

# **Analysis of the law underpinning *Public Benefit and Fee Charging***

**This legal analysis is designed to be read  
in conjunction with**

***Public Benefit and Fee Charging*  
(December 2008)**

**PUBLIC BENEFIT: STATEMENT OF THE BASIS FOR THE CHARITY  
COMMISSION'S ROLE AND ACTIONS**

In 2006, Parliament passed new legislation for charities which, amongst other provisions, gave fresh emphasis to the requirement for all charities' aims to be, demonstrably, for the public benefit. It is in both our interests, as the regulator of charities in England and Wales, and the interests of the charities that we regulate, that our approach to public benefit maintains and, if possible, increases the public's trust and confidence in charities.

Our approach to assessing public benefit comes from the statutory objective set for us by Parliament in the Charities Act 2006, 'To promote awareness and understanding of the operation of the public benefit requirement', and our corresponding duty to produce statutory guidance to help fulfil this objective.

We believe that the statutory objective and the requirement to issue guidance, together with our responsibilities as regulator, mean that we have an obligation to set out a coherent set of principles on public benefit derived from our interpretation of the underlying case law which already exists.

We interpret this case law in the context of modern circumstances, taking into consideration the new framework for charitable status set out in the Act, the existing case law, and the fact that the presumption of public benefit for some types of charities has been removed.

We also consider the impact of the Human Rights Act, which requires fair and equal treatment of the application of the public benefit principles to different types of charity, and that any differences in treatment are necessary, proportionate and legitimate.

Our role is to bring all these elements together and, where necessary, interpret the law to deal with areas that lack clarity. Our interpretation of our new responsibilities is underpinned by our general guidance on the principles of public benefit which we published on our website at the start of 2008.

We will be transparent about the basis on which we take decisions about public benefit and proportionate in the actions we take. Where our decisions affect whether a charity remains as a charity, or indeed whether the way in which it operates is for the public benefit, the charity, or anyone affected by our decision, who disagrees with the regulatory action that we take, can challenge that action with the Charity Tribunal or the Courts where appropriate.

December 2008

# **Analysis of the law underpinning *Public Benefit and Fee Charging***

## **Contents**

### **Introduction**

- Part 1**      **Legal analysis underpinning the general principles of the public benefit requirement relating to fee charging: Extracts from *Analysis of the law underpinning Charities and Public Benefit*, as published in December 2008**
- Part 2**      **Other References**
- Part 3**      **Endnotes: Extracts from *Analysis of the law underpinning Charities and Public Benefit*, as published in December 2008**

## Introduction

1. The Commission's supplementary guidance *Public Benefit and Fee-Charging* explains the key principles of public benefit as they affect fee charging charities in language as clear as it can be to ensure that as many people as possible can follow and understand it. This document is intended to accompany that guidance as a reference to a summary of the Commission's view of the law underpinning the public benefit requirement and necessarily uses more technical language. *Public Benefit and Fee-Charging* is based on this legal analysis and the cases referred to in it.
2. This analysis is not intended to be a comprehensive legal digest, but a useful reference point for trustees, their advisers and the public. It reflects law and practice at the date of publication. It is not binding in law and does not affect any rights to challenge decisions either through the courts, the Charity Tribunal or the Commission's internal Decision Review process. It should be borne in mind that it offers a general analysis of the law, but whether the analysis is appropriate in a particular case will depend on all the facts of that case. In deciding individual cases we will apply the law. The Commission will take the same approach as the courts and the Charity Tribunal in applying the law.
3. The detail of the legal analysis underpinning the principles of public benefit affecting fee charging charities has already been explained and set out in *Analysis of the law underpinning Charities and Public Benefit* (referred to now in this document as "*Legal Analysis (General Principles)*"). *Legal Analysis (General Principles)* was revised in December 2008 and the full document can be found on the Commission's website. However, the Commission considered that it might be useful for trustees and their advisers for the part of the analysis that particularly relates to fee charging to be repeated in a stand alone document.
4. *Public Benefit and Fee-Charging* also refers to the legal criteria that apply to trustees' decision making. As these legal criteria apply generally, not just in the context of fee charging, the Commission will

publish separately in due course a legal analysis of the law relating to the exercise of trustees' discretion which explains the legal underpinning in that area.

## **Part 1. Legal analysis underpinning the general principles of the public benefit requirement relating to fee charging: Extracts from *Analysis of the law underpinning Charities and Public Benefit*, as published in December 2008**

### **Introduction**

1.1 The elements of the general principles of public benefit that particularly relate to fee charging are:-

- **Principle 2b – Where the benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted .... by ability to pay any fees charged.**

(for restrictions based on ability to pay any fees charged see section F10 of *Charities and Public Benefit*)

- **Principle 2c - People in poverty must not be excluded from the opportunity to benefit**

(see section F11 of *Charities and Public Benefit*)

1.2 The law underpinning these is already set out and explained in *Legal Analysis (General Principles)*.

1.3 For ease of reference, the sections relating to the general principles of the public benefit requirement relating to fee charging are repeated below.

1.4 To avoid confusion, the paragraph numbers used below are the paragraph numbers used in *Legal Analysis (General Principles)*. Similarly, the endnotes numbers used below in Part 3 which provide references to the cases are those used in *Legal Analysis (General Principles)*.

## Extract from *Analysis of the law underpinning Charities and Public Benefit*, December 2008

Principle 2b continued – Where the benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted:

- Restrictions based on ability to pay any fees charged (Section F10 of *Charities and Public Benefit*)

### Charities charging for services

3.53 It is well established that the fact that a charity charges for its services does not prevent it from being regarded as charitable - **Scottish Burial Reform and Cremation Society Limited v Glasgow Corporation**<sup>115</sup>, **Incorporated Council of Law Reporting for England and Wales**<sup>116</sup> and **Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney General**<sup>117</sup>. In the **Rowntree** case, Peter Gibson J. referred to Lord Wilberforce's judgment in **Re Resch**<sup>118</sup>, a Privy Council case, where the courts specifically considered the impact of charging on the public benefit requirement.

3.54 **Re Resch**, concerned a gift to a private (or independent) hospital which charged fees. The hospital had an association with a public general hospital. Although the private hospital did not have a constitution or rules of its own, the court concluded that its purposes were essentially for a certain type of medical and nursing care and treatment for which there was a need and which the public general hospital, which was located next to it, did not give.

3.55 The case examined the argument that a hospital set up to provide "*facilities for the well-to-do*" and which excluded the poor from participating could not meet the public benefit requirement. Although the hospital in this case did not expressly exclude any particular person or group of people, in practice, many people could not afford to pay the fees it charged. The fees charged were referred to as "*substantial*", although at approximately cost price. The argument put to the court was therefore that poor people were excluded as a practical consequence of the way in which the hospital was conducted. The inference was benefits were intended to be, and in reality were, only provided to those in relatively

affluent circumstances who could afford the fees.

3.56 The court confirmed<sup>119</sup> the principle that charges could be raised by a charity for the services it provides, even if the charges produce a profit. The judgment also gives some indication as to how public benefit may be assessed in any particular case.

3.57 Lord Wilberforce<sup>120</sup>, confirmed that expensive services and facilities could be charitable but that limiting services to the rich, excluding those who could not afford the fees, could not be charitable:

*“The test is essentially one of public benefit, and indirect as well as direct benefit enters into the account. In the present case, the element of public benefit is strongly present. It is not disputed that a need exists to provide accommodation and medical treatment in conditions of greater privacy and relaxation than would be possible in a general hospital and as a supplement to the facilities of a general hospital. This is what the private hospital does and it does so at, approximately, cost price. The service is needed by all, not only by the well-to-do. So far as its nature permits it is open to all: the charges are not low, but the evidence shows that it cannot be said that the poor are excluded: such exclusion as there is, is of some of the poor - namely, those who have (a) not contributed sufficiently to a medical benefit scheme or (b) need to stay longer in the hospital than their benefit will cover or (c) cannot get a reduction of or exemption from the charges. The general benefit to the community of such facilities results from the relief to the beds and medical staff of the general hospital, the availability of a particular type of nursing and treatment which supplements that provided by the general hospital and the benefit to the standard of medical care in the general hospital which arises from the juxtaposition of the two institutions.”*

3.58 In **Re Resch** the court concluded that it was only ‘some’ of the poor that were excluded from the service for which a charge was made in the case of that hospital, namely those who had (a) not contributed sufficiently to a medical benefit scheme or (b) needed to stay longer in the hospital than their benefit would cover or (c) could not get a reduction of, or exemption from, the charges. Further, the court heard that poor patients had been treated free of charge or at reduced rates. Although not explicitly analysed in the case, as the benefits in **Re Resch** were considered in

totality, the access to those not able to afford the fees was clearly more than minimal or nominal access or access that occurred merely by chance. It was therefore clear that there were sufficient benefits to poorer people who could not afford the fees in this case.

3.59 The principles which appear to emerge from this case are:

- the fact that the charitable facilities or services will be charged for, and will be provided mainly to people who can afford to pay the charges, does not necessarily mean that the organisation is not set up for, and does not operate for, the benefit of the public; however
- an organisation which wholly excluded poor people from any benefits, direct or indirect, would not be set up, and operate, for the benefit of the public and therefore would not be a charity;
- both direct and indirect benefits to the public, or a sufficient section of the public, may be taken into account in deciding whether an organisation is set up, and operates, for the benefit of the public.

3.60 The second principle in paragraph 3.59 above is also supported by statements in previous cases where the courts have said that although the rich can be included as beneficiaries, poorer people cannot be excluded. See **Jones v Williams, Commissioners for Special Purposes of the Income Tax v Pemsel, Oppenheim v Tobacco Securities Trust Co Ltd, re Macduff and Taylor v Taylor**<sup>121</sup>.

3.61 Having considered some of these cases in **Re Resch** Lord Wilberforce expressly confirmed that they were correct. He then stressed that they needed to be “*rightly understood*” and explained he was not saying (and nor were these cases) that facilities could not be charitable “*merely because by reason of expense they could only be made use of by persons of some means*”<sup>122</sup>.

3.62 He confirmed that it could be charitable to provide, in response to a public need, medical treatment that otherwise people could not access, even where that service was, by its very nature, expensive.

3.63 However, crucially, he stated “*on the other hand to limit admission to a nursing home to the rich would not be [charitable]*”<sup>123</sup>. He then went on

to explain how the test was the public benefit, the totality of the benefits were relevant and why in that case it was met.

- 3.64 **Re Resch** and the wider context of the previous cases provide support for the proposition that a restriction based on someone's ability to pay fees charged by a charity affects public benefit<sup>123a</sup>.
- 3.65 The test in **Re Resch** is not simply confined to whether the organisation limits itself to providing services to the rich. A charity's purposes and its operation of those purposes must not be so as to help only those who by reason of their wealth are able to afford the fees. The Commission's interpretation of the case is that if an organisation was limited to benefit only those who could afford the fees, then those people would not be a sufficient section of the public.
- 3.66 As regards indirect benefit, Counsel for the trustees of the hospital raised the issue specifically but the question of whether indirect benefit alone was sufficient was not addressed by the court. The facts of *Re Resch* demonstrate that both direct and indirect benefits were taken into account. The case indicates that direct benefits were clearly acceptable and are looked for first<sup>123b</sup>: "*indirect as well as direct benefit enters into account*" [emphasis added]. In this case the 'indirect' benefit was particularly prominent given the '*juxtaposition of the two institutions*'.
- 3.67 Furthermore, if indirect benefit alone were sufficient in this context, in practice this would render the public benefit test ineffectual. This is because in the case of most, if not all purposes some element of indirect wider benefit to society could be shown. This would have meant, for example, that the nursing home for the rich, which Lord Wilberforce referred to in **Re Resch** could be charitable, whereas he confirmed it would not be<sup>124</sup>.
- 3.68 In summary, therefore, **Re Resch** and other relevant cases<sup>125</sup> suggest that the extent to which charitable services and facilities should be made available to those who cannot otherwise afford to pay for them (including the poor) to satisfy the test of public benefit will depend on a variety of factors. These will include:

- the charitable purpose;

- the need for and nature of the services and facilities provided;
- the extent and level of the charges or fees which need to be paid to access them; and consequently the exclusory nature of the charge;
- the extent to which those charges are moderated in whole or in part to permit access to those who cannot otherwise afford the charges or fees or to give them other access (direct or indirect) to the benefits of the charity arising to such persons;
- the nature of the benefit, including whether it is of a singular or longer term benefit; as well as the general circumstances and modern context in which the charity operates.

**Principle 2c People in poverty must not be excluded from the opportunity to benefit (Section F11 of *Charities and Public Benefit*)**

3.69 The courts have resisted defining the expressions poor and poverty. In **re Coulthurst**<sup>126</sup>, Evershed MR commented:

*“It is quite clearly established that poverty does not mean destitution; it is a word of wide and somewhat indefinite import; it may not unfairly be paraphrased for the present purposes as meaning persons who ‘go short’ in the ordinary acceptance of that term, due regard being had to their status in life, and so forth.”*

What people in poverty means clearly must be considered in light of modern social conditions, the context, the purpose of an organisation, and the nature of the benefits.

3.70 As set out at paragraph 3.59 above, the second principle that appears to emerge from **Re Resch** is that an organisation which wholly excluded poorer people from any benefits, direct or indirect, would not be set up, and operate, for the benefit of the public and therefore would not be a charity. This principle is supported by the court’s approach in previous cases:

3.71 For example, in **Jones v Williams**<sup>127</sup> in 1767 the court reported:

*“Definition of charity; a gift to a general public use, which extends to the poor as well as to the rich”.*

3.72 In **Commissioners for Special Purposes of the Income Tax v Pemsel**<sup>128</sup>, Lord Macnaghton said:

*“The trusts last referred to are not the less charitable in the eyes of the law, because incidentally they benefit rich as well as the poor, as, indeed every charity that deserves the name must do either directly or indirectly.”*

3.73 This is also supported in the case of **Oppenheim v Tobacco Securities Trust Co Ltd and Others**<sup>129</sup>.

3.74 In **Re Macduff**<sup>130</sup> Lindley L.J. said:

*“I am quite aware that a trust may be charitable though not confined to the poor; but I doubt very much whether a trust would be declared to be charitable which excluded the poor.”*

3.75 In **Taylor v Taylor**<sup>131</sup> Griffith C.J. said:

*“The prima facie impression that the words convey to my mind is that the testator intended the establishment of what may be called private lunatic asylums for the benefit of well-to-do persons who could pay for their treatment, or at any rate to include institutions for the exclusive benefit of such persons. If this were the true construction I doubt very much whether the gift could be supported...”*

3.76 Accordingly whatever restrictions there are on those who can benefit, charities must in all cases ensure that poorer people are not excluded from the opportunity to benefit from each of their purposes<sup>1</sup>.

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<sup>1</sup> This is not the same as a requirement that all beneficiaries must be poor. The concern that the effect of these principles meant that the relief of poverty would be a requirement for every charitable purpose was dismissed by the court in **Re Resch** ([1969] 1 AC 514, 542). It does not mean that the purposes are limited to or confined to for example, the poor sick, to educating the poor, to providing health facilities for the poor, or any other purpose. The court confirmed it was concerned with a different, “narrower proposition” about excluding the poor from participation in the benefits of a charity. The effect therefore of these principles is not to introduce a qualification of poverty into each of the thirteen descriptions of charitable purposes.

## Part 2

### Other References

2.1 As decisions on individual cases are made by the Commission and if cases are brought before the Charities Tribunal and the court, there will be other references which will be of use when looking at the analysis of the law in this area.

2.2 Other references which may be of interest include:

1. Odstock Private Care Limited

This reference list will be kept under review and updated from time to time.

## Part 3 Endnotes

### Extract from *Analysis of the law underpinning Charities and Public Benefit*, December 2008

#### Endnotes:

115. [1968] AC 138
116. [1972] Ch 73
117. [1983] Ch 159
118. Re Resch's Will Trusts [Le Cras v the Perpetual Trustee Company Limited and Others] [1969] 1 AC 514
119. See Scottish Burial Reform and Cremation Society Limited v Glasgow City Corporation [1968] AC 138, See Also Incorporated Council of Law Reporting for England and Wales [1972] Ch 73, CA and Joseph Rowntree Memorial Housing Association Ltd v AG [1983] 1 Ch 159
120. [1969] 1 AC 544
121. Jones v Williams [1767] Amb1 651, 652; Commissioners for Special Purposes of Income Tax v Pemsel [1891] AC 531; Oppenheim v Tobacco Securities Trust Co Ltd and others [1951] 1 All ER 31 [Lord Simonds]; re McDuff [1896] 2 Ch 451,464; Taylor v Taylor 10 CLR 218
122. [1969] ibid 544
123. [1969] ibid 544
- 123a Although there was no constitution in re Resch, the general principles are set out in paras 2.24 – 2.28 and in Part 4 of this Analysis.
- 123b This is the approach Lord Wilberforce took in Re Resch
124. 1 AC 541, 543; See also Oppenheim v Tobacco Securities Trust Co Ltd [1951] AC 297, 299 where the fact that society generally may benefit from a select educated few did not save what was otherwise an insufficient section of the public "*The public element, as I will call it, is not supplied by the fact that from a son's education all may benefit*".
125. Jones v Williams (1767) Amb. 651, 652; Commissioners for Special Purposes of the Income Tax v Pemsel [1891] AC 531; Oppenheim v Tobacco Securities Trust Co Ltd [1951] 1 All ER 31, re Macduff [1896] 2 Ch 451; Taylor v Taylor 10 CLR 218 and In re Clarke [1923] 2 Ch 407. See also other references in those cases, and those cases relating to specific charitable purposes, including for example The Attorney-General v The Earl of Lonsdale [1827] 1 Sim 105; Brighton College v Marriott [1926] AC 192; The Abbey Malvern Wells Ltd v Ministry of Local Government and Planning [1951] 1 Ch 728]; and Smith v Kerr [1902] 1 Ch 774 CA
126. [1951] Ch 661, 666
127. [1767] Amb1 651, 652
128. [1891] AC 531
129. [1951] 1 All ER 31 (Lord Simonds)
130. [1896] 2 Ch 451, 464
131. 10 CLR 218