

# Charity law

## ■ English law

### Historical foundations

England has a legal system that traces its roots back to the Norman Conquest in 1066. The previous mix of localised rules, customs and practices changed into a more uniform and centralised approach as a new body of rules, based on local conditions in England, emerged. Other important gradual changes included the centralisation of government, the beginnings of public bureaucracy and the development of a centralised judiciary. The Curia Regis (King's Council) gradually developed into the Royal courts, presided over by professional judges. By 1250 the Royal judges oversaw a system of law common to the whole country (the English 'common law' had come into existence).

## ■ Modern English law framework

Modern English law is a mix of common law and statute law.

### Common law

Common law is that part of English law that is derived from custom and judicial precedent. 'Judicial precedent' enables binding precedents to be set that must be followed in subsequent similar cases in courts at the same or an inferior level. Flexibility is provided by the power of a higher court to overrule a lower court's decision on appeal (for example, if the decision was incorrect in law) and the power for judges in general to distinguish a case from a previous case in relation to a material point.

### Statute law

Statute law is the body of English law rules and principles laid down in the written laws passed by the legislative body of the United Kingdom Parliament. Statute law is set out in Acts of Parliament (known as primary legislation) and in statutory instruments (known as secondary legislation or delegated or subordinate legislation).

An Act provides a broad framework. Statutory instruments provide the detail and bring the relevant Act into force (immediately or in stages). Texts of Acts of

Parliament and statutory instruments are available at: [www.legislation.gov.uk](http://www.legislation.gov.uk). An Act may apply to the entire UK or to parts of it. The practical implementation of an Act is the responsibility of the relevant government department. The Office for Civil Society, part of the Department for Digital, Culture, Media and Sport, is responsible for implementation of Acts that relate to English charity law.

English law is classified into criminal law, concerned with offences against society at large (crimes) and civil law, largely concerned with rights, relationships and disputes between individual parties. Charity law and the regulation of charities are civil law matters.

## ■ Legal jurisdictions in the UK

### Legal systems and jurisdictions

For historic reasons, the United Kingdom does not have one unified legal system. Instead, there are three separate and different legal systems and legal jurisdictions.

**Table 1.1: Legal jurisdictions in the UK**

Country	Legal systems and jurisdictions
United Kingdom (UK)	England and Wales
	Scotland
	Northern Ireland

It is quite common for charities to be fundraising and operating ‘cross border’ in two or more of the UK’s jurisdictions. Such charities may be accountable to more than one of the UK’s charity regulators and may need to be registered as charities in more than one jurisdiction.

### Courts, tribunals and the judiciary

The courts are the final arbiter between the citizen and the state and are therefore a fundamental pillar of the United Kingdom’s constitution. That constitution is underpinned by the three-way balance between executive (government), Parliament and the courts, which are independent of both the executive and Parliament.

The hierarchy of the English civil courts is as follows:

Supreme Court for the United Kingdom

↑

Court of Appeal

↑

High Court

↑

County Court

Modern charity law matters are dealt with in the Chancery Division of the High Court of Justice. The Civil Division of the Court of Appeal hears all appeals from all Divisions of the High Court.

In civil matters, the Supreme Court for the United Kingdom, created by the Constitutional Reform Act 2005, is the court of final appeal for the entire United Kingdom (in civil matters) and the court of final appeal for criminal matters in cases from England, Wales and Northern Ireland. As an appeal court, it may only consider a case if a relevant order has been made in the lower court.

In addition, the Supreme Court can consider cases involving arguable points of law of general public importance. This gives it an important role in developing the common law, as the Supreme Courts Justices consider legal points of the greatest public or constitutional importance, affecting the whole population.

Devolution issues are within the Supreme Court's jurisdiction. So it can hear cases about whether the devolved executive and legislative authorities in Scotland, Wales and Northern Ireland have acted, or propose to act, within their powers or have failed to comply with any other duty imposed upon them.

The court's role is to interpret the law, including statute law made by Parliament. It does not determine public policy and it cannot 'strike down' law made by Parliament.

The impartiality of the courts and the independence of the judiciary in the administration of the law are fundamental features of the English legal system. This must be a demonstrable reality, so that justice is not only done, but is seen to be done. The core principle of separating the highest level of the judiciary from Parliament, to emphasise the independence of the courts, was a driving factor in the establishment of the Supreme Court.

The Tribunal system, now governed by the Tribunals, Courts and Enforcement Act 2007, provides a First-tier Tribunal and an Upper Tribunal. Both the First-tier Tribunal and the Upper Tribunal are divided into Chambers in which similar jurisdictions are dealt with by relevant experts. The Charity Tribunal is now part of the First-tier Tribunal. In the Upper Tribunal, charity matters fall within the remit of the Tax and Chancery Chamber. The Upper Tribunal primarily deals with reviews and hears appeals arising from cases dealt with in the First-tier Tribunal. The Upper Tribunal is a superior court, so its decisions do generally create binding legal precedent.

## **United Kingdom Parliament**

The principle of 'Parliamentary sovereignty' makes Parliament the supreme legal authority competent to create or alter law in the United Kingdom. It does so through the collective body of statute law and through individual pieces of legislation.

Making law is one of the principal roles of the UK Parliament. An Act of Parliament may alter existing law or introduce new law. Acts of Parliament are 'principal' legislation. In addition, under the authority of relevant provisions in

an existing Act, Parliament can make detailed additional and supplementary law in regulations set out in statutory instruments. This is known as 'secondary legislation'.

### **Devolved legislative bodies in the United Kingdom**

The Scottish Parliament, the National Assembly in Wales and the National Assembly in Northern Ireland are devolved legislative bodies within the UK. Charity law and regulation are devolved matters in all three areas of the UK (England and Wales, Scotland, Northern Ireland).

### **European Union and European law**

Member states of the European Union are subject to European Union (EU) law as a result of being a signatory of European treaties. European law consists of the EU treaties, EU Regulations and EU Directives.

The EU treaties are the primary law of the EU and directly applicable to all member states. They define areas of policy for which the EU is responsible and set out general principles on particular areas. Secondary EU law is set out in Regulations, Directives and Decisions. The European Commission monitors the application of EU law. It can take action against a member state that fails to incorporate a Directive into that state's national law or breaches EU law. Ultimately, the Commission can instigate formal infringement proceedings leading to a referral of the member state to the European Court of Justice.

EU Regulations have direct binding effect throughout the member states of the EU, without the need for national legislation to be made in each member state. EU Directives set out goals that member states must achieve. Those are given effect by specific legislation adopted by each member state within that state's own law. Decisions of the European Court of Justice are directly applicable to and binding on those parties to whom the decisions are addressed, which can include EU member states.

A national referendum in 2016 resulted in a majority vote in favour of the UK leaving the EU – a decision that has come to be known as 'Brexit'. A lengthy and complex process of legal change is now underway, the first stage will, for the time being, import UK law that emanates from EU law wholesale into UK law on a 'standalone' basis. This will then allow a planned programme of legal reform to be addressed by Parliament to repeal or alter areas of law as appropriate to UK sovereign public policy and perceived reform need.

There are significant legal challenges involved in this. The law to be temporarily imported to sovereign UK law and then reviewed in this exercise is vast in scale and scope. In addition, that body of law is predicated on the basis that the UK is a member of the EU, so for example much of it refers to the powers of the European Commission or the role of the European Courts or directly refers to particular EU regulations.

There is a two-year time limit for EU law to have any continued effect in a state leaving the EU. The period begins on the date the UK formally triggered the leaving process (by activating Article 50 of the Treaty of Rome, the founding document of the EU). At the end of the two years, EU law automatically ceases to apply in the UK.

## ■ Charity law foundations and framework

### Charity law – foundations

Charitable activity in England and Wales has ancient origins, at least back to the sixth century. Those origins are particularly found in the early English church's initiatives to provide education for at least some children in the general population and to address some of the most chronic needs of the population arising from poverty, sickness and disease. By medieval and early Tudor times, the concept of philanthropic giving to charitable causes was deeply rooted in English culture, with appropriate mechanisms for giving to those in need available through gifts to monasteries, other religious institutions and some public institutions. The charitable activities of the aristocracy and the great trade guilds supplemented this work of relieving need.

The church's charitable work was effectively halted in 1538 when Henry VIII dissolved the monasteries and confiscated vast amounts of funds and a huge variety of other assets from the church. During Elizabeth I's reign, the continuing consequences of that, combined with growing urbanisation, population expansion and dispossession of land from England's peasants led to a poverty crisis. As part of the attempts to address that crisis, Parliament passed three statutes intended to rationalise and clarify the relative roles of the state and private charitable donations. One of those statutes, the Statute of Charitable Uses 1601 (often called 'the Statute of Elizabeth') set out in its preamble the first recorded description of a 'charity' in English law and the purposes or 'objects' for which a charity could be established. Although the 1601 Statute has long since been repealed, that definition provided the foundation on which modern English law's concept of 'charitable purposes' is built.

In the four centuries that followed the 1601 Statute the courts gradually developed the concept of charitable objects. The landmark House of Lords' decision in the case of *Inland Revenue Commissioners v Pemsel* in 1891 decided there were four broad 'heads' of charity:

- Relief of poverty
- Advancement of education
- Advancement of religion
- Other purposes beneficial to the community.

The fourth head enabled gradual legal change to reflect new social conditions and a changing world that could never have been envisaged by those responsible for the wording in the 1601 Statute.

Legal regulation of how charities operate has far more recent origins. In the nineteenth century, Parliament attempted to gather information more systematically on the assets and activities of English charities through the appointment of Commissioners. The emergence of the charity regulatory regime we have today can be traced back to the Charities Act 1960.

### **Charity law and regulation – modern framework**

Modern English charity law is a mix of common law, developed largely out of trust law, and statute. The modern regulation of charities under the law of England and Wales is largely based on statute, supported by wider common law principles.

### **Charity law – principal statutes**

The principal charity law statutes are:

- Charities Act 1992 (Part II) which deals with provisions relating to the regulation of fundraising in certain circumstances
- Trustee Act 2000
- Charities Act 2011
- Charities (Protection and Social Investment) Act 2016.

The underlying aim of the Trustee Act 2000 is to provide trustees of unincorporated trusts (charitable trusts and other trusts) with the powers they require to make investments and to administer trusts in, especially in relation to trustees' duties and their default powers. Most of the Trustee Act provisions relevant to charitable trusts apply automatically to all unincorporated charitable trusts constituted under the law of England and Wales. However, those rules do not automatically apply to charities that are incorporated bodies (for example charitable companies incorporated under the Companies Act).

The Charities Act 2011 is a consolidating Act that came into effect on 14 March 2012. It repealed and replaced the Recreational Charities Act 1958 and the Charities Act 1993 (as then amended) and most, but not all, of the provisions of the Charities Act 2006. Most of the Charities Act 2011 only applies to England and Wales.

The Charities (Protection and Social Investment) Act 2016 provides a range of intended protections for charities against those who might abuse them and their charitable funds and assets, including updated, wider and additional new powers for the Charity Commission. Those powers are largely aimed at equipping the Commission to tackle abuse of charities more effectively and efficiently. In addition, the Act:

- (a) introduced a new statutory power for most (but not all) legal forms of charities to make social investments, that provide a financial return and also a social return;
- (b) made some detailed changes to the existing regulatory regime for certain types of fundraising relationships and activities, particularly those involving professional fundraisers (i.e. businesses that exist to raise funds for charities on a commercial basis) or other commercial organisations (i.e. non-fundraising businesses that at times carry out commercial activities to raise funds for charities);
- (c) introduced additional compulsory disclosure and reporting requirements relating to fundraising for the trustees of charities that are subject to compulsory charity law audit requirements; and
- (d) extended the scope of the reserve powers of the relevant Minister to introduce additional regulations relating to charity fundraising.

### **Role of the courts and other tribunals**

All charities are subject to the ultimate supervision of the courts and all charitable assets are under the ultimate protection of the courts, acting as guardian of the public interest on behalf of the Crown. Charity matters, alongside trust law matters, fall within the jurisdiction of the Chancery Division of the High Court.

The principal focus of the activities of the English courts, in relation to charities, is the protection and proper application of charitable assets, ensuring those assets remain both safe and in actual use for the intended charitable purpose for which they were given. By contrast, the day-to-day regulatory oversight of charities, especially in relation to public accountability, is largely a matter for the Charity Commission.

The First-Tier Tribunal (Charity), usually known as the Charity Tribunal, is intended to provide a low-cost and user-friendly means to challenge certain decisions of the Charity Commission and to assist the development of the law, through its published decisions. The Upper Tribunal may hear applications for judicial review transferred to it by the High Court (this is not within the Charity Tribunal's remit) as well as appeals from decisions of the Charity Tribunal.

## **■ Charity proceedings**

### **Definition**

Section 115 of the Charities Act defines 'charity proceedings' as proceedings in any court in England or Wales brought under:

- (a) the court's jurisdiction with respect to charities; or
- (b) the court's jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes.

The courts have accepted that this is intended to distinguish between internal disputes within a charity, which are charity proceedings, and disputes with outsiders which are not charity proceedings. So, for example, a claim by a charity for breach of contract would not be charity proceedings requiring advance authorisation by the Charity Commission or High Court.

Charity proceedings in a court may not be pursued by or against a charity unless authorisation to bring those proceedings has been obtained from either the Charity Commission or the High Court (the rule does not apply to exempt charities). The definition of charity proceedings does not extend to proceedings of the charity tribunal because that is a tribunal, not a court. This is a longstanding rule, now set out in section 115 of the Charities Act.



### CASE LAW

The courts have stated that the rationale for the charity proceedings rule is 'to prevent charities from frittering away money subject to charitable trusts in pursuing litigation relating to internal disputes' (*Muman v Nagasnea* [1999] 4 All ER 178 at 183, *Mummery LJ*).

## ■ The Charity Tribunal

### Overview

Three types of cases can be dealt with by the Charity Tribunal:

- Appeals against some Charity Commission decisions by certain parties (see Schedule 6 of the Charities Act).
- Reviews regarding Charity Commission decisions.
- References made to the Tribunal by the Attorney General (or by the Charity Commission in connection with the exercise by the Commission of its functions).

In an appeal, the Tribunal is able to make a fresh decision if it considers that to be appropriate, in reaching its decision it can consider for itself the evidence the Charity Commission considered and also other evidence.

In a review, the Tribunal considers the procedure followed by the Commission, taking into account matters such as the fitness to the charity concerned. The Tribunal may, in certain circumstances, remit the matter to the Commission to make a fresh decision, taking into account the Tribunal's findings.

The Charity Tribunal considers a modest number of cases each year, mostly appeals and reviews (a number of other applications are withdrawn before they reach a full hearing). Prior to the introduction of this Charity Tribunal, even fewer cases seeking to challenge Charity Commission decisions reached a hearing in the High Court (Chancery Division) (2006 one case; 2007 none; 2008 three).



However, difficulties that have been identified with the present system include the limited range of Charity Commission decisions that can be challenged by applying to the Tribunal and the limited categories of persons who can make applications in relation to those challenges. A further perceived problem is that an applicant cannot bring a challenge against a failure by the Charity Commission to exercise a particular power (effectively ‘non-decisions’ cannot be challenged) (See Chapter 3).

Appeals from decisions of the Tribunal can be made to the Upper Tribunal (Tax and Chancery Chamber).

## ■ The Charity Commission

### Legal basis

The Charity Commission for England and Wales (the Charity Commission) is a body corporate, performing functions on behalf of the Crown (Charities Act 2011, s. 13). In the exercise of its functions it is not subject to the direction or control of any Minister of the Crown or any other government department. The Commission is accountable to Parliament through the Home Secretary and ultimately answerable to the courts. The Charities Act specifies statutory objectives, functions and general duties for the Charity Commission.

### Statutory objectives

1. To increase public trust and confidence in charities.
2. To promote awareness and understanding of the public benefit requirement (i.e. the obligation for charities to provide public benefit).
3. To promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.
4. To promote the effective use of charitable resources.
5. To enhance the accountability of charities to donors, beneficiaries and the general public.

### Statutory functions

1. To determine whether or not institutions are charities.
2. To encourage and facilitate the better administration of charities.
3. To identify and investigate the apparent misconduct or mismanagement in the administration of charities, and take remedial or protective action in connection with misconduct or mismanagement.
4. To determine whether public collection certificates should be issued and remain in force.
5. To obtain, evaluate and disseminate information in connection with the performance of the Commission’s functions or the meeting of its objectives.
6. To give information or advice, or make proposals, to Ministers, on matters relating to the Commission’s functions or objectives.

Item 1 is why the Charity Commission has responsibility for keeping the public Register of Charities in England and Wales and dealing with new charity registrations. It is also why the Commission has a duty to issue guidance on the public benefit requirements and has the task of monitoring whether or not existing charities deliver suitable public benefit.

### **Statutory general duties**

1. To act in a way compatible with its objectives and most appropriate to meeting them.
2. To act in a way compatible with the encouragement of charitable giving and voluntary participation in charity work.
3. To have regard to the need to use its resources in the most efficient, effective and economic way.
4. To have regard to the principles of best regulatory practice (including the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed).
5. To have regard to the desirability of facilitating innovation by or on behalf of charities.
6. To have regard to such generally accepted principles of good corporate governance as it is reasonable to regard as applicable to the Commission.

## **■ Charity law and regulation in Scotland**

### **Overview**

Scotland has its own distinct common law of charities and public trusts. Scottish public trusts are ultimately supervised by the Court of Session, a civil court with functions broadly similar to the High Court and the Court of Appeal in England and Wales. A statutory system for the registration and regulation of charities in Scotland is provided for by the Charities and Trustee Investment (Scotland) Act 2005 (as amended). That Act also provides the legal basis for the Office of the Scottish Charity Regulator (OSCR), which is responsible for registration of charities in Scotland and the maintenance of the Scottish Charity Register. OSCR has broadly similar functions and powers to those of the Charity Commission for England and Wales, including intervention and investigation powers largely intended to safeguard charitable funds and assets.

The 2005 Act specifies the 'charity test' (s. 7) which determines whether or not an organisation is a charity under the law of Scotland. The test has two elements:

- (a) that the body has one or more of the charitable purposes set out in the Act; and
- (b) that the body provides public benefit in Scotland or elsewhere.