



# Enhancing the Public Benefit Requirement for Charities: Experience from England and Wales

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## Introduction



## Public Benefit Before the Charities Act 2006

- Preamble to Statute of Charitable Uses 1601.
- *Income Tax Commissioners v Pemsel* [1891] AC 531 – Lord Macnaghten’s four-fold classification:
  - Relief of poverty; advancement of education; advancement of religion; other purposes beneficial to the community.
- *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31
  - Presumption that first three heads are for public benefit

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## Charities Act 2006 (now 2011)

- First statutory definition of charity.
- Charities Act 2011, s.2(1):
  - a charitable purpose is a purpose which -
  - (a) falls within section 3(1) and
  - (b) is for the public benefit (see section 4).
- Section 3 lists 12 specific purposes (largely codification of existing case law).

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## Charities Act 2006 (now 2011)

- Charities Act 2011, s.4(2):  
It is not to be presumed that a purpose of a particular description is for the public benefit.
- Charities Act 2011, s.4(3):  
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

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## The Role of the Charity Commission

- Charities Act 2011, s.14:  
CC must promote awareness and understanding of the public benefit requirement as one of its statutory objectives.
- Charities Act 2011, s.17:  
CC must issue guidance in pursuance of this objective.  
Charity trustees must have regard to the public benefit guidance when exercising any powers or duties where it may be relevant.

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## The First Set of Guidance

- 2008: Charities and Public Benefit: The Charity Commission's General Guidance on Public Benefit.
- CC focus on 'reversal of public benefit presumption'.
- Guidance then applied (through 'assessments') to a number of fee paying schools.
- Some schools were told that they 'failed the test'.
- Independent School's Council sought judicial review of guidance.

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## Independent Schools Council Case

- [2011] UKUT 421.
- JR application was heard in the Upper Tribunal together with an Attorney General's reference, asking specific questions re fee paying schools.
- Outcome was a long complex decision.
- Held – with fee paying charitable schools, there must be more than a *de minimis* or token benefit for the poor, but it was for the trustees to decide what was appropriate in their particular circumstances, not the CC.
- Held – certain parts of the CC guidance would need to be re-written.

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## Second Set of Guidance

- Published September 2013 after consultation.
- Offers more freedom to fee charging charities.
- Clearer guidance overall.
- CC has 'made good work of the challenging job of distilling centuries of case law into guidance for trustees' (National Council for Voluntary Organisations).

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## But, public benefit problems have not gone away..

- Lord Hodgson's statutory review of the Charities Act 2006: *Trusted and Independent, Giving charity back to charities* (July 2012).
- The Public Administration Select Committee's Third Report of 2013-14: *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (May 2013).

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## But, public benefit problems have not gone away..

- Hodgson: despite the shortcomings, public benefit is best left to case law rather than Parliament attempt to define it in statute.
- PASC: it is for Parliament to resolve the issues of the criteria for charitable status and public benefit, not the CC, which is a branch of the executive. In this respect the Act has been an administrative and financial disaster for the CC and for the charities involved, absorbing vast amounts of energy and commitment, as well as money.

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## But, public benefit problems have not gone away..

- Government agrees with Hodgson's recommendation not to pursue a statutory definition of public benefit now, although the possibility of change should not be completely ruled out, particularly in light of any developments in the case law.
- 'The case law definition of public benefit has served us well for over 400 years, although we know that recent and current cases before the Tribunal have caused much anxiety for some groups of charities.'  
(September 2013)

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## Current case causing anxiety..

- The public benefit of religious charities is now under the spotlight.
- In June 2012, CC rejected the application for charitable status from the Preston Down Trust, part of the Plymouth Brethren Christian Church (or Exclusive Brethren).
- CC claims the evidence of beneficial impact on the wider public was not sufficient to demonstrate public benefit.

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## Current case causing anxiety..

- First time the CC has refused charitable status to a religious group on the grounds of public benefit, as set out in the Act.
- The Brethren announced in July 2012 that they would appeal to the Charity Tribunal.
- Current stay in proceedings to enable CC and the Brethren to resolve the matter through dialogue, but if this proves unsuccessful the matter will return to the Tribunal for a decision.

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## Lessons to be learned

- The English experience has proved, so far, that it is difficult to remove certain aspects of the common law legacy, derived from the Preamble to the 1601 Act and subsequent case law.
- if *real* substantive reform in this area is desired, this should be made clear on the face of the law.
- reforming the definition of charity in England, including the making of changes to the public benefit requirement, has proved to be a tremendous challenge.

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## Lessons to be learned

‘So far, and it is admittedly very early days, the English journey on the road to reform has been a bumpy one, whose ultimate destination may well prove in time to be somewhere very close to its departure point. Hopefully, other jurisdictions that are considering their own reform process can learn from this experience and take a more straightforward route to their desired location.’ (Morris, 2009)

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