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What is a charity?

1 The meaning of charity and legal frameworks

1.1 What is a charity?

1.1.1 An essential concept to grasp is that a charity is not a type of legal structure; it is a status conferred on an organisation because of its purpose and the activities it carries out. Charitable status is completely separate from the organisation's legal structure, which is examined in chapter A2.

1.1.2 In England and Wales, an organisation is a charity and has charitable status if:

- it is established wholly and exclusively for charitable purposes (known as 'purposes' or 'objects'); and
- it provides a public benefit.

1.1.3 Registration with the Charity Commission and entry in the Central Register of Charities (which provides the organisation with a charity registration number) confirms charitable status. However, an organisation does not have to be recognised by the Charity Commission, HM Revenue & Customs (HMRC) or any other body to be a charity; this is a matter of fact and law. If the organisation fulfils the criteria, it is a charity. A large number of charities are not required to register with the Charity Commission because their income does not reach the charity registration threshold (see chapter A3, paragraph 7.2 on page 66). There are also a number of charities that are exempt or excepted from registration (see chapter A3, section 7.16, page 69). However, the trustees of a charity that fulfils the registration criteria have a legal duty to apply to the Charity Commission for registration.

1.1.4 Key features of a charity in England and Wales:

- It has to be established for exclusively charitable purposes (see paragraph 1.2).
- It has a body of trustees who are responsible for its administration and management. Its trustees will normally be unpaid volunteers, although it is possible to have paid trustees if the constitution or Charity Commission allows. If it is an unincorporated charity (see chapter A2), the Charity Commission

will expect the majority of its trustees to be resident in the UK to ensure that it has jurisdiction over them.

- Any profits or surplus it makes cannot normally be paid out to its members or its trustees; they must be re-invested in the charity and used to fulfil its charitable aims.
- It is established to benefit the public (see paragraphs 1.3–1.7) and must not therefore give disproportionate levels of private benefit to any particular group or person. Any private (personal or commercial) benefit must be incidental to the charitable benefit provided. Material or significant risk bearing non-charitable activities should be carried out through a separate non-charitable subsidiary or other entity because a charity is not the appropriate vehicle for this kind of activity.
- Its assets must always be used to further its charitable purposes: ‘once a charity, always a charity’.
- It is regulated by the Charity Commission and, with some exceptions (provided its gross annual income exceeds £5,000), it is registered with the Charity Commission.

The main advantages of charity status can be summarised as follows:

- Public recognition and support – funders and the general public are greatly reassured by an organisation being a charity. Charity status provides kudos and signifies integrity. Many grant funders will or can only provide funding to charitable organisations.
- Tax advantages – the UK has one of the most generous tax regimes in the world for charities. There are tax advantages both for UK charities and for UK taxpayers (individuals and businesses) who give to them. A detailed description of these tax advantages can be found on HMRC’s website (www.hmrc.gov.uk).
- A charity does not pay tax on profits derived exclusively from activities that are in pursuit of its charitable purposes (known as ‘primary purpose trading’) and which are used for its charitable purposes.
- Eighty per cent mandatory relief from business rates is available for non-domestic property occupied by a charity and ‘wholly or mainly used for charitable purposes’ (and the local authority has discretion to relieve the remaining 20%).
- Charities are exempt from stamp duty land tax (SDLT) on all acquisitions of land and buildings, whether by gift or purchase, which are used for qualifying charitable purposes.
- Gifts of any amount of cash to UK charities by individuals or organisations that pay UK income or profits taxes are eligible for relief under the Gift Aid scheme. Gift Aid relief is available whether a gift is made regularly or as a one-off payment, if the individual donor is a UK resident for tax purposes, or the donor organisation pays UK corporation tax. For donations by individuals,

the Gift Aid scheme enables the charity to recover income tax on the amount of the gift received, for which the donor must account to HMRC. In addition, individuals who pay income tax at the higher rate are entitled to claim the difference between the higher rate and the basic rate of tax on the total (gross) value of the donation. (any Gift Aid claim must be made within four years after the end of the tax year to which the claim relates (for charitable trusts) or the accounting period to which it relates (for charitable companies, charities that are treated as companies for tax purposes and Community Amateur Sports Clubs that are recognised by HMRC).)

1.2 Charitable purposes

1.2.1 The Charities Act 2006 introduced a statutory definition of charitable purposes to the law of England and Wales.

1.2.2 A charitable purpose is:

- one which falls within any of the descriptions of purposes listed in s. 3(1) of the Charities Act 2011 (the 2011 Act); and
- is for the public benefit.

1.2.3 The following descriptions of charitable purposes are set out in s. 3(1) of the 2011 Act:

- (a) the prevention or relief of poverty;
- (b) the advancement of education;
- (c) the advancement of religion;
- (d) the advancement of health (which includes the prevention or relief of sickness, disease or human suffering) or the saving of lives;
- (e) the advancement of citizenship or community development (which includes rural or urban regeneration and the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities);
- (f) the advancement of the arts, culture, heritage or science;
- (g) the advancement of amateur sports;
- (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 by reason of youth, age, ill-health, disability, financial hardship or other disadvantage (which includes relief by the provision of accommodation or care);
- (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 which:

- are not included in the list above, but are recognised under the existing law or s. 5 of the 2011 Act (recreational and similar trusts, etc.) as charitable purposes; or
- may reasonably be regarded as analogous to, or within the spirit of, the charitable purposes listed above or those recognised under the existing law as charitable purposes.

1.3 Before the 2006 Act: the public benefit presumption

1.3.1 Prior to the Charities Act 2006, the definition of a charity was primarily set out in case law. To be a charity, an organisation had to have exclusively charitable purposes and be established for the public benefit (this has not changed).

1.3.2 Accepted charitable purposes were originally derived from the Statute of Elizabeth, dating from 1601. These purposes were refined by the courts and four heads of charitable purposes emerged:

- the relief of poverty;
- the advancement of education;
- the advancement of religion; and
- any other purposes beneficial to the community.

1.3.3 Pre-2006 charities that came within the first three heads of charitable purposes (the relief of poverty, the advancement of education and the advancement of religion) were presumed to provide a public benefit. In practice, this meant that the public benefit credentials of an organisation were rarely tested unless its purpose fell within the fourth, catch-all head of ‘charitable purposes’.

1.4 Post the 2006 Act: the public benefit requirement

1.4.1 Following the Charities Act 2006, all organisations, without exception, that wish to be recognised or to continue to be recognised as charities must demonstrate that they meet the ‘public benefit requirement’.

1.4.2 The 2006 Act introduced a new requirement for the Charity Commission to publish guidance for charities in relation to the public benefit requirement. The Charity Commission currently publishes three short high-level guides (listed below). These replaced the Commission’s original guidance, which was reviewed in light of *The Independent Schools Council v The Charity Commissioners for England and Wales* [2011] UKUT 421 (TCC) (see further paragraph 1.5.1).

1.4.3 Published guidance

The formal guidance:

- *Public benefit: The public benefit requirement (PB1)* – explains the legal requirement that a charity's purposes must be for the 'public benefit' (known as the 'public benefit requirement').
- *Public benefit: Running a charity (PB2)* – explains public benefit in the context of running a charity.
- *Public benefit: Public benefit reporting (PB3)* – explains that charity trustees must report on how they have carried out their charity's purposes for the public benefit.

Additional guidance that does not form part of the formal guidance:

- *Public benefit: An overview* – gives an overview (but does not form part of) the Charity Commission's set of three public benefit guides.
- *Public benefit: Rules for Charities* – provides an overall introductory guide
- *Guidance on charitable purposes* – detailed guidance on how to show that your charity has been set up with charitable purposes that meet public benefit.
- *Legal analysis: Public benefit* – provides an analysis of the law relating to public benefit.

In addition, to accompany the public benefit guidance, the Commission has published the following guide:

- *What makes a charity* – this deals with charitable purposes and the jurisdiction of the High Court.

1.4.4 PB1: The public benefit requirement

This guidance is particularly useful for those who are considering setting up or registering a charity. It explains the legal requirement that a charity's purposes must be for the 'public benefit'. It is also relevant for trustees of an existing charity considering a change in its charitable purpose. It explains that there are two components of 'public benefit':

- the 'benefit aspect': a charitable purpose must be beneficial, and any detriment or harm arising from the purpose must not outweigh the benefit; and
- the 'public aspect': the charitable purpose must benefit the public in general, or a sufficient section of the public, and not give rise to more than incidental personal benefit.

Where the charitable purpose is to prevent or relieve poverty, the 'benefit' aspect only must be satisfied. This means that charities for the relief (and in some cases the prevention) of poverty can define 'benefit' with reference to a family relationship, employment or membership of an unincorporated association.

1.4.5 PB2: Running a charity

This guidance is particularly useful for those who are running a charity, and for those who are proposing to set up and register a charity. It explains that charity trustees must understand their charity's purpose and how this is for the public benefit. When making decisions which affect the way in which people benefit from the charity's purposes, or indeed, who can benefit, the trustees must make sure that:

- the charity's purpose provides a benefit;
- the risks of detriment or harm to the beneficiaries of the charity or to the public in carrying out the purpose are managed;
- those who benefit are consistent with the charity's purpose; and
- any personal benefits are no more than incidental.

The guidance discusses when benefits may be accessed through membership, the circumstances under which trustees may restrict physical access to the facilities provided to the public and how charities may charge for the services or facilities they provide.

1.4.6 PB3: Reporting public benefit

This guidance explains the reporting requirements for charity trustees. It will be of particular interest to those who are proposing to set up and register a charity, and is also relevant to trustees of existing registered charities.

Different reporting requirements apply depending on the size of the registered charity.

Smaller charities (gross income less than £500,000): Charity trustees must report on public benefit in their annual report by including:

- a brief summary setting out the charity's main activities undertaken to carry out its charitable purposes for the public benefit; and
- a statement as to compliance with their duty to have regard to the Charity Commission's public benefit guidance when exercising any powers or duties to which the guidance is relevant.

Larger charities (gross income £500,000 and above): Charity trustees must report on public benefit in their annual report by providing:

- a review of the significant activities undertaken by the charity to carry out its charitable purposes for the public benefit;
- details of purposes and objectives;
- details of strategies adopted and activities undertaken to achieve those purposes and objectives;
- details of achievements by reference to the purposes and objectives set; and
- a statement as to compliance with their duty to have regard to the Charity

Commission's public benefit guidance when exercising any powers or duties to which the guidance is relevant.

1.5 Background to the current position

1.5.1 At the end of 2010, the Independent Schools Council (ISC) sought judicial review of the Charity Commission's original (and now replaced) public benefit guidance due to its effect on independent schools which charge fees. In particular, the ISC questioned the impact of Principles 2(b) (that the beneficiaries must be appropriate to the aims of the charity) and 2(c) (where benefits are provided to a section of the public, the opportunity to benefit must not be unreasonably restricted by geographical or other restrictions). On handing down its ruling on 14 October 2011, the Charity Tribunal decided that Principle 2(b) was too prescriptive, obscure and was wrong in a number of respects, and that the explanation of Principle 2(c) ought to be amended. In particular, the Tribunal ruled that the guidance was not clear regarding the adequacy of the provision for the poor.

1.5.2 In light of the decision, the Charity Commission withdrew its original guidance and issued a simpler set of guidance (as detailed above).

On publication of the current guidance, the Chair of the Commission, William Shawcross, stated that the Commission had

worked hard to provide guidance that is accessible to trustees of all types of charity, while still accurately reflecting the law. We have accepted comments made during our consultation to keep the guidance short and clear. This means that the guidance certainly cannot answer every question. There is no statutory definition of public benefit so its meaning will continue to develop through decisions made by the courts. As the law develops, we will keep our guidance under review.

1.5.3 To accompany its public benefit guidance, the Commission has also published *What makes a charity?* which deals with charitable purposes and the jurisdiction of the High Court. Annex B covers political purposes.

1.5.4 Some more specific guidance that dealt with the public benefit of religious and educational charities and the relief of poverty was withdrawn. This guidance is meant to be under review and does not form part of the Commission's formal guidance, but continues to remain available until it is replaced.

1.6 Assessing public benefit

1.6.1 New organisations seeking to register as charities are required to explain their aims regarding the public benefit and state how they propose to carry them out as part of the registration process (see chapter A3).

1.6.2 Trustees of existing charities have the following duties:

- to ensure that their charity's purposes are carried out for the public benefit;
- to have regard to the Charity Commission's public benefit guidance; and
- to report on how their charity carries out its purposes for the public benefit and to confirm that they have paid due regard to the Charity Commission's guidance in deciding what activities the charity should undertake.

1.7 Not meeting the requirement

Trustees of a charity cannot opt out of the charitable sector if they consider that their responsibilities to meet the public benefit requirement are too onerous. If charities do not meet the requirement, the Commission will take appropriate action, including:

- seeking agreement with the trustees to alter their charity's purposes or the way in which they carry out their purposes;
- taking regulatory action to ensure that the trusts are carried out (such as removing trustees, appointing new trustees or giving directions to trustees); and
- applying the assets for other similar charitable purposes for the public benefit.

If the purposes were never for the public benefit and the organisation was mistakenly registered as a charity, the Commission can ask the trustees to restructure the organisation, amend the purposes or remove it from the register. This option is rarely used.

2 The Charity Commission's role and responsibilities

2.1 The Charity Commission regulates charities in England and Wales. It was originally set up in 1853 as an unincorporated body of individual Charity Commissioners.

2.2 The Charities Act 2006 put the Charity Commission onto a formal statutory footing for the first time, making its role and status clearer and more appropriate to conditions at the time. Sections 14–16 of the 2011 Act set out the Charity Commission's statutory objectives, functions and duties.

2.3 The Charity Commission is a corporate body:

- Prior to the Charities Act 2006, the responsibility for regulating the charity sector was in the hands of 'The Charity Commissioners', a collection of up to five individuals. The 2006 Act transferred their assets, activities and functions to a new corporate body known as 'the Charity Commission for England and Wales' or, in Welsh, 'Comisiwn Elusennau Cymru a Lloegr'.

- The corporate Charity Commission consists of a chair and between four and eight other members, who are appointed by the Minister for the Cabinet Office. Schedule 1 of the 2011 Act stipulates criteria that some of the members must meet, the length of terms they may serve (a maximum three years for each term, subject to a maximum of 10 years in total) and the knowledge and experience they should have. Members can be paid.
- From 2012, the Charity Commission has been governed by its board, supported by a chief executive and directors group. The Charity Commission is a 'non-ministerial government department'. It is accountable to Parliament, but is largely independent of government control, not being subject to the control of any minister or other government department.
- It must prepare an annual report which must be laid before Parliament and made available to the public. It is also required to hold an annual public meeting within three months of publishing its annual report. Its financial year runs from 1 April to 31 March.

The Charity Commission has five objectives under the 2011 Act. These are:

1. *Public confidence*: to increase public trust and confidence in charities.
2. *Public benefit*: to promote awareness and understanding of the operation of the public benefit requirement.
3. *Compliance*: to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charity.
4. *Charitable resources*: to promote the effective use of charitable resources.
5. *Accountability*: to enhance the accountability of charities to donors, beneficiaries and the general public.

It has six general functions, which are:

1. to determine whether or not institutions are charities;
2. to encourage and facilitate the better administration of charities;
3. to identify and investigate apparent misconduct or mismanagement in the administration of charities and to take remedial or protective action in connection with misconduct or mismanagement in charities;
4. to determine whether public collections certificates should be issued and remain in force, in respect of public charitable collections;
5. to obtain, evaluate and disseminate information in connection with the performance of any of the Charity Commission's functions or meeting any of its objectives (this includes maintaining an accurate and up-to-date register of charities); and
6. to give information or advice, or make proposals, to any Minister of the Crown on matters relating to any of the Charity Commission's functions or meeting any of its objectives.

It has six general duties, which are:

1. so far as is reasonably practicable, to act in a way which is compatible with its objectives and which it considers most appropriate for the purpose of meeting those objectives;
2. so far as is reasonably practicable, to act in a way which is 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 when performing its functions;
4. to have regard to the principles of best regulatory practice. In particular, its 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; and
6. in managing its affairs, to have regard to such generally accepted principles of good governance as it is reasonable to regard as applicable to it.

2.4 In addition, the Charity Commission has a wide ‘sweep-up’ power to do anything which is calculated to facilitate, or is conducive or incidental to, the performance of any of its functions or general duties.

2.5 However, it is important to appreciate that the Charity Commission is not authorised to:

- exercise its functions as if it were a trustee of a charity; or
- involve itself directly in the administration of a charity.

2.6 Since January 2012, the role of the Charity Commission has changed quite substantially. The Charity Commission Statement of Strategic Intent 2019–2023 states that ‘our purpose is to ensure charities can thrive and inspire trust so that people can improve lives and strengthen society’. It then lists the current strategic objectives as:

- holding charities to account;
- dealing with wrongdoing and harm;
- informing public choice;
- giving charities the understanding and tools they need to succeed; and
- keeping charities relevant for today’s world.

2.7 The Charity Commission now works within a ‘risk framework’. This requires a risk assessment at an early stage involving the following key questions:

1. Does the Charity Commission need to engage?
2. If it does, then:

- (a) what is the nature and level of risk?
- (b) what is the most effective response?

The Charity Commission is now unlikely to engage if the issue does not fall wholly or partly within its regulatory framework.

2.8. It seems clear that the Charity Commission's focus is on promoting and developing sector *self-reliance*, and it no longer wants to dedicate resources to tailored one-on-one advice to charities. In 2013, the Charity Commission published new guidance on how charity trustees should approach making decisions that affect their charity. The Commission makes it clear that it expects charity trustees to follow the guidance when making strategic or significant decisions (such as those affecting the charity's beneficiaries, assets or future direction). The guidance sets out a number of principles which the trustees are expected to apply to their decision making to enable them to demonstrate that they have followed the appropriate principles.

2.9 The Charity Commission's principles of decision making by charity trustees

Charity trustees must:

- act within their powers;
- act in good faith and only in the interest of the charity;
- make sure they are fully informed;
- take account of all relevant factors;
- ignore any irrelevant factors;
- manage conflicts of interest; and
- make decisions that are within the range of decisions that a reasonable trustee body could make.