulated list of charitable purposes is on the whole self-explanatory. Essentially, a legal charity must have aims that fall within, or are analogous to, the descriptions in the Act. The arrival of the public benefit test, on the other hand, may not be so clear-cut, and its relationship with the list of charitable purposes adds to the confusion. For instance there is no description of public benefit on the face of the Act, or any indication as to how the requirement is to relate to the new statutory list of prima facie charitable purposes.

The categories of charitable purposes and the public benefit test are inextricably linked; it is therefore inevitable that this connection is to be a reoccurring theme in the ensuing discussion of the Charities Act 2006. In *Private Action, Public benefit*[29] the Strategy Unit reported on the law of charity as it stood prior to the Act, and can be seen as the impetus for the recent legislative changes. The report identifies that the law on charity was outdated and complicated, and proposed an updated and expanded list of charitable purposes in recognition of the public benefit these organisations deliver to society.

The report considered the benefits of redefining charity solely in terms of public benefit, thereby dispensing with the need for defined categories of charity. The Strategy Unit decided that such a move would subject the law relating to charity to an unwarranted amount of governmental interference due to the difficulty to find a "workable definition" which would demand "extensive secondary legislation and guidelines."[30] It is therefore of paramount importance that the Act retains a balance between the significance of charitable purposes and the public benefit requirement.

In terms of charitable purposes the Act maintains that any reference to charity-law within its provisions is a reference to the existing law on charity in England and Wales up to the date of the passing of the Act.[31] Nonetheless the Act for the first time lays down a statutory definition of charitable purposes, where previously a decision as to what constitutes a charity would be made by way of analogy to the 'spirit and intendment' of the outdated definition found in the preamble to the Statute of Charitable Uses 1601, or else the classic restatement of the law found in *Pemsel* – which in itself, did not provide a comprehensive definition.

Whether the new list of charitable purposes has changed the law as a result of the Act is of considerable intrigue. The old relief of poverty head has been retained, but

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29 Cabinet Office Strategy Unit Report, *Private Action, Public Benefit: A review of Charities and the Wider Not-For-Profit Sector* (September 2002)

30 *Ibid*., p 39, para 4.17

31 Charities Act 2006, s 2 (8)

renamed to read: purposes for the relief and prevention of poverty. Furthermore, the Act has incorporated a new head of charity: for the relief of need, by reason of, inter alia, financial hardship. There are questions as to what these changes are to entail, in terms of what types of purposes are to fall under each description, and what impact the rewording will have on the requirement for these charities to demonstrate public benefit.

Charity Law Association delegates suggest that the old poverty head will look to a narrower range of charitable activities directed at providing direct financial assistance to those in need.[32] On the other hand, those charities falling under the new category for the "relief of those in need" will look to address "the social and economic conditions that are engendered by that poverty."[33] However delegates have called for "urgent guidance" in order to address the actual meaning and legal significance of these changes.[34]

**Public Benefit**

In addition to the requirement for a charitable character, an institution must have a public character,[35] in other words its purposes must be established for the public benefit. Since public benefit is a necessary condition for a legal charity, it is very often the decisive factor as to the validity of novel charitable purposes.[36] However, as it has already been emphasised above, it is not the sole factor. The case-law has interpreted the public benefit requirement so as to include two broad and 'closely related' elements:[37]

(i) The purpose of the charity must confer some identifiable and clearly defined benefit on the public or a section of the public.

(ii) The class of persons eligible to benefit must constitute the public or a section of the public, as opposed to a private class of individuals.

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32 *For the Public Benefit, op cit* p 9. See also Charity Commission, *Commentary on the Descriptions of Charitable Purposes in the Charities Act*, (March 2007), access online: http://www.charity-commission.gov.uk/spr/corcom1.asp

33 *Ibid*., p 36

34 *Ibid*., p 9

35 *Jones v Williams* (1767) Amb. 651 at 652

36 Tudor, *op cit*, p6 and see, the general tenure of the *dicta* in *Gilmour v Coats* [1949] AC 426

37 Tudor, *ibid*, p 7, para 1-008

The first element is directed at the benefit the charity provides to the public. As such the requirement takes into consideration "the benefit which may be derived by others"[38] from the pursuit of the charitable purposes in question. Before the Charities Act 2006 it was assumed that charities for the relief of poverty, advancement of religion, and advancement of education were for the public benefit,[39] unless evidence to the contrary was introduced. *Gilmour v Coats*[40] and *Re Pinion*[41] were two cases where the proposed benefit to the public was challenged in the courts. *Gilmour v Coats* concerned the validity of a gift, said to be charitable, for the purposes of a priory consisting of a community of cloistered nuns. The House of Lords approved of what was said by Wickens VC in the case of *Cocks v Manners*[42] that:

It is said, in some of the cases, that religious purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public.

Consequently, notwithstanding that the gift was directed at religious purposes, it was held not to be for the public benefit because the so-called benefits conferred on the public - by way of intercessory prayer and edification - were incapable of being susceptible to proof, and too vague, respectively, to be charitable.

*Re Pinion* "called into question"[43] a charitable gift proposed to be for the advancement of education. It was for the court to decide on the educational utility of the gift, which was in this case a collection of paintings and other articles belonging to the testator[44] to be given to trustees to be exhibited in the testator's studio. The court took it upon itself to make value judgments, taking into account the strength of expert opinion, as to the quality of the gift so as to determine whether it would be "conducive to the education of the public."[45] On this basis the court held it could conceive of no public utility or educative value in "foisting upon the public this mass of junk."[46] It is submitted that this controversial statement reveals how the law

38 *Gilmour v Coats* [1949] AC 426, at 446 per Lord Simonds

39 *National Anti Vivisection Society v IRC* [1948] A.C. 31 at 42

40 [1949] AC 426

41 [1965] Ch 85

42 (1871) L.R. 12 Eq. 574

43 *Re Pinion* [1965] Ch 85 at 106

44 Including both his own and one wrongly attributed to the painter 'Lely'

45 *Ibid.* per Harman LJ at 107

46 *Ibid.*

of charity has been driven by strong value judgments, according to judicial concepts of what constitutes public benefit.

However, notwithstanding the apparent presumption of public benefit in the case-law, in recent years the Charity Commission has ignored the presumption of public benefit for the purposes of registration.[47] In the interests of legal certainty there is little to commend this type of disparity between the case-law and current practice. Therefore, statutory intervention, of the type now embodied in the Act, has been long overdue. It is hoped the Act, and the Charity Commission's guidance thereto, creates coherence as to the question of public benefit in order to ensure more certainty and transparency in the law.

The second element of the public benefit requirement engages the question: for whom is the charity good?[48] Essentially, a charity must exist for the benefit of the community or an appreciably important section of the community.[49]

The existing case-law has developed incrementally or "empirically,"[50] on a case-by-case basis, in respect of what is meant by a section of the public. The public benefit test is not defined "precisely or exhaustively"[51] in the case-law. Instead it consists of a number of principles. A good general starting point is to state what the public benefit test is not, that is, a charity cannot exist for the benefit of a particular class of private individual. It is in relation to this proposition that the courts have "struggled to articulate a clear test,"[52] if it is even possible to find a uniform test.[53]

There are certainly mixed opinions as to the mysterious presumption of public benefit.[54] It is not clear whether the law considered that charities falling under the first three heads are likewise presumed to benefit the public, or a section of it. The Strategy Unit report stated it would be wrong to assume that some charities were

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47 As observed by Hayton and Mitchell, *op cit*, p 438, para 7-48, p 438

48 Thanks to Anne Sanders, 'The Mystery of Public Benefit', (2007) Vol. 10, issue 2 *CL&PR* p 38

49 Tudor, *op cit*, p 7, para 1-008

50 As opposed to 'logically' per Lord Simonds in *Gilmour v Coats, ibid*, at para. 449

51 *Ibid* at 447

52 Hayton and Mitchell, *op cit*, p 438; para 7-49

53 Tudor, *op cit*, evidently thinks not see p 10, para 1-010. Lord Simonds in *IRC v Baddeley* [1955] AC 572 at 589 considers public benefit to present the most difficult problem in the field of charity law.

54 The article by Sanders, A., *op cit* is devoted to the '*mystery* of public benefit'

'exonerated'[55] from the public benefit requirement. However the report neglected to clarify what it meant by some charities, and what it understood by the requirement for public benefit. For instance must all charities, or just some, have to demonstrate public benefit ? If so, which aspects of the public benefit requirement must be demonstrated and which parts are purely presumed? It is suggested that any ambiguity must be forgiven in light of the lack of a definitive explanation as to the exact nature of the presumption of public benefit in the case-law.

It is submitted that the true position is that, in reality, every charity must be for the benefit of the public or a section of it. There are, however, some questions as to whether trusts for the relief of poverty are rightly "exonerated" from the requirement.[56] Lord Simonds in *Gilmour v Coats*[57] thought that some element of public benefit was essential for all types of charitable purpose. However his lordship stated that the standard of public benefit was not the same for every category of legal charity.[58]

Likewise, and with greater elucidation, Lord Cross of Chelsea in *Dingle v Turner*[59] stated a preference for a broad approach to the public benefit question. His lordship was not convinced that any specific rule was capable of universal application. Instead, a charity's ability to benefit the public, or a section of the public could only be a matter of degree that depends entirely on the purposes of the charity - this being the only rule capable of any general applicability.[60]

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55 *Ibid*., p 37

56 Tudor, *op cit*, p 42; para 2-014

57 *Gilmour v Coats* [1949] AC 426 at 449 The court was not concerned with any new concept of 'public good', but considered new arguments and evidence raised as to the public character of the religious observances of the cloistered nuns. It appears Lord Simond's was speaking of the importance of public benefit for all charities in terms of public character, the question of identifiable benefit not being considered in the case.

58 *Gilmour v Coats* [1949] AC 426 at 449

59 [1972] AC 601

60 *Ibid* at 604: "It may well be that, on the one hand, a trust to promote some purpose, prima facie charitable, will constitute a charity even though the class of potential beneficiaries might fairly be said to be a private class and that, on the other hand, a trust to promote another purpose, also prima facie charitable, will not constitute a charity even though the class of beneficiaries might seem to some people fairly describable as a section of the public."– this point will be returned to in due course, in order to address the so-called poverty exception

**The Public Benefit Test and the Charities Act 2006**

The Act for the first time places the public benefit requirement into the statute books.[61] However the Act itself does not clarify the preferred meaning of public benefit. There is no statutory definition of public benefit on the face of the document, despite some requests for legislative clarification in this form.[62] Instead the case-law meaning of public benefit has been retained, by virtue of s 3 (3):

"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."

In view of the retention of the existing case-law on public benefit it might be surprising to learn that the Act provides, by virtue of s 3 (2), that the so-called presumption of public benefit has been removed:

> "*In determining whether that requirement [of public benefit] is satisfied in relation to any such purpose, it* ***is not to be presumed***[63] *that a purpose of a particular description is for the public benefit.*"

In its published guidance (both draft and final versions) the Charity Commission has interpreted this to mean that whereas the law previously presumed that the aims of organisations for the relief of poverty, the advancement of education or the advancement of religion satisfied the requirement of public benefit, the Act has removed the presumption in respect of these charities.[64]

This outlook seems to suggest the blanket removal of the presumption of public benefit, without acknowledging the aforementioned subtle distinction between identifiable benefit and public access.

Anne Sanders[65] recently argued that the presumption does not apply to the second element[66] of the public benefit test. Therefore, in her view, the Act could not have changed the law on public access, on account of principle. However it is submitted

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61 By virtue of Charities Act 2006, s 2 (1) (b)

62 As alluded to in *For the Public Benefit*, *op cit*, p 6; see also, generally, Sanders, A., *op cit*

63 The emphasis is my own

64 See *Charities and Public Benefit*, *op cit*, p 8, This position is given significant force elsewhere: by the *Explanatory Notes* to the Charities Act 2006 itself, see paras 25 and 26; and is the position adopted by Anne-Marie Piper, speaking in May 2007 on behalf of the CLA - of which she was then the Chairman, see *For the Public Benefit*, p 6

65 See, generally, Sanders. A., *op cit*

66 P 9, *supra*

that there is little advantage in pursuing this line of reasoning, however accurate it might be. Since, questions as to the degree of public access given by a charity, falling within the first three *Pemsel* heads, have rarely come to light, unless of course its charitable credentials were contested altogether. Consequently any changes brought in by the removal of the presumption of public benefit looks set to raise new questions to how charities can demonstrate a sufficient public character. It is submitted that this is a welcome development since, in the past, the courts have had little occasion to consider such questions in relation to the presumed categories of charity, and as a result there have only been sporadic judicial utterances on the subject.

In any event the extant practice of the Charity Commission has been to require all institutions to show public benefit for the purposes of registration.[67] Thus in *Private Action, Public Benefit*[68] the Strategy Unit stated that the presumption of public benefit was said to be of "limited practical significance."[69] It is stressed that this concession to practice and reality is of little merit where legal certainty is at stake, especially in light of the need to ensure trustee compliance and to promote public confidence in charities operating in England and Wales.

As mentioned if the presumption only existed in terms of the identifiable benefit requirement of the public benefit test, it follows that, in conformity with s 3 (3), any case-law regarding the ways in which a charity can demonstrate public access to its benefits must, in theory, have been retained. However, rightly or wrongly, the Charity Commission's outlook towards charities that charge fees seems to suggest a change to the public benefit requirement. The onus in the Strategy Unit's report, and followed through in the Charity Commission's guidance, is very much on the ways in which fee-charging charities can deliver public benefit, in terms of access to their services and facilities.

The Charity Commission's final guidance points to two principles of public benefit. The first principle requires that there is an identifiable benefit; and, according to the second: the benefit must be to the public, or a section of the public. It is to be noted that these are the same as the two principles enunciated in the case-law. However in the draft guidance[70] there were four principles, the third of which stated: "people on low incomes must be able to benefit". This principle is incorporated into the final guidance, save it is no longer a stand-alone principle and is worded slightly differently. It is clear that the Charity Commission's guidance is geared towards

67 Hayton and Mitchell, *op cit*, p 438, at 7-48.

68 *Private Action, Public Benefit*, *op cit*, p 39, para 4.6

69 *Ibid.*

70 Charity Commission, *Consultation on draft public benefit guidance* (March 2007)

high fee-charging charities, and the ways in which these charities can demonstrate greater access to the wider community to satisfy the requirement of public benefit.

Another consideration is that if there was a presumption of public benefit, it is not immediately clear whether the Act has totally succeeded in its removal. Although the Act is silent on the issue, the Charity Commission has interpreted the law in such a way so as to retain the 'anomalous' position of the poverty cases.[71] That is to say, it is argued that trusts for the relief of poverty have enjoyed a total exception from the requirement to benefit the public or a section of the public.

## The Impersonal Nexus Test after the Charities Act 2006

The existing law of charity includes a rule that in order to fulfill the public benefit test, and hence to be legally charitable, an institution must not exist to benefit a particular family member or common employer.[72] In other words, the charity must not be defined by a personal nexus. This so-called impersonal nexus rule, established in *Re Compton*,[73] grew up in relation to educational trusts, and does not apply to the poverty cases.[74] In as much as this exception continues to exist, it could be said that the poverty cases represent a modern day application of the old presumption of public benefit.[75]

Nowhere is the presumption of public benefit more mysterious than in relation to charities for the relief (and now also prevention) of poverty. Some commentators[76] have simply suggested that the poverty cases have never needed to show public benefit, whereas charities for the advancement of education and religion have always been legally required to show public benefit.

In its draft guidance the Charity Commission[77] said it would be looking into whether the exception still survives in light of the Act. It is submitted that it was wrong of the

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71 *Charities and Public Benefit*, *op cit*, p 20, F6, see also Charity Commission, *Analysis of the law underpinning Charities and Public Benefit* (January 2008), p 26, para 3.51

72 *Re Compton* [1945] Ch 123; *Oppenheim v Tobacco Securities Trust Co. Ltd* [1951] AC 297

73 [1945] Ch 123 (CA)

74 *Re Scarisbrick* [1951] Ch 622, 639; affirmed in *Dingle v Turner* [1972] AC 601, at 622 per Lord Cross of Chelsea

75 According to Alastair Hudson, writing in his informative book *Equity and Trusts*, *op cit* p 1017 "there are now some questions as to exactly how [the requirement of public benefit] will apply to trusts for the relief and prevention of poverty"

76 Hudson., A., *ibid*., p1040

77 *Consultation on draft public benefit guidance*, *op cit* p 26, F2

Charity Commission to suggest it might reconsider the current exception that exists for the poverty cases. In fact the nature of the exception means that there was no reason for the removal of the presumption of public benefit to call the poverty cases into question. It is fortunate that the Charity Commission made the decision to incorporate the exception into its final guidance.[78] If the decision had been taken to remove it, this would have raised concerns as to the power wielded by the Charity Commission, on account of how this might make the development of the law on charity vulnerable to political influence.

The principle, known as the impersonal nexus rule, was laid down in *Re Compton*,[79] where a trust for the education of the children of three named families was held not to be charitable. Lord Greene MR stated:

> "*…a gift under which the beneficiaries are defined by reference to a purely personal relationship to a named propositus cannot on principle be a valid charitable gift*"[80]

In *Oppenheim v Tobacco Securities Trust Co.*[81] this principle was extended to cover a trust for the education of children of employees or former employees of a named common employer, British American Tobacco.

However in *Re Scarisbrick*[82] the Court of Appeal held charitable a testatrix's bequest for the benefit of the descendents of her children, according to the discretion of the surviving son or daughter, who "shall be in needy circumstances," In reaching its decision the Court of Appeal reaffirmed a long line of cases[83] that established that the impersonal nexus test does not apply to the poverty cases, so that, where the necessary intention to relieve poverty is present, the class of beneficiaries can be limited by a personal tie of blood, or a relationship defined by contract. The reason for this exception has been consistent, in that the relief of poverty is considered to be of such an altruistic character that "the public benefit may necessarily be inferred."[84]

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78 *Charities and Public Benefit, op cit*, p 20, F6

79 [1945] Ch 123 (CA)

80 *Ibid* at 131

81 [1951] AC 297

82 [1951] Ch 622

83 *Ibid.* at 649 per Jenkins LJ

84 *Ibid* at 639, per Sir Raymond Evershed M.R. See further, *Re Compton* [1945] Ch 123, at 129; *Gibson v South American Stores (Gath & Chaves), Ltd.* [1950] Ch. 177 at 197

In *Re Compton* Lord Greene MR[85] suggested that the poor relations cases were anomalous, and ought not to be extended. This view was accepted in *Oppenheim* per Lord Simonds who likewise called the poverty cases an anomaly,[86] but preferred not to express an opinion as to the continuing validity of the exception.[87] In *Scarisbrick* Jenkins LJ presents the poverty cases as an exception to the general rule that charitable trusts must be for the benefit of the public, or a section thereof. It was stated in that case that the poverty exception is valid on the basis of a long line of established authority without further explanation as to any possible reason for this exception. Jenkins LJ did, however, leave it open for the House of Lords to reconsider its position in the future. In *Dingle v Turner*[88] the House of Lords did take the opportunity to review the cases on the impersonal nexus test.

In addition Lord Cross of Chelsea offered an explanation for the exception afforded to the poverty cases. First of all Lord Cross of Chelsea stated[89] that there would be no logical reason for not extending the poor relations decisions to cover both 'poor members' and 'poor employees'.

It is suggested that though Lord Cross of Chelsea accepts that the poverty cases are historically regarded as an anomalous exception to the impersonal nexus rule, his lordship does not go so far as to accept this as the only justification. Lord Cross offers a very convincing "practical justification"[90] for the poverty cases in charity law – it is a justification that makes it doubtful whether the poverty cases need be viewed as an anomaly at all. It is submitted that if Lord Cross of Chelsea's opinion is to be accepted as the true interpretation of the poverty cases, this is to have some very real and important consequences on the correct understanding of the public benefit requirement. If the poverty exception can fit into the general law this would mean that the existing law on public benefit is capable of rationalisation under the Act.

It is to be recalled that Lord Cross of Chelsea's *obiter* statements as to what he considered would fairly constitute a section of the public consisted of a question of degree and very much depended on the purpose of the trust in question – in relation to this point the other Law Lords concurred. Consequently, the statements per Lord Cross of Chelsea, having been made in the House of Lords, are to be regarded as the accepted position in the case-law. Moreover Lord Cross of Chelsea's practical

85 *Re Compton* [1945] Ch 123 at 140

86 *Oppenheim v Tobacco Securities Trust Co* [1951] AC 297at 305

87 *Ibid* at 307

88 [1972] AC 601

89 *Dingle v Turner* [1972] AC 60, at 623

90 *Ibid*. At 625

justification for the poverty exception is entirely consistent with his lordship's wider, purposive approach to public benefit.

The editor of the authoritative works of *Tudor on Charities*[91] confirms that the poverty cases, like all other charitable trusts, must demonstrate benefit to the public or a section of it, albeit to a limited degree.[92] It would therefore be misleading to assert that the poverty cases enjoy an absolute immunity from the need to demonstrate public benefit; yet, a "gift for poor persons will not necessarily fail to qualify as charitable because there is a personal nexus between them."[93]

Even in *Re Scarisbrick* there are indications that the poverty cases represent a qualified, as opposed to absolute, exception to the impersonal nexus rule. Jenkins LJ stated that a 'difficult' line had to be drawn between trusts for the relief of poverty properly said to be charitable, and trusts with the same said objects, but which are not, in truth, for the relief of poverty. An example of such a non-charitable gift is one that is constructed for the relief of poverty amongst the testatrix's statutory next of kin, which would amount to "no more than an ordinary gift to some particular individual or individuals."[94]

Furthermore Jenkins LJ disapproved of the first instance decision per Roxburgh J,[95] where it was held that the poor relations cases were to be confined to the status of mere historical anomaly.[96]

Lord Cross of Chelsea's explanation of what constitutes a section of public in *Dingle v Turner* is comparable to Lord MacDermott's dissenting opinion in *Oppenheim*, where his lordship considered the impersonal nexus test to be "a very arbitrary and artificial rule."[97] Lord MacDermott thought that the impersonal nexus

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91 Tudor, *op cit*– was cited with approval in the case-law, including per Lord Simonds in *IRC v Baddeley* [1955] AC 572 at 592

92 Tudor, *op cit*, p 42-43, para 2-014. See also Lord Simonds in *IRC v Baddeley ibid.* at 590 where his lordship suggested, *obiter*, that all charity in the legal sense must show some element of public benefit, but that a different degree of public benefit is required depending on the charitable purpose in question, which is most evident in the 'poor relations' cases.

93 *Ibid*.

94 *Re Scarisbrick* [1951] Ch 622 at 651. Note: Questions of public benefit are important to determine whether there is truly a charity for the relief of poverty.

95 [1950] Ch. 226

96 The distinction was made between cases involving a gift of perpetual significance, rightly considered charitable, and those gifts intended for immediate distribution. Roxburgh j found that the trust fell into the category of gifts being intended for immediate distribution, thus the case was thought to fall outside the poverty exception

97 At 307

test could not be universally applied, for there would be times when distinguishing between a personal class and an impersonal class, would prove a "baffling and elusive" task.[98]

To illustrate the point his Lordship stated that there can be no sound distinction between a trust for railwaymen in general, which would be undoubtedly charitable, and railway servants defined by a particular employer, which would be called into question under the *Compton* test. It is only Lord MacDermott who approves of the argument put forward by Pennycuick (then QC)[99] that the impersonal nexus test would give rise to ludicrous distinctions in consideration of the differing position of colliers and railwaymen prior to and post nationalisation of the mining and railway industries respectively.

According to Lord MacDermott, though the beneficiaries in the instant case were defined by a common employer, the large size and importance of the class were material to the question of validity. Therefore his lordship felt that the appeal should be allowed and the trust declared valid. It is of interest that Lord Cross of Chelsea shared in Lord MacDermott's dissenting opinion concerning the *Compton* impersonal nexus test, and that Lord MacDermott concurred with the majority to determine the appeal in *Dingle v Turner*. Finally it is to be noted that Lord MacDermott expressed his dissatisfaction with the "imperfections and uncertainties" present in the case-law, and called for Parliamentary intervention as regards the proper test to be applied to these cases. His Lordship concluded his dissenting judgment with the following declaration:

> "*It is a long cry to the age of Elizabeth and I think what is needed is a fresh start from a new statute*."[100]

At this stage it can be asked whether the Act has addressed the difficulties Lord MacDermott found to exist in the case-law. Since the Act itself does not define public benefit, it is necessary to look to the Charity Commission's guidance[101] to see whether the complexities of the case-law have been resolved. The Charity Commission's guidance must clarify what is meant by public benefit in the modern context in order to bring some much needed coherence and consistency to what is a very muddled area of law.

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98 *Oppenheim v Tobacco Securities Trust Co* [1951] AC 297 per Lord MacDermott, at 317

99 *Ibid.* at 300 and 318 for the appellant trustee who contended there was a valid trust arguing that the validity of the trust was to be determined by questions of facts and degree

100 *Oppenheim v Tobacco Securities Co.* [1951] AC 297, at 319

101 Guidance which it is compelled to create by virtue of Charities Act 2006, s 4

The way to achieve this end must be for the Charity Commission to identify some flexible and general guiding principles of public benefit from the case-law that can be applied across all categories of charitable purpose. However, this is bound to be a difficult task in light of Act's retention of the existing law on public benefit, and so the Charity Commission must adhere to the case-law. The Charity Commission must not merely 'cherry-pick' its way through the case-law – such an approach would lack consistency and would prove extremely unreliable.

It is submitted that the Charity Commission have found the interpretation of public benefit by Lord Cross of Chelsea to be the most persuasive. While this was not clear in its draft guidance, it is without doubt the approach taken in the final guidance. According to the final guidance the meaning of the public, or a section of the public, is primarily determined according to the organisation's aims, and that: "The beneficiaries must be appropriate to the aims."[102] This factor is to be read in conjunction with the legal analysis document, where under the discussion of the meaning of public or section of the public it is stated that the definition of a sufficient section of the community must have a rational relationship to the charitable purpose in question, and Lord Cross of Chelsea's statements in *Dingle v Turner*[103] are stated in support of this principle.

Furthermore the legal analysis document pioneers both a cautious and flexible approach to the proper application of the *Compton* impersonal nexus test.[104] There it is said that the Charity Commission would even be prepared to accept a beneficial class defined by some personal relationship or contract, if, *inter alia*, upon a "general survey" of the relevant "circumstances and considerations … it is clear that a public class is intended."[105]

**Public Benefit and the Charity Commission**

The Act, under s 4, places a statutory obligation on the newly constituted Charity Commission to issue clear guidance on the meaning of public benefit. In addition the Charity Commission is required to revise its guidance, as and when necessary, in

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102 *Charities and Public Benefit*, *op cit*, p 17

103 At 624. Lord Simonds in *IRC v Baddeley* [1955] AC 572, at 592 explains that, at least in relation to 4th head charities falling under *Pemsel*, public benefit means that a charity must "serve the public purpose which its nature qualifies it to serve."

104 Charity Commission. *Analysis of the law underpinning Charities and Public Benefit*, *op cit*, p 24, para 3.45

105 *Ibid* This may be ground-breaking, even if rational. However of course it is not clear whether the legal guidance is to form part of the guidance itself – and the final guidance makes no reference to this being the case, allowing the exception to persist only in relation to the poverty cases

order to meet any changing social and economic needs.[106] This provision allows for flexibility, which has long been a highly regarded feature of the law of charity. However, reference here to changing social and economic needs must not become a useful tool for the government to effectuate its current policies through the concept of public benefit; the law of charity ought not to fluctuate arbitrarily.

On the face of it there does not appear to be an immediate risk of any government interference. The Act, by inserting a new s 1 A in the Charities Act 1993, creates a new corporate body known as the Charity Commission to replace the former Charity Commissioners and to abolish the role of the Charity Commissioner. The Charity Commission is charged with the duty of principal regulator of charities in England and Wales. The Charity Commission acts on behalf of the Crown;[107] is under a duty to report to the Home Secretary;[108] and is accountable to the administrative controls of the Treasury in respect of its expenditure.[109] Nonetheless the Charity Commission is an independent, non-ministerial body, which can exercise its functions and pursue its statutory objectives in the manner it considers most appropriate,[110] that is, without the "direction or control of any Minister of the Crown or other government department."[111]

It is essential that the Charity Commission exercises it regulatory functions free from government interference, or political pressure. Therefore it is essential that the Charity Commission is open and accountable when exercising its statutory duties. Its guidance on public benefit must be accurate, and consistent with the case-law, so as to enable effective compliance by charity trustees and the Charity Commission alike.

The Act considerably strengthens the regulatory powers of the Charity Commission in respect of charities in England and Wales. As mentioned, it has been given the task to fulfill a number of statutory objectives, one of which being:

> "*To promote awareness and understanding of the operation of the public benefit requirement*."[112]

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106 Charities Act 2006, s 4 (5)

107 Charities Act 2006, s 6, 1 (3)

108 Charity Commission *The Charity Commission and Regulation*, (version 06/03) please consult the Charity Commission website: http://www.charitycommission.gov.uk/spr/regstance.asp

109 Charities Act 2006, s 6, (1) (5) (b)

110 *Ibid.* s 7, 1D, 2 (b)

111 *Ibid* s 6, (1) (4)

112 *Ibid.* s 7 (3) (2)

As already noted the Charity Commission carries out this general objective by preparing guidance on the requirement of public benefit. The guidance, however, is not said to have the force of law.[113] Instead it purports to make use of "the principles of public benefit contained in the existing case-law." [114] There is further open recognition that the guidance distills the key principles of public benefit as derived from the relevant case-law,[115] but does not set out to provide a "detailed statement of the law with all the fine distinctions that can apply in diverse, individual cases."[116]

Nonetheless charity trustees are legally required to show that they have consulted the Charity Commission's guidance, even if they decide not to follow it (though trustees are reminded that they can only depart from the guidance if they have good reason to do so).[117] It is unfortunate that the guidance fails to explain what such instances might entail. As a result, the Charity Commission might find it difficult to meet its statutory "compliance objective," which consists of the following duty:

> "*To promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.*"[118]

It is to be recalled that the third requirement for legal charity is for an organisation to be established for charitable purposes only,[119] thus, each and every principal or main purpose of the organisation must be exclusively charitable.[120] This fundamental principle in the case-law has been incorporated into the Charity Commission's guidance, thus to be accepted on the register, and hence to be regarded legally charitable, it is essential for an organisation to ensure that its aims can be carried out for the public benefit.[121] Accordingly the guidance serves to indicate the best way for trustees to frame their charitable aims and objects. The guidance is therefore of paramount importance for the purpose of registration, especially since the effect of

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113 *Charities and public Benefit, op cit*, p 8, D2

114 *Ibid.*

115 See foreword by Dame Suzi Leather, in *Charities and Public Benefit, op cit*, p 3

116 *Ibid*, p 8

117 *Ibid* p 7, C4

118 Charities Act 2006 s 7, (1B) (2) (3) & (3) (3)

119 *Ibid.* s 1 (1) (a)

120 *McGovern v Attorney General* [1982] Ch 321 at 340-343 per Slade j, see also *For the Public Benefit, op cit*, p7; *Analysis of the law underpinning…op cit* p 12-13; *Charities and Public Benefit, op cit*, p 14, E3

121 *Charities and Public Benefit, op cit*, p 9, D4

entry on the register[122] is to raise a conclusive presumption of charitable status,[123] so that, once registered, the organisation is to be recognised as a legal charity.[124]

## The Relevance of Activities, Aims and Objects

In respect of applications for registration the charity Commission may consider an organisation's activities in order either to determine the construction of its aims and objects, or to decide whether those aims satisfy the purposes test, in the sense of falling to be described as charitable purpose or meeting the public benefit requirement.[125] According to Lord Wright in *National Anti-Vivisection Society v Inland Revenue Commissioners*[126] the court will take into account all the relevant evidence in order to reach a conclusion as to whether "a purpose will or may operate for the public benefit."[127]

In situations where it is uncertain whether an institution's purposes are legally charitable, the courts have found it useful, on a number of occasions, to look at extrinsic evidence, including its activities and other factual background material, in order to determine the consequences of pursuing its stated objects.[128] However, the case of *Attorney General v Ross*[129] reveals that the court is only permitted to enquire into the *intra vires* activities of the charity and only if these are of "probative value" to the question of charitable status. In contrast, the Charity Commission, in its monitoring and supervisory capacity,[130] may look into a charity's actual activities, in order to determine whether the charity has been acting *ultra vires*, so to amount to a breach of trust.[131] In this situation the Charity Commission is not at liberty to refuse

122 The register was originally set up by the Charities Act 1960, the central register is now governed by the Charities Act 1993, s 3

123 Tudor, *op cit*, p 339, para 9-010

124 *Analysis of the law underpinning… op cit*, p 44, para 17

125 Charities Act 2006 s 2 (2), see *Charities and Public Benefit*, *op cit*, p 9, D4, and Tudor, *op cit*, pp 187-8, para 4-017

126 [1948] A.C. 31, 44 citing and approving Russell J in *Re Hummeltenberg*: [1923] 1 Ch. 237

127 *Ibid* at 242

128 *Incorporated Council of Law Reporting v AG* [1972] Ch 73, 91 per Buckley J

129 [1986] 1 W.L.R. 252 at 263 per Scott j

130 Tudor, *op cit*, p 333, para 9-001

131 Ibid. p 189, para 4-018 citing *Re Cranstoun* [1932] 1 Ch. 537 at 547, per Farwell J. see also Farrer & Co., Charities and public benefit, *Publications* (January 23 2008) p 3, see http://www.farrer.co.uk/Default.aspx?sID=790&cID=975&ctID=11

registration or remove an existing charity from the register, unless the activities point to a sham operation, whereby the purposes listed by the trustees were disguising other, non-charitable purposes.[132]

Therefore, when looking into an organisation's activities, the Charity Commission must ensure it makes the complicated, yet "critical distinction," according to Slade J in *McGovern v Attorney General*,[133] between the stated aims or objects of the trust (its purposes); how those purposes are proposed to be carried out; and "the consequences of carrying them out."[134] On this basis Slade J stated there is a distinction between subsidiary or incidental non-charitable activities and those non-charitable activities that properly form part of the trust purpose. According to Slade J only in the latter instance would the non-charitable activities "deprive the trust of its charitable status."[135]

The significance of the Charity Commission's guidance to charity trustees is not simply limited to questions relating to registration. Charity trustees are to consult the guidance throughout the life of their charity. This is because the significance of charitable status does not end at the point of registration, for a registered charity does not enjoy a perpetual "seal of approval."[136] Therefore charity trustees are under a duty to make sure their charity continues to warrant charitable status, which includes continuing to meet the public benefit requirement.

Consequently, as from Spring 2008, existing charity trustees are obliged to report in their Trustee's Annual Report on how their charity continue to meet the public benefit requirement. Although there are different reporting requirements according to the size of the charity, essentially, all charity trustees must explain what activities will be undertaken, for the public benefit, in furtherance of the charitable aims.[137] These obligations must be viewed to run alongside the Charity Commission's strengthened regulatory role and the renewed emphasis on public benefit as provided for by the Act.

In the same way as there is a distinction between aims and activities, the trustees' duty to meet the public benefit requirement is not the same as their duty to satisfy

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132 Tudor, *op cit*, p189, para 4-018

133 *McGovern v Attorney General* [1982] Ch 321

134 *McGovern v Attorney General* [1982] Ch 321 at 340

135 *Ibid*. at 341.

136 Tudor, *op cit*, p 339, para 9-010

137 *Charities and Public Benefit*, *op cit*, p 28, G2

the public benefit reporting requirements.[138] In that if charity trustees fail to meet the public benefit reporting requirement, either in neglecting to prepare a report at all or by submitting an inadequate report,[139] the charity neither necessarily fails to meet the public benefit requirement, nor will it be necessary for the charity to be removed from the register. However the Charity Commission has indicated that it will see persistent failures to meet the reporting requirements as a cause for concern, with those failing charities forming the focus of the Charity Commission's rigorous public benefit assessments on existing charities.[140]

In this event, trustees will be asked to provide a more detailed account of how their charity delivers public benefit. If the results of the detailed assessment are unfavourable, it is possible that regulatory action will be taken against the charity trustees or even, in some extreme circumstances, the charity will be removed from the register, and stripped of its charitable status, for failing to meet the public benefit requirement.[141]

The new reporting requirements offer a means by which the Charity Commission can ensure that existing charities continue to meet the public benefit requirement post registration. Additionally they make it possible for the Charity Commission to meet its "accountability objective"[142] by providing a way for charity trustees to enhance the accountability of their charity to interested parties such as donors, beneficiaries and the public; and, as a result, help promote public trust and confidence in charities: "the public confidence objective."[143]

Clearly, the Charity Commission's guidance fulfils two separate, but interrelated functions. There are subtle differences between the function served by the guidance as regards the duty on trustees to meet their reporting duties on the one hand, and the public benefit requirement on the other. In regard to the first obligation, the task of the Charity Commission is regulatory, in that it is inquiring into an existing charity's actual activities where the charity's objects have already been determined charitable. This is quite different to the question as to charitable status in the first place, where the significance of activities, actual or proposed, are traditionally used only in the limited intra vires sense to ensure an institution's constructed objects are charitable.

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138 *Ibid*. p 30, G7

139 *Ibid.* p 29, G5

140 *Ibid*.

141 *Ibid*. p 35, H5

142 Charities Act 2006, s 7 (1B) (2) (5)

143 *Ibid.* s 7 (1B) (2) (1)

A further complicating feature seems to be the requirement for existing charities to continue to meet the public benefit requirement post registration, with the new reporting requirements being used as a way to flag up any problems the charity might be having in continuing to meet its public benefit requirement. In light of the new emphasis on existing charities to demonstrate public benefit, its actual activities will be significant in order to determine whether the charity's aims are being carried out for the public benefit.[144] However at this stage it is difficult to know when the Charity Commission is determining charitable status, or if it is looking to discover instances of breach of trust. The consequences of the former may cause the loss of charitable status for an existing charity, while the consequences of the latter may point to a misappropriation of trust property resulting in disciplinary proceedings being brought against the culpable trustees.

It is submitted that there is a potential danger that the guidance blurs the dividing line between a charity's aims on the one hand, and its activities on the other.[145]

The public benefit guidance is being used to determine charitable status, and to regulate the proper administration of charities and charitable resources. Thus in just one document the Charity Commission is able to demonstrate how it meets all of its statutory objectives. However questions relating to charitable status are very different to charity regulation. The Charity Commission must not deprive an existing charity of its charitable status purely on account of any incidental benefits that occur as a consequence of or a means by which the charity's main charitable purposes are carried out. The Charity Commission must ensure, where charitable status is concerned, that it only considers an institution's activities in the limited sense so as to determine its aims.

## Fee-Charging and Changes in Charity Law

In the Charity Commission's guidance there is a great deal of emphasis on fee-charging charities and their ability to meet the public benefit test. In the run up to the Charities Bill[146] there were concerns that charities that charged high fees for access to their services and facilities effectively restrict the benefit to a limited class of individuals, as opposed to the public or an appreciable section of the public.

144 *Charities and Public Benefit*, p 9, D4

145 Farrer & Co., *Publications: briefings – Public benefit: our response to the Charity Commission's draft guidance on public benefit under the Charities Act 2006* (2004) p 1, see http://www.farrer.co.uk/Default.aspx?sID=790&cID=932&ctID=11

146 *Charities and Public Benefit, op cit*, p33; see also *Private Action, Public Benefit, op cit*, commencing p 8

In *Private Action, Public Benefit* the Strategy Unit devoted a number of paragraphs to the ongoing ability of fee-charging charities to show a sufficient public character in light of the proposed strengthening of focus on public benefit.[147] The report recommended that the Charity Commission undertake a 'rolling review programme' to check that fee-charging charities, with particular focus on independent schools, continue to provide public benefit in the manner required by the anticipated legal changes, that is, specifically, by way of widening access to those otherwise unable to pay.[148]

In its guidance on public benefit the Charity Commission suggests that the Act has changed the law as a result of the "renewed emphasis on public benefit" and the removal of the presumption for the first three *Pemsel* heads of charity. For instance the Charity Commission indicates[149] that it will look into how certain kinds of charity can meet the public benefit requirement in "areas where the law has changed." For example in relation to the poverty, educational and religious charities that previously benefited from a presumption of public benefit."[150] This might suggest that - despite the retention of the case-law on public benefit - the Charity Commission considers that the public benefit test has changed in respect of these charities, requiring them to prove increased public access to their services and facilities.

In addition, the Charity Commission points to possible changes in the law in relation to high fee-charging charities, where there is, apparently, a significant public interest. It will therefore look to carry out detailed assessments and public benefit research studies on those charities that charge high fees. It is submitted that in light of the limited role of public opinion as regards charitable status,[151] any change of legal position in relation to high fee-charging charities can only come about on the basis of strong evidence of changed social or economic circumstances, as opposed to simply a change in popular opinion or government agenda. At present the Charity Commission only cites public interest as a reason for its concerns regarding fee-chargers,[152] which has arisen in the context of the strengthening of the public benefit requirement in the Act.

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147 The recommendation for a reform of the legal framework to allow for charity to be defined by law in recognition of modernised list of charitable purposes and a principle of public benefit have now, of course, been put into effect by the Charities Act 2006

148 *Private Action, Public Benefit*, *op cit* p 41, proposals 4.26-4.30

149 *Ibid*.

150 *Ibid*.

151 *Charities and Public Benefit*, p 12, D8

152 *Ibid*., p 33, H3

As a matter of principle it is doubtful whether the law as to public benefit has changed in respect of fee-chargers. The only difference the Act might have had on these organisations is the post registration emphasis on good practice activities by which charities can carry out its aims and ensure people in poverty are not excluded from the opportunity to benefit. The topic of fee charging charities is of great interest as to whether, or not, the Act has changed. The removal of the presumption of public benefit as regards charities for the advancement of education, may explain the increased emphasis on educational charities, and in particular independent schools.

On the other hand, the Charity Commission states that the public benefit requirement is not a new requirement, and the law in regard to it (apart from the removal of the presumption) is the same. According to the guidance all charities already have to satisfy the requirement for public benefit, even those where the law previously presumed public benefit. In this way the Act is purely cosmetic in effect, save the importance of the public benefit requirement is highlighted[153] and strengthened by the reporting requirements that give charities "a positive opportunity to demonstrate the benefits they bring to society."[154] The public benefit test only serves to highlight the importance of public benefit, and the need for all charities to positively demonstrate how they deliver a benefit to the public. Thus the existing case-law regarding public access must prevail, there being no reason for charities to change their objects, or drastically change their activities in order to further their stated objects. The only difference should be on the strengthened requirement for charities to *demonstrate* how public benefit is achieved through its activities.

In the draft guidance the Charity Commission included the following as a stand alone principle of public benefit: people on low incomes must be able to benefit.[155] The legal analysis document[156] reveals that the case of *Re Resch*[157] was used as the principal authority for the principle, however as it will become clear in the analysis to follow, it is doubtful whether the case can be used to support this principle. In fact, it is submitted, the draft guidance misapplied and distorted *Re Resch* in furtherance of its campaign against fee-charging charities.[158]

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153 *Ibid*., P8, D1

154 *Ibid*.

155 *Consultation on draft Public Benefit Guidance, op cit*, p 32, G

156 *Analysis of the law…op cit*, p 26

157 *Re Resch's Will Trusts, Le Cras (Vera Caroline) v the Perpetual Trustee Company Limited and Others* [1969] 1 AC 514

158 A feeling shared by some delegates at the CLA conference see follow *For the Public Benefit*, p 12

In *Jones v Williams*[159] Lord Camden stated that a good charitable gift was for "a general public use which extends to the poor as well as the rich."[160] By this, it is important to recognise that the concern was only with the capability of a charity's stated objects to benefit the rich as well as the poor, as opposed to requiring that every poor person must in fact benefit. In addition it is a general rule that charity must be given by bounty and not bargain.[161] However the case-law allows for the charging of fees as long as the institution concerned does not obtain a commercial profit from the fees charged. Furthermore, the receipt of a surplus does not in itself deprive the trust of its charitable status, so long as the profit is not directed towards non-charitable ends.[162] This applies equally to private hospitals, as in *Re Resch*, and likewise to fee-charging schools.[163] According to the Charity Commission itself all that matters is that the primary purpose of the trust is altruistic and not self-seeking.[164]

The Charity Commission's latest guidance on public benefit states that:

> "*Fee-charging charities are encouraged to … maximise the benefits they can offer to the public, and in particular to people who cannot afford to pay the fees charged*".[165]

In both the draft and final versions of the Charity Commission's guidance there are examples of both direct and indirect ways in which organisations might provide benefits to people who are unable to pay the fees. However in the draft guidance direct benefits were separated from indirect or 'knock-on' benefits, with an express preference for the former over the latter. The draft guidance states that in most cases only direct benefits will suffice where fees are charged.[166] The finalised guidance omits this preference. It is submitted that this is more akin to the case-law, which

159 (1767) Ambl 651, 652

160 *Ibid*., at 652

161 Tudor, *op cit*, p 32, para 2-004

162 *Re Resch's Will Trusts, Le Cras (Vera Caroline) v the Perpetual Trustee Company Limited and Others* [1969] 1 AC 514 *op cit*, at 539

163 *Abbey Malvern Wells Ltd v Ministry of Local Government and Planning* [1951] Ch 728

164 CC4 *Charities for the Relief of the Poor* (2001) and CC6 *Charities for the Relief of Sickness* (2000) cited in Tudor, *op cit*, p 35, para 2-005

165 *Charities and Public Benefit*, *op cit*, p 33, G3

166 *Consultation on draft Public Benefit guidance*, *op cit*, p 35, G5

allows for both direct and indirect benefits to the poor.[167] However the legal analysis document reveals a continued preference for direct benefits, stating that indirect benefits alone will not ordinarily suffice.[168]

The requirement for direct benefits coupled with a positive, stand alone principle: people on low incomes must be able to benefit, suggests that in order to be charitable fee-charging charities must incorporate direct and positive ways to benefit people on low incomes into their aims and objects. For instance, in relation to independent schools: by offering bursaries or assisted places, allowing for collaboration and partnerships between independent schools and state schools. In relation to private hospitals: by providing a number of free beds to NHS hospitals or allowing free access to specialised medical equipment.[169]

According to the draft guidance, in order for these activities to be taken into consideration as ways in which the charity provides public benefit, the purposes themselves would have to reflect that people on low incomes would be able to benefit, directly. If the organisation's aims and objects did not provide for direct access it would fail to achieve charitable status, for the institution would not be exclusively charitable[170] in terms of meeting all of the Charity Commission's fundamental principles of public benefit. Having introduced the positive principle that: people on low incomes must be able to benefit, and using *Re Resch* as the principal authority (thereby directing the principle at fee-charging charities), it is submitted that the Charity Commission wrongly merged the law "on not excluding the poor and on charging fees."[171] The former relates to matters of construction, concerning the charity's aims, while the latter looks at the means by which a charity's aims are carried out, and whether these benefit the public, or a section of it.

In reality, *Re Resch* provides that poor people must not be totally excluded from benefiting from the charity. The appellants in that case contended that the purposes of the private hospital did not have a sufficient 'public element' because the poor were excluded from benefiting. A number of cases were relied upon in support of

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167 In *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 Lord Macnaghten said: "The trusts last referred to are not the less charitable in the eyes of the law, because incidentally they benefit rich as well as the poor, as, indeed every charity that deserves the name must do either directly or indirectly."

168 *Analysis of the law underpinning…op cit*, p 29, para 3.67the authority for this statement was *Re Resch*, however it is doubted whether the case can and should be read in this way

169 *Charities and Public Benefit, op cit*, p 25, F10, under heading 2

170 Charities Act 2006, s 1 (1) (a)

171 *For the Public Benefit, op cit*, p 12

this argument, the most important being *Re Macduff*[172] and *Taylor v Taylor*.[173] However while Lord Wilberforce accepted the authority of both these cases, his lordship insisted upon their correct interpretation. A proper reading suggests that charitable status would only be denied in the event of an express exclusion of the poor contained in a charity's objects, as literally stated on the trust document. For In *Re Macduff* Lindley L.J. stated:

> "*I am quite aware that a trust may be charitable though not confined to the poor; but I doubt very much whether a trust would be declared to be charitable which excluded the poor*."[174]

Therefore the fact that the final guidance removes principle three as a stand-alone principle[175] is very much a welcome amendment. Instead, it now appears as a sub-principle or an "important factor to consider" under principle two: benefit must be to the public, or a section of the public. Therefore making it just one factor to be taken into account when addressing the question of public benefit. The principle is also re-worded, to read: People in poverty must not be excluded from the opportunity to benefit,[176] which, as a negative requirement, more adequately reflects the case-law position. Further, the terminology has also changed from "people on low incomes" to "people in poverty." It is submitted that this is an improvement, for people in poverty is far less prescriptive, more flexible, and emphasises that financial disadvantage is relative and best determined according to the charity's aims. For instance, though the final guidance continues to suggest that 'people in poverty' might typically point to those "households living on less than 60% of average income,"[177] it does this only once and only by way of example, whereas substantive emphasis was placed on this factor in the draft guidance.

However, it is not at all certain whether the Charity Commission has fully appreciated the positive differences that it has made to the final guidance. In a recent interview Dame Suzi Leather, the current Chair of the Commission, continued to

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172 [1896] 2 Ch. 451

173 (1910) 10 C.L.R. 218

174 [1896] 2 Ch. 451, at 464. See, similarly, *Taylor v Taylor* (1910) 10 C.L.R. 218 per Griffith C.J.:"*The prima facie impression that the words* convey to my mind is that the testator intended the establishment of what may be called private lunatic asylums for the benefit of well-to-do persons who could pay for their treatment, or at any rate to include institutions for the exclusive benefit of such persons. If this were the *true construction* I doubt very much whether the gift could be supported…" (again the emphasis is my own)

175 In addition the final guidance, rightly or wrongly, omits its fourth principle that any private benefits must be incidental.

176 *Charities and Public Benefit, op cit*, p 7, C3

177 *Ibid*., p 27, F11

speak of "people on low incomes," and suggested that the removal of principles three (and also principle four) did not imply a change in direction.[178]

In any case, the increased need for fee-charging charities to show benefit to the public, and within that requirement the increased emphasis on activities, might detract from the charity's main purpose, for which it was originally set up to achieve. That is, to provide a certain type of specialist service, whether educational or medical. It is conceivable, for example, that a fee charging school might find itself over-burdened in having to make financial allowances for people on low incomes, thereby preventing it from providing the same high-calibre teaching, small class sizes, resources or facilities. It is suggested that the effect might be the levelling out of services across the education and health sectors, which would see a reduction in the gap between the kind of services provided by the state and those specialist benefits provided by charity. Francesca Quint tentatively anticipates the emergence of "a new generation of more inclusive, more outward-looking schools."[179]

The final guidance still does not adequately distinguish between aims and activities; and, matters of charitable status from matters of regulation. It is therefore highly probable that the private sector would have to increase its access to the wider community or forego charitable status altogether. For instance, it is uncertain what would be the Charity Commission's stance in regard to the substantial bequest in *Re Geere (No. 2)*[180] to provide a luxurious swimming-pool for Marlborough College.

The Charity Commission looks to work with charities with a view to establish "sub-sector norms,"[181] which will serve as a good practice guide as to how public benefit can be readily achieved in regard to certain types of charities. As these norms develop there may be increasing cause for concern that the Charity Commission will look only for evidence of certain prescribed activities, as opposed to keeping an open mind as to how public benefit might be achieved. Moreover, there is a real danger that the Charity Commission may determine charitable status purely, and illegitimately, on account of an organisation's activities as opposed to its aims and purposes. During the consultation stage of the Charity Commission's draft guidance many independent schools expressed concern that the ways in which they currently

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178 See David Brindle, 'Testing Times', *The Guardian*, (Wednesday 16 January 2008) please consult online: http://www.guardian.co.uk/society/2008/jan/16/public.benefit This statement, of course, is highly ambiguous – it fails to explain whether the Charity Commission has changed direction or if it is in total conformity with the case-law

179 Quint, F., 'Schools and the Reform Of Charity Law: The Draft Charities Bill' (2004) 5 *Edu LJ* 151, p 153

180 [1954] CLY 388 noted in Chesterman, M., 'Foundations of Charity Law in the New Welfare State', (1999) 62:3 *MLR* 333, p 339

181 Charity Commission, *Charities and Public Benefit*, *op cit*, p 35

provide public benefit would no longer be taken into account. For example, some independent schools stated that the provision of certain ancillary benefits to the wider community is the most cost-efficient and engaging means by which they provide a public benefit to the community. There has been marked uncertainty as to the position of schools which lease their sports facilities to local clubs or lend their school fields to the local state school.[182]

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It is submitted, however, that the Charity Commission encourages "positive, innovative and imaginative" ways to include those who are otherwise unable to pay for their services and facilities. Further, the Charity Commission states that an example of a direct way in which a charitable independent school might provide benefits to people who are unable to pay their fees includes: allowing a state-maintained school to use its educational facilities.[183] In any event the courts have already accepted that the advancement of education can comprise the playing of sport in an educational establishment.[184]

However Francesca Quint,[185] writing in the lead up to the Charities Bill, suggested that certain isolated boarding schools may find it difficult to open their services and facilities out to the wider public. It is therefore uncertain whether the Act will spell the end of the charitable status of these long established academic institutions.

In the past the public benefit of elite schools and private hospitals has commonly been secured by the courts advancing two main arguments. Firstly, the courts have on occasion recognised middle class families as representing a sufficiently important section of the community.[186] However such an outlook is at odds with a line of authority beginning with *Jones v Williams*.[187] Any subsequent departure from such a limited, and quite obviously fallacious, view of public benefit should not prove problematic for either the courts or the Charity Commission.

The second argument is far more problematic, it is said that an acceptable indirect benefit consists of the benefit to the community derived from the relief of public

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182 Thomas, N., 'News: schools are told that public benefit must be educational' (7 March 2007) *Third Sector* c.f. Quint, F., *op cit*, p 5 the latter seems to think such benefits will be taken into account, the CC's guidance itself is silent on this

183 *Charities and Public Benefit*, p 25

184 *IRC v McMullen* [1981] AC 1; *Re Mariette* [1915] 2 Ch 284

185 Quint, F., 'Schools and the Reform Of Charity Law: The Draft Charities Bill' (2004) 5 *Edu LJ* 151

186 Quint, F., 'Schools and the Reform…' *op cit*, p 5

187 *Jones v Williams* [1767] Ambl 651, 652 where, it is to be recalled the Lord Chancellor stated that the definition of charity comprised "a gift to a general public use, which extends to the poor as well as to the rich."

funds. For ease of reference, this outlook is accordingly to be termed the "substitutive principle."[188] The cases of *Joseph Rowntree Memorial Trust Housing v Attorney General*[189] and *Re Resch* appear to uphold the relief of public funds as a means of securing sufficient public benefit. *Joseph Rowntree* fell to be considered under the fourth *Pemsel* Head, and was decided per Peter Gibson J in the Chancery Division. Here Peter Gibson J accepted as charitable the provision of long lease accommodation to the elderly by a charitable housing association. In the case Peter Gibson J explained how housing associations have long been accepted as being for the public benefit, and that a continual need exists for such housing notwithstanding the advent of local authority housing. The benefit offered by such charitable housing authorities involved the long term benefit to the wider community, as well as the private benefit to the elderly concerned, in postponing "the time when they may fall on to state services."[190]

Similar sentiments were expressed in *Re Resch*, whereby Lord Wilberforce, this time in the Privy Council, upheld as charitable a gift to the Sisters of Mercy (the trustees) for the purposes of a private hospital called St Vincent's. In reaching his decision, his lordship attached a great deal of significance to the hospital's indirect and general benefits enjoyed by the community as a result of "the relief to the beds and medical staff of the general hospital."[191]

The Charity Commission itself has given mixed messages as to the significance of the 'substitutive principle'.[192] There is a marked equivocation in the Charity Commission's position on the matter as seen in the disparity between its draft and final guidance. For instance, in consideration of what constitutes an identifiable benefit in the draft guidance, the Charity Commission stated it would be prepared, but would not normally be so inclined, to take into account indirect or general benefits to society brought by the relief of public funds. What's more, in substantiating its position, the guidance speaks of the relief to public funds brought by independent schools and private hospitals.[193] In contrast, the final guidance omits any approval of the "substitutive principle," insisting that, such wider benefits

188 Thanks to Sanders, A., *op cit*, see in particular p 48

189 [1983] Ch 159

190 *Ibid.* at 167 as seen in Peter Gibson J's full endorsement of the view taken by the Charity Commissioners contained in a letter to the Plaintiff's solicitors

191 *Re Resch Re Resch's Will Trusts, Le Cras (Vera Caroline) v the Perpetual Trustee Company Limited and Others* [1969] 1 AC 514, at 544

192 Chesterman, M., *op cit*, p 388, see ftn 27 and 28, and main text thereto

193 *Consultation on draft Public Benefit guidance, op cit*, p 20, E3

received by the general public by way of relief to public funds will not be taken into account when calculating public benefit.[194]

The Charity Commission's latest stance may, or may not, constitute a break away from the case-law position. As already mentioned much is made in the legal analysis document as to the apparent distinction drawn per Lord Wilberforce between direct and indirect benefits. It is submitted that upon a thorough reading of the case it is revealed *Re Resch* does not support such an interpretation. Lord Wilberforce declines to reach a conclusion on this point. Instead, Lord Wilberforce states his learned approval for both direct and indirect benefits, and, in the context of St Vincent's, it is noteworthy that his lordship speaks in terms of wide and general benefits to the community brought by the facilities and particular standard of care at St Vincent's "which *supplements* that provided by the general hospital."[195]

It is not clear whether the Charity Commission would classify the examples given per Lord Wilberforce in relation to St Vincent's as either direct or indirect. A comparison can perhaps be made to the example given in the final guidance of the benefits of "free access to specialised medical equipment," or a number of freely available hospital beds, which would otherwise be unavailable.[196] But where these examples are obviously direct, the examples per Lord Wilberforce are comparatively less so. In addition, it is of interest that the Commission's legal analysis document drew attention to evidence that "From time to time patients have been treated free of charge or at reduced fees."[197] In fact, the weight accorded to this evidence in Lord Wilberforce's judgment was negligible.

In addition it is cautioned that the importance of this direct benefit ought not to be overstated, since to do so would lend support to what the Charity Commission rightly rejects as "token benefits" - those benefits that are no more than minimal or nominal in value.[198] Having heavily relied on this point the legal analysis document loses credibility as an accurate statement of the law that gives rise to a deeper, darker suspicion that the Charity Commission is failing to pay due regard to the case-law. On the other hand, of course, an end to the 'substitutive principle' would ensure that the benefits brought by charity are not simply in relieving the government from its ordinary obligations. In any case, following the repeal of the

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194 *Charities and Public Benefit, op cit*, p 26, F11, note also there is no longer any consideration under principle one: 'identifiable benefits'

195 *Re Resch's Will Trusts, Le Cras (Vera Caroline) v the Perpetual Trustee Company Limited and Others* [1969] 1 AC 514, at 544 – the emphasis is my own

196 *Charities and Public Benefit, op cit*, p 25

197 *Re Resch's Will Trusts, Le Cras (Vera Caroline) v the Perpetual Trustee Company Limited and Others* [1969] 1 AC 514, at 539

198 *Charities and Public Benefit, op cit*, p 23, F10

poor law, the definition of "the poor" for the purposes of charity law has not comprised those people who are entitled to state relief.[199]

In truth, *Re Resch* was principally decided on the existence of a charitable need for the services of St Vincent's Private Hospital to the community, not on account of a systematic, check-list approach to calculate the public benefit of any given fee-charging charity. This approach allowed Lord Wilberforce to consider the totality of the benefits to the public brought by St Vincent's to determine whether the purposes of the private hospital were beneficial to the community. The public benefit delivered by any given charity is determined according to the charitable need it seeks to address. As such public benefit is clearly a question of degree dependent on the particular charitable purposes under consideration.

Lord Wilberforce made reference to the existence of a charitable need for the particular services offered at St Vincent's. According to his lordship: St Vincent's provided medical treatment "in response to a public need" which would otherwise be inaccessible.[200] Similar statements include: "it is not disputed that a need exists…;"[201] "the service is needed by all, not only by the well to do;"[202] and the existence of "several similar hospitals" confirmed to Lord Wilberforce that there was a "public need for"[203] and a benefit to be had from St Vincent's.

The position of the private hospital was, according to Lord Wilberforce, in stark contrast to a nursing home confined to benefit the rich alone.[204] The principle difference between the two is to be gleaned from a passage per Lord Upjohn in the Court of Appeal case of *Re Smith, Decd*.,[205] a case cited with approval in *Re Resch*. According to Lord Upjohn the word 'hospital' in this context "was apt and appropriate to describe only what used to be called a 'voluntary hospital."'[206] Charging a reasonable fee does not necessarily prevent a charity from being regarded charitable. There is a difference between a voluntary hospital, which is run without any profit motive, and a nursing home that is run for profit. Therefore even

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199 Tudor, *op cit*, p 189-190, para 4-020

200 *Re Resch's Will Trusts, Le Cras (Vera Caroline) v the Perpetual Trustee Company Limited and Others* [1969] 1 AC 514 at 544

201 *Ibid.*

202 *Ibid*

203 *Ibid.*

204 *Ibid.*

205 [1962] 1 W.L.R. 763; this case principally concerned a matter of construction of the word 'hospital' in a will

206 *Ibid*, at 768

though St Vincent's charged a high fee, which, on occasion, allowed for substantial surpluses, the purpose of St Vincent's had always been to charge fees at the lowest price as practically possible, and it had never sought to conduct itself as a profit making or commercial venture.

**Odstock Primary Health Care Trust**

A recent example of a fee-charging private hospital is presented by the case of Odstock Private Care Limited.[207] This case concerned an application for registration, which was turned down by the Charity Commission for failing to exhibit exclusively charitable purposes. The case was decided on 25 September 2007, it therefore fell to be considered under the old law.[208] For this reason Odstock cannot be a test case though its appearance is timely for the fact that it was decided by the Charity Commission at the time when its draft guidance was in the public domain.

The review of the decision states that the Charity Commission reached its decision upon analysis of "the relevant law and the relevant or proposed activities of Odstock." Among Odstock's objects were to "relieve sickness" and to provide medical services and facilities ancillary to those offered at the local District Hospital.[209]

A criticism of the Charity Commission's review is that it did not make clear whether the decision to reject Odstock's application was on account of its proposed means of carrying out its aims, or because having considered Odstock's activities, as proposed in its "Summary Business Plan," that its purposes were not charitable.[210] Of course this argument turns on a very fine distinction, but this does not detract from its importance. The question must be determined in order to decipher whether Odstock needed to change its objects in order to be charitable, and if so, how it might do so in order to adequately demonstrate public benefit.

It is submitted, that as with *Re Resch*, the Charity Commission's decision in Odstock turned on charitable need. Only if there was a charitable need would Odstock's purposes have been charitable, which, in turn, would have impacted the degree or standard of public benefit Odstock would have had to provide. The Charity Commission has expressly stated that it will look at the nature and extent of any

207 Charity Commission, *Review Decision made on the application for registration of ODSTOCK PRIVATE CARE LIMITED* (25 September 2007) please consult online version: http://www.charitycommission.gov.uk/Library/registration/pdfs/odstockdecision.pdf

208 The public benefit requirement was not yet in full force - this aspect of the Act came into force on 1 April 2008

209 *Review Decision made on the application for registration of ODSTOCK…op cit*, p 1

210 Farrer & Co, *supra* no 131, p 3

other benefits provided by the fee-charging charity. In doing so greater weight is to be given to the value of services and facilities provided in response to a public need, for instance where a school or hospital provides a specialist service in response to a specific need.[211]

In conformity with *Re Resch*, Odstock's objects were to, inter alia, "relieve sickness," thus, prior to the Act it would have been an example of a charity for "the relief of the aged, impotent and poor people" within the 'spirit and intendment' of the preamble. Today, however, Odstock's purposes could fall under any one of two categories of charitable purpose set out in the Act. The categories for "the advancement of health or saving of lives" or "relief of those in need by reason of…ill-heath" might be equally applicable. However, common to both categories is the requirement that the charity is established to address or relieve a charitable need, in this case sickness.[212]

The Charity Commission were unconvinced that Odstock was established to relieve a need. A genuine charitable need would, in principle, be available to all afflicted with this common disadvantage, and should not be restricted to "those with the ability to pay fees."[213] As a result, Odstock failed to show it provided an identifiable benefit to the public, and as such, the fees it charged, as a factor for consideration, would very much go against it. In this way Odstock conforms to, but can be distinguished from, *Re Resch*. In the latter case a charitable need did exist, therefore the high fees charged at St Vincent's did not constitute a barrier to charitable status, but posed a reasonable restriction on account of St Vincent's aims.

The review of the Charity Commission's decision did not adequately explain how Odstock was to be distinguished from *Re Resch*.[214] However it is possible to identify some slight points of distinction between the cases. Odstock was established to provide private health care ancillary to the general NHS hospital "Salisbury District Hospital." However, unlike *Re Resch*, Odstock's private patient work would take place from within the NHS hospital, using its facilities, and by a limited number of existing medical practitioners. The initial rejection appeared to turn on this fact, which suggested to the Charity Commission that Odstock's principal object was to provide an individual private benefit for certain patients. Moreover, in light of the

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211 *Charities and Public Benefit, op cit*, p 25-26, F10, para 4

212 According to the Charity Commission restrictions based on a charitable need, for example ill-health or 'people with a particular disease or medical condition' pose a reasonable restriction *Charities and Public Benefit, op cit*, p 20, F5. See also Peter Gibson j in *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney General op cit* at 171 and Lord Simonds, in *IRC v Baddeley* [1955] AC 572, at 585

213 Charity Commission, *Review Decision made on the application for registration of ODSTOCK PRIVATE CARE LIMITED op cit*, p 5, para, 19

214 Only a small paragraph was devoted to the factual distinctions, see *ibid* para 24

fact that Odstock did not directly provide financial assistance to those who were unable to pay for Odstock's services, those people would have to rely on medical insurance, though there was no evidence to suggest that the medical insurance was affordable by poor people, and hence no way of knowing whether the availability of medical insurance provided access to the poor.[215]

**Rationalising the *Odstock* decision**

Other than these few differences the cases are not dissimilar, for in both the evidence supplied as to the ways in which the public could access the facilities and services of the private hospitals were in the main indirect. In summary, the question of public benefit can only be a matter of fact and degree. A charity must show that the public can access its services and facilities, in a way that is appropriate to its aims. Therefore, it is good to see that the Charity Commission's final guidance demands that the organisation's benefits relate to its aims, and that its intended beneficiaries are appropriate to its aims.[216]

Thus it appears that the Charity Commission have given full endorsement to the public benefit test advocated per Lord Cross of Chelsea in *Dingle v Turner*. The endorsement of *Dingle v Turner*, and the retention of the poverty exception, suggests a hierarchical attitude towards categories of charitable purposes. The removal of the presumption of public benefit does not suggest that all charitable purposes are to be treated equally insofar as public benefit is concerned. The public benefit requirement entails different things for each category of charitable purpose.

In *Dingle v Turner* Lord Cross of Chelsea suggests that purposes for the relief of poverty are to continue to enjoy special treatment. In addition charities for the advancement of religion are similarly considered charitable notwithstanding that the trust is directed to "promote some religion among the employees of a company." Lord Cross of Chelsea's opinion as to charities for the advancement of education is quite different, in light of what his lordship considers an acute danger that educational charities stand to benefit from an "undeserved fiscal immunity" by way of securing private "fringe benefits" for company employees.[217] According to his lordship charities falling under the fourth head are open to "the same sort of objection as educational trusts." These observations are likely to cause confusion in the wake of changes brought in by the Act, due to those cases previously falling under the fourth *Pemsel* head now forming their own discrete categories of charity.

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215 *Ibid*., para 23

216 *Charities and Public Benefit*, *op cit* these sub principles are reiterated throughout the guidance, see in particular p 7, C3

217 *Dingle v Turner* [1972] AC 601, at 625

It is now well settled that trusts for the relief of aged, impotent, or poor people, as originally stated in the preamble, are to be construed disjunctively. In the case of trusts for the relief of aged persons, the intended beneficiaries need not also be poor;[218] the same argument applies equally to trusts for the relief of impotent people.[219] Despite this disjunctive approach to the preamble, it is not clear whether trusts for the aged or impotent should be considered in line with the poverty cases or if they make up the catch-all category established under the fourth *Pemsel* head. The editor of *Tudor on Charities* prefers to consider trusts for the relief of the aged, impotent and poor collectively under the relief of poverty, yet concedes that Lord Macnaghten in *Pemsel* did not refer to these trusts under the poverty head.[220]

However it is said that the exception to the impersonal nexus rule only applies to trusts for the relief of poverty, and does not extend to trusts for the relief of elderly or ill people.[221] It is submitted that this statement does not adequately reflect the true position, especially in light of Lord Cross of Chelsea's purposive approach to public benefit, as accepted in the Charity Commission's guidance. It would be more accurate to say that where the intended class of beneficiaries are defined by reference to their age, ill health or poverty that "a very small number of persons described in general terms may constitute a sufficiently important section of the public."[222]

Since it is no longer right to treat the poverty exception as pure historical anomaly, it would not constitute a radical move to stretch the poverty exception to the impersonal nexus test to charities for the relief of aged or impotent people. Indeed, it could even be said that had Lord Cross of Chelsea applied his mind to the question, he would have been prepared to admit a personal nexus where the gift was for impotent or aged people.[223] This proposition is highly convincing given Lord Cross of Chelsea's stated reasons for his broad-minded approach towards trusts for the relief of poverty and religion.

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218 See *dicta* in *Re Glyn Will Trust* (1950) 66 TLR (Pt 2) 510, at 511 per Danckwerts j and again in *Re Cottam* [1955] 1 WLR 1299, where this time Danckwerts J's statements probably formed part of the *ratio* (it not being relevant that the aged in that case being also of small pecuniary means)

219 *Re Lewis* [1955] Ch. 104 per Roxburgh J - a bequest of money for ten blind boys and ten blind boys preferably of the parish of Tottenham; and *Re Resch* [1969] 1 AC 514, at 542

220 *Tudor on Charities*, *op cit*, p 29, para 2-001

221 Hayton & Mitchell, *op cit*, p 457, para 7-148

222 Tudor, *op cit*, p 42-3, para 2-014

223 This was a suggestion made in *Tudor on Charities*, *op cit*, p 43, para 2-014, it is one which is to be respectively agreed with. In *Oppenheim* [1951] AC 297, at 308 Lord Simonds stated: " the law of charity, so far as it relates to "the relief of aged, impotent and poor people" … has followed its own line,"

In *Dingle v Turner* Lord Cross of Chelsea stated that the "law of charity is bedevilled" by the fact that charitable status and fiscal privilege "march hand in hand."[224] By affording all charities automatic tax concessions nothing is being said of the true nature of the value judgments of the courts when determining question of validity in regard to charitable status. Consequently Lord Cross of Chelsea proposed that the only "logical solution" would be to separate the question of validity from decisions as to whether a charity should additionally enjoy fiscal immunity.[225]

Lord Cross of Chelsea considered that the "substantial annual subsidy" given to charities and the resulting increased tax burden have in reality pressed heavily on the courts when having to decide whether to uphold a trust as charitable. His lordship cites *Re Compton* and *Oppenheim* as examples of where such considerations "pretty obviously influenced"[226] the outcome in these cases.

In any event the other Law Lords expressed their disagreement with the suggestions made per Lord Cross of Chelsea. The courts are more inclined to base their decisions on "'pure' questions of law"[227] as opposed to concerning themselves with matters ordinarily associated with questions of policy. In interpreting the provisions of the Income Tax Act 1842 Lord Macnaghten in *Pemsel* was compelled to cement the connection between legal charity and tax concessions. However his Lordship preferred not to express an opinion of the merits of his decision to do so, stating that: "with the policy of taxing charities I have nothing to do."[228]

It has most frequently been the role of the courts to rule on the charitable validity of testamentary gifts. In determination of which, the courts have habitually adopted a "benignant construction," the assumption being that it is far better "to effectuate" rather than "to destroy" a charitable intention.[229] The main benefit of charitable status from a trust law perspective is that a charity will not fail for perpetuity. The Charity Commission, on the other hand, is primarily concerned with maintaining an

224 *Dingle v Turner* [1972] AC 601 at 623. Note a charity's fiscal relief is open to challenge by HM Revenue & Customs if it subsequently comes to light that its aims are being carried out in an uncharitable manner: *IRC v Educational Grants Association* [1967] Ch. 993

225 *Ibid*

226 *Ibid*. At 624

227 Hayton and Mitchell, *op cit*, p 429, para 7-11

228 [1891] A.C. 531 at 591

229 *Re Lloyd-Graeme* (1893) 10 TLR 66 (charitable) and *Whicker v Hume* (1858) 7 H.L.C 124, 153 (non-charitable) both are cited in Tudor, *op cit*, p 175, ftn 3 see also text thereto and p 175, paras 4-001 and 4-002

accurate and up-to-date register of charities.[230] Today the Act requires the Charity Commission, inter alia, to encourage and facilitate the better administration of charities[231] and promote the effective use of charitable resources.[232]

For this reason the Charity Commission is much better placed to openly acknowledge the costs incurred by society as a result of the generous tax concessions afforded to charities. The sole policy imperative in the guidance is stated to be the "financial and practical benefits" offered to charities.[233] It is part of a charity's 'covenant' with society that it is able to show sufficient public benefit in order to justify the financial benefits it receives as a consequence of its charitable status.[234]

In this respect, while not implementing Lord Cross of Chelsea's proposals for change, the Charity Commission have given expression to his lordship's dissenting voice. This represents a significant departure from the position of the judicial majority in the case-law, the consequences of which have been sorely felt by fee charging charities.

It is the costs involved in funding the regulation of charities and the loss in tax revenues that pose the most significant threat to public perception of charities and explains the recent governmental pressure for charities to extend their facilities and services to the wider public.[235] Hence the discussions as to the continuing value of fee charging charities. It is submitted that the suspicion as regards those charities that charge fees is not borne out in the case-law established after *Pemsel's* case, and represents a new political approach to the meaning of charity.[236] In effect the strengthened regulatory role of the Charity Commission[237] has enabled the transformation of the old law.

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230 The registration of charities was formally governed by the Charities Act 1993, s 3. Note: s 7 of the Charities Act 2006 inserts a new s (1C) (3) - the Charity Commission's 'fifth general function' - into part 1 of the Charities Act 1993.

231 Charities Act 1993 s (1C) (2) (2) – again inserted by s 7 of the Charities Act 2006

232 *Ibid.* Charities Act 1993 s (1B) (2) (4) & (3) (4) – 'The charitable resources objective' inserted by s 7 Charities Act 2006

233 The practical benefits mentioned are all financially orientated – see *Charities and Public Benefit, op cit*, p 30, G6

234 *ibid*. p3

235 House of Lords and House of Commons Joint Committee on Draft Charities Bill, documented in Hayton and Mitchell, *op cit*, p 427

236 *Re Resch, op cit, Re Cottam* [1955] 1 WLR 1299; *Abbey Malvern Wells Ltd v Ministry of Local Government and Planning* [1951] Ch 728

237 Charities Act 2006, s 4

**A New Approach to Public Benefit**

In light of these considerations it is possible to gauge what the public benefit requirement might mean for each specific description of charity in the Act. Firstly it is accepted that charities for the relief of poverty are to continue to enjoy a special status in respect to its public benefit requirements.

It is to be noted that had principle three in the Charity Commission's draft guidance been retained, the result would have been to take the law back to the days prior to the introduction of the disjunctive approach to the words 'aged, impotent and poor.' Consequently in the period of consultation on the draft guidance the position of charities formally associated with the aged and impotent was highly ambiguous in light of the introduction of the new description of charitable purpose: the relief of those in need by reason of, *inter alia*, age, ill-health or financial hardship.

The final guidance explains that where the charitable purposes in question relate to a clear and identifiable charitable need it would be reasonable for an organisation to restrict access accordingly. Such classes of beneficiaries may include the elderly, disabled or ill, or people in poverty. As previously mentioned the Charity Commission suggests a more lenient approach to fee-charging where the charity is set up to address a specific need, therefore when considering any charges it will take into account "the nature of the particular charitable aim (and the law that applies to it)." Such charities encompass the preamble reference to 'aged, impotent and poor', or its modern day equivalents. However it is not clear whether the Charity Commission share in Lord Cross of Chelsea's lenient approach to charities for the advancement of religion, for elsewhere in its guidance, it is stated that restrictions based on personal characteristics, such as religion, may not be considered reasonable. The Charity Commission allow for restrictions where there is a charitable need, and this will include restrictions based on the ability to pay fees where a school provides a specialist service to address a specific need.

The onus on charitable need is indicative of the modern day direction of the legal meaning of charity in England and Wales. The modern law on public benefit reflects the government's increasing reliance on the charitable and wider not-for-profit sector to deliver services for those in need of state welfare. Reforming the law of charity in order to bridge the gap between the poor and the rich allows the government to continue to use charity to relieve the state of its welfare responsibilities. It is therefore problematic that all charities are accorded automatic tax concessions. It is submitted that fiscal privileges should be reserved only for certain charities whose purposes are associated with modern conceptions of eleemosynary relief.[238] That is, those charities that are established to relieve a genuine need, for instance in relation to those who suffer from the effects of age, ill-

238 Chesterman , *op cit*, p337 argues to a similar effect

health or poverty, or even, to deliver special educational services that would otherwise be inaccessible on the state system.

Historically education would have readily justified the financial benefits which come with charitable status, for charities for the advancement of education were of such an intrinsic charitable quality that public benefit was readily assumed.[239] In regard to education, the preamble spoke of such public good works as "the maintenance of schools of learning, free schools and scholars in universities" and "the education and preferment of orphans." However gradually the connection between poverty and charity began to wane,[240] thus the interaction between charitable status and fiscal privilege became problematic. Thus the historical and moral correctness of the generous tax concessions enjoyed by private schools have long been questionable.[241]

The increased emphasis on public benefit, with especial regard to those charities that charge high fees for their service and facilities, provides justification for the automatic tax advantages enjoyed by charities. It is a situation somewhat comparable to the Australian model, where only those institutions known as 'public benevolent institutions' are granted an exemption from normal Australian and Commonwealth tax obligations. These institutions are engaged in the relief of a need or disadvantage. However, as with the current position in England and Wales, the benefits associated with the label 'public benevolent institutions' are not withheld solely on account of the fact that they charge fees for their services and facilities.[242]

## Conclusion

It is difficult to reach a definite conclusion as to the question of how far, if at all, the Act has changed the law as to charity, since it is not clear what the case-law actually stood for in the first place. The Act with one hand retains the case-law on public benefit, but with the other removes the so-called presumption of public benefit previously enjoyed by the first three *Pemsel* heads of charity. However the removal of the presumption serves only to give expression to the extant practice of the Charity Commission, whereby all charities have been required to demonstrate public benefit in order to be registered as a charity.

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239 *For the Public Benefit*, *op cit*, p 11

240 Gladstone, *op cit*, provides a good commentary on the development of charities for the advancement of education

241 *Ibid*. p60, and Chesterman, *op cit*, p337

242 *Commissioner of Pay-Roll Tax (Vic) v Cairnmillar Institute* (1992) ATC 4307 cited in Chesterman, *op cit*, at 341

By far the greatest significance of the Act has been to impart statutory emphasis on public benefit, coupled with the Charity Commission's new duty to create and revise guidance in regard to public benefit. While not constituting the law, this guidance is set to command the Charity Commission's decisions as to registration and provide charity trustees with a good practice guide to effective and efficient charity management. The importance of which must not be underestimated since it is to be recalled that if charity trustees fail to conduct the affairs of the charity for the public benefit there is a real chance that the validity of the charity itself will be called into question. If the Charity Commission is to ensure accountability and command the confidence of the public in charities and the law relating to it, the guidance must be watertight.

In distilling the case-law into two key principles of public benefit the Charity Commission has provided a much welcome rationalisation of the law as to charity, and in particular of public benefit. The Charity Commission is to be congratulated for its endorsement of Lord Cross of Chelsea's purposive approach to public benefit, which is both general and flexible enough to apply to all categories of charitable purpose. The guidance therefore provides a much-needed restatement of the law. However, a lot of unanswered questions remain as a result of the Act's renaming and reorganisation of the categories of charitable purposes; it is both uncertain what these new categories comprise and what, in turn, should be the appropriate test of public benefit in respect of each of them.

Undoubtedly the Charity Commission's guidance calls fee-charging charities into question, and their increasing need to positively demonstrate public benefit. The Charity Commission were wrong to have manipulated and distorted the case of *Re Resch* in support of its stand alone principle (that people in poverty must not be excluded from the opportunity to benefit ) in the draft guidance. It was a move that constituted a complete abuse of position on the part of the Charity Commission, in flagrant disregard of the retention of the case-law on public benefit provided for in the Act. Although the mistake now stands corrected it cannot be assumed that the Charity Commission will endeavour to put these positive changes into practice. Consequently charities that charge high fees might find they are open to challenge, and refused or stripped of their charitable status solely on account of their activities.

Clearly charities for the relief (and presumably also prevention) of poverty are to continue to benefit from an exception to the impersonal nexus test. The justification for the poverty cases per Lord Cross of Chelsea might allow the exception to be extended to cover other categories of charity that offer eleemosynary assistance. Certainly the level of public benefit required to be demonstrated for those charities with purposes to relieve a genuine need is far less than those charities that do not have this inherent public element. Consequently it could be said that the Act and the accompanying guidance accords special weight to charities previously affiliated with the old preamble reference to the "aged, impotent, and poor." This current direction reflects the latest symbiosis of policy and law in the field of charity.