

# Elasticity of the Boundaries in England and Wales: What Is (And Isn't) Charitable? An Opportunity Lost (or Not Yet Fully Embraced)?

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## INTRODUCTION

The change, introduced in the last decade, from a case law based definition of charitable purposes to a statute based one, has created the biggest potential for elasticity in determining the boundaries of what is and what is not charitable in English Law. This paper will consider this potential and will examine any significant ripples that this has caused. As well as introducing a statutory definition, the same legislation also created a new mechanism for challenging the Charity Commission, the 'gatekeeper' of charitable status in England and Wales.<sup>1</sup> This mechanism is what is now technically called the first-tier Tribunal (Charity), more popularly referred to as the Charity Tribunal. The second part of the paper will examine the Charity Tribunal and the case law that it has generated so far and again consider whether it has caused any ripples in the boundaries. It will be concluded that whilst these recent changes have provided great potential for change, the reality is that all that can be discerned in reality are ripples, rather than major incursions into the boundaries of what is and is not regarded as charitable in law.

## THE DEFINITION OF CHARITY

### The Common Law Definition of Charity

Until the coming into force of the particular provisions of the Charities Act 2006<sup>2</sup> in 2008, there was no statutory definition of charity in operation in England and

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<sup>1</sup> This paper is limited to the case of England and Wales. For constitutional purposes, charity law is a devolved matter in the United Kingdom. The supervision and regulation of charities have been devolved to the Scottish Executive (Scottish Charities Office) and to the Northern Ireland Assembly (the Charities Team in the Department for Social Development) for purposes other than tax. Reform in Scotland and Northern Ireland is the subject of separate local initiatives. In the past, provisions for regulating charities have differed significantly in each jurisdiction, but Scotland and Northern Ireland now have similar regulatory regimes to that in England and Wales, as a result of the implementation of the Charities and Trustee Investment (Scotland) Act 2005 and the Charities Act (Northern Ireland) 2008. The Scottish reforms precede the English ones and the Northern Irish ones came later.

<sup>2</sup> Now contained in the consolidating Charities Act 2011.

Wales. The starting point was the Preamble to the Statute of Charitable Uses 1601 (known as the Statute of Elizabeth). Though it has been repealed,<sup>3</sup> it has remained of significance. The Preamble set out the most typical charitable purposes of the time, ranging from the ‘relief of the aged, impotent and poor people’ to the ‘education and preferment of orphans’ and it has formed the basis for modern judicial pronouncements on how to establish a charitable purpose. The courts and the Charity Commission have been much influenced by Lord Macnaghten’s attempt to distill the spirit of the Preamble by formulating it into clear guidance. In *Income Tax Special Purposes Commissioners v Pemsel*,<sup>4</sup> he said:

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

Lord Macnaghten’s four categories (known as the ‘four heads of charity’) have acquired considerable persuasive status. Establishing a charitable purpose as the first criteria necessary for any intended charitable body has been determined by considering whether the purpose comes within one of the four heads.<sup>5</sup> To be charitable, the purpose had to fall under one of these headings, it had to have an element of public benefit, and it had to be exclusively charitable.

There was a presumption that purposes under Lord Macnaghten’s first three heads were for the public benefit, namely those for the relief of poverty, the advancement of education and the advancement of religion.<sup>6</sup>

[t]he test of benefit to the community goes through the whole of Lord Macnaghten’s classification, though as regards the first three heads, it may be prima facie assumed unless the contrary appears.

No other purposes benefitted from that presumption. The effect of the presumption was that, when the charitable status of an organisation established for the relief of poverty, the advancement of education, or the advancement of religion was being considered, the organisation’s purpose was presumed to be for the public benefit,

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<sup>3</sup> By a combination of Mortmain and Charitable Uses Act 1882 and Charities Act 1960, s 38(1).

<sup>4</sup> [1891] AC 531 (HL) 583.

<sup>5</sup> See e.g. *Inland Revenue Commissioners v McMullen* [1981] AC 1 (HL).

<sup>6</sup> *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) 42 (Lord Wright).

unless there was evidence that it was not for the public benefit. By contrast, organisations established for all other purposes under the fourth head, which did not benefit from that presumption, were required, at the time that their status was being considered, to provide evidence that their purpose was for the public benefit.

### The Current Statutory Definition of Charity

Calls to clarify the legal definition of charity and to enhance public trust and confidence both in the concept of charity and charities themselves have been made for some time in England and Wales. These calls for reform were finally met and, consequently, we have witnessed the development of a programme of reform of charity law which is unprecedented in its extent. For example, for the first time, the calls for a statutory definition of ‘charity’, hitherto determined only through the common law (case law), are answered.<sup>7</sup>

The provisions of the Charities Act 2006 were consolidated in the Charities Act 2011, together with some other pre-existing statutory provisions on charity law. Whilst this paper will refer to the Charities Act 2011, it is important to note that the relevant provisions were introduced in the 2006 Act and have been in force since 2008. Charitable status is now subjected to a two-stage test. To be considered charitable an organisation must demonstrate that its purposes, as set out in its constitution, fall within one or more of those in the new list of 13 charitable purposes, and also that it is established for the public benefit.<sup>8</sup> The specific purposes are:<sup>9</sup>

- a) the prevention or relief of poverty;
- b) the advancement of education;
- c) the advancement of religion;<sup>10</sup>
- d) the advancement of health<sup>11</sup> or the saving of lives;
- e) the advancement of citizenship or community development;<sup>12</sup>

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<sup>7</sup> Part 1 of the Charities Act 2006 (ss 1-5) dealt with the definition of a charity and of charitable purposes.

<sup>8</sup> Charities Act 2011, s 2(1).

<sup>9</sup> Charities Act 2011, s 3(1).

<sup>10</sup> See further Charities Act 2011, s 3(2)(a).

<sup>11</sup> See further Charities Act 2011, s 3(2)(b).

<sup>12</sup> See further Charities Act 2011, s 3(2)(c).

- f) the advancement of the arts, culture, heritage or science;
- g) the advancement of amateur sport;<sup>13</sup>
- h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
- i) the advancement of environmental protection or improvement;
- j) the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage;<sup>14</sup>
- k) the advancement of animal welfare;
- l) the promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services<sup>15</sup> or ambulance services;
- m) any other purposes
  - i. that are not within paragraphs (a) to (l) but are recognised as charitable purposes by virtue of section 5 (recreational and similar trusts, etc.) or under the old law,<sup>16</sup>
  - ii. that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of paragraphs (a) to (l) or sub-paragraph (i), or
  - iii. that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised, under the law relating to charities in England and Wales, as falling within sub-paragraph (ii) or this sub-paragraph.

Whilst the list includes all the previous areas of charity, it also widens the scope of what might be considered charitable. For example, it is now clear that the prevention as well as the relief of poverty is charitable. Like the preamble, the list is illustrative of the types of purposes that are charitable, and it is not definitive. It includes an ‘any other purposes’ clause, enabling an organisation to become a charity if its purposes are not named in the list, but can be shown to be ‘analogous to, or within the spirit of’ those that are named, or to existing charities. This will ensure that there is flexibility for the law to evolve in response to changes in society and changing social and eco-

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<sup>13</sup> See further Charities Act 2011, s 3(2)(d).

<sup>14</sup> See further Charities Act 2011, s 3(2)(e).

<sup>15</sup> See further Charities Act 2011, s 3(2)(f).

<sup>16</sup> See further Charities Act 2011, s 3(4).

nomic needs. The range of charities that exists now has clearly evolved considerably since the seventeenth century. By listing these established purposes, the Act updates the scope of charitable aims for a modern society and gives a much clearer idea of what is considered as being ‘for charity’.

The intention may well have been<sup>17</sup> to change the parameters of charitable status, so as to include organisations which provide a clear public benefit, but which were previously either on the borderline of charitability, or were denied it. Nevertheless, in general terms, the new statutory list covers all purposes which have, over the years, become recognised as charitable purposes through case law development. However, none brings with it a presumption that public benefit is automatically provided.

It is, therefore, a vital second step for all charities to prove the existence of public benefit. However, the key issue of defining public benefit was side-stepped<sup>18</sup> under the Charities Act 2006. The Government decided that the current non-statutory approach will remain, giving flexibility and the capacity to accommodate the diversity of the sector.<sup>19</sup> Public benefit therefore needs to be determined, case by case, by the Charity Commission on the basis of the law as it is.<sup>20</sup> Unfortunately, due to the fact that there has always been a presumption of public benefit in favour of particular charitable purposes in the past, the law as it relates to public benefit is not well developed in the case law. Another problem with the case law, that Warburton has noted,<sup>21</sup> is that, due to the age of many of the cases, they tend to be decisions restricted very much to facts of the particular case.<sup>22</sup>

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<sup>17</sup> See Strategy Unit, *Private Action, Public Benefit. A Review of Charities and the Wider Not-For-Profit Sector* (Strategy Unit, Cabinet Office, September 2002) para 4.10.

<sup>18</sup> Or ‘skirted around’. See the comment to this effect in Kerry O’Halloran, Myles McGregor-Lowndes and Karla Simon, *Charity Law and Social Policy: National and International Perspectives on the Functions of the Law Relating to Charities* (Springer 2008) 481.

<sup>19</sup> Secretary of State for the Home Department, *The Government Reply to the Report from the Joint Committee on the Draft Charities Bill, Session 2003–04 HL Paper 167/HC 660* (Cm 6440, December 2004) 7.

<sup>20</sup> Under Charities Act 2011, s 4(3) it is stated that ‘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’.

<sup>21</sup> Jean Warburton, ‘Charities and Public Benefit – From Confusion to Light?’ (2008) 10 *Charity Law & Practice Review* 1, 3.

<sup>22</sup> Charity Law Association (undated), *Response to the Charity Commission’s Consultation on the Draft Public Benefit Guidance* also notes at p 6 that many of the old cases on public benefit are about charitable trusts, where one of the court’s concerns is to ensure that it can enforce the trusts. Considerations may be different for charities which have the legal structure of a company.

Public benefit has always been an essential element in all charities. It is this factor that distinguishes charitable trusts from private trusts, and it is the public benefit that is often said to justify the advantageous taxation treatment afforded to charities.<sup>23</sup> The important difference is that now there is no longer a presumption that charities for certain purposes are of public benefit.<sup>24</sup> Now, *every* organisation entered on the Register of Charities must show positively that it is set up and operates for the public benefit. For example, churches and schools seeking the benefits of charitable status must demonstrate that they provide a public benefit.

There are two essential elements of the public benefit requirement.<sup>25</sup> First, the pursuit of an organisation's purposes must be capable of producing a benefit which can be demonstrated and which is recognised by law as beneficial. Secondly, the benefit must be provided for or available to the public or a sufficient section of the public.

Throughout the parliamentary debates on the Charities Act 2006 the public benefit test was one of the most controversial issues, with much of the inquiry endeavouring to establish what the consequences of the proposed changes would be. Much has been made of the lack of clarity surrounding the new public benefit requirement. Some sought to rely on the new requirement as a way of removing the charitable status of some of the more controversial fee-charging charities, such as schools. Others argued that the new public benefit test would have little impact in this area. Even at the draft Charities Bill stage, the Joint Parliamentary Committee<sup>26</sup> was concerned that the Home Office and the Charity Commission disagreed as to the extent to which the new provisions would impact on the existing charitable status of fee-paying bodies. The Charity Commission appeared (initially) to be suggesting that there would be little change, whilst the Home Office was of the view that the Act would have a real impact, with some fee-paying schools, for example, losing their charitable status. The Joint Committee accepted that including a definition of public

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<sup>23</sup> See e.g. dicta of Lord Cross in *Dingle v Turner* [1972] AC 601 (HL).

<sup>24</sup> Charities Act 2011, s 4(2).

<sup>25</sup> See now *Independent Schools Council v Charity Commission* [2011] UKUT 421 (TCC) para 44. Luxton has criticised the decision in this case *inter alia* since the Tribunal, whilst recognising this distinction, then went on to confuse and conflate the two elements in its decision; Peter Luxton, 'Opening Pandora's box: the Upper Tribunal's decision on public benefit in the advancement of education' (2012-13) 15 *Charity Law & Practice Review* 27.

<sup>26</sup> Joint Committee on the Draft Charities Bill, *The Draft Charities Bill, Vol.1: Report* (HL 167-I/HC 660-I) September 2004, 25 para 79.

benefit in the Act would stifle development of the law and perhaps lead to uncertainty. It noted that the Home Office and the Charity Commission had agreed a concordat as to how public benefit would be tested. The Joint Committee felt that the principles in the concordat could be set out either as non-exclusive criteria of public benefit in the Act, or in non-binding statutory guidance issued by the Secretary of State.<sup>27</sup> The Government accepted that guidance as to the operation of the public benefit requirement should be issued, but that it should be published by the Charity Commission rather than the Secretary of State, in order to emphasize the independence of the Commission from Government.<sup>28</sup>

This means that decisions about whether a particular charity meets the public benefit requirement continue to be determined by the Charity Commission as the independent regulator, on the basis of case law, and ultimately by the Charity Tribunal and the courts. During its passage through parliament, there were calls for amendments to the Charities Bill<sup>29</sup> to enable the Charity Commission to take account of the impact of fees or charges when considering questions of public benefit.<sup>30</sup> It is interesting to note that the Charities and Trustee Investment (Scotland) Act 2005, contains a definition of public benefit,<sup>31</sup> rather than relying on guidance from the charity regulator and case law to determine whether charitable status should be granted. The level of fees charged by a charity for the provision of its service specifically forms part of the judgment of the Office of the Scottish Charity Regulator (OSCR) when it decides, under the new law, whether a charity should retain charitable status. Under the legislation, in determining whether a body provides or intends to provide public benefit, OSCR and the courts must have regard to both any private

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<sup>27</sup> Joint Committee on the Draft Charities Bill, *The Draft Charities Bill, Vol.1: Report* (HL 167-I/HC 660-I) September 2004, 33 para 102.

<sup>28</sup> Secretary of State for the Home Department, *The Government Reply to the Report from the Joint Committee on the Draft Charities Bill, Session 2003–04 HL Paper 167/HC 660* (Cm 6440, December 2004) 7.

<sup>29</sup> See e.g. Lord Phillips' unsuccessful attempt during the Charity Bill's report stage in the House of Lords to introduce an amendment, which would have required the Charity Commission to 'consider the effect on public benefit of the charging policy of any charity' when consulting in advance of issuing guidance to charities on public benefit; HL Deb 12 October 2005, vol 674, col 312.

<sup>30</sup> The legal principles are derived from the case of *Re Resch* [1969] 1 AC 514 (PC). The Privy Council held that charities which charge high fees for their services are merely obliged to show that people on a low income 'are not entirely excluded from benefit'. If the fees could be paid for through a private insurance scheme, for example, this would be sufficient to enable the charity to demonstrate public benefit.

<sup>31</sup> Charities and Trustee Investment (Scotland) Act 2005, s 8.

benefit gained and also to any public ‘disbenefit’<sup>32</sup> incurred. In particular, where benefit is, or is likely to be, provided to a section of the public only, OSCR and the courts must consider whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive. The words ‘including any charge or fee’ were added to the statutory definition of public benefit under an amendment passed by the Scottish Parliament’s Communities Committee and backed by the Scottish Executive. In applying the public benefit test in order to determine charitable status, OSCR must ask whether there will be any condition on obtaining benefits, such as whether the charity charges (or intends to charge) for its services.<sup>33</sup> Where this is the case, OSCR may need to ask for more information. The specific reference to unduly restrictive fees, together with the approach of OSCR, will clearly bring the issue into focus in Scotland in a more transparent way than in England and Wales.

The Charity Commission was required to consult the public before issuing or revising its public benefit guidance and was required to publish this guidance once agreed.<sup>34</sup> The guidance was published in 2008,<sup>35</sup> and it will be seen that this has had a particular impact on fee-paying schools and religious charities over the last few years.

## THE MACHINERY FOR FACILITATING CHANGE

### The Charity Tribunal

Alongside the introduction of the first statutory definition of charity, another development with significant potential for pushing at the definitional boundaries is the establishment of a Charity Tribunal.<sup>36</sup> This was originally provided for in the Charities Act 2006 but first became operational in March 2008.<sup>37</sup> During parliamentary debates

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<sup>32</sup> When OSCR decides if an organisation provides public benefit, it ‘must also look at disbenefit (detriment or harm). To be taken into account, disbenefit needs to be identifiable and be more than an absence of benefit’; OSCR, *Meeting the Charity Test Guidance* (OSCR 2015) p 85.

<sup>33</sup> OSCR, *Meeting the Charity Test Guidance* (OSCR 2015) pp 89-93.

<sup>34</sup> Charities Act 2011, s 17.

<sup>35</sup> The original guidance produced was Charity Commission, *Charities and Public Benefit. The Charity Commission’s general guidance on public benefit* (Charity Commission, 2008) and Charity Commission, *Analysis of the law underpinning Charities and Public benefit* (Charity Commission, 2008).

<sup>36</sup> This section draws from Debra Morris, ‘The First-tier Tribunal (Charity): Enhanced Access to Justice for Charities or a Case of David Versus Goliath?’ [2010] Civil Justice Quarterly 89 in which the author makes an early assessment of the Tribunal’s effectiveness.

<sup>37</sup> Now technically this is the First-tier Tribunal (Charity). It started life as the Charity Tribunal, but its jurisdiction was transferred to the First-tier Tribunal (Charity) in September 2009 as part of radical overhaul of the Tribunals Service as a whole. See Tribunals, Courts and Enforcement Act 2007. As

on the Charities Bill, Lord Phillips of Sudbury described its creation as ‘arguably the most important single innovation in [the Charities Act]’.<sup>38</sup> Whilst most hearings are held in the First-tier Tribunal, with appeal to the Upper Tribunal on a point of law<sup>39</sup> and then to the Court of Appeal, there is provision for cases to be ‘fast-tracked’ by starting in the Upper Tribunal and progressing straight to the Court of Appeal, if necessary.<sup>40</sup> Whilst the (first instance) Charity Tribunal was not established as a Superior Court with any precedential value, binding precedent can be established through appeal or fast-track to the Upper Tribunal. Before the Charity Tribunal was established, a charity, or any of its trustees or other persons interested in the charity,<sup>41</sup> wishing to appeal a legal decision of the Charity Commission could only do so by an appeal to the High Court. Such an appeal operated by way of a re-hearing which was inevitably a time consuming and expensive procedure. In practice, therefore, this right was rarely exercised. It is the fundamental duty of all charity trustees to protect charity property and to secure its application for the objects of the charity. Charities are therefore, rightly, usually reluctant to spend money on litigation.<sup>42</sup> The Strategy Unit Report (which preceded the enactment of the Charities Act 2006) noted that there was a widespread perception that appeals to the High Court necessitated undue expense and delay, and that the Charity Commission was virtually unchallengeable in practice.<sup>43</sup> It was noted that this may deter significant numbers of charities and individuals with at least arguable grounds for appeal from taking action. The Strategy Unit therefore recommended that a new independent tribunal be introduced to hear appeals against

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background to the reforms, see Sir Andrew Leggatt, *Report of the Review of Tribunals. Tribunals for Users: One System, One Service* (TSO 2001). See also, Robert Carnwath (LJ), ‘Tribunal Justice - a New Start’ [2009] Public Law 48.

<sup>38</sup> HL Deb 28 June 2005, vol 673, col 212 (Lord Phillips).

<sup>39</sup> Tribunals, Courts and Enforcement Act 2007, ss 11-13. Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, r 42-43. Charity appeals from the General Regulatory Chamber go to the (renamed) Tax and Chancery Chamber in the Upper Tribunal.

<sup>40</sup> Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, r 19. See e.g. *Independent Schools Council v Charity Commission* [2011] UKUT 421 (TCC) discussed below at n 83.

<sup>41</sup> Under Charities Act 2011, s 115, charity proceedings may be taken with reference to a charity either by the charity, or by any of the charity trustees, or by any person interested in the charity, or by any two or more inhabitants of the area of the charity if it is a local charity, but not by any other person.

<sup>42</sup> Judges have previously expressed their concerns as to the costs incurred by charities in litigation to resolve disputes with other charities or amongst their own members. See e.g. *British Diabetic Association v Diabetic Society Ltd* [1995] 4 All ER 812 (HC) 816, (Walker J); *Muman v Nagasena* [1999] 4 All ER 178 (CA) 184 (Mummery LJ). See further, Debra Morris, *Disputes in the Charitable Sector* (Charity Law Unit, 2003).

<sup>43</sup> Strategy Unit, *Private Action, Public Benefit. A Review of Charities and the Wider Not-For-Profit Sector* (Strategy Unit, Cabinet Office, September 2002) para 7.72.

the legal decisions of the Charity Commission.<sup>44</sup> The Charities Act 2006 provided for the creation of such a Tribunal to hear appeals against some types of decision made by the Commission.<sup>45</sup>

It was anticipated that the Charity Tribunal would assist the administration of civil justice in two important areas, both of which may well provide for additional elasticity around the boundaries of what is and what is not charitable: First, access to justice would be enhanced due to the provision of a less costly way to challenge Charity Commission decisions. Secondly, the Charity Tribunal should provide an effective way of developing charity law in the future.<sup>46</sup> This is very important as, due to the dearth of cases coming before the courts, charity law has not had adequate opportunity to develop. Admittedly, the Charity Commission's proactive approach, for example, in its Review of the Register project<sup>47</sup> did provide for some development in the definition of charity, recognising some new charitable purposes,<sup>48</sup> by arguing by analogy to an existing charitable purpose. However, lack of resources has hitherto led to there being limited litigation in the charity sphere.

The Charities Act 2011 provides for specified rights of appeal to the Charity Tribunal against specified decisions, directions or orders of the Charity Commission, prescribing, in the case of each specified decision etc., which persons have the right of appeal (in addition to the Attorney General who may always appeal<sup>49</sup>) and what powers the Charity Tribunal has.<sup>50</sup> The Charity Commission is the respondent to any appeal.<sup>51</sup> In determining an appeal, the Charity Tribunal shall consider afresh the decision, direction or order appealed against, and may take into account evidence which was not available to the Charity Commission.<sup>52</sup> The Charity Tribunal may dismiss the appeal, or if it allows the appeal, exercise any specified powers in relation to each individual

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<sup>44</sup> Strategy Unit, *Private Action, Public Benefit. A Review of Charities and the Wider Not-For-Profit Sector* (Strategy Unit, Cabinet Office, September 2002) para 7.79.

<sup>45</sup> See now Charities Act 2011, Pt 17.

<sup>46</sup> See e.g. Alison McKenna, 'Transforming Tribunals: the reform of the Charity Tribunal by the Tribunals Courts and Enforcement Act 2007' (2009) 11 *Charity Law & Practice Review* 1.

<sup>47</sup> See Charity Commission, *RR1 - The Review of the Register of Charities* (Charity Commission, 2001).

<sup>48</sup> E.g., the promotion of community participation in healthy recreation by providing facilities for playing particular sports: Charity Commission, *RR11 - Charitable Status and Sport* (Charity Commission, 2003). See now Charities Act 2011, s 3(1)(g).

<sup>49</sup> Charities Act 2011, s 319(2).

<sup>50</sup> Charities Act 2011, Schedule 6.

<sup>51</sup> Charities Act 2011, s 319(3).

<sup>52</sup> Charities Act 2011, s 319(4).

decision, direction or order.<sup>53</sup> In relation to charitable status, the decision of the Commission to register (or not) an institution or remove (or not) an institution from the Register is subject to appeal to the Charity Tribunal.<sup>54</sup> The persons who can bring the appeal are: the persons who are or claim to be the charity trustees of the institution; (if a body corporate) the institution itself; and, any other person who is or may be affected by the decision. The Charity Tribunal has the power to quash the decision and (if appropriate) remit the matter to the Charity Commission, and direct the Commission to rectify the Register. Hence there is increased potential for elasticity around the boundaries of the definition of what is and what is not charitable.

In addition, in terms of developing the law (and allowing for some elasticity at the boundaries of charitable status) as well as dealing with appeals from decisions of the Charity Commission, and applications regarding reviewable matters,<sup>55</sup> importantly and, exceptionally for tribunals, the Charity Tribunal may also deal with ‘references’.<sup>56</sup> The reference procedure enables the Attorney General or the Charity Commission to ask the Charity Tribunal to consider wider questions to help to clarify or to develop charity law, without a decision first having been made. In this way, individual charities do not need to incur the costs of pursuing a specific case. This reference procedure is very different to the usual function carried out by most tribunals, in that the Tribunal is not being asked to reconsider a decision made by one party in relation to another party appearing before it. The Charity Commission<sup>57</sup> (with the consent of the Attorney General) or the Attorney General<sup>58</sup> may refer to the Charity Tribunal a question which has arisen in connection with the exercise of any of its functions, and which involves either the operation of charity law<sup>59</sup> in any respect or its application to a particular state of affairs. Both the Charity Commission and the Attorney General shall be parties to the proceedings, and, with the Charity Tribunal’s permission: the charity trustees of any charity which is likely to be affected by the Tribunal’s decision on the reference;

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<sup>53</sup> Charities Act 2011, s 319(5).

<sup>54</sup> See Charities Act 2011, Schedule 6.

<sup>55</sup> Charities Act 2011, s 322. Certain decisions are challengeable by way or review (rather than appeal) where the Tribunal considers the way in which the Charity Commission made a decision applying judicial review principles.

<sup>56</sup> Charities Act 2011, Pt 17, Ch 3.

<sup>57</sup> Charities Act 2011, s 325.

<sup>58</sup> Charities Act 2011, s 326.

<sup>59</sup> ‘Charity law’ is defined widely in Charities Act 2011, s 331(1).

any such charity which is a body corporate; and, any other person who is likely to be so affected.<sup>60</sup> The Charity Tribunal will publish details on its website of any references made,<sup>61</sup> including information about how a person likely to be affected can request to be a respondent to the reference. The Charity Tribunal will consider the requests it receives and decide who the respondents are.

Once a matter has been referred to the Charity Tribunal, the Charity Commission shall not (without agreement of all the parties to the proceedings and the trustees of any charities likely to be affected by the Commission's action<sup>62</sup>) take any steps in reliance on any view as to the application of charity law to that state of affairs until proceedings on the reference (including any proceedings on appeal) have been concluded, and any period during which appeals may ordinarily be made has ended.<sup>63</sup> Once these time limits have expired, and the question has been decided in proceedings on the reference, the Charity Commission shall give effect to that decision when dealing with the particular state of affairs to which the reference related.<sup>64</sup> No appeal or application may then be made to the Charity Tribunal by a party to the proceedings in respect of such action by the Commission.<sup>65</sup>

Having the ability to make references to the Charity Tribunal should provide the Charity Commission itself with a way to deal with test cases and should help to provide clarity about the operation of charity law. In this way, the administration of civil justice is enhanced without the need for private parties (in this case, charities) to be burdened with the task and associated costs of bringing legal action. Because any reference could have an important impact on the development of charity law, the original Charity Commission internal operational guidance<sup>66</sup> suggested that a proposal to initiate a reference from the Charity Commission must be agreed by the Board.<sup>67</sup> The Commission may identify the need for a reference as a result of work on a specific

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<sup>60</sup> Charities Act 2011, s 325(4)(b) and 326(3)(b).

<sup>61</sup> Charities Act 2011, Schedule 1D, para 3.1. See also Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, r 26(4).

<sup>62</sup> Charities Act 2011, s 329.

<sup>63</sup> Charities Act 2011, s 327(2). Normal time limits which may apply for the Charity Commission to take any action are suspended while the reference is in progress: Charities Act 2011, s 328.

<sup>64</sup> Charities Act 2011, s 327(3).

<sup>65</sup> Charities Act 2011, s 330.

<sup>66</sup> Charity Commission, Reference Procedure, OG95 B4, 18 March 2008, para 2.1. This guidance is no longer publicly available.

<sup>67</sup> The Board is the Members of the Charity Commission acting collectively.

case, on a group of cases or through wider policy work which highlights themes or concerns in the sector about the operation of charity law.

One area<sup>68</sup> which seemed obviously ripe for examination in the Charity Tribunal was the Charity Commission's new approach to public benefit as a result of the introduction of the statutory definition of charitable purposes, with the positive requirement for all charities to prove public benefit.<sup>69</sup> Under the Act, the Charity Commission must promote awareness and understanding of the public benefit requirement, and how it will test this, as one of its statutory objectives.<sup>70</sup> Charity trustees must<sup>71</sup> have regard to the Charity Commission public benefit guidance<sup>72</sup> when exercising any powers or duties where the guidance may be relevant and they must report in their Annual Report on how they are carrying out their charity's aims for the public benefit.<sup>73</sup> The Annual Report will also include a statement as to whether the trustees have complied with the duty to have due regard to Charity Commission public benefit guidance. The Commission's guidance should reflect the common law, as amended by statute. It should not change the law in any other way, nor re-interpret the limited existing case law on public benefit,<sup>74</sup> which can only be tested further by the courts or otherwise changed by additional legislation. Nevertheless, there are a number of areas of controversy which have arisen as a result of the approach taken by the Charity Commission to its statutory obligations relating to public benefit.<sup>75</sup> If an institution is denied registration as a charity on the grounds of lack of public benefit, applying the principles in the public benefit guidance, the institution could use the

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<sup>68</sup> Charities and political activity is another area which has been flagged as one providing suitable subject matter for a reference to the Tribunal: Alison Dunn 'Demanding Service or Servicing Demand? Charities, Regulation and the Policy Process' (2008) 71 *Modern Law Review* 247, 261.

<sup>69</sup> Charities Act 2011, s 2(1). See text above at n 18 et seq.

<sup>70</sup> Charities Act 2011, s 14.

<sup>71</sup> Charities Act 2011, s 17(5).

<sup>72</sup> See text in n 35 above.

<sup>73</sup> Charities Act 2011, s 17 and the Charities (Accounts and Reports) Regulations 2008, SI 2008/629, Pt 5. The level of detail required will depend on whether the charity is above or below the audit threshold. An audit is required when a charity's gross income in the year exceeds £500,000, or where income exceeds £250,000 and the aggregate value of its assets exceeds £3.26m.

<sup>74</sup> Under Charities Act 2011, s 4(3) it is stated that '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'.

<sup>75</sup> See e.g. Charity Law Association, Response to the Charity Commission's Consultation on the Draft Supplementary Guidance on Public Benefit and Fee Charging Charities, August 2008; Peter Luxton 'A Three-Part Invention: Public Benefit under the Charity Commission' (2009) 11 *Charity Law & Practice Review* 19; Jeffrey Hackney 'Charities and Public Benefit' [2008] *LQR* 347.

Charity Tribunal to challenge the decision. Peter Luxton prophesised that a challenge to the legality of the Commission's public benefit guidance was 'inevitable'<sup>76</sup> and this is what happened.

### Charity Tribunal References with the Potential to Move Boundaries

There are but early signs of the twin aims of access to justice and development of the law being achieved through the two references that have been made since the jurisdiction was established.

#### *1 - Fee-Paying Schools*

Political controversy has surrounded the charitable status of independent fee-paying schools for many years. It has already been noted that part of the thinking behind removing the public benefit presumption was that (indirectly) this would negatively impact on the charitable status of such schools.

The Commission's public benefit guidance required all charities to show both that their purposes were for the public benefit, and they were producing adequate public benefit in their activity. The guidance clearly stated that 'people in poverty must not be excluded from the opportunity to benefit'<sup>77</sup> and suggested that charging high fees may result in an insufficient section of the public being able to benefit from a charity.<sup>78</sup> The provision of bursaries or assisted places was suggested as a way of allowing those who are unable to pay high fees to nevertheless benefit from a charity.<sup>79</sup>

In 2009, following publication of the guidance, the Charity Commission began a programme of 'public benefit assessments' which tested certain charities against its benchmarks. Of the five fee-paying schools that were tested, two failed as a result of having insufficient bursaries for pupils who could not afford to pay the fees. It was stated that these schools were not 'operating for the public benefit' since '...accessibility to benefits needs to be more extensive and targeted...' and '...the totality of benefits

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<sup>76</sup> Peter Luxton 'A Three-Part Invention: Public Benefit under the Charity Commission' (2009) 11 *Charity Law & Practice Review* 19 at p 32.

<sup>77</sup> Charity Commission, *Charities and Public Benefit. The Charity Commission's general guidance on public benefit* (Charity Commission 2008) Principle 2C, p 26.

<sup>78</sup> Charity Commission, *Charities and Public Benefit. The Charity Commission's general guidance on public benefit* (Charity Commission 2008) p 22

<sup>79</sup> Charity Commission, *Charities and Public Benefit. The Charity Commission's general guidance on public benefit* (Charity Commission 2008) p 25.

(provided for those unable to afford the fees) is not sufficient...’<sup>80</sup> The Commission gave both schools time to change their policies so as to comply with the Commission’s view of public benefit, with the suggestion that if they were not able to do so, this may lead to the removal of their charitable status.

The Independent Schools Council (ISC) is an umbrella organisation for approximately 1,270 fee-paying schools of which approximately 980 are charities.<sup>81</sup> The ISC was concerned that the guidance was erroneous, over prescriptive and had the potential to become a means whereby the Charity Commission usurped the trustees’ function to determine how the purposes of the charity should be furthered.<sup>82</sup> Specifically, the ISC took objection to the fact that the Commission was unwilling to take sufficient account of the various ways, besides bursaries, in which its member schools were providing public benefit. The ISC therefore sought judicial review of the Charity Commission’s public benefit guidance. The Administrative Court gave its permission for the claim to be brought, but gave a direction<sup>83</sup> for its transfer to the Upper Tribunal (Tax and Chancery). Shortly after the ISC application, the Attorney General made a reference to the Charity Tribunal with a number of hypothetical questions relating to fee-paying schools. The Charity Tribunal passed the reference to the Upper Tribunal, which heard both sets of proceedings together in May 2011.<sup>84</sup>

The decision of the Upper Tribunal, and the consequent changes to the guidance of the Charity Commission,<sup>85</sup> have been the subject of considerable academic debate.<sup>86</sup> In the words of Peter Luxton, ‘the Tribunal subjected the issues to a full and detailed analysis in a long and complicated judgment: with 260 paragraphs filling 109 pages, it

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<sup>80</sup> Charity Commission, *Public Benefit Assessment Report* on St Anselm’s School Trust Ltd and on Highfield Priory School Ltd (both July 2009).

<sup>81</sup> *Independent Schools Council v Charity Commission* [2011] UKUT 421 (TCC) para 8.

<sup>82</sup> *Independent Schools Council v Charity Commission* [2011] UKUT 421 (TCC) para 224.

<sup>83</sup> *R (Independent Schools Council) v Charity Commission* [2010] EWHC 2604 (Admin) (Sales J).

<sup>84</sup> *Independent Schools Council v Charity Commission* [2011] UKUT 421 (TCC).

<sup>85</sup> See now Charity Commission, *Public benefit: the public benefit requirement* (PB1) (Charity Commission 2013); *Public benefit: running a charity* (PB2) (Charity Commission 2013); *Public benefit: reporting* (PB3) (Charity Commission 2013).

<sup>86</sup> See e.g. Mary Synge, ‘Independent Schools Council v Charity Commission for England and Wales’ (2012) 75 *Modern Law Review* 624; Brian Sloan, ‘Public Schools for Public Benefit?’ [2012] *Cambridge Law Journal* 45; Richard Mullender, ‘Charity Law, Education and Public Benefit: An Oakeshottian Analysis’ (2012) 128 *Law Quarterly Review* 188; Joseph Jaconelli, ‘Adjudicating on Charitable Status - A Reconsideration of the Elements’ [2013] *Conv* 96; Peter Luxton, ‘Opening Pandora’s box: the Upper Tribunal’s decision on public benefit in the advancement of education’ (2012-13) 15 *Charity Law & Practice Review* 27.

is more like a thesis, although it makes no reference to any relevant commentaries.<sup>87</sup> He concluded that whilst the judgment is ‘both detailed and wide-ranging’ nevertheless ‘its legal basis is not always solid’.<sup>88</sup>

Following a long and drawn out survey of charitable status both before and after the Charities Act 2006, the Upper Tribunal concluded that the Charities Act 2006 had not introduced any legal requirement to act in the way prescribed by the Charity Commission in its guidance. The Upper Tribunal rejected the Commission’s emphasis on bursaries as the key test for public benefit. Although it is necessary that there must be more than a *de minimis* or token benefit for the poor, once that low threshold is reached, what the trustees decide to do in the running of the school is a matter for them, subject to acting within the range within which trustees can properly act.

Neither party appealed, with both sides claiming some victory. The Upper Tribunal did confirm many of the principles set out in the Charity Commission’s public benefit guidance. It agreed with the Charity Commission’s view that the advancement of education (and hence potentially the advancement of other charitable purposes including the advancement of religion) is not necessarily automatically for the public benefit. It also agreed that a charity must ‘operate’ for the public benefit. It upheld the principle that a charity must not exclude the poor and confirmed that this applies to fee-paying schools, and that proportionately more benefits must be provided where there is ‘gold-plating’: ‘where facilities at what we might call the luxury end of education are in fact provided, it will be even more incumbent on the school to demonstrate a real level of public benefit.’<sup>89</sup>

Importantly, however, the Upper Tribunal held that certain sections of the Charity Commission’s guidance were wrong. Initially the parties were allowed to attempt to reach agreement on how the guidance should be revised. When no agreement could be reached, the Tribunal acceded to the ISC’s request in a later

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<sup>87</sup> Peter Luxton, ‘Opening Pandora’s box: the Upper Tribunal’s decision on public benefit in the advancement of education’ (2012-13) 15 Charity Law & Practice Review 27, 31.

<sup>88</sup> Peter Luxton, ‘Opening Pandora’s box: the Upper Tribunal’s decision on public benefit in the advancement of education’ (2012-13) 15 Charity Law & Practice Review 27, 52.

<sup>89</sup> *Independent Schools Council v Charity Commission* [2011] UKUT 421 (TCC) para 219.

hearing and quashed specific parts of the guidance.<sup>90</sup> The Commission accordingly withdrew those parts of its guidance which have since been re-written.

This was the first (and perhaps not so satisfactory) reference dealt with under the new jurisdiction of the new Tribunal. The outcome in the second reference, discussed below, received a more welcome response.

## *2 - Benevolent Funds*

A further reference from the Attorney General asked the Tribunal to settle questions concerning whether a trust for the relief of poverty could be charitable if those who benefited could be defined by their relationship to an individual, company or unincorporated organisation.<sup>91</sup> The reference was limited to those charities where beneficiaries had a common nexus and it did not consider the position of charities to assist members of a profession, as this is a wider class of person not defined by reference to a single employer. In addition, charities supporting members of the armed forces or members of the emergency services were not within the ambit of the reference. The Charity Commission had asked the Attorney General to make a reference because it considered that there was some doubt about the law following changes in the Charities Act 2006. Ten members of the Association of Charitable Organisations (ACO)<sup>92</sup> were party to the case and a further 19 (including the ACO itself) were named as interveners. Parties included the Professional Footballers' Association Benevolent Fund, the Chartered Accountants' Benevolent Association and the Grand Steward's Lodge 250th Anniversary Benevolent Fund, a masonic charity. The reference had the potential to affect around 1,500 benevolent charities that were on the Register of Charities.<sup>93</sup> The Upper Tribunal considered the two requirements to satisfy the 'public benefit' test, namely that the charity's purposes were of benefit to the public and that the charity served a sufficient section of the community. It concluded that in the context of a trust for the relief of poverty, only public benefit in the first

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<sup>90</sup> *Independent Schools Council v Charity Commission* [2011] UKUT B27 (TCC) (2 December 2011).

<sup>91</sup> *Charity Commission v Trustees of the Professional Footballers' Association Benevolent Fund and Others* [2012] UKUT 420 (TCC).

<sup>92</sup> The ACO is the umbrella body for 130 benevolent funds. They collectively provide £70 million per year in grants to needy individuals and have collective assets of £2 billion; *Charity Commission v Trustees of the Professional Footballers' Association Benevolent Fund and Others* [2012] UKUT 420 (TCC) para 19.

<sup>93</sup> *Charity Commission v Trustees of the Professional Footballers' Association Benevolent Fund and Others* [2012] UKUT 420 (TCC) para 17.

sense was required to be shown. The Tribunal referred to the well-known ‘poor relations’<sup>94</sup> and ‘poor employees’<sup>95</sup> cases where charitable trusts have been upheld.

Consequently, bodies that exist for the prevention and relief of poverty were confirmed as being charitable even if they only help a restricted group. Aside from on the part of the Charity Commission, by the time the reference was heard, it was common ground that the Act did not in fact cast doubt on the continued charitable status of the type of charity with which the reference was concerned. The outcome in the reference was widely expected and many questioned the need to bring such a reference (since the definition of ‘public benefit’ has not changed as a result of the legislation). Nevertheless, the decision did confirm specifically that the law had not changed with regard to these particular charities and it sets out the legal basis on which they are established for the public benefit.

### Charity Tribunal Appeals with the Potential to Move Boundaries

Many of the appeals (not references) to the Tribunal that have been heard so far have not related to the Charity Commission’s decisions to register (or not) an entity as a charity and therefore have not moved the boundaries around what is or is not charitable. The majority of appeals have tended to challenge decisions of the Charity Commission to exercise other statutory powers such as the power to remove a trustee<sup>96</sup> or to make schemes.<sup>97</sup> Nevertheless, there is evidence to suggest that cases are trickling through and some of these, described below, have stretched the elasticity at the boundaries of what is and what is not charitable.

#### *1- Human Dignity Trust*

The objects of Human Dignity Trust (HDT)<sup>98</sup> are to promote human rights (as set out in the Universal Declaration of Human Rights and subsequent United Nations conventions and declarations) in particular in relation to the support of homosexual

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<sup>94</sup> *Re Scarisbrick* [1951] Ch 622 (CA).

<sup>95</sup> *Dingle v Turner* [1972] AC 601 (HL).

<sup>96</sup> Under Charities Act 2011, s 76 et seq. See e.g. *Seevaratnam v Charity Commission* [2009] UKFTT 378 (GRC).

<sup>97</sup> Under Charities Act 2011, s 69. See e.g. *Ryan and Maidment v Charity Commission* [2009] UKFTT 377 (GRC).

<sup>98</sup> This comment on the Human Dignity Trust case draws on the author’s forthcoming work in the Charity Law & Practice Review which looks more generally at charities and political activity.

persons around the world whose human rights are violated by laws criminalising private homosexual acts between consenting adults.<sup>99</sup> In pursuit of these objects HDT provides assistance such as legal advice and representation and also engages in legal challenges and judicial review proceedings with the aid of a pro bono panel of constitutional and international law experts. HDT's application for charitable status was rejected by the Charity Commission. The appeal before the Charity Tribunal challenged the Commission's decision, including its finding that the objects of HDT were 'unclear or ambiguous' and political in nature and did not satisfy the public benefit test. The Charity Tribunal allowed the appeal and directed rectification of the register.<sup>100</sup>

The Charity Commission argued that HDT's objects were too vague for the Commission to be certain that it was established for charitable purposes only, but HDT had based its purposes on the Commission's suggested objects for a human rights charity.<sup>101</sup> The Charities Act 2011 now explicitly recognises the advancement of human rights as a charitable purpose.<sup>102</sup> Whilst the Act makes it clear that, where a purpose had a particular meaning before the Charities Act 2006 was passed, it would continue to have that meaning,<sup>103</sup> the Charity Tribunal was of the view that the 'advancement of human rights' had not been given such meaning by the courts and was not defined in the legislation and therefore should be given its natural meaning. After hearing expert evidence from both parties, the Charity Tribunal held that human rights includes a core set of rights (such as those set out in the Universal Declaration of Human Rights, the European Convention on Human Rights and other widely-recognised international human rights treaties) but that it is also a flexible, evolving concept. The Charity Tribunal expressly rejected the Commission's argument that it would only be charitable to advance human rights that were accepted by English law.

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<sup>99</sup> Over 80 countries continue to have laws which purported to criminalise such acts, making the expression of their identity illegal and punishable by imprisonment or even death; *Human Dignity Trust v Charity Commission* [2014] FTTT 0013 B(GRC) para 92.

<sup>100</sup> *Human Dignity Trust v Charity Commission* [2014] FTTT 0013 B(GRC).

<sup>101</sup> *Human Dignity Trust v Charity Commission* [2014] FTTT 0013 B(GRC) para 49. Presumably other charities were already registered using the Commission's recommended objects and any decision to the contrary would have also impacted on other existing registered charities.

<sup>102</sup> See text above between n 13 and 14.

<sup>103</sup> See now Charities Act 2011, s 3(3).

The Commission also argued that it was unclear what human rights meant in English law and that objects should be restricted to the rights in the European Convention on Human Rights. However, the Commission's own suggested objects for a human rights charity refer to the rights contained in the Universal Declaration of Human Rights and subsequent United Nations declarations and conventions. The Charity Tribunal agreed with the concurring views of the parties' experts that human rights had a broad, common-sense meaning and it was not restricted as newly proposed by the Commission.

Although the Commission was not satisfied that promotion of the right to human dignity (one of HDT's purposes) fell within the scope of the advancement of human rights, its own independent human rights expert explained that human dignity was the founding principle of human rights and the Charity Tribunal accepted the concurring views of the parties' experts on the existence of this right.

The Charity Commission also contended that HDT existed for a political purpose. The Commission relied on *McGovern v Attorney General*,<sup>104</sup> where it was held that Amnesty International was a political organisation and not a charity because it sought to change the law through the abolition of the death penalty and to effect the release of prisoners of conscience even if they had been detained lawfully. HDT argued that the Charity Commission's decision demonstrated a fundamental misunderstanding of the nature of a constitutional human rights challenge, since litigation aimed at upholding a citizen's constitutional rights does not seek to change the law of the relevant jurisdiction but rather to enforce and uphold the superior rights guaranteed by that country's constitution. The Charity Tribunal agreed.<sup>105</sup> HDT was concerned with the promotion of human rights by establishing whether particular laws were valid through a process of constitutional interpretation. This process fell entirely outside the categories of activity held to be political (and thus not charitable) in *McGovern*. Those categories should not be extended to include HDT's objects because a process of constitutional litigation did not offend the separation of powers in a constitutional (as opposed to parliamentary) democracy.

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<sup>104</sup> *McGovern v Attorney General* [1982] Ch 321 (HC).

<sup>105</sup> *Human Dignity Trust v Charity Commission* [2014] FTTT 0013 B(GRC) para 96.

The Commission also claimed that conducting litigation of the type undertaken by HDT was not a proper way of advancing human rights because HDT was essentially trying to change the law in other countries and that there was no way of knowing if this produced public benefit. The Charity Tribunal held that HDT's purposes were for the public benefit because the purported criminalisation of relevant conduct represented a serious breach of international human rights norms.<sup>106</sup> There was a public benefit in seeking to interpret, clarify and protect superior constitutional rights.

The case may well give rise to concern that much 'political purpose' activity could be re-framed as 'human rights' activity and therefore the implications of the case could be very wide indeed. However, once the promotion of human rights was recognised as a charitable purpose (in 2005) it was inevitable that this would lead us in new directions. How far it takes us beyond the actual facts of this case is as yet unclear. The Charity Tribunal was careful to limit the case to its circumstances, 'as a matter of law this decision is confined to its own facts and does not establish a legal precedent for the registration of other prospective charities'.<sup>107</sup> Further, the Charity Tribunal added that the judgment would not affect charities which are already registered and would not supersede the Commission's guidance or the decisions of higher courts. To the extent that HDT's activities are somewhat unusual, this is no doubt true. Nonetheless, it seems likely that this decision will influence future discussions about the scope of the charitable purpose of advancing human rights.

In the HDT case, the Charity Tribunal accepted that, in the hierarchy of law, international human rights obligations are, effectively, a superior law and that the activities of HDT were an attempt to enforce superior law, and not change domestic law. This is very helpful for those who are carrying out any kind of campaigning work in the field of human rights. Arguably, provided that it can be shown that the rights being campaigned for are recognised as international human rights (such as those that appear in the European Convention on Human Rights, the Universal Declaration on Human Rights, and the International Covenant on Civil and Political Rights), and the territory in which the campaign is being undertaken has signed up, then the campaign becomes one of enforcing existing rights, and not seeking to change existing law.

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<sup>106</sup> *Human Dignity Trust v Charity Commission* [2014] FTTT 0013 B (GRC) para 109.

<sup>107</sup> *Human Dignity Trust v Charity Commission* [2014] FTTT 0013 B (GRC) para 113.

## 2- Full Fact

Although the Charity Tribunal dismissed the appeal of an independent fact-checking organisation that was denied charitable status by the Charity Commission due to its purpose not being exclusively charitable,<sup>108</sup> it was eventually recognised and registered as a charity several years later.<sup>109</sup> At the time of Full Fact's application for registration and when the appeal was considered by the Tribunal, its operations were at a formative stage. The Tribunal noted that it was difficult to definitively summarise the activities of Full Fact, but in broad terms the Tribunal found that it intended 'to provide accurate information on matters that are the subject of debate and public interest in order to improve the quality of public and political discussion and media coverage of it.'<sup>110</sup> The Tribunal had considered that the work of Full Fact was capable of being viewed as advancing education for the public benefit provided that it met the requisite standards and methodology of education in charity law:<sup>111</sup>

... the provision of accurate information derived from rigorous factual analysis on matters of public debate should be for the public benefit. In the most simple of terms; there must be a public benefit in public discourse and debate on matters of public concern taking place on the basis of accurate facts rather than inaccurate facts. The Tribunal concludes that should the requisite standards be met in the course of producing and making available accurate factual information then it is not necessary to search for a new charitable purpose under the Act. The activity that Full Fact would be carrying out would fall within the ambit of education.

Full Fact re-applied with revised objects based on the 'advancement of education' and was able to meet the Charity Commission's concerns that it would not meet requirements of education in charity law by agreeing to adopt objects that stated that the organisation has an 'impartial, objective, balanced, and independent manner observing strict political neutrality'.

Whilst the decision of the Charity Tribunal is not a legal precedent that would bind the Commission, nevertheless, in its consideration of the renewed application, the

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<sup>108</sup> *Full Fact v Charity Commission* Case No CA/2011/0001, 26 July 2011. There were concerns over the terms 'civic engagement' in its objects.

<sup>109</sup> Charity Commission, *Full Fact - Application for Registration. Decision of the Commission* (Charity Commission 17 September 2014).

<sup>110</sup> *Full Fact v Charity Commission* Case No CA/2011/0001, 26 July 2011, para 8.1.

<sup>111</sup> *Full Fact v Charity Commission* Case No CA/2011/0001, 26 July 2011, para 8.7.

Commission did have regard to certain observations made by the Tribunal which clearly impacted on its final decision to recognise Full Fact as a charitable organisation. It is easy to understand the Charity Commission's original concerns that commenting on political matters is likely to be a political activity and that all sides in a political debate may well argue that their views are based on facts and diligent research, whilst coming to conflicting conclusions. However, as the Tribunal noted,<sup>112</sup> whilst academic research and other educational activities may also stray into areas of political disagreement, what distinguishes the former from the latter is the rigorous standards of objective analysis and factual research that support these conclusions. Once Full Fact had put measures in place to ensure this rigour and objectivity, including the appointment of an independent reviewer to periodically audit and quality review the public educational work of the organisation, the Charity Commission was obliged to register it as a charity.

### *3- Preston Down Trust*

One important case on charitable status was *not* heard in the Charity Tribunal but was ultimately determined by the Charity Commission, upon threat of an appeal to the Tribunal. This was a case where the flexibility of the definition of charitable status was tested but was found to remain robust, so boundaries were stretched but not breached. This was the Charity Commission's first opportunity to examine groups set up for the advancement of religion since the statutory changes to the public benefit requirement.<sup>113</sup> The Charity Commission originally denied charitable status to the Preston Down Trust (PDT) concluding in 2012<sup>114</sup> that it did not advance religion for public benefit. The PDT owned a meeting hall used for the purposes of the Plymouth Brethren Christian Church (PBCC), a highly conservative Evangelical Christian movement. Central to the beliefs and practices of PDT and the PBCC is the doctrine of separation from evil. This doctrine results in both a moral and physical separation

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<sup>112</sup> *Full Fact v Charity Commission* Case No CA/2011/0001, 26 July 2011, para 8.9.

<sup>113</sup> See text above at n 18 et seq.

<sup>114</sup> In a letter sent from the Charity Commission Chief Legal Advisor to the PDT's legal advisor, dated 7 June 2012. In 1981, following a refusal by the Charity Commission to register a Brethren meeting hall, on appeal, the Court held on the evidence before it that the purposes of the group were charitable: *Holmes v Attorney General* The Times 12 February 1981. This decision was considered to be distinguishable since it may have turned on a presumption, or at least been largely influenced by the existence of a presumption, of public benefit.

from the wider community and limited interaction between the Brethren and the wider public.

The Charity Commission originally determined that the PDT and PBCC had not demonstrated that they had sufficient beneficial impact on the wider community to meet the public benefit requirement to be a charity. The Commission was not satisfied that the access to religious services was sufficiently open to the public and thought that the religious doctrines and practices of PBCC limited the engagement of PDT with the community beyond the Brethren themselves and had a limited beneficial impact on the wider community. The Commission was also generally aware of allegations with regard to detriment and harm which might militate against public benefit, but had no direct evidence of this and therefore did not take this into account in its 2012 Decision.

The PDT's application for charitable status was used as a test case for all the other halls used by the Plymouth Brethren, and it was considered that the Charity Commission's decision would impact significantly on both the PBCC generally and potentially other religious groups. PDT appealed to the Charity Tribunal. However, shortly after the directions hearing in December 2012 and the filing by both parties of the Statements of Case, PDT requested and was granted a stay in the proceedings. This was with a view to finding an alternative way to deal with the issues outside of the Tribunal process, in order to save further significant legal costs.

Further discussions took place between the PDT and the Charity Commission. Additional evidence from both PDT supporters and detractors was submitted and the Charity Commission took into account evidence from independent experts. Specifically, the Commission considered evidence relating to allegations of detriment, harm or disbenefit which could outweigh or militate against public benefit. It noted that PDT had demonstrated a willingness to do what it could as a Christian organisation to ensure, as far as was consistent with its religious beliefs, that it would act with Christian compassion in the future, particularly in carrying out its disciplinary practices<sup>115</sup> and in its relations with former members of the Brethren.

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<sup>115</sup> 'Disciplinary practices' described by an expert involve 'shrinking' (formerly known as 'shutting up') and 'excommunication' (formerly known as 'withdrawal'). See Charity Commission, *Preston Down*

The Charity Commission ultimately accepted that the evidence that it considered showed an organisation which was evolving and increasing its level of engagement with the public. As a result, the Commission was able to give a revised decision on the PDT's charitable status.<sup>116</sup> The Charity Commission therefore agreed to register PDT as a charity on the basis of an application for registration based on a Deed of Variation to the original trust deed which provided a framework for the future administration of the trusts in a way which is charitable and which is binding on the trustees. In coming to its decision, the Charity Commission drew heavily on comments made by the Upper Tribunal in the *ISC* case.<sup>117</sup>

In coming to its decision, the Charity Commission appears to have upheld the main elements of the public benefit test from the pre-Charities Act case law. There are hints, however, that religious groups in future may need to demonstrate a more tangible public benefit for the wider community, beyond the adherents of the particular religion. This would amount to a tightening, rather than a loosening of the boundaries and is reminiscent of the Commission's attempts in its original public benefit guidance to suggest that fee-paying schools should offer a specific sums by way of bursaries to show public benefit. This was successfully challenged in the *ISC* case. The Charity Commission decision on the PDT does not have the same precedential status as that of a case decided in the Upper Tribunal. Certainly, the Charity Commission would have preferred the case to have been dealt with authoritatively and independently in the Charity Tribunal.<sup>118</sup> For the moment, the potential for contraction around the perimeters of the sector has been held at bay, but it could be suggested that until this issue is determined authoritatively in a legally binding setting, this threat remains.

## COMMENT – ASSESSMENT OF THE DEVELOPMENTS POST CHARITIES ACT 2006

The provisions of the 'new regime' have now been operational for seven years. It would be correct to describe any movements around the boundaries of charitable

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*Trust - Application for Registration of the Preston Down Trust. Decision of the Commission* (Charity Commission 3 January 2014) para 58.

<sup>116</sup> Charity Commission, *Preston Down Trust - Application for Registration of the Preston Down Trust. Decision of the Commission* (Charity Commission 3 January 2014).

<sup>117</sup> Considered above at n 84 et seq.

<sup>118</sup> Charity Commission, *Preston Down Trust - Application for Registration of the Preston Down Trust. Decision of the Commission* (Charity Commission 3 January 2014) para 9.

status as only amounting to ‘ripples’ so far. In terms of appeals to the Charity Tribunal, it has been noted that many of the cases before it have concerned matters that do not relate to the perimeters of charitable status; rather the Tribunal has been used as a way to test the jurisdiction of the Charity Commission by way of its regulatory powers in relation to entities that are already recognised as charities. This is very useful but does not impact on charitable status per se. Undoubtedly, the two reference procedures that have been brought before the Charity Tribunal so far have been the most important developments in relation to charitable status. Neither has been without controversy. There was much discussion about the charitable status of fee-paying schools in the debates that preceded the introduction of the Charities Act 2006, but in a classic political fudge, the legislators decided to leave the matter largely in the hands of the regulator and the courts, should the opportunity arise. The *ISC* case may have provided that opportunity, but the Upper Tribunal was not willing to oblige:<sup>119</sup>

Our Decision will not, we know, give the parties the clarity for which they were hoping. It will satisfy neither side of the political debate. But political debates must have political conclusions, and it should not be expected of the judicial process that it should resolve the conflict between deeply held views.

The benevolent funds reference proved to be equally controversial, since many could not see the value in it being heard. In the words of the Upper Tribunal:<sup>120</sup>

By the time of the hearing of the Reference, it was common ground between the parties, with the exception of the Charity Commission as well as the interveners that the 2006 Act did not in fact cast doubt on the continued charitable status of the type of charity with which the Reference is concerned. One might wonder, therefore, why the Reference was felt to have been necessary.

There is no doubt that the introduction of the Charities Act 2006, with its statutory definition of charity and the changes to public benefit presumptions, suggested that significant change may be afoot. Yet, we have seen that the Tribunal has largely been keen to follow previous case law and has been reluctant to take any meaningful steps away from it. The reality is that any appetite for major transformation has been found to be wanting and most of the cases considered so far by reference to the new law and through the Tribunal system have, subject to some minor tweaks, merely confirmed the status quo.

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<sup>119</sup> *Independent Schools Council v Charity Commission* [2011] UKUT 421 (TCC) para 260.

<sup>120</sup> *Charity Commission for England and Wales v Trustees of the Professional Footballers’ Association Benevolent Fund and Others* [2012] UKUT 420 (TCC) para 21.