

Part 1 - The Review of the Register

Why review the Register of Charities?

1. The Register of Charities is a list of the charities set up in England and Wales that we supervise. It currently contains the details of over 185,000 charities. We have a statutory responsibility for keeping it up to date. The understanding of what is legally charitable has continued to evolve since the Register was first created over 40 years ago. Consequently, there are almost certainly organisations on the Register which most people would not now regard as charitable and organisations not on it that perhaps they might.

2. We are therefore considering within the law whether those organisations which currently benefit from charitable status can still legally be regarded as charities. We will also look to see whether there is scope for legal recognition of organisations as charitable which are not registered at the moment. Our approach to this will be characterised by the use of our powers to apply and interpret the law in a way which fully recognises that what is legally charitable may change following trends in social and economic circumstances.

3. The **Essential Characteristics of a Charity**, which can be found in **Part 2**, sets out the principles that we are using. These are all based on existing charity law.

Why now?

4. The year 2001 marks the 400th anniversary of the Preamble to the Charitable Uses Act 1601, which established the original framework or source of charity law. Since then charity law has been evolving to reflect changing social and economic circumstances. Whilst the past has been valuable in bringing us to where we are today we need to look forward to the role of charity and charities in the 21st Century.

5. This ever changing social backdrop to charity law has recently seen another shift with the introduction of the Human Rights Act 1998, bringing home to the United Kingdom the rights and freedoms set out in the European Convention on Human Rights. It is therefore timely to be looking hard at how the Commission uses its powers to interpret established legal principles, which were developed sometimes under very different social circumstances, to ensure that these are interpreted in a modern social context and compatibly with Convention rights. Part of our aim to promote public confidence in the integrity of charity is to ensure that the concept of charity remains credible in modern society. We recognised the importance of this when we launched the Review of the Register in April 1998.

Our approach to the Review

6. The Commission, acting on the same basis as the courts, works within and interprets the legal rules that determine whether an organisation is charitable. These are mainly laid down in decisions of the courts on particular cases rather than set out in Acts of Parliament. There may not always appear to be any direct court precedent. We then have to decide using fundamental legal principles whether solutions to problems thrown up by changing social and economic circumstances are legally charitable in the

same sense as those already accepted by ourselves and the courts. We must also consider whether the courts of today would or would not now follow a decision made many years ago and in different circumstances. Naturally we respond to individual organisations' requests to be recognised as charitable. We also look generically at issues or types of organisation. As is the increasing practice of the courts, where appropriate we will consider the underlying principles raised by a particular application for registration in order to provide guidance for future cases.

7. Our separate publication **RR1a: Recognising New Charitable Purposes** sets out briefly the legal principles that govern charitable status and the scope which the Commission has for recognising new charitable purposes.

8. An organisation refused registration, or that objects to being registered, can appeal to the High Court. Also, any person who is, or may be, affected by the registration of an organisation as a charity may, on the ground that it is not a charity, object to its registration or apply for it to be removed from the Register. For example, because charities receive certain tax and other advantages that have implications for the Exchequer, the Inland Revenue may make representations to the Charity Commission and may appeal to the High Court against the Commission's decision to register an organisation as a charity.

Recognising new charitable purposes

9. Charity law has developed a long way beyond the purposes set out in the Preamble to the Charitable Uses Act 1601. The framework of charity law is essentially based upon the use of analogy to existing purposes already accepted as charitable and by applying a public benefit test. The Commission works within the legal framework but one of the virtues of that framework is that it allows both the court and the Commission to recognise new charitable purposes, particularly where that is in response to changing social and economic circumstances. This means we can apply the law in response to those changes without the need for lengthy or costly litigation, or legislation. We take a constructive approach to the analogy principle, to ensure that the Preamble to the Charitable Uses Act 1601 and subsequent legal cases are interpreted in a modern context. Our policy for deciding whether novel purposes are charitable is set out in Annex A.

Our willingness to recognise new charitable purposes

10. The Review of the Register process has illustrated both our ability and our willingness to recognise new charitable purposes (by accepting, for example, the promotion of urban and rural regeneration, the relief of unemployment and the promotion of community capacity building as new charitable purposes) and to refine the circumstances under which we would accept certain purposes as charitable (as with conservation of the environment for example). And it is not just in the context of the Review of the Register that new charitable purposes can be recognised; some new charitable purposes have been accepted in the context of decisions in individual cases. But charitable status brings certain benefits (such as fiscal advantages) and charities have obligations (towards their beneficiaries, their benefactors and the public) and are accountable to the Commission and the courts for their actions. The recognition of charitable status (via the

registration process) is not something that can be undertaken lightly or arbitrarily. We do not, therefore, have a free hand to recognise new charitable purposes; there are some limitations.

Limitations

11. Firstly, new charitable purposes must be analogous to other purposes previously recognised as charitable, by the courts or the Charity Commission.

12. Secondly, for any new charitable purpose it will be necessary to demonstrate what benefit to the public will flow from it (where no assumptions about benefit to the public can be made).

13. Thirdly, charitable purposes must be clear and certain. This is important for all charities but it is particularly important in the case of new charitable purposes to ensure that charities with those purposes operate within the newly identified boundaries of charitable status. It is also important to help us monitor and regulate charities and so that, in the last resort, the charity could if necessary be administered under the direction of the court.

14. Fourthly, to be charitable a purpose cannot amount to a political purpose.

The effect of the Human Rights Act on charitable status

15. The implementation of the Human Rights Act 1998 is a major new development in that (since 2 October 2000) all legal authorities have to be considered against compatibility with the European Convention on Human Rights and will be construed (by the Commission and the courts) in that way. This may change the way that some long established legal principles are now viewed.

16. The effect of the Human Rights Act on the Commission's approach to the recognition of new charitable purposes is also considered in **RR1a**.

Constructive use of our powers

17. We take the same approach to Review topics as we take to individual applications for registration. This may result in either including or excluding some types of organisation from the Register. The Review of the Register has brought a structure to our consideration of certain charitable status issues but there is nothing new in the constructive use of our powers within the law in order to take a wider view of the social and economic circumstances of the day with reference to underlying principles of charity law. Annex B of **RR1a** sets out some examples of where we have done so in the past.

18. In the exercise of our powers to recognise organisations as charitable for the purposes of the Register we act in a way which seeks to predict the approach which would be taken by the courts if the charitable status of the particular organisation was being determined by the courts. Accordingly we do not have the power to change the law beyond being empowered by the court to recognise that what they considered to be charitable may change with changing social and economic circumstances. Any changes beyond that would need to be made by the courts or by Parliament.

Process of the Review

19. The importance of the Review to the organisations concerned and to society generally means that it is essential that we do it carefully. Inevitably this means that the work, analysis and consultation on each topic takes some time to complete. It is a rolling programme with issues coming through for discussion on a continuing basis.

20. With over 185,000 charities on the Register it would not be practical for us to examine each one's continued claim to charitable status, so we are tackling the Review by looking at particular groups of organisations, or **Topics**, in turn to make it manageable, consistent and effective. This approach also allows us to review new areas of charitable status where no organisations are currently registered. Review topics are likely to focus on the boundaries of charitable status. We are not looking to review the position of organisations that clearly fall within the current charitable definitions although we may need to review the position of those organisations on the register that do not.

21. Where appropriate we issue a consultation paper on the topic to help ensure that all those interested have the opportunity to comment. Where we do so, we send it to organisations having a particular interest in the subject and they are also available on request. They are published on our Internet site. Everyone has access to them and a chance to comment.

22. All the comments from these consultations are considered before a final decision is taken on whether or not to endorse the proposals discussed in the consultation document. All the Review decisions are publicly announced, usually by the publication of guidance on the future treatment of organisations covered by the Review topic.

Public opinion

23. The courts develop charity law to keep the law's view of what is charitable reasonably in line with modern social and economic circumstances. Thus the legal concept of charity alters; and its evolution is influenced by ideas about social values. Court decisions reflect ordinary life, taking into account generally accepted views on the nature and usefulness of what an organisation aims to achieve and its benefit to the public. So, whilst public opinion cannot determine what is or is not charitable, it is an important factor to be taken into account in the shaping of the legal understanding of charity.

24. In reaching decisions generally on matters of public benefit the courts, and the Commission, have proper regard to public opinion in so far as it represents:

- a general consensus; or
- people's views on what should as a matter of ethics be regarded as beneficial; or
- a common understanding of informed opinion.

Implications of the Review for organisations

25. The Review of the Register is not about finding ways to remove organisations from it. Indeed we have already found it possible to identify and recognise new charitable purposes and have published guidance about the boundaries of any new charitable purposes recognised. Where we produce such guidance, or where we clarify the boundaries within which charities with existing charitable purposes can operate, it will apply equally to those charities that make grants for those purposes (rather than undertaking active work in that area themselves).

26. But a consequence of a Review topic may be that we conclude certain types of organisation currently included on the Register are no longer entitled to remain there and a number may be removed. We cannot predict what the results of a Review topic will be for any particular body. That would be to prejudge the results of the careful analysis and extensive consultation required.

27. Decisions about the charitable status of particular types of organisation will not be taken overnight. There will need to be a thorough understanding of the issues and concerns. We will discuss the issues with them and, where appropriate, their representative bodies.

28. Detailed guidance on the steps we will take, and the reasons for those steps, when it becomes clear that the Register of Charities includes organisations which are not charities and which ought not to be on the Register is contained in our separate publication **RR6: Maintenance of an Accurate Register of Charities**.

The purpose of the Essential Characteristics

29. We are carrying out the Review using common principles. The **Essential Characteristics of a Charity** helps in this. They have been designed to provide a framework and no more than that for the Review. Decisions on individual applications for registration as a charity will continue to be taken on the facts of the application and not on the basis of these **Characteristics**.

30. In preparing the **Characteristics** we wished to develop a clear and simple statement to assist the Review that covered the principles currently underpinning the law of charity. This would help the understanding of how the legal concept of charity has to evolve to deal with changing social and economic circumstances. The principles are all based on the existing law.

31. The **Essential Characteristics of a Charity** are set out in **Part 2**. These are the characteristics, which affect an organisation's ability to be a charity.

32. We have also produced a separate publication **CC60: The Hallmarks of an Effective Charity**, which covers a range of areas of good practice. The characteristics set out in that publication do not determine the charitable status of an organisation; they are the characteristics that we think best describe the attributes of a well-run charity. We believe that a charity that can demonstrate that it achieves, or seriously aspires to achieve, those hallmarks is one in which the public can have confidence.

Part 2 - The Essential Characteristics of a Charity

A charity:

(a) has purposes all of which are, and continue to be, recognised by law as exclusively charitable ie that are:

(i) directed to the provision of something of clear benefit to others in society;

A charity must have the potential to sustain or enhance the lives of people in the community (not only local communities but also community in its broadest world-wide sense, including humankind, natural and man-made environments, and the animal kingdom). Altruism and self reliance are both important parts of the uniqueness of charity and the way in which it contributes to the well being of society.

Another element of the benefit that many charities contribute to society is their ability to inspire others to volunteer to work on the charity's behalf, to offer financial support to achieve its purposes or just to support, in general terms, the cause. This is especially so of charities that are innovative, risk taking or fund research which can inspire others by their own example or by a direct appeal for public support.

Guidance on the general requirement that all charities must benefit the public can be found in our separate publication **RR8: The Public Character of Charity**, which is relevant also to subparagraph (ii) below.

(ii) not concerned with benefiting individuals in a way which outweighs any benefit to the public;

An essential part of this characteristic is that charity should not be selfish. The law does not permit a charity, other than one for the relief of poverty, to confer more than incidental private benefit and has always stressed the unselfish nature of charities.

Exceptions to this are where the purposes of the organisation are:

- to remedy some social disadvantage; or
- to preserve a community resource (such as a site of special scientific interest); or
- where immediate benefits to an individual are the way in which the social benefit to the community is delivered (for example, the community as a whole benefits when individual criminals are rehabilitated). By contrast, an

apparent benefit to the public would be undermined where benefits to individuals are more than merely a mechanism that delivers charitable purposes (as would be the case in a village shop whose proprietors could benefit significantly from it).

(iii) directed to things that overall are not harmful to humankind;

What an organisation is set up to do will have different effects depending on the standpoint from which they are viewed. For example, the preservation of a particular species of animal will be beneficial (because it both contributes to zoological science and may have environmental benefits or may preserve a gene pool necessary for some public good). But equally that preservation may simultaneously have consequences which are detrimental to the community - as where the particular species is verminous and/or especially destructive of agriculture. A view must be taken, by the Charity Commission or the courts, whether on balance in the particular circumstances of any case the aim will or may work for the public benefit.

(iv) certain and lawful;

The objects must be in existence before the organisation is accepted as charitable. They must not be so wide or vague that they cannot be enforced by the courts. If there is charitable intention but there are not clearly defined objects or purposes, the court will provide the necessary details. In certain cases the people entrusted with the administration of funds donated for ill-defined charitable purposes may themselves declare more precise trusts as agents of the donors.

“Lawful” does not simply refer to charity law, but to all legislation and international conventions (in so far as they apply to charities), including those which prohibit discrimination, such as the Race Relations Act 1977, and the Human Rights Act 1998.

(v) not for the pursuit of party or other political aims;

The law requires that a charity must not have a main aim to seek or oppose changes in the law or in government policy or decisions (here or abroad). Nor may it support or oppose a political party. Research confirms the absence of party politics is particularly important to the public; they do not want charities to be seen as partisan. All charities can undertake campaigning activities if those activities can reasonably be expected to further their legal aims. Any campaigning must be based on a well-founded and reasoned case and expressed in a responsible way. Campaigning must not be in general support of the policies of any particular political party. Further guidance on this can be found in our publication **CC9: Campaigning and Political Activities by Charities**.

(b) is independent;

The independence of trustees is essential. They must make their own decisions and exercise their discretions solely in the interests of the charity. In an ideal world those outside the trustee body would recognise this and not seek to put pressure on or otherwise influence trustees. We know that this is not always the case and are willing to help or issue guidance as appropriate, where these matters cannot be resolved within the charity. Charity trustees must not:

- be controlled or directed by anyone outside the charity (except where they have to comply with general legal requirements - such as health and safety - which an outside body is there to enforce);
- act on the instructions of the person or body which appointed them as trustees, such as members of the charity or central or local government; or
- comply with any external or internal directions if, in doing so, they would be acting outside the charity's purposes.

The charity may, perfectly properly, have provisions that give people other than trustees influence over the way the charity operates or particular types of decisions. Such powers must be exercised in the interests of the charity. Typically these can include powers:

- allowing members to appoint (and in some cases remove) trustees;
- over membership rights;
- requiring the consent of an outside person to certain actions (for example where the charity's Founder or Settlor must be consulted about the way in which income is distributed); or
- of delegation, allowing someone outside the trustee body, such as an employee, to decide how the funds of the charity should be used within policies laid down by the trustees (provided always that the trustees retain responsibility for the delegate's actions and retain the ability to rescind the delegation if necessary).

See also our separate publication **RR7: The Independence of Charities from the State**.

(c) is able to show that any personal, professional or commercial advantage, is and will continue to be incidental to carrying out its charitable purposes;

Organisations providing professional or commercial advantage to members will not generally be acceptable as charities. However, it has been accepted in some cases that the advantages to those individuals is outweighed by the benefit to members of the public in receipt of that professional service.

(d) does not impose conditions on access or membership that in practice restricts the availability of facilities in a way that results in the organisation as a whole not benefiting the public.

To restrict benefits to the rich is not charitable although a charity may charge for its services.

Access may though properly be limited in certain circumstances including:

- by the nature of the charity's purposes (a charity for people in Bradford should not spend money for the benefit of people in Bristol; a charity to relieve migraine sufferers must establish that those it helps actually suffer from migraine and not chilblains);
- where, in order to deliver benefit to the public, it is reasonable to expect the members to have reached a certain standard of skill or knowledge or possess particular qualifications (such as a performing orchestra or choir); or
- where a membership structure is adopted where that is appropriate for the better delivery of benefits (providing all those who might benefit can join and there are objective criteria for deciding membership).

The Commission's policy for deciding whether novel purposes are charitable

Our policy

A1. In 1985 we reviewed our policy for deciding whether novel purposes are charitable¹. Having examined the legal authorities, the Commissioners concluded that they must follow the courts' approach in seeking an analogy². An up to date interpretation of that policy is as follows:

The Commission will take a constructive approach in adapting the concept of charity to meet constantly evolving social needs and new ideas through which those needs can be met. Acting within the legal framework which governs the recognition of new charitable purposes, we would aim to act constructively and imaginatively.

In considering new purposes as charitable we will look closely at those purposes which have already been recognised as charitable either under the Preamble or in subsequent decisions of the court or the Commission. We will also look at contemporary needs of society and relevant legislation passed by Parliament and, where Convention rights are in issue, to the European Convention on Human Rights and decisions of the the European Court of Human Rights and the European Commission of Human Rights.

In identifying a new purpose as charitable we will, following the legal framework, need to be clear that there exists a sufficient correlation between those new purposes and purposes already accepted as charitable. While in most cases a sufficiently close analogy may be found, in others an analogy may be found by following the broad principles which may be derived from the scope of the Preamble or from decided cases of the court or the Commission.

In addition we will need to be clear that the purpose is not a political purpose as understood in charity law and that the purposes are expressed with clarity and certainty to facilitate monitoring by us and any subsequent control by the court should that be necessary.

A2. In effect, our view is that we will look for a suitable analogy in order to confirm whether or not the way in which a purpose will benefit the public is charitable. We also believe it will nearly always be possible to find an analogy, if the nature of the benefit is really of a kind that ought to be recognised as charitable.

¹ See Commissioners' Annual Report 1985 paras 24-27

² In **Barralet v. Attorney General** [1980] All ER 918, 926-7 per Dillon J.

Notes

Notes