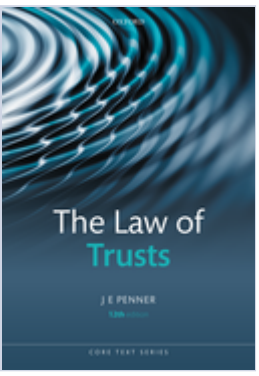

The Law of Trusts (12th edn)
J E Penner

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18. The law governing charities

J E Penner, Kwa Geok Choo Professor of Property Law, National University of Singapore, and Barrister of Lincoln's Inn

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Abstract

Titles in the Core Text series take the reader straight to the heart of the subject, providing focused, concise, and reliable guides for students at all levels. This chapter focuses on charitable trusts. Charitable trusts are not subject to the beneficiary principle. These are valid purpose trusts that are enforced, not by beneficiaries, but by the Attorney-General or the Charity Commission. Charities are generally exempt from most taxes. The conditions for charitable status; the charitable character of public purpose trusts; trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; trusts for other purposes beneficial to the community; the law concerning the public benefit requirement; and the application of the cy-près doctrine to save charitable trusts from failure are discussed.

Keywords: charities, public purpose trusts, religion, education, relief of poverty, public benefit, cy-près

Summary

Charities and the law of trusts

18.1 Charity has no essential connection with the law of trusts, as Matthews (1996), 2 explains:

> *[Charity] derived from the ecclesiastical jurisdiction, not from that of the Chancery. Charity did not need to be performed through the medium of the trust. It was not so in English law at the outset, and even today it need not be. It could, for example, be carried out through a company. And many legal systems have well developed laws of charity without recourse to, indeed without any knowledge of, trusts.*

p. 450 **18.2** While there are some features of charitable trusts (as opposed to charitable corporations) that concern their nature as trusts per se (eg aspects of the cy-près doctrine, **18.68** et seq), this topic largely comprises particular aspects of the law of charities. This is not to say, however, that the law relating to non-trust charities has *nothing* to do with the legal principles that are associated with trust law, including the law on fiduciaries. For example (and we shall not dwell on this here), the UKSC recently held in *Lehtimäki v Cooper* (2020) that voting members of a charitable company owe fiduciary duties to the *charitable purposes* of the company, and that these duties must be complied with when exercising voting rights.

18.3 Charitable purposes are (1) purposes that benefit the public, which (2) on the authority of statute and common law are 'charitable'. Not all publicly beneficial purposes are considered by the law to be charitable. The question, 'What counts as a charitable purpose?' has been the source of a constant supply of case law, and has been the subject of recent legislation in the form of the Charities Acts 2006 and 2011. The 2011 Act, which came into force on 14 March 2012, repeals and replaces the Recreational Charities Act 1958, the Charities Act 1993, and most of the substantive provisions (without significant changes) of the 2006 Act save for Part 3, which concerns fund-raising.

18.4 Charitable trusts are not subject to the requirement of certainty of objects, or at least not in the same sense as private trusts are. A testamentary trust for 'charitable objects', without further specification, is valid. The court (or the Charity Commissioners) will specify those objects to which the trust funds should be devoted. Moreover, the UKSC confirmed in *Shergill v Khaira* (2014) that where a settlor creates a trust in general or vague terms, the trustees have the power and the obligation to execute a trust deed which gives practical contours to how the trust funds are to be spent, so long as it does not conflict with the broad purpose the settlor intended. Charitable trusts are also not subject to the beneficiary principle (**Chapter 7**). Charitable trusts are valid purpose trusts that are enforced, not by beneficiaries, but by the Attorney-General or, more recently, by the Charity Commission (formerly the Charity Commissioners). The Charity Commission is the regulator of charities in England and Wales, which not only registers charities but has broad powers to monitor the accounts of charitable trusts, investigate the running of charities to check abuses, and advise charitable trustees. (For a comprehensive consideration of the role of the Charity Commission in maintaining and reviewing the register of charities, see Mitchell (2000).) An appeal from decisions of the Commission lies in the first instance to the First Tier Tribunal or the Upper Tribunal, depending on the issue. Charitable trusts can last forever, and on that score are not subject to the rules limiting the duration of trusts (**3.85**). (Charitable gifts that are determinable or made upon condition subsequent, are, however, subject to the rule as it applies to gifts of that kind.)

Fiscal benefits

18.5 Charities are generally exempt from income tax, capital gains tax, corporation tax, and stamp duty. Relief from inheritance tax, capital gains tax, and income tax is also available for donors who give to charities.
p. 451 Charities are not taxed on the profits they earn from trading so long as the profits are applied to charitable purposes and the trading carries out the purpose of the charity (**18.66**).

Dissociating validity from exemption from taxation

18.6 In *Dingle v Turner* (1972) Lord Cross suggested in obiter (at 624D–G) that:

> *[T]he courts—as I see it—cannot avoid having regard to the fiscal privileges accorded to charities … [T]hey enjoy immunity from the rules against perpetuity and uncertainty and although individual potential beneficiaries cannot sue to enforce them the public interest arising under them is protected by the Attorney-General … But that is not all. Charities automatically enjoy fiscal privileges which with the increased burden of taxation have become more and more important and in deciding that such and such a trust is a charitable trust the court is endowing it with a substantial annual subsidy at the expense of the taxpayer … It is, of course, unfortunate that the recognition of any trust as a valid charitable trust should automatically attract fiscal privileges, for the question whether a trust to further some purpose is so little likely to benefit the public that it ought to be declared invalid and the question whether it is likely to confer such great benefits on the public that it should enjoy fiscal immunity are really two quite different questions.*

18.7 Misgivings about the automatic provision of fiscal benefits to charities have a long history (see in particular the dissenting judgments of Lord Halsbury LC and Lord Bramwell in *Income Tax Special Purposes Comrs v Pemsel* (1891)). The concern, well expressed by Lord Cross, is that there seems to be no obvious reason why fiscal benefits should automatically be accorded to every non-private purpose, since such purposes will vary in the extent to which they confer genuinely public benefits. Consider, for example, student unions. These are charitable on the grounds that they contribute to the education of university students, the concept of 'education' obviously being construed broadly here. Does a student union really provide public benefits in the way that, say, a charity for research into the causes and prevention of cancer does? Or is the practice of religious rites or the education provided by public schools as beneficial to the public as the support of cultural institutions such as the National Gallery?

18.8 The idea is sometimes mooted that the state ought to give money directly to those 'true' charities which confer a genuinely public benefit (eg Chesterman (1999)). But the difficulties with dissociating fiscal advantages from charitable status must also be acknowledged. If the law were changed so that only charities providing certain public benefits received fiscal advantages, this would require a new definition of, or graded scale for, 'public benefit', and this might be complex and hard to apply, and might seem to raise the question why purposes with insufficient public benefit should be treated as charitable at all. The real problem does not seem to lie in dissociating fiscal advantage from charitable status, but rather that charitable status has, over time, with the expansion of purposes deemed to be charitable, become only weakly connected to public
p. 452 benefit in at least some cases. If qualifying as a charity indeed entailed that the purpose provided a genuinely public benefit, then every charity would *deserve* its advantages drawn from the *public* purse because every charity would indeed genuinely benefit the *public*; it would, in these circumstances, be irrational or perverse for the public to tax charities, for by doing so it would only be taxing itself.

18.9 Moreover, the proposal that automatic fiscal benefits should be replaced by direct government grants to particular charities has difficulties of its own. If the government of the day were able to subsidise whichever charities in whatever amounts it liked, then one is faced with the concern that the independence of charities to pursue public goals that might be politically unpopular would be discouraged, leading some charities at least to tailor their purposes for political reasons; furthermore, smaller charities that could not muster the political support to lobby for a state subsidy would be unfairly disadvantaged. In any case, it is clear that the question of justifying fiscal benefits is intertwined with the requirement that charities confer a *public* benefit, and so the fiscal background should be borne in mind when we consider that requirement in detail later (**18.41**

et seq). A last point can be made here about fiscal advantages: occasionally, students declare in their exam scripts that one of the main purposes of creating a charity is to obtain tax advantages, but this is misconceived: no settler of a charitable trust personally receives any ongoing tax advantages from doing so. It is the charity itself which obtains ongoing tax relief, tax relief which benefits the charity, not anyone else. By creating a charity one devotes property to a *public* purpose; one does not engineer a private benefit with special tax advantages. Trying to use the law of charity to achieve this sort of result is impermissible in principle though, as we will see (**18.35**–**18.36**, **18.46**–**18.49**, **18.52**), there are borderline cases.

The conditions for charitable status

18.10 In order for a purpose to be charitable:

- the *character* of the purpose must be charitable;
- the purpose must, on balance, be beneficial rather than detrimental;
- the purpose must benefit a section of the public, not a collection of private individuals or an artificially restricted class;
- the purpose must be *exclusively* charitable, and in particular, the purpose must not be political; and
- the purpose must not include making a financial profit, not in the sense that a charity like a university cannot make an operating profit in any one year, but in the sense that a charity may not distribute profits to investors in the way a private business can.

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The charitable character of public purpose trusts

18.11 The Charities Act 2011 provides a list of those purposes which the law regards as charitable, though one can only make sense of and interpret this new statutory list of charitable purposes in light of the previous law, so we will look at that in some detail. The relevant sections of the Act are as follows:

2 Meaning of 'charitable purpose'

(1) *For the purposes of the law of England and Wales, a charitable purpose is a purpose which—*

(a) *falls within section 3(1), and*

(b) *is for the public benefit (see section 4).*

(2) *Any reference in any enactment or document (in whatever terms)—*

(a) *to charitable purposes, or*

(b) *to institutions having purposes that are charitable under the law relating to charities in England and Wales, is to be read in accordance with subsection (1).*

(3) *Subsection (2) does not apply where the context otherwise requires.*

(4) *This section is subject to section 11 (which makes special provision for Chapter 2 of this Part onwards).*

3 Descriptions of purposes

(1) *A purpose falls within this subsection if it falls within any of the following descriptions of purposes —*

(a) *the prevention or relief of poverty;*

(b) *the advancement of education;*

(c) *the advancement of religion;*

(d) *the advancement of health or the saving of lives;*

(e) *the advancement of citizenship or community development;*

(f) *the advancement of the arts, culture, heritage or science;*

(g) *the advancement of amateur sport;*

(h) *the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;*

(i) *the advancement of environmental protection or improvement;*

(j) *the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage;*

(k) *the advancement of animal welfare;*

(l) *the promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services;*

(m) *any other purposes—*

p. 454 (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,*

> (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.*
>
> (2) *In subsection (1)—*
>
> (a) *in paragraph (c), 'religion' includes—(i) a religion which involves belief in more than one god, and (ii) a religion which does not involve belief in a god,*
>
> (b) *in paragraph (d), 'the advancement of health' includes the prevention or relief of sickness, disease or human suffering,*
>
> (c) *paragraph (e) includes—*
>
> (i) *rural or urban regeneration, and*
>
> (ii) *the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities,*
>
> (d) *in paragraph (g), 'sport' means sports or games which promote health by involving physical or mental skill or exertion,*
>
> (e) *paragraph (j) includes relief given by the provision of accommodation or care to the persons mentioned in that paragraph, and*
>
> (f) *in paragraph (l), 'fire and rescue services' means services provided by fire and rescue authorities under Part 2 of the Fire and Rescue Services Act 2004.*
>
> (3) *Where any of the terms used in any of paragraphs (a) to (l) of subsection (1), or in subsection (2), has a particular meaning under the law relating to charities in England and Wales, the term is to be taken as having the same meaning where it appears in that provision.*
>
> (4) *In subsection (1)(m)(i), 'the old law' means the law relating to charities in England and Wales as in force immediately before 1 April 2008.*

18.12 We will refer to each these provisions as we go along, but look first at ss 2(1)(a) and 3(1). Together they could be said to give the statutory meaning of charitable purpose, but it is important to see that this does *not* constitute a legal *definition* of charitable purpose in any real sense. All it does is refer to a list of charitable purposes. A true definition would be some characterisation of charitable purpose which could be applied by itself to a prospective purpose to determine if it were charitable. These provisions clearly do not do that. The list of charitable purposes in s 3(1), elaborated in some cases in s 3(2), only makes sense against the categorisation of charitable purposes which operated prior to the 2006 and 2011 Acts and, indeed s 3(1)(m)(i) preserves as charitable any purpose recognised under the pre-2008 law, so it is to that prior learning that we now turn.

p. 455 **18.13** Prior to the 2006 and 2011 Acts the law recognised as charitable those purposes found in the Preamble to the Charitable Uses Act 1601, or purposes that the case law held to be 'analogous' to those in the Preamble and within its 'spirit and intendment'. The relevant section of the Preamble is as follows:

> *... some [property given] for relief of aged, impotent and poor people, some for the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; some for repair of bridges, ports, havens, causeways, churches, sea banks and highways; some for education and preferment of orphans; some for or towards the relief, stock, or maintenance of houses of correction; some for marriages of poor maids; some for supporting, aid and help of young tradesmen, handicraftsmen and persons decayed; and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes ...*

18.14 In 1601, this list consisted almost entirely of purposes that would directly work a public benefit by lowering the local rates, since the persons and projects named would otherwise have been financially supported by the parish; thus an individual who devoted his funds to such purposes provided a very tangible public benefit indeed. There is a school of thought that holds that even today tax relief afforded to charities can only be justified to the extent that these charities provide services that would otherwise require the allocation of state funds. (Consider this point in relation to our discussion of fiscal advantages at **18.6**–**18.9**.)

18.15 Basing himself on the guidance the Preamble provided, in *Income Tax Special Purposes Comrs v Pemsel* (1891), Lord Macnaghten produced his famous four-fold characterisation of what is charitable (at 583):

> *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.*

The first three divisions appear as the first three charitable purposes in the new statutory list, while the remaining purposes in the list are fruitfully regarded as the 'spelling out' of the last, catch-all category.

Growth by analogy

18.16 In *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corpn* (1968) the HL decided that the Scottish Burial Reform Society, a non-profit-making company whose main object was the inexpensive, sanitary disposal of the dead, particularly by cremation, was a charity. Lord Reid stated (at 147A-B):

> *... in more recent times a wide variety of other objects have come to be recognised as also being charitable.*
> p. 456 *The courts appear to have proceeded first by seeking some* ↵ *analogy between an object mentioned in the preamble and the object with regard to which they had to reach a decision. Then they appear to have gone further, and to have been satisfied if they could find an analogy between an object already held to be charitable and the new object claimed to be charitable.*

18.17 A strained use of this extension of charitable purposes by analogy occurred in *Vancouver Regional Freenet Association v Minister of National Revenue* (1996). The Canadian Federal Court of Appeal drew an analogy between the provision of free internet access, ie access to the 'information highway', to the Preamble's 'repair of bridges, ports, havens, causeways, churches, sea banks and highways', to decide that such provision was charitable.

18.18 This 'extension by analogy' approach to the identification of new charitable purposes has at times been regarded as out of date (see the judgment of Russell LJ in *Incorporated Council of Law Reporting for England and Wales v A-G* (1971)), but as is clear from s 3(1)(m)(ii) and (iii) of the 2011 Act, the use of analogy to extend the scope of charitable purposes has now been given a statutory footing.

18.19 The history of this expansion by analogy is not a particularly honourable one. Worries about testators disinheriting their families through gifts to the Church and other charities led to the Mortmain and Charitable Uses Act 1736 (now repealed), which made most gifts of land on trust to charities void. Apparently favouring disinherited family members over charities, judges slowly expanded the boundaries of what counted as charitable so as to bring about the failure of as many gifts as possible under the Act. In particular, the wide scope for what counts as religion can be explained in part by the fact that a wide definition ensured that gifts of land to all sects were equally struck down. In the famous case of *Thornton v Howe* (1862), a gift on trust to publish the writings of Joanna Southcott, 'an ignorant and foolish woman' who believed herself with child by the Holy Spirit and about to give birth to the new Messiah, was held to be charitable, therefore void under the Act.

18.20 Very occasionally, a purpose once regarded as charitable ceases to be so. In 1993 the Charity Commissioners deregistered gun and rifle associations (formerly found to be charitable in *Re Stephens* (1892)) as no longer charitable in view of changed social circumstances (*The City of London Rifle and Pistol Club; The Burnley Rifle Club* (1993)). When an organisation seeks registration as a charity, both the Charity Commission and the courts (*Southwood v A-G* (2000)) will consider the organisation's activities and proposed activities when trying to determine whether its purpose is charitable, although this is to be understood as evidence going to help the court determine the nature of the purpose itself. Where an organisation's purpose is charitable, any activities the organisation undertakes which fail to advance that purpose do not undermine the charitability of the purpose itself; rather, the carrying out of those activities with charitable funds will be a breach of charity law (*Independent Schools Council v Charity Commission for England and Wales* (2011)).

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Trusts for the relief of poverty

18.21 Poverty does not mean destitution; trusts for poverty are for those who would otherwise have to 'go short' (*Re Coulthurst* (1951)), so trusts for 'ladies of limited means' (*Re Gardom* (1914)) and for 'decayed actors' (*Spiller v Maude* (1881)) were valid. The charity can be limited to particular classes so long as it does not name individuals, nor include those who might not be poor. So trusts for poor employees (*Dingle v Turner* (1972)), or an individual's poor relations (*Re Scarisbrick* (1951); *Re Segelman* (1996)) are good, but a trust benefiting the working classes was not because being a member of the working class did not necessarily entail poverty (*Re Sanders' Will Trusts* (1954)), nor was a trust for providing clothing to boys aged 10–15 years in a certain district, since eligibility was not restricted to the poor (*Re Gwyon* (1930)). In *Re Niyazi's Will Trusts* (1978) a trust for a working man's hostel in Famagusta, Cyprus, where there was a grave housing shortage, was upheld as charitable, although Megarry VC opined that the trust was 'desperately near the border-line'.

Trusts for the advancement of education

18.22 This head obviously includes conventional education and training: thus trusts for schools, colleges, universities, and other institutions of learning are valid. But this head extends to cover research, artistic and aesthetic education (*Royal Choral Society v IRC* (1943)), museums (*British Museum Trustees v White* (1826)), sport facilities provided for the young at school (*Re Mariette* (1915)), student unions (*London Hospital Medical College v IRC* (1976)), and professional bodies so long as they advance education (*Royal College of Surgeons of England v National Provincial Bank Ltd* (1952)). However, courts are careful to ensure that this head is not used to provide charitable status for political purposes masquerading as education or research (**18.26**, **18.53** et seq).

18.23 Education of the young must be taken in a broader sense than mere classroom learning. In *IRC v McMullen* (1980) a trust for the provision of facilities to play association football or other sports in schools or universities was held valid. In *Baldry v Feintuck* (1972) the charitable status of student unions was affirmed as part of the educational enterprise, but the devotion of funds to political campaigns by student unions on issues not related to university education (see further **18.26**, **18.53** et seq) was not, and could be restrained by injunction (see also *Webb v O'Doherty* (1991)).

18.24 The education head also covers the dissemination of useful knowledge. It was upon this basis that the CA decided that the production of the Law Reports was a charitable advancement of education in *Incorporated Council of Law Reporting v A-G*. It also covers the promotion of culture: in *Re Delius* (1957) a charity to promote the music of Delius was good.

p. 458 **18.25** Carrying out useful research is charitable under the education head as well, but the limits of charitable research are not entirely clear: in *Re Shaw* (1957) George Bernard Shaw's testamentary gift of funds to be devoted to research into a 40-letter alphabet for English and the translation of one of his works into the new alphabet was held to be not charitable; this was probably a narrow decision, based on the idea that the gift did not contemplate education or teaching. In contrast, in *Re Hopkins' Will Trusts* (1965) a gift to the Francis Bacon Society 'to be earmarked and applied towards finding the Bacon-Shakespeare manuscripts', ie to finding evidence that Francis Bacon wrote the works attributed to Shakespeare, was valid under the education head, on the basis that such a discovery would be of immense importance. In *McGovern v A-G* (1982) Slade J summarised the principles (at 352F–353A):

> *A trust for research will ordinarily qualify as a charitable trust if, but only if, (a) the subject matter of the proposed research is a useful subject of study; and (b) it is contemplated that knowledge acquired [thereby] will be disseminated to others; and (c) the trust is for the benefit of the public, or a sufficiently important section of the public. (2) In the absence of a contrary context, however, the court will [readily construe] a trust for research as importing subsequent dissemination of the results thereof. (3) Furthermore, if a trust for research is to constitute a valid trust for the advancement of education, it is not necessary either (a) that a teacher/pupil relationship should be in contemplation or (b) that the persons to benefit from the knowledge to be acquired should be [students] in the conventional sense. (4) ... [the court] must pay due regard to any admissible extrinsic evidence which is available to explain the wording of the will in question or the circumstances in which it was made.*

18.26 The production of mere propaganda is not the advancement of education. *Re Hopkinson* (1949) is one of several cases in which trusts for educating adults in the principles of particular political parties were held invalid, in which the oft-cited words of Vaisey J appear: 'political propaganda … masquerading as education is not education within the statute of Elizabeth'. *Re Koeppler's Will Trusts* (1986) concerned a trust for carrying on the work of the 'Wilton Park' Institution, which ran conferences for representatives of member nations of major Western organisations to exchange views on political, economic, and social issues; although political figures participated, the conferences did not further any particular political viewpoint, and the trust was charitable under the education head.

Trusts for the advancement of religion

18.27 In general, the law of charities assumes that any religion is better than none but, as between religions, stands neutral (*Neville Estates Ltd v Madden* (1962) *per* Cross J). Case law prior to the 2006 Act held that religion required a spiritual belief or faith in some higher unseen power, and some worship or veneration of that higher power; the consequence was that promoting morality or particular ethical ways of life did not count as
p. 459 a religious purpose. Thus, in *Re South Place Ethical Society* (1980) Dillon J said: 'Religion is concerned with man's relations with God, and ethics are concerned with man's relations with man.' The trust in question, one for the study and dissemination of ethical principles and the cultivation of a rational religious sentiment, was not charitable under the religion head, but was as a trust for the advancement of education, as well as under the fourth head as contributing to mental or moral improvement.

18.28 In *R v Registrar General, ex p Segerdal* (1970) the 'Church' of Scientology, based upon the American L Ron Hubbard's theory of 'dianetics', was held to be a philosophy of existence, not a religion, so not a charity. In the Australian case, *Church of the New Faith v Comr for Payroll Tax* (1983), Scientology was held charitable under the religion head: the court considered any 'belief in a supernatural Being, Thing, or Principle' to be sufficient so long as that belief was combined with canons of conduct giving effect to that belief. By contrast the Charity Commissioners (1999) considered an application by the Church of Scientology for registration as a charity, but denied it charitable status. While adherents believed in a higher power, their practices of training and auditing were more akin to therapy or study than to worship. Scientology also failed the public benefit test (**18.41** et seq) because its activities were only for the private benefit of its practising adherents.

18.29 You will see, however, that s 3(2)(a) widens the definition of religion to ensure that multi-deity faiths (such as Hinduism) or *non-deity faiths* (such as some types of Buddhism) now also clearly qualify. This raises the question whether the 'worship and veneration' requirement mentioned above continues to operate, since where a religion has no deity it is not clear there is anything to venerate or worship. In part relying upon these provisions, the UKSC held in *Hodkin v Registrar General of Births, Deaths and Marriages* (2013) that the Church of Scientology is a religion for the purposes of the Places of Worship Registration Act 1855. Although the court's finding that Scientology fell within the definition of religion under s 3(2)(a) is strictly speaking *obiter* as regards the application of the Charities Act, it would be unlikely in the extreme for a subsequent UKSC or the Charity Commission to take a different view.

18.30 Section 3(2)(a) shows that, in bringing in the new Act, the government did not question whether the recognition of the advancement of religion as charitable (so providing religion with the fiscal benefits flowing from that) was justified in a predominantly secular society. If charitable status had been withdrawn from religion that would not, of course, have meant that religious organisations would lose all association with charity. Many religious organisations carry out non-religious charitable activities, such as the relief of poverty and the maintenance of historic buildings, and so would to that extent remain charitable; a proposal to deny charitable status to religion per se would deny that status to those activities such as the performance of religious rites, to proselytising, and so on. It is the according of charitable status to activities of that kind to which a reform of charities law would be directed, simply because it is not clear how these activities benefit the public (**18.41** et seq), rather than just the adherents of the particular religion, whose beliefs are often very controversial (see also Penner (2016)). As has been said before, the problem with the death of God is not that
p. 460 people believe in nothing, but that people will believe in anything: crystals, dolphins, the summer solstice, heaven only knows what nonsense; where, one might ask, is the public benefit in such belief? Since the coming into force of the 2006 Act there has not, apparently, been a stampede to register new religious charities. Thank heaven for small mercies.

Trusts for other purposes beneficial to the community

18.31 For obvious reasons, this is the most difficult category for which to define what counts as charitable, and the 'growth by analogy' approach is most evident here. Perhaps the easiest case is a gift to a locality, such as a village or town (eg *Re Allen* (1905)), or even England (*Re Smith* (1932)), which will be treated as a gift for charitable purposes unless non-charitable purposes for the gift are clearly specified (eg *A-G Cayman Islands v Wahr-Hansen* (2001), where the objects included 'worthy individuals'). In *Williams' Trustees v IRC* (1947) there was a gift on trust to establish and maintain an institute, to be known as the 'London Welsh Association', the purposes of which included maintaining an institute for the benefit of Welsh people in London, and promoting their language and culture. The activities of the institute included lectures, dances, games, and provision of facilities for clubs. These purposes and activities not being exclusively charitable, the trust failed. Lord Simonds quoted Viscount Cave LC in *A-G v National Provincial and Union Bank of England* (1924) (at 455):

> *it is not enough to say that the trust in question is for public purposes beneficial to the community; you must also show it to be a charitable trust;*

Nor did the gift count as a gift to a locality. Lord Simonds said (at 456):

> *If the purposes are not charitable per se, the localisation of them will not make them charitable.*

Thus for a purpose under the fourth head to be charitable, it must be one of those found to be so in the 'old law' (s 3(1)(m)(i), (4)), or one of those listed in s 3(1) of the 2011 Act, or one that the courts are prepared to hold for the first time is analogous to one of those (s 3(1)(m)(ii) and (iii)). Simply because the gift is beneficial to a particular community is entirely insufficient.

18.32 The Preamble specifically mentions the 'relief of aged, impotent and poor people'. This passage is construed disjunctively, and this is reflected in s 3(1), so trusts for the provision of housing for the aged are charitable (*Joseph Rowntree Memorial Trust Housing Association Ltd v A-G* (1983)), as are trusts for blind children (*Re Lewis* (1955)), the seriously ill or wounded (*Re Hillier* (1944)), the permanently disabled (*Re Fraser* (1883)), and trusts for hospitals, even if they charge fees to patients, so long as they are not profit-distributing (*Re Resch's Will Trusts* (1969)); the same reasoning applied to make independent schools that charge fees charitable
p. 461 (*Independent Schools Council* (2011), **18.46**, ↵ **18.66** et seq). Trusts for the relief of victims of disasters are charitable (*Re North Devon and West Somerset Relief Fund Trusts* (1953)), but only in so far as they provide relief from poverty, or in the case of sickness or disability, the class is a public one (**18.41**). The Charity Commission strongly advises those considering launching an appeal to consider whether the funds sought are to be used exclusively for charitable purposes or not and to inform prospective donors accordingly (Charity Commission (2016a)).

18.33 Certain public services and facilities are charitable under the fourth head, such as the production of the Law Reports (*Incorporated Council of Law Reporting v A-G* (1971)) and the work of the National Trust (*Re Verrall* (1916)).

18.34 Although apparently far from the concerns evident in the Preamble, trusts for animal welfare such as the Society for the Prevention of Cruelty to Animals (*Tatham v Drummond* (1864)) and the preservation of wildlife through animal sanctuaries (*Re Wedgwood* (1915) (Wild Fowl Trusts)) were charitable even before the coming into force of the 2006 Act. However, in *Re Grove-Grady* (1929), the CA held that a gift for an animal sanctuary that specifically excluded humans so that the animals would not be molested, was not charitable, because such a gift produced no public benefit. Section 3(1)(k) now makes clear that the advancement of animal welfare is a charitable purpose, and *Re Grove-Grady* might be decided differently today applying s 3(1)(i), which provides that environmental protection or improvement is a valid charitable purpose.

18.35 Trusts for sport or recreation have had a difficult time in the past. In *Re Nottage* (1895) trusts for mere sport, here yacht racing, were held not to be charitable purposes. Similarly, in *IRC v City of Glasgow Police Athletic Association* (1953) the HL accepted that trusts that promote the efficiency of the police or the armed forces are charitable, but held that a trust for the purpose of promoting athletic sports and general pastimes for the Glasgow police was not, being more in the nature of a private trust for the advantage of the members. On the other hand, the provision of land for a recreation ground for public use by the community at large is charitable (*Re Hadden* (1932)). In 2003 the Charity Commissioners recognised the promotion of amateur sport as charitable, and this position was confirmed by ss 3(1)(g) and (2)(d).

18.36 In *IRC v Baddeley* (1955) a trust to be administered by Methodist leaders for the promotion of religious, social, and physical well-being of persons resident in West Ham and Leyton, by the provision of facilities for religious services and instruction and for the social and physical training and recreation of persons, who for the time being were or were likely to become members of the Methodist Church who had insufficient means to otherwise enjoy these advantages, was held not charitable by the HL. These recreational purposes were not charitable because there was insufficient public benefit. Viscount Simonds said that one must observe the distinction (at 592):

> *between a form of relief accorded to the whole community yet by its very nature advantageous only to the few, and a form of relief accorded to a selected few out of a larger number equally willing and able to take*
> p. 462 *advantage of it ... The Master of the Rolls in ↵ his judgement cites a rhetorical question asked by [counsel] ... : 'Who has ever heard of a bridge to be crossed only by impecunious Methodists?' The reductio ad absurdum is sometimes a cogent form of argument, and this illustration serves to show the danger of conceding the quality of charity to a purpose which is not a public purpose.*

The Recreational Charities Act 1958; Charities Act 2011, s 5

18.37 Lord Reid dissented in *Baddeley*, and the law was felt to be in some confusion. In response the Recreational Charities Act 1958 was passed, which is now superseded by s 5 of the 2011 Act, which states:

> *5 Recreational and similar trusts, etc.*
>
> (1) *It is charitable (and is to be treated as always having been charitable) to provide, or assist in the provision of, facilities for—*
>
> (a) *recreation, or*
>
> (b) *other leisure-time occupation, if the facilities are provided in the interests of social welfare.*
>
> (2) *The requirement that the facilities are provided in the interests of social welfare cannot be satisfied if the basic conditions are not met.*
>
> (3) *The basic conditions are—*
>
> (a) *that the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended, and*
>
> (b) *that—(i) those persons have need of the facilities because of their youth, age, infirmity or disability, poverty, or social and economic circumstances, or (ii) the facilities are to be available to members of the public at large or to male, or to female, members of the public at large.*
>
> (4) *Subsection (1) applies in particular to—*
>
> (a) *the provision of facilities at village halls, community centres and women's institutes, and*
>
> (b) *the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation, and extends to the provision of facilities for those purposes by the organising of any activity.*
>
> *But this is subject to the requirement that the facilities are provided in the interests of social welfare.*
>
> (5) *Nothing in this section is to be treated as derogating from the public benefit requirement.*

18.38 The Act makes clear that such facilities are subject to the public benefit requirement (s 5(5)), and so it is not clear that it does much more than restate the prior law, except in so far as s 5(3)(b)(1) allows facilities restricted to a class limited on the basis of social and economic circumstances that do not, apparently, simply

mean poverty; the other restrictions appear to define classes that have an independent status in the law of
p. 463 charities: gifts for the poor, aged, and impotent are good anyway, and recreational facilities for youth are generally treated as charitable as advancing education. Section 5 does not seem to overturn *Williams v IRC*, *Baddeley*, or the *Glasgow Police* cases.

18.39 In *IRC v McMullen* (1980) the HL decided that the gift for sports fell under the education head, and so did not consider the Recreational Charities Act, but in its 1979 decision in the case the CA did: the majority held that the gift was not 'provided in the interests of social welfare', because it did not merely provide facilities for those deprived; secondly, it was not intended to 'improve the conditions of life of those for whom the facilities were primarily intended', because it was intended as a gift for pupils generally, but would only benefit those who played, irrespective of their conditions in life. Bridge LJ dissented from this 'deprived class' view, saying, 'Hyde Park improves the conditions in life for residents in Mayfair and Belgravia as much as for those in Pimlico or the Portobello Road'. His dissent won the day in the HL in *Guild v IRC* (1992), where a gift for a public sports centre was held to be charitable.

'New' charitable purposes under the 2006 and 2011 Acts

18.40 Section 3(1)(e) and (h) provide that the advancement of 'citizenship or community development' and 'human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality or diversity' are charitable purposes. It is likely, perhaps, that these purposes might have been regarded as charitable prior to the Act in any case, as analogous extensions from purposes such as religion, education, and research, but their specification in the Act makes their status clear. Charities carrying out these purposes are likely to benefit most from the Commission's facilitative attitude toward political campaigning by charities (**18.60**).

The public benefit requirement

18.41 The law concerning the public benefit requirement has been thoroughly reviewed by the Upper Tribunal (Tax and Chancery Chamber), *Independent Schools Council v Charity Commission for England and Wales* (2011). As the decision makes clear, there are two aspects to the public benefit requirement: the first is that for a purpose to be beneficial to the public, it must actually be *beneficial*, not of no value or worse, detrimental; the second is that the purpose must be of benefit to the public as opposed to some private group or artificially restricted section of the public. A charity that operates abroad satisfies the public benefit test if its activities would be charitable if carried out in England (*Re Carapiet's Trust* (2002)).

A detrimental purpose cannot be charitable

18.42 Occasionally the courts make decisions about the ultimate benefits of certain purposes. In *National*
p. 464 *Anti-Vivisection Society v IRC* (1948), the purpose was found not be charitable as a political purpose. In addition, the HL decided to weigh the conflicting moral and material utilities of, on the one hand, the advancement of morals and education that would result from a suppression of vivisection and, on the other, the benefits to

medical science and research vivisection afforded. It decided that on balance the suppression of vivisection was not beneficial to the public. It departed from the earlier case *of Re Foveaux* (1895), which held that the court stood neutral on the public benefit of abolishing vivisection. In *Re Hummeltenberg* (1923) a gift for the training of spiritual mediums was held to provide no public benefit, and in the course of his decision in *Re Pinion* (1965), Harman J gave the illustration of schools for prostitutes or pickpockets as purposes that would not be charitable on this score. In the *Independent Schools Council* case, the tribunal rejected the argument that fee-paying schools are detrimental because they impair social mobility and are socially divisive; in the court's view, the issues raised in such an argument required political, not judicial, resolution. In *McGovern v A-G* (**18.25**) the court considered the possible detriment that Amnesty International's activities might have in the conduct of foreign affairs by the government.

18.43 In the case of religion the court appears to allow charities that it regards as having no benefit whatsoever, as in the case of *Thornton v Howe* (**18.19**). With respect to detrimental religious purposes, the Church of Scientology was formerly held not to be charitable (**18.28**), and this may in part have reflected the pronouncements of judges in other cases not concerning Scientology's charitable status: in *Hubbard v Vosper* (1972), Lord Denning said that Scientology was 'dangerous material', and it was described by Goff J as 'pernicious nonsense' in *Church of Scientology v Kaufman* (1973).

The requirement that a section of the public must benefit

18.44 Section 4 of the 2011 Act provides:

> *4 The public benefit requirement*
>
> (1) *In this Act 'the public benefit requirement' means the requirement in section 2(1)(b) that a purpose falling within section 3(1) must be for the public benefit if it is to be a charitable purpose.*
>
> (2) *In determining whether the public benefit requirement is satisfied in relation to any purpose falling within section 3(1), it is not to be presumed that a purpose of a particular description is for the public benefit.*
>
> (3) *In this Chapter 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.*
>
> (4) *Subsection (3) is subject to subsection (2).*

18.45 Section 4 of the 2006 Act and ss 14, 15(2) and (3), and 17 of the 2011 Act require the Charity Commission to issue guidance to charities and prospective charities on the public benefit requirement. (See Charity Commission (2013).)

p. 465 **18.46** Section 4(2) provides that there is no presumption that any particular purpose is for the public benefit. In *Independent Schools Council*, the tribunal held that there was no legal 'presumption' of benefit in the pre-2006 Act law; rather, the determination of public benefit was always context sensitive, turning on the particular purpose under consideration. The tribunal quashed the Charity Commission's guidance on the public benefit in relation to independent schools which charged substantial fees out of the reach of many, in

particular anyone poor. Whilst the tribunal found that any organisation which positively excluded the poor from benefiting from its purpose could not be charitable, none of the independent schools in question had this as part of their organising purposes. The schools did not charge substantial fees in order to exclude the poor; rather, they could not afford not to charge substantial fees if they were to carry out their educational purposes. It was the duty of the trustees to ensure that in carrying out their educational purposes the poor were not entirely excluded from benefit. If they did effectively exclude the poor beyond a token or *de minimis* level, it would not indicate that the purpose of the organisation was not charitable; rather, it would mean that the trustees were in breach of their duty properly to carry out their charitable purpose. Moreover, determining how best to carry out their charitable purpose was primarily a matter for the judgment of the trustees themselves. The Charity Commission could not fetter the exercise of this judgment by setting out a requirement that a school devote such and such proportion of its fee-income to bursaries.

18.47 Trusts for the education of residents of specific localities, or for the children of members of various professions are valid. In *Oppenheim v Tobacco Securities Trust Co Ltd* (1951) however, a trust for the education of children of employees or former employees of the British-American Tobacco Company, the employees of which numbered over 110,000, was held to be not charitable by the HL, on the ground of insufficient public benefit, employing what has been called the 'personal nexus' test: if a class is defined by a personal nexus to someone, and in this case the children's connection with their parent's employer stands on the same footing as one's connection with a relation, then that class is not a section of the public. Lord MacDermott dissented, asking whether there should be a difference between a trust for the children of coalminers before all the pits were nationalised, which would be charitable, and one for the same children afterwards, which would fail since they would all be joined by the employment nexus to the National Coal Board. He rejected the test and said that the court must consider all the circumstances of the case, and would have held the gift charitable. In *Dingle v Turner* (1972) Lord MacDermott's criticism of the personal nexus test was accepted by the HL, although this was *obiter*, as the gift in that case was a gift to relieve poverty, in respect of which there are no similar tests on the extent of the class.

18.48 Indeed, in respect of trusts to relieve poverty, it appears that the public benefit test means no more than that the trusts cannot be for named individuals; a gift for one's poor relations is perfectly valid (*Re Scarisbrick* (1951)). *Dingle v Turner* (1972) concerned a trust to pay pensions to poor employees. Being restricted
p. 466 to the poor, the trust was valid, but the HL unanimously joined Lord Cross in rejecting the personal nexus test in favour of determining a trust's validity on the basis of all the circumstances of the case. Lord Cross did, however, consider that certain schemes such as the educational scheme in *Oppenheim* were, perhaps, akin to fringe benefits for employees that should not be subsidised by the taxpayer.

18.49 The 'fringe benefit' issue appeared to be central in two cases that concerned the preferential treatment of a private class in educational trusts. *Re Koettgen's Will Trusts* (1954) concerned a trust for the promotion of commercial education for members of the public who could not afford it, which, however, contained a provision stating that a preference should be given to the families of employees of a named company of up to 75 per cent of the total fund; it was held charitable, although it is clearly very close to the line, if not incompatible with *Oppenheim*. The CA's decision in *IRC v Educational Grants Association Ltd* (1967) may better reflect the law. Here, there was a fund devoted to the advancement of education in general terms, which was therefore charitable; the fund was maintained by payments from the Metal Box Company; in one year,

however, when the claim was made for tax relief, between 76 per cent and 85 per cent of the income was paid for the education of children of persons connected with the company; the tax relief was denied, because it was held that it was not spent for charitable purposes only—the non-charitable payments were *ultra vires*.

18.50 In the case of trusts for the advancement of religion, the requirement that a section of the public benefits is elusive. In *Neville Estates Ltd v Madden* (1962) it was held (at 853) that a gift to the Catford synagogue was good, because the court:

> *is entitled to assume that some benefit accrues to the public from the attendance at places of worship of persons who live in this world and mix with their fellow citizens.*

18.51 In *Gilmour v Coats* (1949) the HL held that a gift to a contemplative order of nuns was not charitable, reasoning that intercessory prayer on behalf of members of the public was not a sufficient public benefit; there must be some engagement with the public. In *Re Heatherington* (1990) a gift for the saying of masses for the repose of the donor's husband and relations was charitable on the basis that the masses were said in public.

18.52 Under the 'other purposes' fourth head of charitable purposes, purposes will fail if the benefit appears to be unnecessarily or artificially restricted, as in *Baddeley*, or restricted to what amounts to a class of private individuals, as in *Glasgow Police*. Such a gift is not bad on this count if the benefits are restricted to residents of a particular community. Nor does the trust's being restricted to victims of a disaster create an invalid class (*Re North Devon and West Somerset Relief Fund Trusts*), although being the victim of a disaster alone does not make one an object of charity—one is a proper object of charity only if, and to the extent that, one is thereby impoverished, or disabled, etc. So if a millionaire loses his rose garden in a flood, he is not the proper object of a disaster relief charity.

A charity must be for exclusively charitable purposes

18.53 It has always been the law that a purpose, to count as charitable, must be wholly charitable. Trusts have failed for being expressed to be for more than charitable purposes. A classic example is *Morice v Bishop of Durham* (1805), where a trust for 'charitable or benevolent' purposes failed, since not every benevolent purpose would count as a charity under the law. (The Charitable Trusts (Validation) Act 1958 overturns the actual decisions in such cases, providing that where, within the terms of a gift, the property *could* be used entirely for charitable purposes, it shall be treated as a gift confined to those charitable purposes.). However, charitable trusts may engage in subsidiary purposes or activities that are not themselves charitable, such as fund-raising, which contribute to the fulfilment of their main purposes. It is, however, the issue of charities engaging in political activity that has raised some of the thorniest issues. In general, political purposes are not charitable. The rationale for this was explained by Lord Simonds in the *National Anti-Vivisection Society* case (quoting Tyssen on Charitable Bequests) (at 62):

> *However desirable the change may really be, the law could not stultify itself by holding that it was for the public benefit that the law itself should be changed. Each court in deciding on the validity of a gift must decide on the principle that the law is right as it stands.*

18.54 Furthermore, Lord Simonds pointed out that the Attorney-General must supervise and enforce charities, and, in some cases, formulate a scheme for their execution, and he should not be put in the position of forwarding a purpose that he and his government might feel to be quite against the interests of the general welfare.

18.55 *McGovern v A-G* (1982) concerned a trust set up by Amnesty International for those of its purposes that it felt were charitable. The relevant purposes were to secure the release of prisoners of conscience, to procure the abolition of torture and other cruel, inhumane, or degrading treatment of prisoners, to undertake research into the maintenance and observation of human rights and to disseminate the same. Slade J held that where the political purpose was one of a change in the laws of a foreign country, there was no danger of the court 'stultifying' itself by having both to regard a law that it was bound to apply as both right and needing to be changed, since the law was a foreign one. But such a trust would still fail the public benefit test for the court would in such a case have even less means of judging whether the proposed change in the law was of benefit to the local inhabitants. Furthermore, the court would have to take into account the substantial risk that such activity by a UK charity would prejudice the foreign relations of the UK with that country.

18.56 On the requirement that trust purposes must be wholly and exclusively charitable, Slade J said (at 340F–341F):

> *[Each] and every object or purpose designated must be of a charitable nature. Otherwise, there are no means of discriminating what part of the trust property is intended for* ↵ *charitable purposes and what part for non-charitable purposes and uncertainty in this respect invalidates the whole trust. Nevertheless ... a distinction of critical importance has to be drawn between (a) the designated purposes of the trust, (b) the designated means of carrying out these purposes and (c) the consequences of carrying them out. Trust purposes of an otherwise charitable nature do not lose it merely because, as an incidental consequence of the trustees' activities, there may enure to private individuals benefits of a non-charitable nature ... Similarly, trust purposes of an otherwise charitable nature do not lose it merely because the trustees, by way of furtherance of their purpose, have incidental powers to carry on activities which are not themselves charitable ... The distinction is ... one between (a) those non-charitable activities authorised by the trust instrument and which are merely subsidiary or incidental to a charitable purpose, and (b) those non-charitable activities so authorised which in themselves form part of the trust purpose. In the latter but not the former case, the reference to non-charitable activities will deprive the trust of its charitable status.*

p. 468

18.57 Slade J found that both securing the release of prisoners of conscience and securing the abolition of torture and other degrading or inhuman punishments were not charitable purposes. As to the former, the purpose (at 347EF):

> *must be regarded as being the procurement of the reversal of the relevant decisions of governments and governmental authorities in those countries where such authorities have decided to detain prisoners of conscience, whether or not in accordance with local law. The procurement of the reversal of such decisions cannot, I think, be regarded as one possible method of giving effect to the purposes … it is the principal purpose itself.*

18.58 Making reference to the Amnesty International statutes, Slade J construed the latter purpose as including the abolition of capital and corporal punishment, and found its main object was (at 352A):

> *to procure the passing of the appropriate reforming legislation for the purpose of abolishing inhuman or degrading punishments by process of law, including capital and corporal punishment…*

18.59 Had research into human rights and dissemination of the result thereof been the only purpose, Slade J would have found the trust charitable, but given that the other purposes were not, it fell with the rest. The general orientation of Slade J's approach continued in the CA decision in *Southwood v A-G* (2000), where an organisation seeking charitable status whose purposes included 'propos[ing] alternative policies to achieve disarmament' failed to do so, the purpose being found to be political (see Garton (2000)).

18.60 The Charity Commission produces guidance from time to time on the allowable political activity by charities. The guidance has become less and less restrictive of political activities over the years. Most recently, the Charity Commission has emphasised the positive aspects of political advocacy by charities: owing to the high regard in which they are held, their strong links to local communities, and the diversity of their
p. 469 activities, it is argued that they are well situated to comment on government policy and offer alternative ways of engaging in public debate and give voice to otherwise under-represented groups or interests. The 2008 Guidelines suggest that, in the eyes of the Charity Commission, the ambit of acceptable political activity by charities is now very wide, up to and including supporting the policies of a particular political party and devoting all of their resources, for a time, to political campaigning if this best serves the purpose of the charity (Charity Commission (2008)). In *Aid/Watch Incorporated v Commissioner of Taxation* (2010) the High Court of Australia reviewed the 'no political purposes' rule and held charitable an organisation, Aid/Watch, the principal purpose of which was to review the efficacy of various aid programmes and to generate discussion of their findings, with the understanding that this might influence government policy. The majority of the court (French CJ, Gummow, Hayne, Crennan, and Bell JJ) held that 'in Australia there is no general doctrine which excludes from charitable purposes "political objects" and has the scope indicated in England by McGovern v Attorney-General'.

18.61 Disapproval of the 'political objects' doctrine was also expressed in *Re Greenpeace of New Zealand Inc* (2014), a decision of the NZSC. (For misgivings about this trend, see Penner (2016).) The case concerned the registration of the Greenpeace organisation as a charity in New Zealand. Two objects of the organisation were considered problematic—first, the promotion of peace and disarmament, and second, the promotion of 'legislation, policies, rules, regulations and plans which further [Greenpeace's other objects] and support their enforcement or implementation through political or judicial processes as necessary'. A majority in the

Supreme Court (Elias CJ, McGrath and Glazebrook JJ) allowed Greenpeace's appeal against the Court of Appeal's decision that political objects cannot be charitable, and that the law prevents registration of an entity with such objects unless they are merely ancillary to charitable objects.

18.62 In the view of the NZSC, the 'political objects' doctrine has neither been necessary nor beneficial, and is in fact a relatively recent development based on scant authority. Furthermore, the label placed on the doctrine has contributed to confusion:

> *[60] The label 'political' itself has been used in a number of different senses (party political, controversial, law-changing, opinion-moulding, among others) and is apt to mislead.*

18.63 The majority doubted that all advocacy for legislative change should be excluded from being recognised as charitable, citing the kind of promotion of law reform undertaken by law commissions (which aims to keep laws updated for modern usage) as one example of the kind of law reform that might well be seen as charitable if undertaken by a private body. Drawing a link to the realities of how modern democracies work, the majority also accepted that:

> *[63] ... in the circumstances of modern participatory democracy and modern public participatory processes in much administrative and judicial decision-making, there is no satisfactory basis for a distinction between general promotion of views within society and advocacy of law change (including through such available participatory processes).*

p. 470 **18.64** Further, in the view of the majority, a strict exclusion 'risks rigidity in an area of law which should be responsive to the way society works'. The idea is that changes in society may throw up new philanthrophic endeavours which may need to be properly treated as charitable, and some of these may well be considered political. In sum, the majority agreed with the view expressed by Kiefel J in *Aid/Watch Incorporated v Commissioner of Taxation* (2010) that charitable and political purposes are not mutually exclusive:

> *[72] The better approach is not a doctrine of exclusion of 'political' purpose but acceptance that an object which entails advocacy for change in the law is 'simply one facet of whether a purpose advances the public benefit in a way that is within the spirit and intendment of the statute of Elizabeth I'.*

18.65 As an olive branch of sorts, the majority was prepared to accept that the circumstances in which advocacy of particular views is shown to be charitable will not be common. However, they argued that that does not justify a rule that all non-ancillary advocacy is properly characterised as non-charitable. An assessment of whether advocacy or promotion of a cause or law reform is a charitable purpose will depend on several considerations, including the end that is advocated, the means promoted to achieve that end, and the manner in which the cause is promoted.

A charity must be non-profit-distributing

18.66 Charitable trusts may engage in activities to raise funds, including charging fees for their services (*Re Resch's Will Trusts* (1969); *Independent Schools Council* (2011)). They must absolutely not distribute profits. This goes for charitable companies as well as charitable trusts. As for earning profits, in *Oxfam v Birmingham City District Council* (1976), the HL held that a charity shop was not entitled as a charity to relief from rates, because it was used for the purpose of fund-raising and was not directed to the charitable purposes themselves. The general rule, therefore, is that the profit-earning activities of charities are liable to the same rates and taxes, such as VAT, as are any other businesses, although various exceptions exist. For example, the Rating (Charity Shops) Act 1976 overturned the *Oxfam* ruling in respect of those shops that are used solely or mainly for the sale of donated goods, the proceeds of which are used solely for charitable purposes. *Nuffield Health v Merton LBC* (2020) was a difficult case. A charitable company, with the object of promoting 'health and healthcare of all descriptions', ran a commercial gym at Merton Abbey. Although commercial membership fees were charged at this gym, the court held that the premises were used for charitable purposes. The company was therefore entitled to relief from rates. After considering the authorities, including *Oxfam*, Mr Stuart Isaacs QC (sitting as Deputy Judge) stated that three factors need to be considered in these cases:

> *[21] first ... it is the charity's use of the premises that must be considered; second, that if the use which the charity makes of the premises is directly to facilitate or ancillary to the carrying out of its main charitable purpose, that is sufficient to satisfy the requirement* ↵ *that the premises are used for charitable purposes; and third, that if the charity's use of the premises is not for its charitable purposes or does not directly facilitate or is not ancillary to its charitable purposes, the charity will not be entitled to relief.*

p. 471

18.67 Detailed guidance on trading by charities and the tax implications can be found in Charity Commission (2016b).

Preservation from failure: the cy-près doctrine

18.68 Where a charitable purpose would fail because the means chosen by a testator for its implementation are either impractical or impossible to carry out, the cy-près doctrine, and more recently, Part 6 of the Charities Act 2011, can be applied so that it will not fail. 'Cy-près' is law French, originally meaning something like 'as near as possible'. The cy-près power of the courts allows the court to direct that the trust property be applied to a purpose as close as possible to the one intended by the settlor. Cy-près can save charitable trusts from failure at the outset, or from subsequent failure when carrying out the purpose becomes impossible or impractical. Given, as we have seen, that when a private trust fails an automatic resulting trust arises (**Chapter 10**), it is not obvious why, when a charitable trust fails, the court ought to be empowered to devote the trust funds to a new charitable purpose, and it is, in fact, not an easy matter to justify the court's jurisdiction to do so (see Garton (2007)).

Preservation from failure at the outset

18.69 The cy-près doctrine can save a charitable trust from failure at the outset because the charitable purpose is impractical or impossible to carry out. NB: The doctrine only applies to a purpose *that already counts as a charitable purpose*, ie to relieve poverty, or advance education, or some other charitable purpose. Students regularly make the mistake of thinking that the court can use the cy-près doctrine to turn a non-charitable purpose into a charitable one—the court cannot; if the proposed purpose is not charitable, the court has no power to make it so. In order for the court to redirect money intended for a charitable purpose that fails by applying the cy-près doctrine, the court must find that the donor manifested a 'general' or 'paramount' charitable intention, ie an intention to give the money to charitable purposes of which the particular gift was but a specification; if the intention was to give only to the specific charity or charitable purpose, and the charity is defunct or the purpose impossible to carry out, then the gift fails.

18.70 What is a general charitable intention? In *Re Lysaght* (1966) Buckley J said (at 202E-F):

> *A general charitable intention ... may be said to be a paramount intention on the part of a donor to effect some charitable purpose which the court can find a method of putting into operation, notwithstanding that it is impracticable to give effect to* p. 472 ↵ *some direction by the donor which is not an essential part of his true intention ... In contrast, a particular charitable intention exists where the donor means his charitable disposition to take effect if, but only if, it can be carried into effect in a particular specified way ...*

18.71 The courts have employed cy-près effectively to strike out conditions on trusts for scholarships. In *Re Lysaght* (1966) an endowment of medical studentships at the Royal College of Surgeons was to be restricted to recipients not of the Jewish or Roman Catholic faith; the College would not accept the gift because the condition was 'so invidious and so alien to the spirit of the college's work as to make the gift inoperable in that form'. In *Re Woodhams* (1981) music scholarships were restricted to boys from two particular groups of orphans' homes. In both cases the condition was regarded as an inessential element of the testator's bequest, specifying particular means of carrying out his general charitable intention to fund the said scholarships, and the conditions were deleted.

18.72 Many cases in which charitable gifts are saved from failure at the outset concern testamentary gifts to charitable institutions or bodies that operated when the testator made his will but have since been amalgamated with others or have gone defunct. Three cases must be distinguished. The first concerns gifts to particular named charities that no longer exist in their own right, but the purposes of which are continued by other charities. In *Re Faraker* (1912) there was a testamentary gift to 'Mrs Bayley's Charity, Rotherhithe', which had, with other local charities, been consolidated into a trust for the poor in Rotherhithe. The CA held that the gift should go to the consolidated charity because it continued the named charity. This is not an example of cy-près, because the gift is regarded as being successfully made to the intended charity. This is so even in the circumstances where, as in *Faraker*, the continuing charity has substantially different overall purposes; the original charity was for poor widows, and the consolidated charity was for the poor generally, so that there was no guarantee that any of the gift actually went to poor widows.

18.73 Secondly, where the particular charitable institution named to be the recipient of the gift no longer exists, the gift will not fail if on a true construction of the testator's intentions he intended to create a charitable purpose trust and merely indicated this institution to serve as the trustee. This, too, is not an example of cy-près: since a trust will not fail for want of a trustee, the court will find another trustee to carry out the charitable purpose. This construction is much more likely in the case of a gift to an unincorporated charitable body than an incorporated one, for the following reasons given by Buckley J in *Re Vernon's Will Trusts* (1972) (at 303C–F):

> *Every bequest to an unincorporated charity by name without more must take effect as a gift for a charitable purpose. No individual or aggregate of individuals could claim to take such a bequest beneficially. If the gift is to be permitted to take effect at all, it must be as a bequest for a purpose, viz., that charitable purpose which the named charity exists to serve. A bequest which is in terms made for a charitable purpose will not*
> p. 473 *fail for lack of a trustee ... A bequest to a named unincorporated charity, however,* ↵ *may on its true interpretation show that the testator's intention to make the gift at all was dependent upon the named charitable organisation being available at the time when the gift takes effect to serve as the instrument for applying the subject matter of the gift to the charitable purpose for which it is by inference given. If so and the named charity ceases to exist in the lifetime of the testator, the gift fails: In re Ovey (1885). A bequest to a corporate body, on the other hand, takes effect simply as a gift to that body beneficially, unless there are circumstances which show that the recipient is to take the gift as a trustee. There is no need in such a case to infer a trust for any particular purpose ... the natural construction is that the bequest is made to the corporate body as part of its general funds, that is to say, beneficially and without the imposition of any trust.*

18.74 This reasoning is inventive but unpersuasive. Surely most testators do not know whether the institutions to which they give are unincorporated or not and, secondly, most probably do not register a distinction between a gift to a charitable body as an accretion to its funds or a gift for the charitable purposes it carries out; how, then, can such a distinction be used to discern the testator's intentions? Nevertheless, the distinction is accepted as good law; it was applied in *Re Finger's Will Trusts* (1972), so that a gift to a now defunct unincorporated association was valid as a purpose trust, whereas a gift to a defunct incorporated body failed, although the latter was saved by applying the money cy-près. *Re Vernon* and *Re Finger* were both cited with apparent approval by the CA in *Re Koeppler's Will Trusts* (1986). Such a purpose trust is a trust for that specific purpose only; a particular charitable institution serving as trustee must not treat the gift as a general accretion to its funds, but must apply it only to the specific purpose (*Re Spence* (1979)). In contrast, testamentary gifts to an incorporated charity that took effect following a court order that it be wound up, but before its actual dissolution were, on the same principles, held by Neuberger J not to be gifts on trust for a charitable purpose, but gifts in accretion to the corporation's funds; the gifts went into the general assets of the charitable corporation for distribution to its creditors (*Re ARMS (Multiple Sclerosis Research) Ltd* (1997)).

18.75 True cases of cy-près only occur where the intended charitable gift actually fails, as in the gift to the incorporated body in *Re Finger's Will Trusts* above. In *Re Rymer* (1895) the testator gave money to a particular seminary, which at the time of the testator's death had ceased to exist, although its current students were

transferred to another seminary. The gift could only be saved by application of the cy-près doctrine, but since the court found that the gift was to the particular seminary only, there was no general charitable intention, so cy-près could not be applied.

18.76 *Re Harwood* (1936) established something of a general rule that a gift to a particular charity that once existed but is now defunct, is interpreted, unless there are indications to the contrary, as a gift intended for that body alone, disclosing no general charitable intention, whereas in the case of a gift to a named charity that never existed it is much easier to find a general charitable intention. In *Re Spence*, Megarry VC extended
p. 474 the principle to the case where the testator has selected a particular charitable purpose, here the purpose of benefiting the residents of a particular old peoples' home, which at the testatrix's death ceased to exist. He explained the rule's rationale as follows (at 439A–C):

> *... I think the essence of the distinction is in the difference between particularity and generality. If a particular institution or purpose is specified, then it is that institution or purpose, and no other, that is to be the object of the benefaction. It is difficult to envisage a testator as being suffused with a general glow of broad charity when he is labouring, and labouring successfully, to identify some particular specified institution or purpose as the object of his bounty. The specific displaces the general. It is otherwise where the testator has been unable to specify any particular charitable institution or practicable purpose, and so, although his intention of charity can be seen, he has failed to provide any way of giving effect to it. There, the absence of the specific leaves the general undisturbed.*

18.77 Section 63 of the 2011 Act usefully provides that where collections are on public appeal for a charitable purpose, such as purchasing a work of art for the National Gallery so that it remains within the UK, which fails at the outset (eg not enough money is raised for the purpose), the money will be applicable cy-près as if given for charitable purposes generally.

Preservation from subsequent failure

18.78 When a charitable trust has been effectively carried out for a time, but then its purposes become impossible or impractical to carry out, the court may modify the purposes, on the basis that they are giving effect to the settlor's intention to give property 'out and out' to charity. Up to the turn of the century, the cy-près power to modify the terms of a trust was narrowly construed, and only if the original terms were actually impossible or impractical to carry out would the court intervene. So, as Martin (2001), 446, remarks, cumbersome, uneconomical, and inconvenient trusts for 'the distribution of loaves to the poor or of stockings for poor maidservants' continued well into the last century. Section 62(1)(e)(i) of the 2011 Act expands the scope for the doctrine, in particular providing that a cy-près modification may occur where the original purposes have been adequately provided by other means, which encompasses statutory services in a welfare state. The predecessor s 13 of the Charities Act 1993, although often used by the Charities Commissioners, has not been frequently litigated. In *Re JW Laing Trust* (1984) it was held that s 13 applied only to permit alterations in the purposes of a trust, not variations of settlors' directions that were merely administrative, although in this case such a direction, that the capital and income be fully distributed within a short time period, was

deleted under the court's inherent jurisdiction. *Varsani v Jesani* (1999) is an interesting case. The court employed its power under s 13 to divide the assets of a religious sect between two rival factions following a fundamental disagreement over the true tenets of the faith.

18.79 Recently, the High Court dealt with an example of subsequent failure in *HM Attorney General v Zedra Fiduciary Services* (2020). In 1928, £500,000 was settled on trust by Mr Gaspard Farrer, with the direction that
p. 475 the trustees were to accumulate income and profits until the sum (alone or in conjunction with other funds then available) would be enough to discharge the National Debt of the United Kingdom. As things stood in 1928, this was a reasonable prospect. However, as of the date of hearing in 2020, the trust fund amounted to only 0.026 per cent of the National Debt. Expert evidence tendered before the court (and indeed, common sense) showed that the prospect of the fund ever being large enough to discharge the National Debt was now 'vanishingly small'. The charitable purpose, whilst once possible to carry out, was now deemed impossible. Zacaroli J held that the court had jurisdiction to make a scheme altering the charitable trust pursuant to its cy-près jurisdiction, but reserved the exact nature of the scheme for a further hearing.

Further reading

Charity Commission (2008, 2013a, 2013b)

Chesterman (1999)

Economist (1995)

Garton (2005, 2007)

Gravells (1977)

Mitchell (1999a, 1999b, 2000)

Moffat (1999), ch 18

Must-read cases: *Shergill v Khaira* (2014); *Independent Schools Council v Charity Commission for England and Wales* (2011); *McGovern v A-G* (1981); *Hodkin v Registrar General of Births, Deaths and Marriages* (2013); *Re Lysaght* (1965); *Incorporated Council of Law Reporting for England and Wales v A-G* (1972); *IRC v McMullen* (1981); *IRC v Baddeley* (1955); *Oppenheim v Tobacco Securities Trust* (1951); *Dingle v Turner* (1972); *Re Faraker* (1912); *Re Vernon's Will Trusts* (1960); *Re Finger's Will Trusts* (1971); *Re Spence* (1978)

Self-test questions

1. Are the following purposes charitable?
    - To set up a sporting institute to train Great Britain's most promising young athletes.
    - To provide birth control to students in schools in London.
    - To provide tennis rackets to the unemployed of Manchester.

- To provide a national health service in a poor developing country where the predominant religion prohibits blood transfusions.
- To further the activities of a religious sect that counsels its adherents to withdraw from the world and live in remote communes.
- To establish a sixth form college for dyslexic pupils which charges high fees, 5 per cent of the annual fee income being devoted to bursaries for pupils from poorer families.

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- To abolish the use of animal testing to assess the efficacy of newly developed drugs.
- To provide scholarships to assist students to learn ballroom dancing while at university, with the condition that the trustees may, in applying up to 75 per cent of the income of the trust, give preference to children of employees of Y Ltd.
- To provide funds to the Sisters of 2001, an association of Roman Catholic nuns whose sole purpose is to persuade the Vatican to allow the ordination of women priests.
- To purchase tracts of land in the Amazon basin of Brazil so as to preserve the natural habitat, where possible in areas that are currently subject to logging authorised by the government.
- To convert British Muslims to Christianity.

2. What is the public benefit requirement? Has the requirement been changed by the Charities Acts 2006 and 2011?
3. How does the law operate to save charitable trusts from initial failure? Describe and critically assess the law governing the court's finding of a 'general charitable intention'.
4. 'The Charities Acts 2006 and 2011 represent a missed opportunity to reform charities law.' Discuss.
5. 'The prohibition on charities advancing political purposes or engaging in political activities has always been difficult to apply, and is made even more difficult in view of the recognition of certain purposes as charitable under the Charities Act 2011.' Discuss.

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