

Christian charities and the new ‘public benefit’ test

1. Introduction

The regulation of charities, particularly religious charities, is being significantly overhauled. The new Charities Act removes the presumption that religious groups are for the ‘public benefit’. In future, Churches and Christian organisations will have to prove that they have a ‘public benefit’.

But how will ‘public benefit’ be interpreted? That question is at the heart of our concerns.

I should say from the start that *in theory* the charitable status of churches is unlikely to change. They can easily demonstrate public benefit (because, for example, they hold public services of worship).

Whilst evangelistic charities will be permitted, there is concern that the Commission seems to disapprove of evangelism which selectively targets members of one particular faith. What about *Jews for Jesus*? What about an evangelistic charity which seeks to convert Muslims living in the inner city?

There is also concern for other Christian charities which are strongly out of kilter with some of the tenets of secular political correctness.

It is timely that we consider this issue today as the Charity Commission is about to launch a public consultation on how the public benefit rules should apply to religious groups.

2. What is a charity?

A charity is a non-profit organisation, recognised by the State as having charitable purposes and which exists for the public benefit.

There are many financial benefits to being a charity, principally

- Tax relief on gift aid donations
- No income tax or corporation tax to pay
- No tax on investments
- Non-domestic rate relief – a discount of at least 80%
- No VAT on advertising for fundraising and on new buildings
- Preferential rates from banks and suppliers

Charities also have the advantage that their status confers respect. Their finances and conduct are regulated. This encourages people to have confidence and make donations.

No Church would find it easy to give up these benefits. The good news is that Parliament is not requiring them to give them up. And there is much that *we can do* to help protect Churches in the future.

3. Charity Law

Charity law determines which organisations are charities. This has been laid down by Parliament in various pieces of legislation starting with the Charitable Uses Act 1601.

But charity law has been mainly decided by judges. This is called case law.

In 1891, a prominent judge, Lord Macnaghten, set out four heads of charity:

- 1) The relief of poverty
- 2) The advancement of religion
- 3) The advancement of education
- 4) Other purposes beneficial to the community not within the other three heads.

Special Commissioners of Income Tax v. Pemsel [1891] AC 531

Case law established a presumption that the first three heads were for the public benefit so that individual organisations did not have to be assessed unless there was some doubt or ambiguity.¹ The presumption could be overturned *only if there was compelling evidence to do so*. Charities falling under the fourth head, however, had to prove public benefit in each and every case.

4. Key principles of case law for religious charities

There are two key principles of case law that set the ground rules for religious charities.

No discrimination between religions.

First, there is no discrimination between religions.

Over the past 75 years the courts have consistently refused to rule on which religion is true or beneficial. As far as the courts are concerned, any religion will do. Except in the most extreme cases all religions are treated in the same way.

As Lord Reid said in 1949:

“A religion can be regarded as beneficial without it being necessary to assume that all its beliefs are true, and a religious service can be regarded as beneficial to all those that attend it without it being necessary to determine the spiritual efficacy of that service or to accept any particular belief about it.”

Gilmour v Coats and others [1949] AC 426

In 1963 Justice Wilberforce stated that:

“The court cannot discriminate between religions.”

Re Pinion (deceased) [1965] Ch 85

In 1981 Justice Walton concluded:

“... it has long been settled that the law presumes that it is better for a man to have a religion – a set of beliefs which take him outside his own petty cares and lead him to think of others – rather than to have no religion at all. ”

Holmes and others v HM Attorney General [1981] transcript

The requirement that religion must be advanced.

The second fundamental ground rule is the requirement that religion must be advanced.

¹ King M and Phillips A *Charities Act 2006*, The Law Society, 2007, page 3

Charity law distinguishes between private religious devotion (which is not charitable) and the advancement of religious belief (which is).

In the words of Lord Denning:

“When a man says his prayers in the privacy of his own bedroom, he may truly be concerned with religion but not with ‘the advancement of religion’”
Lord Denning in *National Deposit Friendly Society Trustees v Skegness UDC* [1958] 2 All ER 601

A 1931 case held that the promotion of religion is,

“the promotion of spiritual teaching in a wide sense, and the maintenance of the doctrines on which it rests, and the observances that serve to promote and manifest it.”
Keren Kayemeth Le Jisroel v IRC [1931] 2 KB 465, at 477 *per* Lord Hanworth MR

The promotion of spiritual teaching and the maintenance of doctrines would embrace preaching, door to door evangelism, street preaching, Sunday school classes, mid-week Bible studies, Church newsletters, or other means such as websites, radio or TV.

Observances would embrace an act of worship such as a Church service to which members of the public are admitted.

These two ground rules of case law fit very well with the activities of evangelical churches which seek to proclaim the gospel and welcome outsiders into their services of worship.

5. The Charities Act 2006

Now I would like to turn to the Charities Act 2006

The legislation affects charity law in many ways. For example the creation of nine new distinct heads of charity covering such things as the advancement of amateur sport or the advancement of human rights. In all there are now 13 heads of charity. (section 2(2) Charities Act 2006)

But I want to consider only those changes which I think are of immediate relevance to our subject of public benefit.

- The most radical change is that all religious charities are now going to have to prove public benefit. The same goes for educational charities and those concerned with the relief of poverty. This presumption established for hundreds of years has now been swept away. (section 3(2) CA 2006)
- Under the old law thousands of Churches had little or no involvement with the Charity Commission. They were deemed to be charities. Now unless they have a very small turnover they’ll all have to register with the Commission for the first time. But they may have a breathing space. These churches will not have to register until 2012 if their turnover is less than £100,000 and they are in the list of “excepted charities” such as
 - The Methodist Church
 - Baptist and Congregational churches
 - FIEC affiliated churches
 - The Church of England
 - The Presbyterian Church of Wales

- The Church in Wales
- The URC
- The Quakers

The Charities (Exception from Registration) Regulations 1996

All other churches will have to register immediately if they have an income of £5,000 or more. This threshold may rise later this year to £10,000.

Let me mention some more general things which also turnout to be relevant

- Charities promoting atheism can now be registered. (section 2(3)(a) CA 2006)
- The Commission has enhanced powers of supervision over charities. (Part 2, Chapter 5, CA 2006)
- Charity Appeal Tribunals (CAT) are to be set up as a counter-balance to a much more powerful regulator. The tribunals will be able to quash the decisions of the Commission and their decisions will be binding unless overturned by a higher court. (section 8, CA 2006)

And finally,

- There is a new requirement that charities must have regard to the Commission's guidance on public benefit. "Having regard to" means that the guidance is not necessarily binding. But it would be foolish for any charity simply to ignore it. (section 4(6) CA 2006).

The Commission is keen to assert that the case law on public benefit is unaffected by the 2006 Act.

"Our guidance sets out a framework of factors to consider when assessing public benefit based on the principles of public benefit contained in existing case law"²

Obviously there will be certain areas where case law will change such as the admission of non-theistic charities.

The Charity Commission has also said that as well as the courts and the Charity Appeal Tribunals, the law will be developed by the Commission itself.³ In some areas that I will be talking about in a moment, the Commission are emphasising some aspects of the case law without taking on board judgments which balance out the argument.

There is excellent case law which certainly defends the activities of evangelical churches. These precedents might need to be cited against particular decisions of the Commission.

6. Factors influencing the new arrangements

As far as public benefit is concerned there are four factors which have influenced the recent legislation and its implementation.

- Out of date historic trust deeds

There are a number of old charities which were set up to operate under conditions which no longer apply today. The Charity Commission quote the example of hospital comfort funds. These were set up to give out cigarettes in hospitals during the First World War. Today patients cannot smoke in their beds, and doctors strongly disapprove of patients smoking.⁴

² *Charities and Public Benefit Guidance*, The Charity Commission, January 2008, page 10

³ *The Charity Commission Public Benefit and the Effect of the Proposed Legislation*, Briefing Paper for the Joint Committee on the Draft Charities Bill, The Charity Commission, September 2004, para 17 see www.charitycommission.gov.uk/spr/submerge.asp as at 25 February 2008

⁴ *Charities and Public Benefit Guidance*, The Charity Commission, January 2008, page 11

Undoubtedly there are charities whose trust deed is frozen in a time warp. The Commission wants to be able to ensure that funds given to charity are used in a manner as close to the original purpose as possible. This is the so-called cy-près doctrine. The Charities Act will help to speed up this process.

- Public schools

There is a view that public schools should be required to give something back to the community in return for their charitable status. Removing the presumption and requiring evidence of public benefit is seen as a way of compelling such schools to change their practice. These changes have also been applied to religious charities and charities which alleviate poverty. Apparently, equality is good for all.

- Extremist religious charities

To be fair, there are some religious charities which have given cause for concern. For example, the authorities are alarmed by the take-over of Islamic charities by extremist groups.

The Charity Commission has already taken over several mosques, including Finsbury Park Mosque in London. A whole monitoring unit has been established at the Commission, euphemistically called “the faith and social cohesion unit”.

- The Human Rights Act

The Charities Act has taken the principle of religious non-discrimination one stage further: groups promoting atheism can now be routinely admitted as charities. Before it was difficult to do this, though not impossible.

Secularist groups have long argued for this change. They succeeded partly because they could argue that the Human Rights Act 1998 required them to be treated equally.

The problem for the Commission is that *once the doors have been opened* to allow non-theistic groups to be charities then the Human Rights Act makes it much harder to *close the door on* cults and political groups which may seek charitable status. Surely this is one reason why the Commission wants to use the public benefit test to restrict charitable status.

So far the Commission has always succeeded in the courts in blocking Scientology from becoming a charity. It maybe that under the new regime the Commission will lose this battle.

The Human Rights Act enforces religious neutrality. I doesn't matter whether you are an orthodox Christian or believe that Elvis Presley is the son of God. If your belief is sufficiently coherent it falls to be protected by the European Convention on Human Rights.⁵

It's no wonder the Commission has sought greater legal powers. These powers could potentially be used on evangelical charities. On the other hand, Christians can use the Human Rights Act to defend their religious freedom.

7. The new Public Benefit Guidance

There are two sets of public benefit guidance

⁵ Regina v. Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others [2005] UKHL 15, para. 23 *per* Lord Nicholls

General guidance for all Charities (this was published in January 2008)

Sector-specific guidance

Guidance for religious charities goes out for public consultation very soon and I would encourage those here to respond to it. This guidance will be crucial in administering the new law.

General guidance on public benefit

Let us consider the general guidance for all charities.

The Commission has set out two key principles of public benefit for all charities. Within these principles there are criteria which must be satisfied in **every case**.

Principle 1: There must be an identifiable benefit or benefits

- *Principle 1a* It must be clear what the benefits are
- *Principle 1b* The benefits must be related to the aims
- *Principle 1c* Benefits must be balanced against any detriment or harm

Principle 2: Benefit must be to the public, or section of the public

- *Principle 2a* The beneficiaries must be appropriate to the aims
- *Principle 2b* Where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted: by geographical or other restrictions; or by ability to pay any fees charged
- *Principle 2c* People in poverty must not be excluded from the opportunity to benefit
- *Principle 2d* Any private benefits must be incidental

In general evangelical churches are extremely keen for members of the public to come along to Church. In the language of charity law, evangelical Churches always want to increase their beneficiaries.

Of course we want to make our own rules on the administration of the sacraments, on Church membership, and on the selection of leaders. But we are very keen for people to come to church.

Whilst monasteries might well have some concerns about the second principle, I don't think that *by itself* it will be a major concern to the vast bulk of evangelical charities. Principle 2 is unlikely to cause a problem unless it is combined with the powerful balance of harm test in Principle 1c.

So it's the first principle I want to concentrate on. The first two factors can be quickly dealt with.

Principle 1a It must be clear what the benefits are

Principle 1b The benefits must be related to the aims

As far as the law is concerned the promise of eternal life is an intangible benefit. So is the forgiveness of sins. Thankfully the Commission accept that religious charities mostly provide intangible benefits. But the emphasis that I have picked up from the staff of the Commission is that religious charities need to go further and set out some of the tangible benefits they provide.

8. How are Christian charities to demonstrate public benefit?

How are Churches and other Christian charities to demonstrate that they have a public benefit?

First, we must continue to argue that Churches and Christian charities meet people's spiritual needs. That is primary and it must be clear that it is primary.

The Commission wants religious charities to go further. They want us to give tangible benefits as well as intangible benefits. We will not know definitely until the Commission publishes its guidance for the public benefit statement in the annual report. But the following are some ideas of things that might be said by a Church in their statement on public benefit:

- The fact that Church services are open to the public
- Details of the services held
- Estimates of the total regular attendance at services every week and the total number of people attending within any one year
- Details of outreach activities
- The number of new people who are now coming to church
- Details of the range of groups which the church provides (eg youth group, pensioner's lunch, women's prayer meeting etc)
- Numbers attending groups of the church
- Information on the spread of backgrounds, races and cultures of people who attend church
- Perhaps include some testimonies of people who have been helped

This information would, I am sure, be far more than is needed. For larger charities and denominations it might be appropriate to mention the following tangible benefits:

- Christian belief offers people a set of values by which to live and make decisions as to how people should interact with fellow humans⁶
- Morals and ethics are the basis of civilised behaviour
- There is academic research that shows the Christian faith is good for people's psychological well being.⁷

9. Principle 1c - the balance of harm test

What does Principle 1c mean?

Under the previous law, the presumption of public benefit could be rebutted if there was evidence to the contrary. Christian churches were automatically charities. They were waived through at the public benefit barrier. No doubt a bogus church which never held a service could be struck off the charity register. But things had to be fairly extreme before charitable status was denied or withdrawn.

In essence the old test was concerned with the purpose of the charity. What a charity is, rather than what it does. But the new test is concerned with the activities of a charity.

Officials at the Charity Commission now say they want to weigh up what they consider to be the good and bad activities of a charity. In their words:

“Any benefits must be balanced against any detriment or harm”⁸

I call this the balance of harm test. Although a charity may be able show that it has a public benefit, this could be entirely outweighed by negative factors.

⁶ King M *Public Benefit and Religious Charities*, Quickpoints, StoneKing Solicitors, 6 March 2007

⁷ See for example Francis, Leslie J and Kaldor, Peter *The Relationship Between Psychological Well-Being and Christian Faith and Practice in an Australian Population Sample*, Journal for the Scientific Study of Religion Volume 41 Issue 1 Page 179-184, March 2002 see <http://www.blackwell-synergy.com/doi/abs/10.1111/1468-5906.00109> as at 26 February 2008

⁸ Jo Edwardes, Head of Charity Status and Public Benefit at the Charity Commission, Charity Times, February 2008

The legal basis

The Commission says that the idea of weighing up the benefits and detriments is based on case law, although many religious charities believe that the Commission is over-egging the pudding at this point.

The legal basis for the Commission's new harms and detriments is fairly slender. The Commission quotes only one case in their published analysis of the law on public benefit.⁹

In 1948 the courts decided that the National Anti-Vivisection Society which sought to ban experiments on animals could not be a charity as the need to protect animal welfare was outweighed by the need for society to have scientific experiments on animals. (National Anti-Vivisection Society v IRC [1948] Ch 31)

Two concerns

I believe that the balance of harm test will bite on mainstream religious charities in two areas.

- a) Proselytism. This is usually defined as an activity which seeks to convert people from one religion to another. Cross-cultural evangelism necessarily involves proselytism. So would church planting in many inner-city areas.

Staff at the Commission accept that most religious faiths proselytise to some extent. This will be permitted to continue provided it is not the sole activity of the charity. The view seems to be that advancing belief is fine, but proselytising as a sole activity necessarily involves the criticism of other people's views. The argument goes that although this is perfectly lawful, it should not be charitable if conducted as an exclusive activity.

This is a dangerous way of thinking which needs to be challenged. It is vital to do this in order to protect evangelism and our missionary organisations.

- b) Proselytism is one concern. The second concern relates to Organisations which promote contentious moral beliefs (such as Christian beliefs on homosexuality or abortion). Pregnancy counselling centres, or a ministry for former homosexuals could face more difficulties being a charity.

How the balance of harm test could be wrongly used

The Charity Commission has now published the criteria that its staff will use to assess detrimental or harmful activities which no charity should be involved in.

The Commission will be on the look out for, among other things, activities which:

- Unlawfully restrict a person's freedom
- Encourage or promote violence or hatred towards others
- Are dangerous or damaging to mental health¹⁰

These words as traditionally understood would not be a problem for Christians. No Christian would want to promote violence or hatred for example.

⁹ *Analysis of the law underpinning Charities and Public Benefit.*

¹⁰ *Charities and Public Benefit Guidance*, The Charity Commission, January 2008, page 16

But just think for a moment about these words are bandied about. Gay rights groups regularly say that Christians are unlawfully trying to restrict their freedom. That we are promoting hatred. That Christian ‘homophobia’ encourages violence. That Christian homophobia leads to gay men getting depressed or damaging their mental health.

So these words are easily capable of more than one interpretation.

Many Christians are concerned about the subjective wording of the guidance. This situation is not helped because the Commission says that the public benefit requirement will be influenced by

“changes in social values”¹¹

and by

“what is relevant and appropriate for current social and economic conditions”.¹²

Most people would accept that organisations should no longer get tax relief for handing out cigarettes in coronary care units. Forcing a hospital comfort fund to give out grapes instead might be entirely appropriate. Seeking to impose modern secular values on religious bodies would not be appropriate. Yet for all the caveats in the guidance the Commissions wording seems to be open to this interpretation.

The Commission also say that “public attitudes and opinion” can be a “useful factor” which can come to shape “the legal understanding of what is charitable”.¹³

So even if it is not determinative on its own, there is a risk that under these guidelines public opinion could (with other factors) be decisive in assessing public benefit.

The final guidance does give rise to matters of concern, but it is a considerable improvement on the draft guidance which went out for consultation.

10. Conclusion

What should we do?

1. At one level Christian organisations should do nothing at all. There is no reason why Churches cannot continue to be charities. They provide services of public worship which the public can attend. That is a primary function of advancing religion. It clearly is a public benefit.

All Churches and Christian organisations will have to spend time completing the new public benefit section of their annual report.

2. We have to be as wise as serpents and as harmless as doves. Given the general secular direction of our society, problems might well arise in five years time. How important it is therefore that we are firm on what we believe in all our dealings with the Commission.
3. I see no reason why Christians should de-register their charities. We should fight our corner. If a charity de-registers, there will be a loss of gift aid and a loss of the 80%

¹¹ *Charities and Public Benefit Guidance*, page 10

¹² *Charities and Public Benefit Guidance*, page 10

¹³ *Ibid*, page 12

community charge relief. In a such a case it would be worth asking the local tax office if there are any tax implications (which there will probably not be). But no church needs to countenance this step at this stage.

4. I would encourage Christian charities to be up-front about what they believe. Why should the Charity Commission think your beliefs are important if you are not willing to state them publicly?
5. Finally, I would encourage you to take part in the Charity Commission consultation on religious charities.