

For the public benefit?

**A consultation document
on charity law reform**

For the public benefit?

**A consultation document
on charity law reform**

Acknowledgements

NCVO gratefully acknowledges the contributions to this report from the members of the Charity Law Reform Advisory Group, particularly Winifred Tumim, who chaired the Group, and John Gardner; members of the reference group, who provided detailed comments, especially Patrick Ford, Janet Ulph, Jane Arnott and Julian Smith, and all those who gave oral evidence. Special thanks to Francesca Quint for her inspiration and good sense; and Anne Davies and Ann Blackmore for excellent editorial work.

Foreword

Charity law reform is a complex and contentious issue, which can provoke strong views. This report represents over two year's work by the NCVO Charity Law Reform Advisory Group. It is also informed by the comments of expert individuals and groups who submitted either oral or written evidence. We are very grateful to those who prepared responses.

Through extensive discussion, we have come to a greater appreciation of the value of the current system of charity law. Our recommendations, therefore, clearly build on this useful foundation and develop from it, rather than attempting to construct something new. Our proposals will obviously not satisfy everyone but we have developed what we see as a workable solution based on what is best about the law as it stands. We have emphasised the centrality of public benefit. Such an approach potentially removes some of the most striking anomalies in the current law and makes it more explicable to a lay audience.

Much of the comment received in the early stages of our consultation focused on regulatory issues including registration requirements. While we acknowledge the importance of these issues, we have decided to leave them on one side in order to concentrate on the legal treatment of charity. Nevertheless, it is difficult to discuss one without the other and this report contains some proposals for further work on regulation. Our consultation has revealed some differences of opinion on regulation as well as other issues. We found a tension between those who advocate tougher regulation and those who advocate a framework within which charities can operate with an appropriate degree of freedom. Our view is that these considerations can be balanced. The sector should be free of excessive regulation but subject to requirements of accountability proportionate to the degree of risk.

We know we have not come up with all the answers and state clearly where we think that further work is needed. Although we make specific proposals, the main intention of this report is to stimulate a debate during the six-month consultation period, which will finish on 31 July 2001. Our work follows on from the Commission on the Future of the Voluntary Sector, better known as the Deakin Commission, which contained recommendations for reform of charity law and the regulatory regimes.

Many people have contributed to our work to date. I should like to thank in particular: my fellow members of the Advisory Group; Francesca Quint, whose Opinion forms part of this report; and all those who contributed to the consultation, particularly the members of our Reference Group who provided detailed and helpful comments on our proposals. Thanks also to Margaret Bolton of NCVO who acted as secretary to the group.

Finally, I would like to encourage all those with an interest in the charitable sector to take the time to read this report and to respond. Many dismiss charity law as a dry topic. Yet it is a crucially important one. The law on charitable status serves to promote public confidence in charities and to encourage the giving of time and money. We need to ensure that the legal treatment of charity best serves the interests of the public, promoting the health and development of the charitable sector in the new century.



Winifred Tumim
Chair, Charity Law Reform Advisory Group

January 2001

Contents

Executive Summary	I
Chapter 1: Introduction and background	
1.1 Background	1
1.2 Working methods	1
1.3 The scope and benefits of charitable status	1
Chapter 2: Themes in the debate on charitable status	7
2.1 Themes in the debate	7
2.2 The role of charity and its relationship with the statutory and private sectors	7
2.3 The popular idea of charity	11
2.4 How do we view charity as a concept today?	13
2.5 Is the basic legal framework sound?	15
Chapter 3: Reform proposals considered	18
3.1 Proposal 1 – Abolish charitable status	18
3.2 Proposal 2 – Adding an activities test and possibly an outcomes test to the existing objects test	19
3.3 Proposal 3 – Codify charity law	20
3.4 Proposal 4 – Re-classifying charity	21
3.5 Proposal 5 – Introduce the same public benefit test across the four heads of charity	23
3.6 Proposal 6 – Restricting charitable status to organisations relieving poverty	24
3.7 Proposal 7 – Liberalising the law on political activities and campaigning	24
3.8 Measures to develop the common law and ensure the ‘charitability’ of registered organisations	26
Chapter 4: Towards a favoured option	28
4.1 Preamble	28
4.2 The favoured reform option	30
4.3 How would our main reform proposal impact on organisations applying for charitable status?	31
4.4 How would the proposed change impact on existing charities?	34
4.5 Determination of charitable status/regulatory issues	34
4.6 Conclusion	35
Appendix 1: Charity Law Reform Advisory Group	36
Terms of reference and membership	
Appendix 2: Oral evidence witnesses	36
Appendix 3: Opinion provided by Francesca Quint	37

Executive Summary

Introduction

In 1998 NCVO established a Charity Law Reform Advisory Group to assess whether the law on charitable status should be amended to ensure a good fit with today's circumstances. This report is the result of their work. It has been produced with the benefit of contributions and ideas from a wide range of organisations and individuals.

Summary of conclusions and recommendations

1. The Group concluded that, in broad terms, the legal treatment of charity does protect and promote charitable activity. The reform option we supported is to apply the same strong 'public benefit' test, currently only applicable to charities falling under the fourth head (other purposes beneficial to the community), across all four heads of charity.[♦] This has the merit of emphasising the centrality of public benefit, realigning charity with principles which over the years have been partially eroded. In reaching this conclusion we had the following in mind:
 - Charitable status is valuable and should be preserved. Charitable organisations are unique in that they are governed by an independent board of trustees whose primary responsibility is to serve the objects of the charity, and thus its beneficiaries;
 - A basic rationale for retaining charity as a legal category is to encourage individuals to give either time or money to particular causes about which they feel strongly;
 - Charity law is undoubtedly complex and can be difficult to understand. However, simplifying the law runs the risk of reducing the flexibility which is one of its strengths and the Group concluded this was too great a price to pay.
2. The Group is proposing that the stronger 'public benefit' test, should apply to all charitable purposes. This change should be grafted on to the law by means of new legislation, avoiding the problems which would arise if existing case law became redundant. This approach also preserves the charitable status of the broadest range of public benefit purposes.
3. The Group's proposal does not simplify the main test of charitable status, namely benefit to the public or a sufficient section of it. Indirect as well as direct public benefits would still count. Determining public benefit will not always be straightforward and the Group proposes that cases be looked at on their individual merits, examining issues such as the balance between public and private benefit, and, if private benefits are conferred, whether these are outweighed by intangible public benefits.
4. The Group considers its proposal will expand rather than contract the weighing up of considerations about public benefit. By removing inbuilt favourable assumptions with respect to the relief of poverty, and the advancement of religion and education, organisations and causes falling under these three heads are exposed to the same degree of scrutiny on their merits as already applies to 'fourth head' causes. The result may be that some organisations falling under the first three heads of charity might no longer be deemed to be charitable, but the Charity Commission and the courts should be free to determine this question on the merits of the particular application and without any presumption.

[♦] There are four heads of charity: relief of poverty; advancement of education; promotion of religion; and other purposes beneficial to the community. This classification is based on a 19th century case.

5. Relief of poverty: The Group's reform option would mean that, in relation to organisations relieving poverty, the balance between public and private benefit, including indirect public benefit, would need to be assessed on a case by case basis. Public benefit would not be presumed.
6. Promotion of religion: The Group believes that its proposal does not threaten the charitable status of religious organisations as such. Organisations promoting religion would continue to be charitable because they provide an opportunity for the expression of belief and for spiritual and moral development which has the potential to benefit the public. However the general presumption will be removed and each case assessed on its individual merits.
7. Advancement of education: The spotlight inevitably falls on the charitable status of public schools. The proposed reform will mean that the indirect public benefit of education will no longer be seen as a trump card when it comes to deciding charitable status. Other factors to be considered might include the extent of public access to educational facilities, set against educational segregation and social divisiveness.
8. Impact on existing charities: The Group considers that charitable status should only be given to those organisations meeting the newly strengthened public benefit test. This means that some organisations which are charitable under existing law might well cease to be charitable if our reform proposal is implemented. In such cases, charitable funds held for objects that are no longer deemed charitable should be applied to the closest possible object that is still charitable. The Group recognises this may cause legal and policy difficulties over ownership of assets and the Charity Law Association will be carrying out further work on these issues.
9. Determination of charitable status/regulatory issues: Our preferred reform option places a greater emphasis than at present on the role of the Charity Commission and the courts as independent arbiters, determining whether or not purposes really are for the benefit of the public. The cost in both time and money means that court action is not a feasible option for most organisations. We agreed that while the best solution would be the establishment of a suitor's fund, financed by public money, this was unlikely given other demands on public spending. Another option might be a new appeals mechanism between the Charity Commission and the courts. We did not reach a conclusion on this issue, and welcome views on it. It will also be looked at by a project on charity regulation, a collaboration between NCVO and Kings College, London. This project will also examine the role of the Charity Commission and its regulatory relationship with the voluntary sector.
10. Exempt and excepted charities: The consultation revealed that many in the sector have strong views on exempt and excepted charities.[♦] It was argued that different, less stringent, regulatory rules for some reduce confidence in charity as a whole. Concern was also expressed that some exempt organisations with significant charitable funds are not adhering strictly to charity law principles. Regulations providing for exception are due for review in March 2001. This provides an opportunity for the rationale for exception and exemption to be debated and possible changes discussed. The joint NCVO/Kings College project (see 9) is looking at this issue in more detail.

[♦] These are charities which generally speaking are not subject to the same reporting and accounting requirements as charities registered with the Charity Commission.

11. Mutual organisations: The Group carefully reviewed the views of those who think organisations based on mutual benefit should be charitable. However, it considers such a change would strike at the root of charity: charitable status reassures donors that their contribution will be used for the charitable purposes for which it was given and that any private benefit will be secondary. However, organisations based on the mutual model should be supported and encouraged, possibly through the tax system, and their special status and contribution should be more widely recognised. Although strictly speaking outside the scope of our review, we think that consideration should be given to a new legal form for the mutual sector. Such a form should be as broad and flexible as charity and with a comparable range of advantages. The Group recommends further investigation of this option.

12. The Group also considered a number of other reform options. These were adding to the existing objects test an activities and possibly an outcomes test; codifying charity law; re-classifying charity; restricting charitable status to organisations relieving poverty; liberalising the law on charities and political activities. The report explains the Group's thinking in relation to each of these other proposals. It is clear to us that generally our main reform proposal has advantages over other options. Nonetheless some of the other proposals discussed - for example, liberalising the rules on charities and political activities - are consistent with our main recommendation and could be implemented alongside it. This report suggests further work on charities and political activities and in some other areas. We welcome your views on this and all the other issues raised.

Although the Group consider that this report contains sensible and workable proposals, it is a consultation paper designed to promote debate on relevant issues. The consultation period will last six months, ending on **31 July 2001**. NCVO will then formulate an agreed policy position on charity law reform and lobby for change, if change is considered necessary.

Please direct comments to Margaret Bolton at NCVO, Regent's Wharf, 8 All Saints Street, London N1 9RL, email: margaret.bolton@ncvo-vol.org.uk

Chapter I

Introduction and background

1.1 Background

1.1.1 Anniversaries are a useful opportunity for reflection and review. A statute enacted in 1601 provides the foundation for our law on charitable status. In the run up to the 400th anniversary of the Statute of Elizabeth, as it is known, it seemed timely to reconsider the legal treatment of charity. The work of the NCVO Charity Law Reform Advisory Group was prompted by the need to examine in detail the recommendations for reform of charity law and the regulatory regime proposed by the Commission on the Future of the Voluntary Sector, better known as the Deakin Commission¹. It was given additional impetus by debate in the media about the continuing relevance of charity. Meanwhile, interest within the charitable sector was fuelled by the Charity Commission's Review of the Register, which is reassessing eligibility for charitable status, within the constraints of the existing law, and by a government review of the tax treatment of charities.

1.1.2 After the Deakin report was published in 1996, NCVO and other voluntary sector intermediaries established working groups to consider and follow through the recommendations that it made in key areas. By the beginning of 1998 charity law was the last major topic to be tackled. The evident reluctance to address it is explained by its complexity and the fact that any reform, however mild or radical, would be regarded as highly contentious in some quarters. Despite the importance of the issue, and the publication of some well received reports during the final quarter of the last century², government had not responded to calls for change.

1.1.3 Given a different political environment and greater interest in the charitable sector and its contribution to society, NCVO decided to look again at the issue. In 1998 NCVO established an advisory group to assess whether the law on charitable status needed to be amended to ensure a good fit with today's circumstances. Our terms of reference and membership are given in Appendix 1. It was agreed that work would be undertaken in five phases:

1. Consideration of the case for a special status for some organisations or activities;
2. Collection of evidence from a range of groups with an interest in the issue;
3. Preparation of the advisory group report;
4. Wide-ranging consultation on the report within the voluntary and charitable sector in order to formulate an NCVO policy position;
5. Lobbying on the agreed position with the aim of achieving change, if change was considered necessary.

The publication of this report launches phase four.

1.2 Working methods

1.2.1 Our starting point was the case for conferring the special status 'charity' on organisations pursuing certain objects. Previous reviews appeared simply to assume that charitable status was a good thing in itself and should be preserved. Partly in response to media comment, we wanted to explore the case for charity and why it might be considered to have distinct

¹ Deakin Commission, *Meeting the Challenge of Change: Voluntary Action into the 21st Century* (NCVO, 1996)

² Goodman Committee, *Charity Law and Voluntary Organisations* (Bedford Square Press, 1976), and Deakin Commission

value. This initial work was undertaken in collaboration with the Law School at Kings College London, who hosted a conference in September 1998 called ‘The Foundations of Charity’³. This conference involved academics from a number of disciplines and senior practitioners from the voluntary sector. It considered charity in its legal, social, political and historical context, exploring current perceptions of charity and whether its legal treatment needed to be amended to reflect what it should mean today. This discussion helped us develop the content of chapter 2 of this report and formulate our reform recommendations.

- 1.2.2** In 1999 we sought the views of voluntary sector practitioners, policy experts, charity lawyers and media commentators on the strengths and weaknesses of the law as it stands. We commissioned two small scale research projects, invited written evidence from the sector and held oral evidence sessions involving a range of experts⁴. This part of the project was illuminating. It demonstrated considerable confusion amongst non-lawyers about the law and a strong feeling amongst the policy experts and media commentators that the law required fundamental change, though this was not shared by the sector itself. Thus, the report examines arguments for and against fundamental reform of charitable status.
- 1.2.3** The terms of reference were to review the law on charitable status. We limited our interest in regulation to consideration of the Charity Commission’s role in deciding charitable status and to the charitable status of ‘exempt’ and ‘excepted’ organisations (see 1.3.19). Many of the charity practitioners involved in the research and submitting evidence concentrated their comments on issues relating to regulation and public trust and confidence in the sector. Broadly their view was that charity was a currency at risk of being devalued if the regulatory system was perceived as deficient. Particular concern was expressed about the regulation of ‘exempt’ and ‘excepted’ organisations. Given the strength of feeling in the sector about this issue and the questions raised about the role and purpose of charity regulation, we developed a proposal, again in collaboration with the Law School at Kings College London, for a three year studentship. This work started in September 1999.
- 1.2.4** During the initial phases of the project many people contacted us to make submissions or simply to request more information about our work. These individuals and organisations comprise our Reference Group. A first draft of our report was sent to the 250-strong Reference Group in June 2000. They were given three months to comment and the responses received were enormously useful, helping us to clarify and develop our thinking.
- 1.2.5** The remainder of this chapter provides basic information about charity law and the regulatory system. It aims to provide sufficient background to make the rest of the report intelligible to the lay reader. It is not a comprehensive review but provides a context for some of the key issues and themes discussed later in greater detail.

1.3 The scope and benefits of charitable status

- 1.3.1** The question ‘what is charity?’ is deceptively simple. To précis Goodman: ‘Charity is based on an “other regarding” impulse to help others either by giving time or money to relieve those suffering deprivation and/or to improve the quality of life of the community’⁵. As a charity lawyer put it during our oral evidence sessions: ‘The public has an emotional understanding of charity’. Yet in spite of having an understanding of the idea of charity, in practice people have very different views about how the defining features of charity can best be applied to different objects or activities. For example, some would say that opera companies should not be charitable because they tend to benefit those who are already well off. Others might argue that relief of poverty should be the responsibility of the state and should fall outside charity.

³ The ESRC provided funding for this phase of the work which comprised two seminars and a conference. A summary report of the conference discussion is available from NCVO. A book containing some of the conference papers will be published by Hart Publishing early in 2001.

⁴ A list of those providing oral evidence is included as Appendix 2.

⁵ See note 2.

1.3.2 The law does not help those seeking a watertight definition. There is no single statutory definition of charity. In fact there are very few statutes that consider charitable status at all. The preamble to the Charitable Uses Act 1601 continues to provide the foundation for today's law on charitable status. The preamble was designed to illustrate the types of objects considered charitable and includes repair of bridges, ports and highways as well as the more familiar relief of aged, impotent and poor people. However, the list in the preamble was not intended to be comprehensive. It was developed as a guide. Objects are deemed charitable because included in the preamble or because they are accepted as analogous to objects on that list. In difficult cases the courts must decide whether the object before them 'falls within the letter, the spirit or intendment of the preamble and subsequent case law'. Although it is impossible to describe the category 'charity in law' with any precision, it is possible to attempt to classify the organisations granted charitable status. Lord Macnaghten, in the *Pemsel* judgement in 1891, developed such a classification:

'Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.'

This probably remains the closest that we are likely to get to an easily understood general description of the class.

1.3.3 One view is that law based on a preamble to a repealed statute that is now nearly 400 years old is unlikely to be appropriate to the demands of society today and the needs of the voluntary sector. Others hold that the beauty of the common law system, in which the law evolves on the basis of decided cases, is that it is immensely flexible. The courts can, taking account of changes in society and corresponding needs, develop the law. They can, in other words, update their interpretation of basic charity law principles to fit modern circumstances. This means, according to one charity practitioner, that the law is 'as up to date as the latest legal challenge'. Yet very few legal challenges on applications for charitable status reach the courts. One of the prominent lawyers participating in the oral evidence sessions argued that perhaps no more than two cases for each of the last dozen years have made any significant impact on charity law. In response to concern about the small number of court cases, we also heard the view 'that the Charity Commission is more important than the courts'.

1.3.4 Thousands of organisations each year apply to the Charity Commission to register as charities. The Charity Commission has quasi-judicial powers. It can, like the courts, update its interpretation of basic charity law principles to meet current circumstances, provided it bases its decisions on accepted legal argument. However, it has frequently been criticised for failing to use this power to best effect and has been accused of conservatism in its decision making. The Charity Commission's Review of the Register, launched in 1998, may mark a watershed.

1.3.5 Over time the Charity Commission intends to review categories of organisations on its register of charities which throw up specific questions or issues in relation to their charitable status to assess if they are genuinely charitable. It is also considering whether, in the light of new social and economic developments, some objects previously not considered charitable might now be regarded as such. The Charity Commission has sought to stress that the Review of the Register cannot change the law on charitable status. The Commission is constrained by the basic legal principles, which have evolved with the case law, and the legal arguments underpinning decided cases. Its aim is to ensure that interpretation of the basic legal principles has kept pace with social and economic developments. Many decided cases provide

guidance not only on the objects considered charitable but also on the principles underpinning eligibility for charitable status. *The Framework for the Review of the Register* aims to explain these principles in simple non-legalistic terms⁶. Our explanation is, in part, derived from their document.

- 1.3.6** In order to be charitable organisations must aim to ‘benefit’ the public. For the first three heads of charity (relief of poverty, advancement of education and promotion of religion) benefit is generally presumed. For the fourth head of charity (other purposes of benefit to the community) a case has to be made that the fulfilment of the charity’s purposes will have a beneficial effect upon the public or an appreciable section of the public. This does not mean that the courts always uncritically accept that there is a benefit deriving from applications which fall under the first three charitable heads. A case to illustrate this point is *Re: Pinion*⁷. In this case, examining whether the preservation of a particular individual’s lifetime collection would count as charitable, the court decided against, on the basis that the items in the collection were ‘worthless junk’ in educational terms.
- 1.3.7** The courts seek to establish that the ‘public’ will benefit from an organisation’s activities. The court famously did not accept that the public would benefit in the case of George Bernard Shaw⁸, who left a bequest for research into the creation of a new alphabet believing that it would be charitable because it was educational. The court held that the project would not provide any educational benefit to the public at large. It would help educate those doing the research but would be of no utility to anyone else.
- 1.3.8** The question of whether the ‘public’ will benefit has been a particular issue in relation to applications from organisations advancing religion. Contemplative religious orders have been refused registration as charities. Courts have ruled that, if they are not engaged in charitable work in the community, such as teaching or nursing, an element of public worship is needed in order for these organisations to be charitable. There have been other controversies over which organisations are accepted as charitable because they are advancing religion. Some have had applications for charitable status turned down by the Charity Commission on the basis that they are not religions in the accepted judicial sense of the term. They are not charitable due as much to the system of belief as the lack of any public benefit⁹.
- 1.3.9** The judges also have to decide whether a ‘sufficient section’ of the public is likely to benefit from a proposed charity. Over the years the fine judgements made in considering this question have led to a number of anomalies in the law. For example, while trusts established to provide funds to relieve ‘poor relations’ have been deemed charitable by the courts, trusts for the education of the children of a particular firm’s employees have been deemed ineligible. The emphasis on a ‘sufficient section’ of the public also means that an organisation which aims to assist a particular minority group in a defined geographical area might not be deemed charitable under the fourth head (general public utility) because the spread of benefit is believed too narrow (known as the ‘class within a class’ rule). On the other hand, a charity could properly be established for the relief of those suffering from a very rare illness. There might be very few beneficiaries, simply because few people were affected by it, but this would not affect the charity of the organisation.
- 1.3.10** In order to be charitable, organisations need to be formed for exclusively charitable purposes. A number of general rules derive from this principle, including the rule that organisations should not work against public policy and that they should not engage in ancillary trading activity on any scale. The rule that organisations should not work against public policy and should operate within the law has been interpreted as meaning that organisations should not, as a primary purpose, seek a change in the law or government policy here or abroad. As a secondary activity organisations may make representations to government but the limits of appropriate campaigning are specified. The general rule on trading is that a charity is allowed to engage in a trade that furthers its purposes. A school

⁶ Charity Commission, *RR1 Framework for the Review of the Register*, (Charity Commission, March 1999)

⁷ *In re Pinion* [1964] 1 All ER 890

⁸ *In re Shaw* [1938] 1 All ER 408

⁹ See the Charity Commission’s ruling on the Church of Scientology on the Charity Commission website (www.charity-commission.gov.uk).

with charitable status, whose primary purpose is to promote education, can therefore charge fees for places. In contrast, an organisation established to provide respite for carers can only develop significant ancillary trading ventures, for example catalogue selling, by means of a subsidiary trading company which gift aids the profits back to the charity.

- 1.3.11** While governments have been shy of legislating to define charity¹⁰, they have acknowledged its value and importance by putting safeguards in place designed to encourage giving. Government policy has focused on measures aimed at reassuring donors that charitable gifts will be used for the purposes for which they were given. The primary purpose of the 1601 statute was to respond to contemporary abuses. The statute has long since been repealed and it might be regarded as a historical accident that its preamble is so important in charity law today. Subsequent legislation promoted by government, up to and including the 1992 and 1993 Charities Acts, has concentrated on regulation designed to ensure that charitable funds are protected and, in so far as it is practicable, donors' wishes are respected.
- 1.3.12** This emphasis within the law and public policy on the donor may seem strange to people working in the charitable sector today. Yet it is possible to argue that the best means of promoting giving is to allow people to support their choice of beneficial activities (with beneficial activities defined by an independent arbiter in the courts). Although today the benefits of charitable status are seen from the perspective of the charity, the primary focus was on the donor when many of these benefits were first introduced. The law on charitable status is an offshoot of trust law or the law about money and other goods held on trust for particular individuals. Before the courts chose to allow general charitable trusts, all trusts had to be established to benefit particular individuals. Allowing charitable trusts in which money or land was held for beneficiary classes and in perpetuity was aimed at encouraging people to make bequests for public benefit purposes by reducing the risk of aggrieved relations successfully challenging the gift.
- 1.3.13** Over the centuries, tax benefits have been added. There is significant confusion about the tax treatment of charities. One common misconception about charitable status is that charities pay no tax. There are very few blanket exemptions for charities, although most heads of income tax fall into this category. The exemption from income tax for charities was first granted in the 18th century, with the current exemption allowed in the 19th century. Charities also receive a partial exemption (this concession extends more broadly to all voluntary organisations) on rate relief. There is, however, no general exemption for charities from VAT, employers' National Insurance contributions and all the other taxes that organisations pay.
- 1.3.14** Charities do not pay income tax on the money that they receive from donors. There appears to be a clear rationale for this. Taxation on companies is levied on the surplus or profit that they make on their operations. Since legally all charitable funds are dedicated to charitable activity, there is no surplus or wealth on which taxation could be levied. It is also usually argued that taxing charities on income donated from the public would be a form of double taxation, since generally the individual will have paid tax in respect of the amount donated.
- 1.3.15** Over recent years governments have sought to encourage charitable giving by allowing charities to reclaim the tax already paid on donations made through specific tax-effective giving schemes. This extra concession was limited either to a pledge to give over a number of years or a one off gift above a certain threshold figure. Government's objective was to encourage regular committed giving or larger one off gifts. In April 2000 new measures, *Getting Britain Giving*, were introduced allowing a much broader range of donations to be made tax efficiently. The Government now allows tax relief on all traceable, that is, auditable, donations and has also simplified the associated administration.

¹⁰ A notable exception being the 1958 Recreational Charities Act which sought to clarify the charitable status of some recreational charities

- 1.3.16** The review of charity taxation which led to these new and welcome measures again considered whether it would make more sense for the available tax relief on donations to go to the donor rather than to the charity. Many regarded it as counter-intuitive that tax efficient giving, aimed at encouraging individuals and commercial organisations to give, provided the relief to the charity rather than to the individual. People were encouraged to give on the basis that the charity would receive an extra additional tax benefit from their donation. In fact, since the introduction of the new *Getting Britain Giving* measures, it is only gift aid by individuals that enables charities to reclaim tax at the basic rate. All other forms of relief offer the tax break to the donor.
- 1.3.17** The current system of tax relief for charities has evolved organically rather than being systematically planned. The covenant system, the first tax-efficient giving scheme available to charities, which encouraged committed giving over a number of years, was introduced with a more specific purpose in mind. In the early part of the last century, a clever lawyer argued and won a case applying it to all charities. However, one element, rate relief for ‘charitable, philanthropic and benevolent organisations’, was adopted more deliberately than some others in the 19th century. The rationale was that encouraging voluntary sector activity in the local area would both reduce pressure on the authorities’ mainstream provision and help ensure that other important services, not deemed to be a statutory responsibility, were developed and had some link with the local authority.
- 1.3.18** Charities today consider that the main benefit of charitable status is not tax relief but the public credibility that it lends the organisation, encouraging the giving of time and money. This public credibility is based on the knowledge that registered charities are regulated by a public body which has powers to monitor organisations and investigate if it suspects something is amiss. This badge of credibility is important not only to the public but also to institutional funders and grant making charitable trusts.
- 1.3.19** The best known model of charity is that of a charity registered with the Charity Commission and subject to its regulation. Few people are aware that there are many thousands of charities which fall outside some or all of the Charity Commission’s regulatory requirements. These organisations are either ‘exempt’ - not allowed to register and the Charity Commission has no powers to investigate them - or they are ‘excepted’ from registration - they can, if they wish, register. The Charity Commission in its normal course of business does not monitor the activities of excepted organisations but can investigate them if it receives a complaint.
- 1.3.20** Exempt organisations include universities, certain public schools and all grant maintained schools, leading galleries and museums and charitable businesses registered with the Registrar of Friendly Societies. Charities with a small annual turnover and no significant assets, and some charities forming part of the established church, are ‘excepted’. Other ‘excepted’ charities include the Girl Guides, Boy Scouts and some armed forces charities. Exemption predates the 1601 Statute of Elizabeth. An earlier 1597 Act set the precedent for exemption. The excepting regulations date back to the early 1960s¹¹.
- 1.3.21** A great variety of organisations are either ‘exempt’ or ‘excepted’. A series of decisions, each regarded as reasonable at the time they were made, has resulted in two categories which appear to lack internal logic. The general reason given to justify treating these organisations differently is that they are subject to regulation by another body or bodies or that they lack the resources to justify scrutiny. The question is, are these ‘other’ regulators interested in whether or not these organisations are complying with charity law? This apparent lack of concern about the responsibilities that charitable status entails is contrary to the spirit of the 1992 Charities Act which signalled a move, for registered charities, to more active monitoring.

Chapter Two

Themes in the debate on charitable status

2.1 Themes in the debate

2.1.1 ‘Over the past two or three years there.... were repeated calls in various books, in Parliament, in the Press, and from charities and associated pressure groups for the law to be reviewed’. Although this could have been written today it dates from the introduction to the 1976 Goodman Report. The debate since reflects a variety of perspectives on the same key issues or questions:

- the role of charity and its relationship with the statutory and private sectors;
- an apparent disparity between the legal category charity and public perceptions of what is or should be charitable;
- whether charity, both as a concept and as it is expressed in legal treatment, continues to meet the needs of the sector and the society it serves.

The material in this chapter gives a flavour of the debate, drawing on media comment, reports produced by think tanks and policy institutes, and review material produced by the charitable sector itself.

2.2 The role of charity and its relationship with the statutory and private sectors

Independence from government

2.2.1 Over the decades there have been huge shifts in the balance of provision, state and voluntary¹². Charities were the major welfare provider until the development, post-Second World War, of the welfare state. More recently, belief in the capacity of the state to provide has been eroded and a larger role has been sketched out for voluntary organisations. This analysis of shifting boundaries is an over simplification. There has always been an overlap between the purposes of some charities and those of the state. A recent Charity Commission paper describes this very well: ‘Many charitable purposes correspond with what are today purposes of local and, to a lesser extent, national government. Examples include the provision of schools, libraries and public museums, the relief of the poor and of the elderly ... perhaps the most striking illustration of this duality is that gifts for the reduction of the National Debt have been recognised as charitable.’¹³

2.2.2 The growing funding relationship between government and the voluntary sector is perceived as diluting the sector’s independence. Some hold that the independence of voluntary organisations which provide services under contract to the state is eroded because the organisation has to conform to criteria which are agreed with a third party. The Centris Report¹⁴ made this argument and went on to suggest that ‘authentic’ voluntary organisations were very different in character from contracting organisations. They were: ‘prophetic, vision-led, reformist, pursuing independent activity for a moral purpose’. Some take the argument further and suggest that even a relationship based on grant aid compromises independence. Robert Whelan argued in a recent pamphlet¹⁵ that organisations accepting funding from the state cannot claim to be independent. Since a distinctive feature of charity is independence, he continued, organisations in receipt of grants from the statutory sector should no longer hold charitable status.

¹² This chapter refers to the voluntary sector as well as the more restricted category, charities in law. We found as we worked on this report that numerous commentators based charity law reform proposals on discussion of trends or developments in the wider sector, not distinguishing sufficiently between voluntary organisations and charities.

¹³ Charity Commission consultation paper, *Review of the Register; The Independence of Charities from the State Discussion Document* (Charity Commission, 1999-2000)

¹⁴ Knight B., *Voluntary Action* (Centris, 1993)

¹⁵ Whelan, R. (ed), *Involuntary Action; How Voluntary is the ‘Voluntary’ Sector?*, Choice in Welfare No. 52 (The IEA Health and Welfare Unit, London, 1999)

- 2.2.3** The reports discussed in paragraph 2.2.2 fail to emphasise the checks and balances that charitable status itself provides to counter some of the potential pitfalls of working with government where purposes overlap. Charity law makes clear that charitable organisations are required to act independently in accord with their trust deed and always in the best interests of the charity, and therefore their beneficiaries or the cause. This means that, regardless of the funding arrangement, charities will always be at one remove from government. Charity Commission guidance makes clear that work undertaken by charities under contract must sit squarely within the organisation's objects, otherwise its trustees will be in breach of trust and will be personally liable if any difficulties emerge from the contract. Trustees must also retain control of all aspects of organisational policy, including policy on who is given or denied access to a particular service¹⁶.
- 2.2.4** Those seeking to counter the view that contracting inevitably dilutes independence by stifling criticism argue that in a mature relationship differences of opinion on policy and practice can be aired and successfully negotiated. One of the motivating factors behind the Compact negotiated between government and the voluntary sector in November 1998 was to achieve mutual recognition of the importance of the sector's independence, since without this it would lack some of its vitality and its overall contribution would be lessened¹⁷. The Government undertakes in the Compact: 'To recognise and support the independence of the Sector, including its right within the law, to campaign, to comment on Government policy, and to challenge that policy, irrespective of any funding relationship that might exist, and to determine and manage its own affairs'.

Campaigning

- 2.2.5** Voluntary organisations provide a means for people seeking changes in government policy to work together to develop their case and make their views known. Many would say that the sector at its best provides a valuable check and balance, critically assessing government action and advocating a range of strategies from radical change to minor amendment. It has therefore been argued that the restrictions on charities and campaigning should be lifted so that an organisation can be charitable even if its primary purpose is to campaign for a change in the law or public policy.
- 2.2.6** The rules on charity and campaigning activity are often misunderstood. There is no absolute bar on charities campaigning. Charities can engage in non-party political activities, lobbying for change so long as this is not a primary purpose of the organisation. They can therefore legitimately lobby government to change its policy on the basis of information gained from primary purpose activity. For example, an organisation which as a primary purpose provides benefits advice might therefore engage in some lobbying for reform of social security. The legal argument supporting this restriction is that the courts can only enforce trusts that are within the law. The courts cannot decide that a change in the law would be in the public benefit; to do so would be to usurp the role of Parliament.
- 2.2.7** If political purposes, other than party political ones, were to be deemed charitable this would raise many difficult questions. Even if it was within their powers, how would the courts decide what was a public benefit campaign in the many instances where arguments might stack up equally on either side? It is sometimes suggested that changing the rules would expose the sector to controversies about which organisations proposing amendment to the law were properly operating in the public benefit. However, as we discuss in more detail in section 3.7, purposes deemed controversial and political at a certain point in time may come to be regarded as uncontroversial and apolitical later. Legal treatment needs to be sensitive to this.

¹⁶ See note 13

¹⁷ CM4100 *Compact, Getting it Right Together. Compact on Relations Between Government and the Voluntary and Community Sector in England*, (Home Office, November 1998)

Entrepreneurial organisations

- 2.2.8** There is some evidence that people value the distinctiveness of charity and want the sector to retain its volunteer ethos. Attempts to become more effective by recruiting and training staff prized for their professional approach to the job are perceived as diluting some of the passion that is one of the sector's most attractive features. But despite concerns about professionalism, people making decisions about which organisations to support do want evidence of effective management. Focus group work with young people also suggests that they favour entrepreneurial organisations which develop successful subsidiary trading ventures to finance core activity. While they recognise that this activity may be motivated by funding pressures they nonetheless see it as a good in itself. It means that the organisation is doing its best to add value to every pound raised from individuals¹⁸.
- 2.2.9** While some complain that the sector is too like business, others claim that it is not sufficiently business-like. It is argued that the full potential of charity would best be realised in a legal framework that allowed more economic vibrancy. Reform options from this perspective are discussed in more detail in the next section. Their basic premise is that by developing social businesses, which provide jobs and help to regenerate a particular area by investing in new social ventures, voluntary organisations are making a greater contribution to addressing poverty and disadvantage than by simply making one off payments to meet people's urgent subsistence needs. The latter of course represents the traditional model or action of charity.
- 2.2.10** Ian Hargreaves made a related point when he gave oral evidence, referring to the need to embrace organisations which are hybrids of the voluntary, public and private sectors. Efforts are being made to ensure that old organisational stereotypes no longer hold: the insensitive and faceless bureaucracy of the public sector; the well meaning amateurism of the charitable sector; and a lack of any social responsibility on the part of business. The Government is stressing the value of partnerships which bring together the best of all three sectors. Even without this specific public policy emphasis, there is generally felt to be an increasing congruence based on joint working and exchanges of personnel. Those concerned with the development of more sensitive, effective services regard this congruence as a good thing because it is generally based on an attempt to determine and disseminate best practice. It is also the case that the boundary between the sectors has never been watertight. There are numerous examples of the charitable sector developing services that have later been taken on by the state or of businesses developing their own responses to what they see as our most pressing social problems.

Tax treatment

- 2.2.11** Tax relief for charity is another area of contention. The Government's review of charity taxation, announced in the July 1997 Budget, focused the attention of the charitable sector on the rationale for tax reliefs available to all charities without discrimination¹⁹. The Charity Law Association²⁰ submission to the tax review starts from the proposition that tax on charitable property or income is in principle wrong. It says 'that the tax system ought to be designed to foster charitable giving so long as there is no doubt that this will indeed help to ensure that relevant social needs are met'. Generally speaking, this is based on the premise that taxation is designed to meet public needs and that if people chose to give voluntarily for the particular charitable purpose they favour than this should be promoted. The element of choice is important: 'Respect for the individual's right to choose is the necessary price for achieving a climate in which charitable giving is encouraged'.

¹⁸ Research conducted for NCVO in September 1999 by Tom Farsides to inform NCVO's response to the Review of Charity Taxation

¹⁹ During the review period Millennium Gift Aid, later known as Gift Aid 2000, was introduced which lowered the Gift Aid threshold to £50 for charities providing education or health projects in the poorest countries overseas.

²⁰ Charity Law Association, *Submission to the Review of Charity Taxation* (September 1998).

- 2.2.12** Others outside the sector have argued that the fact that tax relief is available to all charities, regardless of the specific nature of their activities, is a bad thing. This view was represented by the journalist Polly Toynbee in our oral evidence sessions: ‘The Government should have a right to choose who they give to. This would make the expenditure more accountable’. This reflects a consistent theme of the charity debate. As early as 1885 Gladstone expressed the same view in a debate on whether or not charities should receive an exemption from income tax, arguing that a general tax concession for all did not make sense.
- 2.2.13** The view that charities should not receive tax relief because all government expenditure should be dedicated to government objectives underestimates the importance of the fact that government is unable to support all the activity that the public might consider beneficial and important to quality of life. There has to be some scope for additional activity and also actors capable of attempting new approaches which can challenge and inform the way that particular governments choose to develop policy or implement services. One way of looking at the tax relief that goes to charities is that it encourages, for a relatively small investment, a vast range of research and development activity in the social arena. Seen in this context, the argument that charitable tax relief is unjustifiable because it does not equate with any particular government’s priorities misses the point. One of the real strengths of the current system is that tax relief for charities is not subject to political whim. If it were, government would always fund on the basis of current policy priorities or political expediency and that would mean losing the benefit of variety in provision and the challenge to current orthodoxy that it offers.
- 2.2.14** A related point is that the current system of tax concessions allows the Government to support donors’ interests in public benefit activity. Tax relief on donations is democratic because it follows from the donor’s choice. The system acknowledges that there may be a range of services or activities which the Government cannot fund directly or cannot fund sufficiently because of other calls on the public purse, but which some members of the public believe to be important and which they therefore support by donating money. These charitable activities may be more of what is provided by government or they may be distinct, but either way members of the public are showing a particular interest or commitment to provision by the charitable sector. Government is acknowledging and encouraging this commitment by offering tax relief. In some instances this charitable provision reduces the call on fully publicly funded services, in others it will offer something that the statutory sector is not providing.
- 2.2.15** Charities that do not own their own premises and do not fundraise directly from the public receive little benefit from tax relief. Particular organisations may benefit greatly from discretionary rate relief, if they own significant property. Charities which are successful public fundraisers may also benefit to a significant degree from tax relief on donations. Charitable status also secures relief from tax on rents, bank interest and investment income plus the profits from primary purpose trading. However, tax relief is simply one component helping ensure that an independent public benefit activity can survive. Many charities submitting evidence to this review stressed that the main benefit of charitable status was not tax relief but rather the badge of legitimacy it provides. This enables organisations to raise money not only from individuals but from trusts and public sector bodies.
- 2.2.16** Another recurrent theme of debate on charity taxation is that reliefs are not moderated based on the wealth of the organisation receiving them²¹. Generally speaking, charitable tax reliefs follow from donations. The fact that many organisations raise large amounts of money from the public, regardless of their asset base, may demonstrate that the public sees them as working for causes which need money. How could we link a system where tax relief is based on the preferences of people giving money, and therefore designed to encourage giving, with a system based on an assessment of the relative wealth of the organisation

receiving the money? In any case, is this relevant when the main focus is, as it should be, the charitable cause, given that all charitable ‘wealth’ has in any case to be used for this purpose?

- 2.2.17** One perceived difficulty with charitable status is that small community-based organisations cannot get access to it. This is not necessarily the case. Voluntary organisations with solely charitable objects and a very small turnover are not required to register with the Charity Commission but are eligible for tax concessions because they are recognised as charitable by the Inland Revenue. The real difficulty is that this recognition may not always provide these organisations with all the benefits of charitable status. Many funders require a Charity Commission registration number and, because they have little understanding of the legal and regulatory framework, may not be entirely satisfied with Inland Revenue recognition.

2.3 The popular idea of charity

Does the legal category charity fit perceptions of what is charitable?

- 2.3.1** There may be a prior question here – does it matter what people think about charity? There is a general consensus that it does matter, as does the legal treatment of charity. It is possible to argue that the legal category is designed to reflect enlightened public attitudes about what constitutes public benefit activity. This link between charities and enlightened public attitudes might be regarded as particularly important in this area of law because, historically, one of the objectives of the legal category was to promote the giving of time and money for public benefit purposes. However there is some concern about a growing gulf between what people think should be charitable and what actually is charitable in law and whether this undermines the credibility of the category, leading, as one commentator puts it, to the ‘absurdities of what we call charities’²².
- 2.3.2** For most, relief of poverty and other purposes beneficial to the community are incontestable but it is less clear to many that advancement of religion, within a largely secular society, is a self-evident good. The charitable status of public schools is also questioned on the basis that the poor are paying, through the mechanism of tax relief, for the education of the better off. This could be summarised as reflecting concern that as we begin the 21st century:
- we lack a common understanding of what charity is for;
 - some of the purposes currently deemed charitable may no longer be perceived as meeting the basic criterion of being for the benefit of the public;
 - the law unduly benefits the well off when many feel the major emphasis should be on helping the materially deprived.

*‘It’s no longer clear what charity is for and why one system covers everything from a university to a squashed hedgehog refuge’ (Polly Toynbee, journalist, in *The Guardian*, 4 May 1998).*

- 2.3.3** It is possible to argue the contrary view – that people do have a strong vision of charity and its value congruent with the diversity of the category charity in law. This can be summarised by saying that the public does not think that charity is important solely because of what it achieves but also because of what it symbolises and allows. Charity allows credibility and some financial assistance to public benefit causes which particular individuals have a passion for and which they support through giving time or money. This is not to argue that the question ‘what is charity for?’ is unproblematic. The question is

²² Parris M., ‘Uncharitable Thoughts’ in *The Times*, 12 December 1997

open for debate precisely for the reason that we do not have a statutory definition of charity. The closest that the law comes to an underpinning principle for the category is altruism or the unselfish pursuit of public benefit²³. Given that public benefit is itself a concept open to lively debate, it is easy to understand that many find charity a slippery concept.

Should charitable resources be concentrated on material disadvantage?

- 2.3.4** In 1996 the Ontario Law Commission reviewed charity law and recommended certain reforms²⁴. The report argued that charity has two widely accepted but different connotations: one narrow, covering only acts aimed at relieving the distress or suffering of others; one wider, covering philanthropy. The report suggested that one approach to defining charity is to consider the differences between charity and philanthropy. Charity indicates acts of kindness and consideration that demonstrate concern for the poor and needy. Philanthropy signifies acts of generosity that demonstrate regard for the achievements of human kind in general, for example, the promotion of the arts. They are both concerned with doing good and the report concludes that the tension between charity and philanthropy requires no resolution but indicates the possibility of treating the first more favourably than the second.
- 2.3.5** The distinction outlined in paragraph 2.3.4 reflects a perennial debate about charity law. This was clear in the last major review of charitable status undertaken by the voluntary sector, leading to the Goodman report. This commended the philanthropic model and rejected radical reform of the law but contained minority recommendations advocating a narrower focus. Ben Whitaker, author of those recommendations, argued that: ‘although the ideal criterion for charitable status would be any purpose beneficial to the community, since tax relief and the public’s ability to give are limited, the first priority was to concentrate on the disadvantaged’. This reflected a strand of opinion, prominent in the late 1970s, which argued that charity should be a vehicle for achieving social justice.
- 2.3.6** It is interesting to juxtapose this discussion with the work of political theorists, such as Hobbes, who have traditionally seen charity as the foil of justice. Hobbes and others after him considered it important to maintain the dualism of charity and justice. The state is concerned primarily with justice and equity and a weighing of the relative entitlements of different people. Charity, by contrast, might be characterised as more spontaneous, an individual responding to another’s need for assistance or the claims of a particular cause (see also section 2.4).²⁵

Should the law be simplified to increase public understanding?

- 2.3.7** One of the major difficulties that commentators have with charitable status is how to reconcile apparent inconsistencies in legal treatment. This argument tends to arise when an organisation the commentator considers self-evidently worthy is denied charitable status, while one that they consider undeserving is a charity. Part of the difficulty is that charity law reflects a legal logic that is complex and difficult for a lay audience to grasp and arguably, on this basis alone, the law needs to be reformed.

‘The case for radical reform comes from the fact that lawyers have tied the definition of charity into knots...what is needed is a legal description of charity that means something in common parlance.’ (Ian Hargreaves, oral evidence session, 1999).

- 2.3.8** Some of the voluntary organisations that provided evidence to this review pointed to the importance of a legal and regulatory framework that gave the public confidence in charity. They suggested that there should be a correlation with the public instinct about what objects or activities are seen as charitable. It was also argued that charity law should be

²³ Some of those commenting on a consultation draft of this report suggested that it was going too far to suggest that charities reflected selfless pursuit of public benefit since many people engaged in charitable work received significant benefits from their involvement both for themselves and their family. The point is surely one of degree and who benefits and to what extent from the activity.

²⁴ Ontario Law Reform Commission, *Report on the Law of Charities, 1996* (two volumes). Toronto, Ontario: OLRC, 1996

²⁵ Thomas Hobbes, *De Homine* in W. Molesworth (ed), *The Latin Works of Thomas Hobbes* (Bohn, London, 1839-1845), vol II, 116-117

formulated in such a way that lay people can grasp it without too much difficulty. Ann Marie Piper, a charity lawyer, echoed this view in her evidence: ‘It is hard to maintain and promote public confidence when there is ignorance as to the definition of charity in law’. In a speech at the 1998 Charity Law Association Conference she also suggested that complexity in the law means that the public consistently misunderstands it, and that this matters. The basic argument here is that the law needs to be simplified because when the law attempts to speak to the public, it should speak clearly.

- 2.3.9** While a common law system has great strengths, over time anomalies creep in which complicate the law (discussed further in section 2.5). However, an individual submitting written evidence argued that the extent of public concern over this could easily be exaggerated: ‘Although the present law and practice are a mess, does the public really mind? Shall we still be debating these issues in ten years time?’ Perhaps the real answer is that charity is a marginal concern in most people’s lives and that most people, unless prompted, would probably not have strong views on the issues discussed in this report. The point is that when prompted to give, some may find they have reservations based on fact or myth which discourage generosity. Hence, perhaps, the importance of public education designed to increase awareness.

2.4 How do we view charity as a concept today?

‘Cold charity’?

- 2.4.1** While some hold that charity is an important and valuable status that should be retained, others ask whether charity still has a rightful place. Charity is sometimes stereotyped as the rich helping in a patronising manner ‘the poor’ rather than as a way of giving people the means to help themselves and improve their lot. References are made in some literature to ‘cold charity’ and the overwhelming urge ‘to wash the charity out of’ donated goods. The implication, which explains such intense resentment, is that charity seeks to maintain dependency and the status quo between the powerful and powerless. Given a renewed political and public interest in escaping dependency and enabling those who can to help themselves, it seems inevitable that charity, as it is traditionally but negatively viewed, might be out of favour.

‘There is concern that the charity world is out of step with the world of the 1990s and that the idea of charity is no longer as self-evident and beyond reproach as it once might have seemed’. (Mulgan, G and Landry, C., Remaking Charity for the 21st Century, Demos, 1995)

- 2.4.2** Alternatively, charity could be characterised as a very personal reaction to some perceived need or distress, or to particular causes. It could be demonstrated in the response to the evident need that a particular person or group has for food or shelter, or to particular issues, such as the environment, which strike a chord with the individuals pursuing them. People giving time or money to particular groups do not make their donations based on a full assessment of the relative merits of all the options. Assessing relative merits and allocating scarce resources to meet them is part of the political domain; charity is better placed in the personal domain. Rather than being patronising and dividing people from each other on the basis of wealth and social standing, charity brings people together, enabling them to appreciate that they have common needs and concerns.

- 2.4.3** It might be argued that the notion of charity as ‘cold’ emerges from the Victorian era, when charity often enabled the rich to control the poor. By contrast, many earlier depictions of charity in literature, reflecting the social and cultural preoccupations of the time, presented charity as a means of binding communities together. One of the strengths of the current legal treatment of charity is that it allows some flexibility to individuals to enable them to determine and put into practice their own views about how best to be charitable. This means that charity can be reinvented over time to meet different social needs. However, the question that is often debated is whether the law develops either fast enough or determinedly enough in response to social and economic changes (discussed in more detail in section 2.5 of this report).

Promoting self-help and enterprise

- 2.4.4** The debate about whether charity should do more to assist people to help themselves, rather than focusing on immediate needs, is not a new one. In the 19th century the Charity Organisation Society (COS) advocated providing people with the means to assist their families. The COS emphasised the importance of instilling the values of hard work, thrift and prudence in the people it was setting out to help. It believed these values would best be encouraged through the friendship and support offered by the organisation’s visitors. It could be argued that such a perspective on charity, which emphasised helping people to help themselves, became very unpopular during the first half of the twentieth century when the emphasis shifted to a focus on people’s rights to provision as taxpayers and citizens. However, it returned to favour at the end of that century and continues to have currency.
- 2.4.5** Increasingly, there is debate in the voluntary sector about the need to move away from the old ‘welfare’ model of provision towards services and approaches based on self-help and the promotion of enterprise. Organisations working with homeless people, for example, were perceived in the past as primarily responding to people’s basic and immediate needs and focusing on their rights as citizens to decent accommodation. Some new organisations, for example the Big Issue and the Foyer Federation, aim to help people take control of their own lives and start to plan for a better future based on enhanced educational and career opportunities. Many other homelessness agencies have been considering how they can integrate the people that they work with back into the labour market, recognising that lack of adequate housing is not the only problem they face.
- 2.4.6** An even stronger emphasis on self-help and the promotion of enterprise is evident in overseas aid organisations. Appeals by these organisations have often focused on the objective of meeting the immediate needs of people suffering the effects of natural disasters. Concern has grown both that this presented those in receipt of the aid as powerless victims rather than individuals with aspirations and talents, and also that more emphasis should be placed on the development of projects that capitalise on the enterprise of local people, providing in a sustainable way for their basic needs.
- 2.4.7** Some of the new interest in self-help and empowerment in the charitable sector is reflected as much in the way individual organisations govern and manages themselves as in the services that they provide or promote. Many charities comprise networks of self-help groups; many more have reviewed and changed their operations to ensure that service users play an appropriate role in decision making.

2.4.8 It is sometimes argued that a major problem with the current framework of charity law is that it restricts charities in what they can do to promote enterprise. Ian Hargreaves and Ian Christie from Demos cite a range of difficulties²⁶. They argue that the social entrepreneurs who start many worthwhile community-based enterprises need financial support while they are fully engaged in developing the initiative. The implication is that during the early stages a charismatic leader will serve the function of both chair and chief officer. They also argue that the restriction on beneficiary trustees makes people feel that they are being done to rather than being in control. Ian Hargreaves said during our oral evidence sessions that we need a legal framework in which ‘the third sector feels less confined and constrained’. It is not clear that charity law constrains the development of entrepreneurial community-based activity. If it is genuinely in the best interests of the organisation and its beneficiaries, a charity can include a provision in its founding document for trustees to be paid. And if organisations want to be based on a mutual or co-operative model, because the ethos it implies is important to them, there are legal forms which would allow pursuit of this option. Today there appears to be less awareness and recognition of the mutual form than there would have been in the nineteenth century. Although interest in mutualism is reviving, it has been a neglected form and this has led to attempts to squeeze mutuals, inappropriately, into the charity category.

2.4.9 The major disadvantage of the mutual route is that it does not allow for tax concessions. But rather than suggesting that charity law might be amended, the best response might be to lobby for tax breaks for mutual organisations and co-ops to promote their success and development. This is not to say that mutuals and co-ops should be charitable, because this would destroy the integrity of charitable funds, but rather that the Government might consider providing additional appropriate and specific tax incentives to small mutuals, such as credit unions and organisations like community cafes run on a co-operative model. These tax incentives might be analogous to those provided to small businesses. Changing the law to allow for the payment of trustees (as trustees) as the default position, rather than a strong case needing to be made in individual cases, would strike at the root of charity because it would open the way to abuse, potentially allowing social entrepreneurs to pursue their own individual interests under the cloak of charity and public benefit. One of the advantages of the current system, with the need for a governance structure which differentiates paid staff from trustees, is that this provides a check against staff pursuing individual or organisational interest over the interests of the cause and service users.

2.5 Is the basic legal framework sound?

Can charity law keep pace with social developments?

2.5.1 Earlier in this chapter we touched on the issue of the law evolving in response to changing social mores. The Deakin report put the basic dilemma well and drew its own conclusion: ‘Some believe that the distinctly British model of evolutionary development of the definition of charity over the centuries has, despite or because of its lack of rational codification, worked well and allows an appropriate flexibility. Others regard the present categorisation to be outdated, inflexible and inappropriate for a modern and largely secular society.’ Their message is that the common law system is resistant to change and therefore works against the recognition of new public benefit purposes.

2.5.2 Previous reviews of the law on charity commented on reluctance on the part of the courts and the Charity Commission to use their powers flexibly to recognise new public benefit purposes. Advances are very small and very slow. It is consistently argued that the law contains the potential for innovation but that this is not being exploited because few cases

²⁶ Hargreaves, I. and Christie, I. (eds) *Tomorrow's Politics; The Third Way and Beyond* (Demos, 1998)

are brought before the courts. The Charity Commission has an important role in determining charitable status because it has quasi-judicial powers and considers and decides many hundreds of applications for charitable status each year. But legal precedent binds it. In some cases no precedent will exist. In others the Charity Commission may be able to use its power to determine that if a similar case were considered today it would have a different outcome, provided this can be supported by sound legal argument and does not involve departure from a binding precedent.²⁷

- 2.5.3** Both Goodman and Deakin suggested that there were purposes that they considered should be charitable which had been excluded. In the Deakin report community development, self-help and schemes to help the unemployed are cited as examples. This was a theme that inevitably emerged in the interviews conducted with voluntary organisations as part of the research for this project. Some were aggrieved that the specific purpose of their organisation, in this instance community development, was not accepted as legally charitable since they believed the public would identify their work as charitable. One said: ‘We are clearly doing work of public interest and we have to pussyfoot around with poverty. It’s galling that we have to apologise for what we do, anyone can see that we are charitable’.
- 2.5.4** Since we undertook this research in 1998 the Charity Commission has consulted on the circumstances in which community development activity can be charitable under the fourth head of ‘other purposes beneficial to the community’. Guidance has emerged as one product of the Review of the Register. One of the purposes of the Review is to assess whether in the light of social change new objects might now be charitable. Deakin, while acknowledging that the Review of the Register would take a long while to complete, suggested that the more creative use of the Charity Commission’s powers which it implied would overcome some of the previously identified difficulties with charity law and the registration system. Some organisations responding to our call for evidence also welcomed the Review: ‘In the absence of a commitment to reform the legislation, flexibility to extend or expand the... [legal category charity] and be adaptable to current circumstances is welcome.’ However, we need to recognise that the Review of the Register project has its limits since the courts and the Charity Commission cannot make decisions which are counter to precedent nor innovate in a way which is not supported by legal argument.

Objects, activities or outcomes?

- 2.5.5** Some have argued that a major flaw in the law as it stands is its failure to emphasise outcomes. Geoff Mulgan, in an article in *The Independent* in 1998, argued that the root of the problem with charitable tax incentives is that: ‘they are targeted to a category of organisations rather than to activities which are deemed useful. A far saner approach would be to provide incentives for useful activities, regardless of the type of organisation that engaged in the activity’.
- 2.5.6** The view that tax reliefs are targeted to organisations is inaccurate. Tax reliefs do not follow a particular organisational form, rather they attach to the pursuit of charitable objectives. One difficulty that voluntary organisations say they have with charitable status is that it does not provide a legal personality. Trustees are individually held responsible for the charity and its actions. This is the reason why most charitable organisations of any scale have another legal form, for example, a company limited by guarantee or industrial and provident society²⁸. They are subject to regulation by more than one authority because of their dual status. The status charity therefore does not attach to a category of organisations with a particular form but rather to charitable objects managed in such a way as to maintain the integrity of the gift.

²⁷ that is, previous cases determined by the courts are only analogous and not identical

²⁸ The Department of Trade and Industry has consulted on a proposed new incorporated structure for charities as part of a much wider company law review. The Charity Commission has established an advisory group to consider the responses to the consultation and to develop the proposals further.

- 2.5.7** What is true is that the charitable status of an organisation, and hence its entitlement to charitable tax reliefs, does not directly depend on how much it achieves. It depends on what it sets out to do, its charitable objects. It is easy, however, to exaggerate this contrast. As soon as an organisation is established as a charity, the law requires that it actually does that and only that which it was set up to do. If the organisation's activities do not in fact further its purposes then, in time, its activities must change to conform to the law. So while the law does not specify exactly what the activities in question must be, or exactly which outcomes they must have, it does specify that they must in general be worthwhile activities with worthwhile outcomes, with their worth being judged by their contribution to the objects that the law judges charitable.
- 2.5.8** Would it be better, the Government might ask, for the law to decide which activities are worth subsidising according to what they actually achieve? To this, there are at least four responses. One is that charitable tax reliefs are not subsidies. Since there is no distributed profit, but only reinvestment in the worthwhile objectives, there is nothing there to tax. The second is that the monitoring and enforcement costs involved in tracking the usefulness of charitable activities, together with the costs of lost goodwill and enthusiasm from the monitored organisations and their workers, will eat dramatically into any savings which may be made by withdrawal of tax reliefs from underachieving organisations. Thirdly, we may anyway doubt whether the law, or the Government, is always best placed to decide which activities are useful or which outcomes are desirable. And fourth, it is in any case a mistake to think that all the worth in charitable activities can be understood in terms of the outcomes of those activities as opposed to their intrinsic value as expressions of public moral concern.

Chapter Three

Reform proposals considered

3.0 During the course of preparing this report we considered many proposals for changes to the law on charitable status ranging from the extremely radical to the very conservative. In large measure, these proposals follow from the issues discussed in the previous chapters and draw on the research conducted for the project:

- abolishing the category charity;
- adding to the existing objects test an activities test and possibly an outcomes test;
- codifying charity law;
- re-classifying charity;
- extending the same positive public benefit test, that currently applies to fourth head charities, across all of the heads;
- restricting charitable status to organisations relieving poverty;
- liberalising the law on political activities and campaigning.

Apart from the first, these proposals are not mutually exclusive, and aspects of each could be combined. We also considered some practical measures, not requiring any change in the law, aimed at securing the development of the common law and helping to secure a robust legal framework for charitable institutions. These measures are discussed at the end of this chapter.

3.1 Proposal 1: Abolish charitable status

3.1.1 The main thrust of the argument for abolishing charitable status is that close financial and policy links with government compromise the sector's independence and erode its value base. This was put in its most stark form in the Centris report²⁹ which recommended that, in the interests of a healthy and vibrant voluntary sector, government support, including that currently derived from charitable tax reliefs, should be concentrated on those voluntary organisations that make a direct contribution to meeting government's policy objectives. However, charitable status itself helps to secure independence, regardless of links with government. Charitable status places those who govern the charity under a requirement to act independently and emphasises their duty to act in the best interests of the charity and therefore its beneficiaries. Further, tax relief, rather than being tied to government objectives, is available to any organisation pursuing any purpose which, other things being equal, the courts or the Charity Commission accept as being in the public benefit.

3.1.2 A recurring theme of Centris and other reports published over the last 20 years is concern that the boundaries between the three sectors - voluntary, public and private - have been eroded and that charity is now irrelevant. This issue was discussed in more detail in the last chapter. Our response is that, while it may be true that the boundaries between the sectors are becoming increasingly blurred as partnerships develop and hybrid organisations emerge, charity remains distinct. One voluntary organisation responding to our call to give written evidence pointed to the legitimate concern of the Charity Commission that the

²⁹ See note 14

charitable element of partnership projects remain separate and that there is no leakage of charitable funds away from purely charitable purposes. Charitable status is a valuable protective mechanism in these situations.

3.1.3 A third argument for abolition is based on the notion that charity is outmoded and that other forms such as mutuals or co-ops are the way forward. This viewpoint is defended on some of the grounds discussed in the last chapter, namely that beneficiaries govern the organisation and that the benefit they individually receive generates greater entrepreneurial effort and therefore success. This fails to recognise the importance of plurality. It also ignores the enabling role played by charities. For example, some large endowed charities have provided grants to aid the development of credit unions providing cheap loans to entrepreneurs in deprived areas³⁰. Other charities promote and support the development of self-help groups open to people suffering from a particular condition or ailment. Rather than being an outmoded form, charity is a vitally important part of the overall mix of provision with the capacity to lend credibility and lever resources into areas that have previously been ignored or under-resourced. From the perspective of individual donors, endowed charitable trusts and corporate donors, the beauty of charity is that it is underpinned by a regulatory system designed to protect the gift.

3.1.4 Another argument in favour of charity is that charity is distinctive because of its capacity ‘to engage altruism’. Charity is different from the other structural options available to voluntary organisations, which are currently more favoured by commentators and policy pundits, because it specifically requires that board members and those providing donations should not directly benefit in a tangible way from their gifts. The public continues to have charitable instincts. Why else would such high proportions report in surveys that they donate money and/or time to charities? It could be argued that the main reason why charity as a concept and a distinct legal category should be preserved is that it provides a vehicle for, and therefore encourages, unselfish action for the public benefit.

‘... *altruism is the basis of all charity*’ (Lord Phillips of Sudbury, charity lawyer - oral evidence session, 1999)

3.1.5 Those who argue for the abolition of the category charity also fail to recognise that it is a legal structure important not just for a category of service-providing organisations but also for other organisations and purposes, and that its abolition would have wide ranging implications. Charitable trusts enable people to give money for charitable purposes, administered by trustees; this money will be disbursed in the future, in the form of grants to individuals or organisations. Private trusts also exist and are an important mechanism in the law enabling money to be kept in trust for particular purposes for individuals either too young or infirm to manage it themselves.

3.2 Proposal 2: Adding an activities and possibly an outcomes test to the existing objects test

3.2.1 As the law stands, organisations are charitable, other things being equal, if they have exclusively charitable purposes, as explained in the first chapter. We discussed whether there should be an activities test in addition to an objects test. In 1997 the Charity Commission first published for consultation a paper setting out the framework for the Review of the Register. This promoted debate on whether charitable status should be based on objects,

³⁰ This is on the basis that credit unions will be helping to relieve poverty, which is a charitable purpose. These organisations are themselves obviously ineligible for charitable status.

activities or even outcomes. The paper was read as implying that the Commission would like to develop additional tests for charitable status. Responses to the consultation from the Charity Law Association and NCVO pointed to the fact that the Charity Commission could not introduce new tests for charitable status but also discussed the implications of such a change in the law³¹.

3.2.2 When the 1992 Charities Act was discussed in the Lords it was mooted that an activities test was needed. The argument made against this was that such a test would be too difficult both to define and to apply in practice. It is easy to understand why this argument might have been made - imagine the difficulty of defining a beneficial activities test that could encompass the diversity of the charitable sector's work. It was suggested by some of those submitting evidence that a more obvious concern with what organisations do and achieve would promote public confidence in charities. However, as the term 'more obvious concern' indicates, the law already allows an emphasis on activities and outcomes. Consideration is given to whether pursuit of the particular purposes of the organisation will benefit the public. Organisations are not granted charitable status if it is believed either that their objects will do harm or that they will not achieve benefit. The proposed activities of the organisation are assessed on application to ensure that they are in accord with the organisation's objects. Further, if charities act outside their objects or fail to pursue them with proper care they are acting in breach of trust and trustees are personally liable for any funds that have been lost or misapplied.

3.2.3 Voluntary organisations submitting evidence generally agreed that a more explicit emphasis on activities would be beneficial but that this could best be achieved through Charity Commission accounting and reporting regimes rather than through a change in the law. However, there was concern about the prospect of any more explicit emphasis on outcomes. The current obsession with 'what works counts' can be unhealthy; we need some public space for 'heroic failures' and taking educated risks, otherwise we will limit people's capacity to be ambitious and to attempt to achieve difficult or long-term goals. It is in the nature of innovation that some projects are risky and may not achieve the outcomes their promoters expect, particularly in the short term. There were also concerns about how an outcomes test might be defined and applied. It was suggested that an outcomes test could potentially disadvantage those organisations whose work has less tangible outcomes, for example those giving advice and information where meaningful outcome measures are difficult to formulate. It is also hard to see how this requirement might be applied to organisations undertaking education work aimed at securing a long term change in attitudes or behaviour.

3.3 Proposal 3: Codify charity law

3.3.1 To codify charity law would mean writing it down in statute³². Some countries, notably those in continental Europe, set out their law in a series of codes. Currently our charity law is 'encoded' in hundreds of cases rather than being set out in a single Act or set of Acts. Codification could help meet one of the objections to our current system which is that lay people find it extremely difficult to grasp the basic shape of charity law and to uncover information about the principles underpinning it (as a result they say they need more expensive legal advice when they are looking into registration and more frequently in the course of their operations). It could also be argued that the 'encoded' nature of charity law serves to mystify it, both for the promoters of charities and for the public, and that this mystification must to some extent undermine both the concept and the practice of charity.

³¹ NCVO briefing, *Comments on the Charity Commission Review of the Register Draft Consultation Paper* (NCVO, September 1997), and Charity Law Association briefing *'The Review of the Register of Charities'; Comments on Behalf of the Charity Law Association*, (Charity Law Association, August 1997)

³² In Chapter 1 it was explained that there is no one statute which sets out charity law principles. However, there have been some rare statutory interventions such as the Recreational Charities Act in 1958

- 3.3.2** A new Consolidation Act could set out the law as it stands at present. It could for example, start by paraphrasing the preamble to the Statute of Elizabeth, as Macnaghten did with his four heads of charity: relief of poverty; promotion of education; advancement of religion; and other purposes beneficial to the community (see also 1.3.2). The new Act might also set out the factors which should be taken into account in the determination of public benefit. Codification provides an opportunity to make the law more specific, sharper at the edges and to remove inconsistencies and anomalies in treatment, which inevitably arise over the years in a common law system. However, some have argued that any attempt to clarify the law and smooth out inconsistencies through codification could do more harm than good.

‘There are always going to be problems with public comprehension of the law and this is not restricted to charity law. This is exacerbated in an idiosyncratic system. However, one of the benefits of this system is its flexibility; it doesn’t exclude.’ (Stephen Lee, oral evidence session, 1999)

- 3.3.3** Much of the evidence that was submitted to us reflected a tension between the desire for greater certainty or clarity about how particular applications for charitable status would be treated and the view that one of the most important characteristics of charity law is the potential that it offers for flexible interpretation. The charitable sector could be accused of wanting the best of all worlds. The sector wants a system which is both easy to grasp and predict, with apparent anomalies and inconsistencies in the legal treatment of similar objects ironed out (some of which are discussed below). But the charitable sector also praises charity law for its flexibility which means that each application is assessed on its individual merits, on the basis of how it measures up to charity law principles as expressed in case law precedent. The 1997 Charity Law Association conference hosted a debate on charity law reform. Arguing in favour of evolution, Andrew Phillips (now Lord Phillips of Sudbury) said that he understood the desire to have an easily understood definition of charity but believed it to be the legal equivalent of ‘fools gold’.

3.4 Proposal 4: Re-classifying charity

- 3.4.1** Chapter 1 explained that there are currently different sorts of charity subject to different regulatory requirements. It is possible to argue that this variation in regulatory treatment, which cuts across the four heads of charity, represents an implied classification system, albeit one that seems cumbersome because of the number of categories it presents. In other words, charities fall into one of a number of regulatory categories (registered, exempt or excepted) and in addition fall under one of the four charitable heads (relief of poverty, advancement of education, promotion of religion and other purposes beneficial to the community). Many of the voluntary organisations submitting evidence to this review called for a new or simplified classification system for charities based on concern about variations in regulatory treatment. Others voiced concerns about particular heads of charity (discussed below in section 3.5).

‘There are a plethora of different charities which report to different regulators and have slightly different regulatory requirements placed on them. Ideally we need some harmonisation in treatment. At the least we need an improved and more easily understood classification system.’ (voluntary organisation submitting written evidence, 1998)

3.4.2 Attention in the evidence we received was focused on ‘exempt’ and ‘excepted’ charities - organisations with charitable status but not subject to all the reporting and accounting requirements of the Charity Commission, such as universities and places of worship. The concern reported by voluntary organisations is that because these organisations are not subject to regulation as charities per se there is no pressure on them to be aware of, let alone to abide by, the responsibilities that follow from charitable status. The argument usually given to justify this is that there are sponsoring government departments or church hierarchies which monitor their activities, but this obviously does not meet this anxiety - rather it reinforces it. During the course of our work written evidence was submitted to us questioning whether charity law principles are being upheld in every case by all the established religions and by all universities. These organisations understandably see themselves as primarily accountable in other ways and to other authorities.

3.4.3 Some other countries operate a classification system for the different types of not for profit organisation which receive tax concessions. The Germans, for example, separate out both ‘public service’ organisations and organisations promoting religion because they consider that they are different in nature from organisations which are truly independent of government or church hierarchies. Religious organisations are regarded by many as a category apart and while some might regard their charitable status as an anachronism, others justify it. Many submitting evidence who expressed concern that a new classification system might be overly complicated and result in difficult boundary disputes, nonetheless supported the need to more clearly distinguish organisations promoting religion within the broader charity category.

‘We don’t want too complicated (a classification system), but certainly different treatment forreligious institutions is a must.’ (voluntary organisation submitting written evidence, 1998)

‘Religion is another contentious issue but religion is the philosophical mainspring of charity. It has social rather than public benefit, teaching people to distinguish between right and wrong.’ (Christopher McCall, QC, oral evidence session, 1999).

3.4.4 Most welcomed the idea of a new classification system but some pointed to dangers; the risk of developing too complex a system or one that was insufficiently sensitive. However, most agreed a simple classification system, which made more explicit some of the differences in the current legal treatment rather than introducing new boundary disputes, would be beneficial. This could isolate the three main categories relevant for our purposes:

1. independent organisations registered with the Charity Commission;
2. public sector organisations preparing accounts and reports for government departments;
3. places of worship accountable to the relevant church hierarchy.

An advantage of this approach is that it would point out key differences between the categories thereby promoting public understanding.

‘There is a risk with any classification that we can over-categorise and place organisations in strictly defined boxes...How would organisations that cross boundaries be treated?...We would prefer a simple classification of charities and other not-for-profit bodies.’ (voluntary organisation submitting written evidence, 1998)

3.4.5 The main issue here is that this proposal is very similar to the codification proposal, simply clarifying distinctions already present in the current legal treatment. It might be argued that promoting the new categories proposed would help people with a distinct interest in the issue better appreciate and understand differences in regulatory treatment but this appears a small gain relative to the effort required for implementation. This is particularly the case given that the main plea emerging from the evidence was for a harmonisation in regulatory treatment for all charities. This is obviously a much larger issue and one that, strictly speaking, is beyond our terms of reference. Nonetheless, we return to it in the next chapter, recommending that further work is undertaken.

3.5 Proposal 5: Introduce the same public benefit test across the four heads of charity

3.5.1 Those concerned about anomalies in charity law often point to problems created by the difference in the public benefit test across the four heads of charity. To be registered under the fourth head organisations have to make a convincing case that their work is for the benefit of the public. For educational and religious organisations public benefit is generally presumed. This different burden of proof means for example that, other things being equal, the following can be charitable:

- independent schools charging fees which the average person cannot afford;
- private hospitals;
- churches which do not undertake social activities of benefit to the wider community or whose premises are of no architectural or historic interest.

There is also the anomaly that trusts for the relief of poor relations are charitable. It was suggested that the same strong public benefit test should be introduced across the four heads of charity. This would remove one layer of complexity in the law and re-emphasise public benefit as the over-riding consideration. It would bring ‘legal’ charity closer to the general public perception of what is charitable and make the law easier to understand and explain to the general public. As charity lawyer Francesca Quint said during our oral evidence sessions: ‘The basic justification for charity is public benefit. Legislation on charitable status should merely require positive proof of public benefit for all charities, removing the present anomalies and disparities. This would improve public perception of charities, as well as countering some of the opposition to tax concessions.’ This proposal will be discussed in much greater depth in chapter four.

3.6 Proposal 6: Restricting charitable status to organisations relieving poverty

- 3.6.1** The last chapter (section 2.3) discussed the fact that there are two common but differing conceptions of charity. One focuses on the relief of material disadvantage or suffering. The other is wider and views charity as embracing common human needs, beyond the material, which might include for example access to artistic pursuits and religious succour. Charity law as it stands is based on this second wider conception of charity. It is in part based on the premise that charity may work indirectly as well as directly for the benefit of the public. This means, for example, that the benefit of education is presumed because it is deemed that this is a public good regardless of whether or not there is evidence of tangible benefits emerging. Neither does it matter which group benefits from the facilities offered, provided that it is not too restricted a class.
- 3.6.2** Some have suggested that the main problem with charity law as it stands is its acceptance that the materially rich as well as the materially poor benefit from charitable provision. Following on from this is the proposal that the legal category charity should be limited to those organisations which seek to relieve poverty. This argument appears based on the premise that the most urgent needs should be met first. Further, that the most urgent needs will always be material needs and that they will always be the material needs of the poorest, or at least poorer, members of society. This proposal would artificially limit charity. It implies the sort of prioritisation of social needs that is the rightful province of government but which would be inappropriate applied to charity. It also ignores the role of charitable status in encouraging and promoting altruistic activity by individuals through its recognition of a wide range of objects as being broadly for the benefit of the public. The issue of indirect as well as direct benefit is also important. Limiting charitable status to direct or more material benefits would reduce the coherence and strength and therefore the value of the category.

3.7 Proposal 7: Liberalising the law on political activities and campaigning

- 3.7.1** Earlier in this report we discussed the law on political activities and campaigning (section 2.2) and explained that some now believe that it should be liberalised to allow non-party political organisations with certain political purposes access to the benefits of charitable status. In October 1998, the Committee on Standards in Public Life recommended that donors to political parties should receive tax relief on donations of up to £500 a year. The Government, understandably enough, rejected this proposal³³.
- 3.7.2** We also explained (section 2.2.6-7) that many misunderstand the law on this issue, assuming that there is an absolute bar on charities' campaigning. While organisations which, as a primary purpose, are seeking to change the law or public policy are not charitable, charities are allowed to campaign as a means to their particular end. Over the past few years many charities have run significant, high profile campaigns as one means of achieving a primary purpose, such as to secure a better quality of life for older people³³.
- 3.7.3** This review received no evidence to suggest that the law and the associated Charity Commission guidance are creating severe operating difficulties for charities. Charities may find the Charity Commission guidelines on political activities flexible enough to allow them to campaign in their preferred manner. Other organisations may feel that they have found a perfectly workable solution by separating their charitable, often educational, activity from significant activity aimed at changing the law or public policy. The research and policy work undertaken by the parent charity informs the attempts to change the law or public policy undertaken by the linked voluntary organisation.

- 3.7.4** However, we are tolerating a fudge. The Charity Commission guidance on the issue acknowledges that this is a difficult area and that the distinction that the law makes between objects and the methods of achieving them ‘although easy to state is not always easy to apply in practice’³⁴. What it comes down to, perhaps, is how organisations choose to draft and present their objects. Some suggest that this is unsatisfactory and that the law and associated guidance need to be clearer about what sort of non-party political purposes and what degree of activity deemed to be political is acceptable. This, of course, brings us back to a consistent tension in attitudes towards the law; attempts to achieve greater clarity would inevitably reduce the flexibility which the majority agree is a boon.
- 3.7.5** It is also sometimes argued that it would threaten the positive image of charity if charities were allowed to focus on political activities since these are by their nature controversial. It does not much help to say that charities might be allowed to campaign as a primary purpose if these campaigns were non-party political since inevitably the positions taken would align with or diverge from those of political parties. Generally, then, the principle that charities should not have political objects is accepted. It has been suggested however that the Charity Commission’s interpretation of political purposes is broader than might now be appropriate. For example, the current view of the Charity Commission is that objects such as advancing human rights and promoting civil society are political, on the broad basis that achieving such purposes would mean a change in the law or public policy in this or another country. It may now be possible to argue, on the basis of UK legislation, particularly the incorporation of the Human Rights Act into UK law, and international conventions that pursuit of such objects should no longer be regarded as political³⁵.
- 3.7.6** A difficulty arises in applying the argument contained in the previous paragraph to organisations working overseas. It is reasonably clear that from October 2000, when the Human Rights Act came into effect in this country, promoting human rights here will be charitable. It is less certain that promoting human rights overseas will be accepted. The Charity Commission is on record as saying that what is charitable if carried out in this country will be charitable if carried out abroad. However, it might be argued that the promotion of human rights in the face of local laws to the contrary might do more harm than good and on this basis would not be charitable. The response could be made that purposes such as advancing human rights and promoting civil society have an overriding importance and are of universal application.³⁶
- 3.7.7** The rule against organisations whose primary purposes are political gaining access to charitable status is a relatively new one³⁷. The campaign for the Abolition of Slavery for example was and continues to be a charity. The main rationale for the rule appears to be that it serves to help maintain public trust and confidence in charity. However, Amnesty International is just one example of an organisation currently deemed to have primarily political purposes but thought by the public to be a charity because its work is regarded as incontestably for the benefit of the public.

³⁴ Charity Commission paper, CC9 *Political Activities and Campaigning by Charities*, (Charity Commission, September 1999)

³⁵ This was the approach taken by the Charity Commission in 1983 when accepting the promotion of racial harmony as a charitable purpose (Charity Commission Annual Report 1983 para 15).

³⁶ Thanks to Francesca Quint whose comments informed this paragraph

³⁷ The leading case on political activities was decided in the late 1940s (National Anti-Vivisection Society v IRC [1948] AC 31). Political activities were also considered in a 1917 case, *Bowman v Secular Society Ltd*.

3.8 Measures to develop the common law and ensure the ‘charitability’ of registered organisations

3.8.1 When we were collecting evidence to inform this report a number of interesting trends emerged. Media commentators and policy pundits advocated radical reform of charity law, many suggesting that nothing short of abolition would do. The charity lawyers were predictably more conservative, with some more conservative than others. Some supported the basic framework but considered that changes should be made to the law at the margins. Others suggested that attempting even minor change would be contentious and difficult relative to the likely gain. Some argued that the system that we have at the moment is sound, requiring only small administrative changes. The changes advocated were: the introduction of measures to develop the common law and/or additional measures to ensure the ‘charitability’ of registered organisations.

3.8.2 Those against any change in the law argued that the system as it stands is basically sound because it has the potential for evolution. The beauty of the common law system is its flexibility, they argued, and the scope allowed for constant small advances. However, this evolution depends on cases being brought before the courts. Very few are, and these are expensive in time and money with only a tiny number of voluntary organisations considering that they are worth the investment. It was suggested to us that public funding to meet the costs of a couple of cases each year could address some of the main areas of difficulty, anomaly or lack of clarity. Public funding to bring cases would offer the promise of gradual change building on the strengths of the current system. However, assuming that support would only be available to bring a couple of cases a year, change would be slow.

‘We are currently experiencing the worst of all worlds - no statutory definition and no common law updating.’ (Lord Phillips of Sudbury, charity lawyer - oral evidence session, 1999)

3.8.3 Others raised appeals as an issue. The Charity Commission has recently introduced a very welcome internal appeals procedure. However, some organisations consulted as part of this review expressed concern that it was sometimes both expensive and difficult to appeal Charity Commission decisions in the courts. A more specialist and user friendly appeals mechanism on the model of Employment Appeals Tribunals might therefore be developed. The Goodman report considered this issue and concluded that this would only make sense ‘if the decision of the tribunal, although only on a point of law was final. We consider that on points of law the High Court should be the final arbiter.’³⁸ The Goodman report suggested that the best means of overcoming this difficulty was for provision to be made from public funds for cases to be pursued.

3.8.4 Many of those who considered the current system basically sound, suggested that some relatively minor changes in the regulation of charities could serve to counter some important concerns. There is a public perception that charities continue beyond their useful life. During our oral evidence sessions some contributors suggested that charitable status should be conferred on a time-limited basis. There is an obvious problem with this: what lawyers call the perpetuities rule. A principle of charity law is that a charitable trust can exist in perpetuity. This was a special concession for charity; designed to reassure donors that the money they had donated would be spent for the purposes for which it was given. Only if

³⁸ See note 2

this is no longer feasible is it possible for the Charity Commission to step in and determine that the money should be spent on the nearest equivalent charitable purpose. This would happen if, for example, there were funds remaining which had been left for the health and welfare of coal miners in a particular district where all the pits have closed. The nearest feasible charitable purpose in this case might be the provision of education and employment training opportunities for unemployed people in the same area.

3.8.5 This is not to imply that once an organisation is granted charitable status there are no mechanisms for checking that it continues to operate for the benefit of the public and within the constraints of charity law. The Charity Commission requires charities with income of any significance to submit accounts and annual returns which check compliance with charity law. The written evidence from voluntary organisations again stressed the important role of the Charity Commission and indicated that a harder line on non-compliance with the accounting and reporting regime was perhaps necessary in order to help maintain and increase public confidence in charities. It was suggested that the Charity Commission might helpfully introduce a more rigorous and detailed check on the operations of charities. Given the number of organisations on the register this would be a mammoth task and the Charity Commission would need a massive increase in resources. The Charity Commission suggests that the new reporting and accounting regime is designed to pick up potential problems in charities and that regular monitoring visits to all charities are not necessary given the degree of risk. The Commission sees its role as investigating abuse where it occurs but also as encouraging good practice through advice and information provision. It is sometimes argued that these roles conflict, that the Charity Commission can not be both enforcer and supporter. However, another view is that this manner of operating is sensitive to the nature of the sector; the encouragement of good practice but a harsh line on failures to meet minimum standards is the best means of securing compliance without stifling the voluntary effort that government is seeking to promote.

Chapter Four

Towards a favoured option

4.1 Preamble

- 4.1.1** In this report we argue that charitable status continues to be valuable and should be preserved. A charity has certain features which distinguish it from other types of organisation. In particular, it is governed by an independent board of trustees whose primary responsibility is to serve the objects of the charity and thus the interests of its beneficiaries. Although charities can, and often do, engage with the public sector and support or challenge public policy, this is not their main reason for being. Their independence allows scope for innovation and risk taking alien to most public services. Charities have recently become more business-like but they remain distinct from private sector organisations. Their emphasis is not on making profits for shareholders but on using resources to best effect for service users or their cause. Furthermore, their business-like behaviour might be regarded as a good thing since it is designed to squeeze the maximum benefit from donated income.
- 4.1.2** Many of those who challenge the current law on charitable status feel it is perverse that certain organisations are deemed charitable while others they perceive as more deserving are not. Yet those who question the law on this basis on the whole have no reservations about the value and importance of charitable status. A common complaint is that the category is too broad, encompassing organisations as diverse as animal sanctuaries and public schools. The response to this is simple: a basic rationale for retaining charity as a legal category is to encourage individuals to give either time or money to particular causes about which they feel strongly. One person's passionate pursuit may leave another indifferent but, assuming appropriate development in the law, one of its greatest strengths is that it enables people to pursue, unselfishly, activities deemed to be for the public benefit.
- 4.1.3** Another objection to the current law is that some forms of worthwhile voluntary sector activity are excluded from the benefits of charitable status because, for example, it is judged that they deliver undue private benefit. However, those who argue that organisations based on mutual benefit should be charitable fail to recognise that this would strike at the root of charity. Charitable status reassures donors that their contribution will be used for the charitable purposes for which it was given and that any private benefit deriving from the gift will be secondary. This is not to say that organisations based on the mutual model should not be supported and encouraged, possibly through the tax system, and that their special status and contribution should not be more widely recognised. It is rather to say that attempts to squeeze mutuals into the charitable category would distort it beyond recognition. What is needed is a new legal form, as broad and flexible as charity and with a comparable range of advantages, which serves the mutual sector. Although it falls outside our terms of reference we strongly believe this merits further investigation.

- 4.1.4** The preferred buzzwords and phrases of the time include: enterprise; mutuality; modernisation; community involvement; partnership; social inclusion. Although such approaches are not necessarily alien to organisations with charitable status, and indeed many would see them as fundamental, they are often regarded as out of tune with ‘charity’ which is stereotyped as patronising and disempowering. Even though many people have a very different direct experience of charities at work, the suspicion remains that charity is not entirely in line with current thinking. However perhaps part of the basic value of legal charity lies in the fact that it is not at the mercy of the dominant political agenda or the whim of fashion in public policy. This means charities can challenge the dominant orthodoxy, pilot and show the value of different approaches, and seek to educate or even sometimes change public opinion. This is not to argue that charities do not have a great deal to contribute to the Government’s policy agenda, they obviously do. Around a quarter of charities seek, for example, to address poverty. Some support self-help groups. Others run extensive volunteering programmes. Most trustees are unpaid. However, the fact that they contribute to achieving government policy objectives is incidental.
- 4.1.5** We were presented with a variety of evidence about the complexity of the law and whether and in what respects it might be simplified. Some journalists, policy pundits and charity lawyers hold the view that charity law is too complex for the public and for prospective promoters of charity to understand. Such complexity, they suggested, is inappropriate in a system designed to foster public confidence. But we concluded that measures to simplify the law, for example by codifying it, would inevitably reduce the flexibility inherent in the current system and that this would be too great a price to pay. It is not always possible to have legal simplicity without damaging the very thing which the law is supposed to protect and promote. This said, and accepting the fact that views on this issue differ, we were reassured by Charity Commission research from 1997 which demonstrates that the public, while obviously not having a grasp of the detail, understand some of the basics about the legal category and support its diversity³⁹. In other words, while they might argue with the determination of particular cases, they appear broadly in tune with the overall structure or rationale of the law. In this case, perhaps as with all law, this is as much as could be hoped for.
- 4.1.6** As a group we concluded that the legal treatment of charity, leaving aside the need for some changes at the margins, serves to protect and promote charity. The reform option that we therefore preferred is referred to as proposal 5 in the last chapter, namely the application of the same strong public benefit test across all four heads of charity. We are recommending this option because we believe that it deals with most of the major difficulties of the present system by placing the concept of public benefit firmly at the centre. Some would argue this would realign charity with principles which have over the years been partially eroded. This change would make the law more intelligible and give it greater unity. It would not eradicate some of the underlying conflicts and complexity but we could see no way of removing this complexity without too great a loss in flexibility. The next sections consider our recommended reform option and its likely implications in greater detail. (The content of these sections has been informed by an Opinion provided by Francesca Quint included in this report as Appendix 3. They have also been informed by many helpful comments made by members of the reference group for this project).

³⁹ MORI: *Public views of charitable status, Research conducted for the Charity Commission, March 1997*

4.2 *The favoured reform option*

Overall approach and reasons for adopting it

- 4.2.1** The main reform option we propose is that all charitable purposes should pass the same test for public benefit, this being the ‘strong’ test currently applicable to charities falling under the fourth head, ‘other purposes beneficial to the community’. We propose that this change should be grafted onto the law by means of new legislation. This would limit change to the substantive law to a minimum. Rather than making all the existing case law irrelevant, it would build on or supplement it. We consider it important to preserve the existing case law, adding a new rule to it, by legislative means, because this is the safest option in terms of preserving the charitable status of the broadest range of public benefit purposes.
- 4.2.2** We have already been asked why we are not proposing simply to abolish the first three heads of charity and establish ‘other purposes beneficial to the community’ as the only charitable head. We decided against this particular approach largely for pragmatic reasons. It is a more radical proposal and one that would therefore be more difficult to steer to implementation. It might be taken as suggesting that the relief of poverty, the advancement of education and the promotion of religion are irrelevant and should not be charitable. Our view was that they should continue to be charitable. We have nothing against them in principle, provided that charitable organisations pursuing these purposes are placed under appropriate pressure to operate for the public benefit.
- 4.2.3** We were also asked why we are not adopting the approach taken by Deakin and recommending a statutory re-definition of public benefit. We consulted many practising charity lawyers in the course of our work and all expressed much the same view, based on a series of related arguments: they believed a statutory definition of public benefit would result in less rather than more flexibility in legal treatment. We concluded that rather than providing greater clarity, a new statutory definition would render all the existing case law irrelevant; until new case law was established the shape and tenor of the law would be extremely uncertain.
- 4.2.4** Some commentators suggested to us that the existing case law was a major block to the appropriate development of the law and that it should be cast aside. Further, it was put to us that if it was possible to hazard a good summary of judicial thinking on public benefit, then it was surely possible to develop an appropriate statement of public benefit which could be given as a guide in the proposed legislation. We decided that attempting a legislative definition of public benefit would be likely to have unforeseen negative results and was in fact unnecessary. We concluded that on balance we could and should work with the grain of the common law. Extending the fourth head treatment of public benefit to other heads would meet our main objectives.

Treatment of public benefit

- 4.2.5** Our proposal does not simplify the main test of charitable status, namely benefit to the public or a sufficient section of it. Indirect as well as direct public benefits would still count, so that the mere fact that the direct benefit of a charitable fund goes to a very narrow group is not automatically fatal to its charitable status, so long as there is a sufficient compensating indirect benefit to the larger public⁴⁰. Moreover the fact that the well off benefit to a significant degree from a charitable organisation does not by itself rule out charitable status. Our reform proposal simply tests whether the charitable organisation could potentially benefit a wider constituency. In our view, these three problems - the problem of

determining a sufficient ‘section of the public’, the problem of weighing indirect public benefit against direct private benefit, and the problem of the well off continuing to benefit from charitable projects - are inevitable consequences of maintaining an adequately broad public benefit test. In our view no better approach could be developed than that already taken by the courts and the Charity Commission in ‘fourth head’ cases, namely to look at particular cases on their merits, and to weigh up the complex matters of degree involved in each case (is the beneficiary ‘section of the public’ sufficiently numerous? if the direct benefits are largely private, is there sufficient compensating indirect public benefit?)⁴¹.

4.2.5 Our proposal is, in effect, to expand rather than contract the scope of such weighing up of competing considerations. By removing favourable presumptions from the relief of poverty, the advancement of education and the promotion of religion, organisations and causes falling under these heads are exposed to the same degree of individual scrutiny on their merits that already applies to fourth head charitable causes. The likely implications of our proposal for organisations falling under the first three heads of charity are discussed in the next section. This illustrates that the Charity Commissioners and the judges might hold that some organisations no longer have charitable status in the light of the reform we propose. In our view, the main point is that they should be free to determine this question on the merits of the particular application and without any presumptions.

4.2.6 It follows that the proposed reform is, in one respect, a simplification of the law and, in another respect, not. It simplifies the law of charitable status by making it clear that all organisations or causes must pass the same threshold of public benefit to achieve that status. On the other hand the threshold remains an inevitably complex one. If anything, the complexity is more explicitly revealed once the presumptions in heads one, two and three are removed. This will clearly produce more work, and more fine-grained work, for the Charity Commission and the courts. That is not to be imposed lightly. But in our view it is, on balance, a blessing rather than a curse. The suggestion of advantageous treatment for some kinds of organisations is a thorn in the law’s side and the case for putting all on the same legal footing is correspondingly strong. We concluded that the proposed reform will tend to strengthen the public legitimacy of the decisions made in its name, even when they continue (as they sometimes will and should) to ascribe charitable status to an unpopular institution.

4.3 *How would our main reform proposal impact on organisations applying for charitable status?*

4.3.1 It is hard to generalise about the likely impact of our main reform proposal given that we emphasise that each case should be examined on its individual merits. We explain the need to balance considerations of public as against private benefit and to also add into the equation any compensating indirect public benefit. However, the following paragraphs discuss each of the first three charitable heads in turn to give an impression of how the new law might play.

⁴¹ Thanks to Janet Ulph from Durham University for her very helpful comments. She points out that this gloss is not an accurate statement of the judgement in any particular case and therefore is open to challenge. However, we believe it to be an accurate synthesis.

Relief of Poverty

- 4.3.2** A basic anomaly or inconsistency which is often commented on in the current law is that in the case of organisations alleviating poverty, unlike other charitable causes, a ‘personal’ connection between the donor and the beneficiaries does not call into question the charitable nature of the cause. Our proposed extension of the same strong public benefit test across all heads of charity would necessitate re-evaluation of this doctrine by requiring the balance between public and private benefit to be assessed from case to case rather than public benefit being presumed. For example, it might be accepted that particular company benevolent funds with the object of poverty relief are charitable because the number of potential beneficiaries is large and the notion of personal connection irrelevant due to company size and levels of staff turnover.
- 4.3.3** Even if the number of potential beneficiaries is smaller, there may be sufficient indirect public benefit from the relief of their poverty to render the cause charitable. Relieving poverty may improve beneficiaries’ prospects in terms of health, employment etc, and it therefore may make a broader social and economic contribution. Our proposal does not rule out consideration of this indirect public benefit. It merely focuses attention on it by raising the question, in each case, of whether the benefit in question will arise⁴².
- 4.3.4** Relief of sickness, infirmity or old age is a charitable purpose separate from the relief of poverty although it is often taken alongside it. It was pointed out to us during our oral evidence sessions that some organisations providing private health care are charities. One effect of our proposal is that the question of whether health care providers fall under the first head of charitable status (i.e. relief of poverty) loses its importance. Whatever their classification, the important question for their charitable status is whether they are of public benefit. This depends on the tests set out in 4.2.5 above. No doubt some health care providers will pass these tests and others will fail. Very exclusive health care institutions might well find their charitable status questioned given a more thorough assessment of public benefit.

Promotion of religion

- 4.3.5** When we were collecting evidence for this review a significant number of the submissions commented on the relationship between advancing religion and public benefit. It is often argued that many religious organisations could potentially fall under other charitable heads because, for example, they are engaged in social welfare activity and/or they are maintaining buildings which are of historic interest. But this misses the point. Worship is the primary purpose of many of these organisations and if this is no longer deemed charitable this would surely call into question their charitable status. One important distinction made in the current treatment of religious organisations is whether worship is public or private. Contemplative orders have had applications for charitable status turned down on the basis that there is no public aspect to their worship.
- 4.3.6** During our consultations some people argued that in a largely secular society charitable status for religion was anachronistic. It was also suggested that the charitable status of religious organisations could be questioned on the basis that little in the way of tangible benefit flowed from their work, or at least benefit as tangible as the other heads. However, supporters of the charitable status of religious organisations argued that the purpose benefited the public because at its best it embodied attitudes and virtues that should both be preserved and promoted. These values and attitudes, including a generous attitude towards others and a desire to relieve suffering, can be seen as the source of charity. Religious organisations established the tradition of charity in this country and elsewhere and it remains the case

today that those active in any religion are more likely than others to donate money or time. Some suggested that it is precisely because of secularisation and our consequent lack of conviction about the content of moral education that religious organisations have become a more important source of guidance and succour.

‘We would argue that even a church with a small congregation does provide spiritual and moral support and leadership to a society in which increasingly the traditional family and community structures and values are breaking down.’
(voluntary organisation submitting written evidence, 1998)

- 4.3.7** Earlier in this chapter we explained that we believed that public benefit should be assessed on the basis of intangible as well as tangible benefits. We accept the argument that charity should therefore encompass attempts to address spiritual as well as material poverty. In our view implementation of our main proposal does not threaten the charitable status of religious organisations as such. Organisations promoting religion should continue to be charitable, other things being equal, on the basis that they provide an opportunity for the expression of belief and for spiritual and moral development which has the potential to benefit the public. Of course in each case the question will be whether the object is indeed to the public benefit, to which the question of public accessibility to facilities for worship or the support offered will continue to be relevant.

Advancement of education

- 4.3.8** The issue on which a spotlight inevitably falls, under this heading, is the charitable status of public schools. Whether it makes sense for such organisations to have charitable status has been questioned on the basis that entry is often restricted, with few exceptions, to people from affluent families. One strand of legal argument has promoted the notion that all education is of benefit to everyone. This has resulted in cases where charitable status has been conferred on organisations which, to use the legal term, are benefiting a ‘private’ or artificially limited class. The cases that have this effect are few in number but for the avoidance of doubt the legislation that we propose should create a pressure for these schools to provide wider access. Obviously this is not to argue that charities should not be allowed to charge fees but merely that those that do so should be serving the public benefit. So far as direct benefits are concerned, a school could satisfy this requirement by providing sufficiently wide access to its educational facilities. This claim could be based on a number of factors which might include: the number of bursaries or scholarships offered; the access provided to other local schools and the wider community to facilities including sports fields, gyms and swimming pools. Meanwhile the indirect public benefit of education – which is not to be disregarded – must also be balanced in each case, under our proposed test, against the possible public disbenefits of educational segregation and thus social divisiveness. In other words, the indirect public benefit of education would no longer be treated as a trump card.
- 4.3.9** If, after consultation, the main recommendation of this report is endorsed by the sector, and government agrees to enact legislation to that effect, future cases would of course be decided with reference to the new legislation.

4.4 How would the proposed change impact on existing charities?

4.4.1 If our main recommendation is implemented some organisations that are charitable under the existing law might well cease to be charitable. Some people suggested to us that no organisation should be removed from the register of charities merely by virtue of the implementation of our proposed reform. The change, in other words, should not be retrospective. However, we had some difficulty with this view. In the first place, we regard it as one of the objectives of the reform to require all those managing charitable funds to reorientate their work towards the public benefit where, under the old law, they may have been under less pressure to do so. Secondly, we are unhappy, in any case, with the idea of a two-stream law of charitable status, giving wider latitude to older organisations than to newer ones. Our general view, therefore, is that charitable status should belong only to those that meet the newly strengthened test.

4.4.2 But what will happen to funds currently held by organisations if their objects cease to be charitable in law thanks to our proposed reform? At the moment, when charities change their objects or activities in such a way that they are no longer charitable, the law requires that they resume solely charitable objects, or their funds are applied to the closest feasible charitable objects. We see no general reason why this same doctrine should not apply in the wake of our proposed reform. Charitable funds should continue to be applied to charitable objects (as newly conceived). In the event that funds are held for objects no longer charitable, the general approach is that they should be applied to the closest possible object that still is charitable. We acknowledge that in its unqualified form this approach yields various legal and policy difficulties regarding ownership and transfer of charitable assets. In particular it raises the question of who owns charitable assets when a charity is a company rather than a trust, and the question of how the law is to maintain the respect that it traditionally gives to the wishes of donors. These problems cannot all be resolved here and our view is that they call for further detailed work. The Charity Law Association has agreed to undertake follow up work on our proposals and will consider this issue ⁴³.

4.5 Determination of charitable status/regulatory issues

4.5.1 Our preferred reform option, as explained earlier, places a greater emphasis on the role of the Charity Commission and the courts, as independent arbiters, determining whether purposes really are for the benefit of the public. It requires them to make more decisions and more difficult decisions about eligibility for charitable status. We started discussion about whether changes were needed to achieve a system better able to make more difficult decisions. Earlier sections of this report have discussed some of the proposals made by Goodman and others on determination mechanisms. Everyone would like to see the law develop but the only certain means of achieving this is for more cases appealing Charity Commission decisions to be brought to court.

4.5.2 The costs in both money and time means that court action is not a feasible option for most organisations. We agreed that a ‘suits fund’, supported by the public purse, would be the best way forward. This would meet legal costs enabling voluntary organisations to take cases. However, we agreed that it seemed unrealistic to suggest that such a fund might be established by government given other calls on public funds. We also discussed whether there should be a new appeals mechanism between the Charity Commission and the courts but did not reach agreement on whether or not this would really add value, overcoming perceived problems with the existing system (see section 3.8 for more detail). We are, therefore, deferring this issue to the consultation and the joint Kings/NCVO project on regulation to enable further in-depth consideration.

⁴³ To some extent these problems have already been encountered and considered by the Charity Commission in its Review of the Register project.

- 4.5.3** In the last chapter we discussed a number of ideas for regulatory change which fell short of reform of the law, on the basis that robust legal treatment of charity requires a strengthening of the regulatory environment. A notable feature of the evidence submitted to us was the consensus view that the sector needs to be perceived as better regulated. We concede that the problem might be more one of perception than reality. Since implementation of the 1993 Charities Act the Charity Commission has new powers and is no longer an organisation focused mainly on registration. The Act created a new reporting regime for charities and reinforced the Charity Commission's power to intervene in cases of mismanagement of charitable funds. Some in the sector argue for a different sort of relationship with the Charity Commission. They suggest that contact is limited unless and until the Commission becomes concerned that something has gone wrong within the charity. However, the Commission itself argues that the new reporting regime ensures regular contact and that their advice function enables ongoing dialogue. The joint Kings/NCVO work on the regulation of charities will be examining further the role of the Charity Commission and its relationship with the sector.
- 4.5.4** One of the striking aspects of this work was the strength of feeling revealed about 'exempt' and 'excepted' charities. We received evidence indicating that some of these organisations do not respect charity law principles as they should. Some of the examples given related to the thorny issue of trustee beneficiaries, with employees deciding, for example, on their own package of benefits. Questions were also raised about the transparency of some of these organisations and whether all could demonstrate that money given for charitable purposes was used for those purposes. In March 2001 the regulations providing for exception are due for review and the Home Office and the Charity Commission have consulted on whether changes are necessary.⁴⁴ This provides an opportunity for the rationale for exception and exemption to be discussed and for proposals for changes both in the categories themselves and their regulation to be developed. An obvious response to the difficulty raised is that the Charity Commission should have greater powers in relation to exempt and excepted organisations. However, this would mean a significant increase in workload for the Charity Commission and it is doubtful that resources would be made available by government to support an enhanced role. Again, the joint Kings/NCVO project will look at this issue in more detail.
- 4.5.5** The last chapter considered whether change in the law on charity and political activities is required. On balance we decided not to advocate legal changes. However, we began a discussion about whether it would now be legitimate for the Charity Commission to review their guidance on political activities and to take a different view on the range of activities deemed political. Such a review would potentially bring a range of purposes currently excluded because they are deemed to be too political within the ambit of charity. Promotion of human rights is one example. This issue is a complex one and NCVO proposes to undertake further detailed work on it. This report is designed to promote debate and we particularly invite comments on this issue.

4.6 Conclusion

This report is the culmination of an attempt by a small group of people to address key issues and to make recommendations which will help strengthen the legal category charity since, in our view, it has distinct value. Although we make specific recommendations, the main intention of this report is to stimulate a debate. Over the six month consultation period we will be running a series of events to obtain feedback on our proposals. On the basis of this consultation NCVO will develop its own policy position on charity law reform and will start to lobby for any changes considered necessary.

⁴⁴ Charity Commission consultation paper, *Charity Registration: When Should it be Voluntary?*, (Charity Commission, August 2000)

Appendix I

Charity Law Reform Advisory Group

Terms of Reference

The Group will consider:

- a) whether the law relating to charitable status needs to be reformed;*
- b) the options for reform (if the Group concludes that reform is necessary);*
- c) the practical implications of reform proposals.*

The Group will produce a report for NCVO, based on consideration of these questions, which makes recommendations about the future of charity law.

It was agreed that within this remit the Group would give consideration to the issue of exempt and excepted charities and also to the role of the Charity Commission in granting and denying charitable status.

Membership

Winifred Tumim (Chair)	<i>Chair of NCVO</i>
Margaret Bolton (Secretary)	<i>NCVO</i>
Richard Fries (from mid '99, observer status before this)	<i>Centre for Civil Society, LSE</i>
John Gardner	<i>University of Oxford</i>
Judith Hill	<i>Farrer & Co</i>
John Stoker (observer from mid '99)	<i>Charity Commission</i>
Charles Woodd (observer status from mid'99, full member before this)	<i>Active Community Unit, Home Office</i>
Nick Young	<i>Macmillan Cancer Relief</i>
Anthony Kenny (until March 2000)	<i>University of Oxford</i>
Melinda Letts (until 2000)	<i>New Ways to Work</i>

Appendix 2

Oral Evidence Witnesses

These people took part in our oral evidence sessions between 1 March and 10 March 1999	
Perri 6	<i>formerly of Demos, now at the University of Strathclyde</i>
Ian Hargreaves	<i>University of Wales</i>
Stephen Lee	<i>Kingston Smith</i>
Bharat Mehta	<i>City Parochial Foundation</i>
George Reid	<i>St John's College, University of Cambridge</i>
Francesca Quint	<i>11 Old Square, Lincoln's Inn, London</i>
Polly Toynbee	<i>The Guardian</i>
Frank Prochaska	<i>Institute of Historical Research, University of London</i>
Christopher McCall QC	<i>13 Old Square, Lincoln's Inn, London</i>
Hubert Picarda QC	<i>13 Old Square, Lincoln's Inn, London</i>
Lord Phillips of Sudbury	<i>Bates, Wells and Braithwaite</i>
Anne Marie Piper	<i>Paisner & Co</i>

Appendix 3

Opinion provided by Francesca Quint

Introduction

I am asked to advise on the technical aspects of the Committee's recommendation that charity law should be reformed by requiring all charitable purposes to pass a single test for public benefit, being the 'strong' test currently applicable to charities within the fourth head in the Pemsel classification. I have had the benefit of discussing the matter with members of the Committee on two occasions. I confirm that primary legislation is, in my view, clearly necessary in order to bring about such a reform, and, as requested, I have prepared some draft clauses which might be considered as a starting point for consideration of such legislation.♦

Extent of change

It seems to me that reform along these lines will only be feasible if the alteration to the substantive law is kept to a minimum, and no attempt is made to change the meaning of 'public benefit' or the test by which a purpose is assessed as being either for the public benefit or not for the public benefit, as opposed to changing the purposes in respect of which the test applies.

There is a certain amount of variation depending on the precise purpose, but broadly speaking, a purpose is currently treated as being for the public benefit under charity law if the financial assistance, items, services, facilities or other, less tangible, benefits which are provided to people in furtherance of the purpose are accessible to (i) the population at large, (ii) taxpayers, (iii) people born, living, studying or working in a particular content, country, region, city, town or area (iii) the female population (eg in the case of charities within the Recreational Charities Act 1958) or (iv) a section of the public, a numerically significant group defined by nationality, age, sex (if either young, old and/or female), medical condition or disability, occupation, vocation, educational or technical qualification, or those connected with one another by some other link which is 'objective' rather than 'subjective'.

By 'subjective' I mean qualifications (i) which are either arbitrary and capricious (eg people with red hair or black skin - although in the later case the qualification would in any case be censored out of any governing document by s 34(1)(a) of the Race Relations Act 1976) or (ii) which specify contractual or personal link or 'nexus' between the beneficiaries. Such a link may be specified through common employment by a particular company or group of companies, by common membership of an association, church, masonic lodge, trade union or firm, or by their belonging to the same family, having the same ancestor, or (whether or expressly or by implication) by enjoying above average income or wealth (see *Jones v Williams* (1767) Amb 651.) These well-established principles should, in my view, remain untouched. They can then be further clarified or developed by case law if necessary.

The application of the test of public benefit does need to be altered if charitable efforts are to be encouraged without preference for one category of charitable purpose over another. There is more than one way of analysing the present law.

In the first place, it is evident that the public benefit test does not apply, or does not apply in the normal manner, to charities for the poor: *Dingle v Turner* [1972] AC 601 (HL). Whether the underlying explanation is that there is an overriding presumption that the relief of poverty benefits society however the individual beneficiaries are chosen or, more prosaically, that any relief provided voluntarily to the poor reduces the extent to which the taxpayer must provide is immaterial.

♦These clauses are not contained in this report.

On the other hand, benefit to the public is presumed (subject to being rebutted) in the case of charities for the advancement of religion: *Re White* [1893] 2 Ch 41; and see *National Anti-Vivisection Society v IRC* [1941] AC 31, at p 65 (HL).

There is also a strand of opinion to the effect that education is beneficial to the whole of society even if those receiving instruction are not a section of the public. Whilst it is obviously better for society that some people should be educated than that none should be, however, the modern view of education as the entitlement of all, now enshrined in the Human Rights Act 1998, necessitates holding that the advancement of education (as opposed to the provision of educational services to a private group) cannot consist of providing educational services either to a private class, as in *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 (HL), or exclusively to the well-off.

The simplest way of providing a level playing field for charities would be to remove the anomaly which favours charities for the relief of poverty, to remove the legal presumption which favours charities for the advancement of religion and for good measure to remove any doubt about the requirement that the direct recipients of education in an educational charity must be the public or a section of it.

New charities

These changes will have certain foreseeable consequences for the creation of new charities, as follows.

Relief of poverty

At its simplest, the requirement that recipients of assistance are a section of the public will prevent the establishment of new charities for the relief of poor relations (eg of the founder), or for poor members of a club, society or employees of a firm, company or trade union. It would no longer be open to an employer to set up a charitable 'benevolent' fund to alleviate need among those employed or formerly employed by him. This is not unreasonable in the light of the introduction of a National Minimum Wage: why should the taxpayer subsidise an employer's failure to keep his employees and pensioners out of poverty? If some of a company's profits (or trade union's surplus) is going to be applied for a charitable purpose, it is truer to the spirit of charity that it should not be one which provides an indirect benefit for the founder or the donors. As has been well observed by Salmon LJ in *IRC v Educational Grants Association Ltd* [1967] Ch 993 (CA), charity in law is not the kind of charity that begins at home.

There would be the further consequence that, in the case of a proposed charity for educational or other purposes where the beneficiaries were to be a class defined by financial need, the founding trustees would need to ensure that any additional qualifications for benefit to be enshrined in the governing document did not prevent the beneficial class from constituting a section of the public. It would no longer be easy to render charitable a purpose which was designed to benefit a private class merely by inserting a poverty qualification.

Advancement of education

As indicated above, there would not be any actual change to the application of the test of public benefit to educational bodies seeking recognition as charities, since it is already fully applicable to them. I have, however, recommended the inclusion of an express provision 'for the avoidance of doubt' both for completeness' sake and to underline the fact that same test is to apply throughout.

It would also be possible by this means to clarify the effect of the much-criticised case of *Re Koettgen's Will Trusts*[1954] Ch 252 (see *Tudor on Charities* (8th edn) at page 61) by ensuring that, if there were a preference for a private class, or indeed if the need to charge high fees automatically effected a preference in favour of the well-off, there should still be benefits for a substantial number or proportion of persons who do not belong to the preferred group. My expectation is that, if such a provision were enacted, the Charity Commission and the Inland Revenue would be more wary in future than they may sometimes have been in the past in accepting as charitable schools and other institutions which charge high fees without showing that they would be making substantial provision for scholarships or bursaries for those with few financial resources.

Advancement of religion

The requirement that a body seeking recognition as a charity for the advancement of religion should be able to demonstrate public benefit, and would not be able to rely on any presumption to that effect, would involve proof that the teachings of the relevant faith or denomination, and its ethical principles, were such that those who adhered to them were in fact more likely to conduct themselves as responsible members of society and behave decently towards others. It would also be necessary to show either that the religious services and teaching would be open to the public, that membership of the body was readily available and affordable to all those interested, or at least that those attending services and receiving the teaching would be likely to spread the message through ordinary contact with others in their daily lives: see *Neville Estates Ltd v Madden* [1962] Ch 832. Inward-looking religious bodies, such as contemplative orders of monks or nuns, would remain non-charitable for lack of any identifiable benefit to the public, as in *Gilmour v Coats* [1949] AC 426 (HL).

In other words, it would have to be shown that the public would benefit from the advancement of religion whether the benefit was provided either directly through the holding of services and through teaching or indirectly by the example of adherents. Religion would thus be placed on a par with humanism and philosophical beliefs such as anthropology, whose promotion is charitable either because it is educational as in *Re South Place Ethical Society* [1980] 1 WLR 1565 or on the ground that it tends to elevate public morality as in *Re Price* [1943] Ch 422.

It is to be hoped that it would no longer be possible to establish a religious charity based on eccentric beliefs as in *Thornton v Howe* (1862) 31 Beav 14 (promoting the questionable views of Joanna Southcott) or simplistic materials *Re Watson* (1973) 1 WLR 1472 (distribution of jejune pamphlets) unless very positive proof were given that the purpose was nevertheless beneficial to the public or a section of the public. It would therefore be far easier than it has been for the Courts and the Charity Commission to refuse to recognise 'fringe' religions as charitable where there is no evidence of positive harm but equally no evidence that the purposes are beneficial to the community.

It may be observed that it is high time that charity law underwent such a reform, given that (i) charity law is centred on the benefits to human beings as measured by human standards and not on benefits to a deity (or, in the context of animal welfare charities, to other sentient beings) (ii) that in many ways we live in an increasingly secular age, at least in public, and (iii) that the increasing diversity of religious activity within the community has displaced the former beliefs and assumptions which provided recognised religious sanctions to inhibit anti-social behaviour.

On the other hand, newly established religious bodies whose religious work did not pass the test of public benefit but which maintained historic buildings would still enjoy charitable status in relation to their buildings, records and contents, provided that these were to remain accessible to the public, at least as architecture, historical documents and works of art, i.e. through the promotion of educational or fourth head purposes.

Another consequence is that there would be a potential difficulty if it were sought to include religious qualifications for the beneficiaries in the governing instrument of a proposed charity for some other purpose, eg the relief of poverty, except where a subsidiary purpose of the charity was actually to advance religion. This is an area of law which is not yet fully developed, as can be seen by comparing *IRC v Baddeley* [1955] AC 572 (HL) in which recreational facilities for Methodists was held non-charitable whereas a school for the education of the sons or daughters of freemasons has been accepted as charitable (see Picarda, 3rd edition, p 22). There is an interesting discussion in the Charity Commission's 4th volume of 'Decisions' about whether the Jewish community in Britain is a section of the public (Community Security Trust, p 8).

It might not, therefore, be possible for (say) a housing association to be established as a charity if it restricted housing accommodation to needy, elderly or disabled members of a particular church, unless a specifically religious dimension to the charitable purposes of the association were evident, eg the provision of a chapel or hall (open to the public) on the same site.

In the case of an educational charity such as a school or college, there would be no objection to the provision of education of a religious nature alongside secular education. What might be regarded as unacceptable would be to limit the recipients of that instruction to those who were already adherents of the relevant church religion. This could be regarded as contrary to freedom of religion under the Human Rights Act 1998. A mere preference for a particular religious group, however, would be acceptable so long as it was not applied exclusively (see para 8 above).

Fourth head (including recreational charities)

It would not be necessary to change to the test of public benefit in these cases.

Existing charities

The Charity Commission has already highlighted, in their discussion document 'Maintaining an Accurate Register', some of the problems which will arise as a result of the Review of the Register if and when they decide, as a result of the Review, that some existing registered charities may not be established for exclusively charitable purposes. If the proposed reform to the application of the public benefit test is carried out, this problem will arise in acute form for some charities under the first and third heads, and for charities for mixed purposes.

In the case of exempt charities the theoretical position is simple, if stark: the body ceases to be a charity as soon as it ceases to be established for the benefit of the public. In the case of registered charities it is simple but anomalous: while registered, the body is conclusively presumed to be a charity for all purposes except removal from the register. Such a body is therefore liable to be removed from the register by the Commission at any time, but meanwhile retains the fiscal and other benefits of charitable status.

Whilst removal would appear a straightforward matter, there may be serious consequences for those charities which are established as trusts, including those with a permanent endowment, in that if no longer charitable they may also cease to be validly established. There would also be a serious moral difficulty in these and other cases in that in many cases the founders and subsequent donors would have made gifts to the body on the understanding that it was a charity, and had no intention that their gift should be used for a non-charitable purpose.

Then there is the further point that s 13(1)(e)(ii) of the Charities Act 1993 provides that, if a body has ceased in law to be a charity, the Charity Commission or the Court can make a cy pres scheme to alter the purposes appropriately. This seems odd in that the Commission is usually regarded as having jurisdiction only in respect of charities, and by definition such a body is no longer a charity (except, in relation to registered charities only, in the very technical sense indicated above). The answer to that question may lie in an examination of the intention of those who provided the funds rather than the stated purposes of the recipient

organisation. According to the express words of s 13, it is the gift rather than its legal framework which contains the essence of charity. The donors' intention, being charitable, founds the *cy pres* jurisdiction. Nevertheless it is an awkward interpretation and some trustees might well prefer to be free of the Charity Commission, and thus accept removal from the register and/or a change of status, provided that they were in a position to retain the relevant funds.

This problem should ideally, in my view, be dealt with by the proposed legislation, which could refer either exclusively to bodies ceasing to be charities because of the extended application of the public benefit test or (perhaps more usefully but with greater complexity) to all bodies which have ceased to be charities because their purposes have ceased to be or to be accepted as exclusively charitable.

Permanent endowment

It seems to me that if a charitable trust which has a permanent endowment ceases to be established for charitable purposes and thereby ceases to be validly established, it is essential that the purposes should be altered so as to become exclusively charitable. Thus, in the case of a charity for the relief of poor relations of the founder, the class of beneficiaries should be widened as far as necessary to become a section of the public, perhaps to encompass all poor persons of the founder's nationality. A preference for the founder's kin could be retained in such cases if it is desired to retain the Koettgen principle.

In more modern charitable trusts permanent endowment is rare, but where it is provided for there may nevertheless be an express power to alter the objects. It seems to me that to ensure that permanently endowed trusts were not left in limbo it would be desirable to provide that, in the case of permanently endowed registered charities, charities which ought to be registered and charities which are excepted from registration (rather than being exempt), the Charity Commission should be given a statutory power to establish a *cy pres* scheme on their own initiative if the trustees do not within a defined period either exercise an existing power of alteration or make an application to the Commission for a scheme under ss 13(1)(e)(ii) and 16(4)(a) of the 1993 Act.

In the case of those exempt charities which are charitable trusts with a permanent endowment (eg prize funds connected with Colleges or Universities) it would be inappropriate to provide for the Commission to impose a scheme, since their exemption specifically shields them from the Commission's involvement unless the trustees so elect. It would seem reasonable, however, for legislation to empower the Attorney-General to apply to the Court in such cases if the trustees did not take steps themselves to apply for a scheme.

There is, in my view, no fundamental objection to this degree of compulsion given that s 13(5) of the 1993 Act imposes on charity trustees a statutory duty to take steps to alter the purposes of a charity where a *cy pres* application is required.

No permanent endowment

In the case of other types of charity, notably unincorporated associations and companies, and those charitable trusts where capital is expendable as income, it seems to me that the trustees ought to have the option of continuing to administer the body with its existing purposes, even though they are no longer charitable, as an alternative to amending the purposes so as to render them exclusively charitable. This does not mean, however, that funds acquired while the body was still a charity should become applicable for charitable purposes.

In my view, a fair solution would be to subject the pre-existing funds to a compulsory scheme (ie on the Commission's initiative if not an exempt charity, on the Attorney-General's application if exempt) if the trustees do not take steps to effect constitutional change within the prescribed period. The trustees would be able to retain as non-charitable assets all property and funds acquired after the change of status, i.e. after the relevant change in the law in case of exempt and unregistered charities (including those that should have been registered) and after removal from the register in the case of registered charities. This is based on what happens now when a corporate charity adopts non-charitable objects: see s 64(1) of the 1993 Act.

Application

Of course it is impossible to judge precisely how a reform of this nature would work, or foresee all the possible difficulties which would be thrown up for those administering the system. Generally, however, it seems to me that now is an opportune time for a reform of this nature. The Charity Commission in their consultations on the Review of the Register have stressed in almost every paper the need to show public benefit (originally paraphrased as 'social value'), and their practice in assessing application for registration is to place very great importance on this feature when examining (as they so often do) the existing and proposed activities of the applicant body. It is therefore likely that if such a reform were carried out the Charity Commission would not undermine it by continuing to apply the previous rules in relation to the relief of poverty and the advancement of religion.

Nevertheless, it is undeniably true that the staff of the Inland Revenue and the Commission are very likely to regard all the well-known and well-established religious bodies as charitable without seeking further information about the activities of particular local churches. The principal change is likely to be seen in relation to new or unusual religious bodies seeking registration or tax relief, and organisations where the advancement of religion is carried out in a novel manner or as a secondary purpose.

The risk of a reversion to the previous situation regarding charities for the relief of poverty ought not to arise if the legislation is explicit, as I have suggested. Nevertheless, the difference may not be very great if in practice the newly defined objects clauses include a preference for the original class of beneficiaries. It is conceivable that with a preference, and if the suggested tightening up of the exercise of a preference is adopted, the net result might be that about a fifth of the beneficiaries would be chosen without regard to the preference (by analogy with the equation of a 'substantial interest' in a company with control of a fifth of its voting power under Schedule 5, para 4 of the Charities Act 1993).

To sum up, the likely effect of the reform would not be revolutionary, but would strengthen current trends in charity policy and practice and help to harmonise charity law with the European Convention on Human Rights.

11 Old Square, Lincoln's Inn, London

3 April 2000

**National Council for
Voluntary Organisations**

Regent's Wharf

8 All Saint's Street

London N1 9RL

Tel: 020 7713 6161

Fax: 020 7713 6300

Minicom: 020 7278 1289

e-mail: ncvo@ncvo-vol.org.uk

Website: www.ncvo-vol.org.uk

Charity registration no. 225922

Designed by: Philip Pestell

Printed by: Latimer Trend & Co. Ltd