

THE REVIEW OF THE  
REGISTER OF CHARITIES

## **Maintenance of an Accurate Register of Charities**

*December 2012*



## The Charity Commission

The Charity Commission is the independent regulator of charities in England and Wales. Its aim is to provide the best possible regulation of charities in England and Wales in order to increase charities' effectiveness and public confidence and trust. Most charities must register with the Commission, although some special types of charity do not have to register. There are some 180,000 registered charities in England and Wales. In Scotland the framework is different, and the Commission does not regulate Scottish charities.

The Commission provides a wide range of advice and guidance to charities and their trustees, and can often help with problems. Registered charities with an annual income over £10,000 must provide annual information to the Commission. The Commission has wide powers to intervene in the affairs of a charity where things have gone wrong.

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## About this publication

1. This publication summarises the steps the Commission will take, and the reasons for those steps, when it becomes clear that the [Register of Charities](#) is not an accurate record of those institutions which have charitable status and which ought to be on the Register.
2. We have considered the maintenance of the Register as part of our Review of the Register of Charities<sup>1</sup>. We are very grateful to all those who contributed to the public consultation that has led to the formation of the policy explained in this publication. Detailed explanations of aspects of our policy can be found in the annexes.

## Why does the Register matter?

3. Registration with the Charity Commission is confirmation of charitable status. Certain categories of charity either cannot be, or are not required to be, registered:
  - charities known as “exempt charities”. These are exempt from our supervisory jurisdiction and cannot be registered with us;
  - charities which are excepted by order or regulations from any requirement to register;
  - charities which neither have permanent endowment nor have the use or occupation of any land and whose income from all sources does not in total amount to more than £5,000 a year; and
  - no charity is required to be registered in respect of any registered place of worship.
4. Apart from these categories registration provides institutions with acknowledgement of their charitable status. Section 37 of the Charities Act 2011 specifically provides that “an institution shall for all purposes other than rectification of the Register be conclusively presumed to be or to have been a charity at any time when it is or was on the Register of Charities”.
5. It is therefore fundamentally important that the Register is confined to those institutions currently entitled to an acknowledgement of their charitable status through registration.

## Maintaining an accurate Register

6. Our responsibility to maintain an accurate Register means that we need to give particular attention to the steps which need to be taken by us and the trustees of institutions on the Register to ensure that the property of charities continues to be used for charitable purposes.
7. We use our powers to respond to changes in social circumstances and values and to identify and recognise new charitable aims. Institutions with such new charitable aims will be entered on the Register, provided they satisfy all the other criteria for registration. At the same time there may be institutions on the Register which are not charitable.

## Removal of an institution from the Register

8. As a last resort, after all other avenues have been explored, we have a duty, under section 34(1) of the Charities Act 2011, to remove an institution from the Register which no longer appears to us to be a charity<sup>2</sup>. Of course we will not do this unless there are clear grounds for doing so. The legal basis for removing an institution from the Register is set out in [Annex A](#). This includes an explanation of our obligation to remove any charity which ceases to exist or does not operate.

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1 Our publication [RR1 - The Review of the Register of Charities](#) - explains the review processes in detail and also sets out the essential characteristics of a charity.

2 The discharge of our duty under this section of the Act is not dependent on the receipt of an external application requesting an institution's removal from the Register. Section 36(1) enables a person affected by the registration of a body as a charity to apply to us for it to be removed. Such applications may come from a person whose own financial or other interests may be prejudiced by the classification of a body as charitable.

9. If an institution is removed from the Register on the grounds that it no longer appears to us to be a charity we have a duty to consider:
  - whether, (notwithstanding that the institution itself is no longer a charity) charitable trusts continue to apply to property connected with the institution and, if so
  - what steps we should take to enforce those trusts

## Reviewing a decision to remove an institution from the Register

10. The decision to remove an institution from the Register on the grounds that it no longer appears to be a charity is not one the Commission would reach lightly. Institutions affected will have the opportunity to ask us to conduct an internal Decision Review of a preliminary decision to remove it from the Register.
11. Where we agree to conduct a Decision Review, the process will usually be conducted within a maximum of 3 months. The process is managed by Legal Services and co-ordinated by the Litigation and Review Team. The decision you receive following the decision review process is the Commission's final decision.
12. Alternatively, if you are dissatisfied with the decision we have made, you may be able to apply to the [First-tier Tribunal \(Charity\)](#). You do not have to go through our decision review process before making an application to the Tribunal.
13. The First-tier Tribunal (Charity) is an independent legal body which has the power to look again at some of the decisions made by the Commission and to quash, change or add to them. In some cases the Tribunal may direct us to take further action or rectify our decision.

## Mismanagement of charity property

14. The need to maintain an accurate Register (ie a Register which includes only institutions whose objects are charitable in law) must be distinguished from a situation where an institution's objects are clearly charitable, but where the trustees operate it in a way which is inconsistent with its charitable objects.
15. An institution may be identified as having activities which are not charitable, although its objects are charitable. If this is the case, we will offer advice on ways in which the organisation can continue to carry out its objects by operating in a purely charitable way. This could involve limiting or changing certain current activities or hiving them off to non-charitable subsidiaries.
16. In cases where the conduct of the trustees amounts to "misconduct" or "mismanagement" we will not normally remove an institution from the Register. Instead, we will use our remedial powers to ensure that the charity pursues its charitable objects. Our guidance [Complaints about Charities \(CC47\)](#) explains in general terms the powers we have to investigate charities and to put matters right. The exception will be in the very limited number of cases where the institution is demonstrated to be a sham. What we mean by "sham" is explained in [Annex B](#).

## Reasons for removal from the Register

### A. Mistaken Registration

17. An institution which was never charitable may have been placed on the Register in error. This could have occurred because:

- we were given false or mistaken information at the point of registration; or
  - because we made an error; or
  - because a widely held view of the law is revealed by a subsequent decision of the court to have been wrong; or
  - because the institution has, since registration, been shown to be a sham.
- 18.** Whatever the reason for a mistaken registration, once it is recognised, section 34(1) of the Charities Act 2011 places us under a duty to rectify the Register by removing the institution. Where we remove an institution from the Register because its inclusion was a mistake, the assets will never have been held for charitable purposes. This is so even if it was thought that they were at the time of registration. Removing the institution from the Register corrects the mistake.
- 19.** The assets of an institution which has never legally been a charity will, on removal from the Register, remain with that institution<sup>3</sup>. The assets will not be automatically available for other charitable purposes. We appreciate that this approach may leave the institution with the benefit of tax reliefs and donations which it has obtained on the basis of a now mistaken understanding that it was a charity, when it was actually on the Register. [Annex C](#) sets out our reasons and legal arguments for reaching this view.
- 20.** The explanation above applies to assets which belong to an institution which was never a charity but which was mistakenly registered as one. It is, of course, perfectly possible for a gift to be made on trust for special charitable purposes (ie on special trusts) in connection with an institution which has itself been mistakenly registered as a charity.
- 21.** Where the institution is a company, the institution itself is likely to be a trustee of those assets: if the institution is not a company, then its trustees will be the trustees of the special trust. The trusts will be registerable and enforceable as charity trusts in the usual way, despite the removal of the institution itself from the Register.
- 22.** It is the intention of the donor, express or implied, which is important when deciding what the special trusts are. The objects of the institution with which the special trusts are connected are not relevant.

## **B. Objects no longer charitable as a result of a change in social circumstances**

- 23.** An institution may have been correctly placed on the Register but because of a change in social circumstances and values may seem to us possibly to be no longer charitable - see Annex D. We may look into an institution's entitlement to remain on the Register in a number of circumstances - for example, as a consequence of the Review of the Register process<sup>4</sup> or as a result of our consideration of a current application for registration.
- 24.** Prior to the circumstances actually arising, we cannot, and indeed ought not to, predict which purposes will cease to be charitable because of a change in social circumstances. What we can say is that any change in the status of a particular purpose will be fully discussed with the institutions concerned. We will give as much advance information as possible to any institution which appears to us to be no longer charitable because of a change in social circumstances and values.
- 25.** In such circumstances, the first step will be for us to consult the trustees and for the trustees to consider, with us, whether all of the objects of the charity are indeed no longer charitable.

<sup>3</sup> Subject to any adverse claims eg from donors.

<sup>4</sup> The Review of the Register process is a continuous one, explained in our publication [RR1](#).

26. If the institution has more than one object, and where at least one of the objects remains charitable (even though the other object(s) are no longer considered charitable) the trustees will be legally bound to apply the institution's property only for the object(s) that remain charitable<sup>5</sup>. In such instances, we would normally expect trustees to make appropriate arrangements to remove the non-charitable object(s) from the governing document of the charity.
27. If, however, it appears to us that an institution is in fact no longer a charity the steps to be taken will vary, depending upon whether its property is held on trust, or is held beneficially by a company in its corporate capacity. The distinction between corporate property which is beneficially owned by a company and property which is held on trust, whether by a company or by any other trustees, is important.
28. Any property held on charitable trust is irrevocably dedicated to charity<sup>6</sup> (ie must always be used for charitable purposes - [see paragraph 33](#)). This is the case regardless of whether the trusts have been:
  - expressly declared by a donor; or
  - implied on the basis of indications that it was the donor's intention to create a trust; or
  - imposed by section 198 of the Charities Act 2011, when a charitable company changes its constitution so as to cease to be a charity; or
  - otherwise imposed by law, on the basis that it would be inequitable for the legal owner of the property in question to assert the beneficial ownership.
29. However, property which is owned by a company beneficially (ie for its general purposes, rather than on trust) is applicable for those purposes whether or not they are legally charitable.

### **I. Consequences for property held on trust for an institution which is removed from the Register because it is no longer charitable**

30. Property is held on trust where the charitable institution is a trust, an unincorporated association, or a body incorporated by Royal Charter. Property is also held on charitable trust by a company where there is evidence that the property is given to the company on trust for its charitable purposes rather than as a contribution to its corporate property or where a trust has been imposed by section 198 of the Charities Act 2011. A company that holds permanent endowment will always hold this as trust property, rather than as part of its corporate property.
  - (i) Property held on trust
31. The first step in all cases where property is held on trust is for the trustees to consider whether they wish to alter the terms of their governing document to have objects which are exclusively charitable.
32. The governing documents of some institutions contain powers that allow the trustees (or members of the charity) to alter the objects themselves. Where the governing document contains such powers these can be used to alter its terms to contain objects which are exclusively charitable. We may be willing to give such powers to institutions which do not have them. In some cases the powers in section 275 of the Charities Act 2011 may be used by trustees for this purpose.
33. In law, assets held on a charitable trust are irrevocably dedicated to charitable purposes. So, if trustees are unable or unwilling themselves to arrange for changes to their charity's objects so that these are exclusively charitable, then they must apply to us to make a cy-près scheme directing that the assets held on trust are used for other charitable purposes as near as possible to the original purposes of the institution. We can help trustees in making such an application. [Annex D](#) sets out the legal authority for this approach.

<sup>5</sup> Subject to the addition of other charitable objects by cy-près scheme or otherwise. The position may be different if the charity is a company: in our view, the members of the company would have to pass a special resolution to delete the non-charitable object from its memorandum of association, for that object to cease to be an object of the company. If they declined to do so, the consequences would be as described in [paragraphs 38 and 39](#) and [Annex E](#).

<sup>6</sup> Unless the duration of the trust is explicitly limited, eg as in the case of a time charity.

34. Our publication *Changing your Charity's Governing Document (CC36)*, provides information on the scheme making process. The terms of the cy-près scheme will determine what will happen to the institution. Where a scheme is made which directs the property to be used for new charitable objects, the trust will remain on the Register. If the scheme directs the property to be held by another charitable institution the original institution will be removed from the Register.
- (ii) Trust property held for an unincorporated association or a body incorporated by Royal Charter
35. In the case of an unincorporated association or a body incorporated by Royal Charter, property is held on trust for the purposes of the institution. If those purposes are no longer charitable and if the institution does not obtain a change to its constitution to have exclusively charitable purposes, the trustees responsible for managing the property will be under a duty to apply to us for a scheme to provide charitable purposes for which the property can be used. After a scheme has been made the trustees will hold the property for new charitable purposes and that trust will be registerable in the normal way.
36. It is our normal practice to register the institution itself, rather than the trust of its property. The effect of the legal principle described in [paragraph 33](#) will be that the institution is divorced from the trust property previously held in connection with it if the institution does not change its constitution to have exclusively charitable purposes. In these circumstances we will be obliged to remove the original institution from the Register as no longer appearing to us to be a charity.
37. The effect of section 34(1) of the 2011 Act, when read in the light of section 37(1) (conclusive presumption of charitable status whilst on the Register) and section 62(1)(e)(ii) (cy-près occasion on institution ceasing in law to be charitable) means that such an institution will not lose its charitable status until it is actually removed from the Register.

## **II. Consequences for property held by a charitable company which is removed from the Register because it is no longer charitable**

38. The corporate property of a charitable company is not in general held on trust. Informed by the results of the public consultation, we have arrived at a tentative conclusion on the consequences for property held by a charitable company when the objects of the company no longer appear to be exclusively charitable because of a change in social circumstances and values. The conclusion is tentative because as yet, neither the Courts nor ourselves have had a case in which there has been a need to reach a decision on the issues relevant in these circumstances. There may, of course, never be such a case.
39. Our conclusion, which is explained in detail at [Annex E](#), leans in favour of the imposition of a constructive charitable trust on the beneficially owned corporate property of a company which finds itself in this position. If that is right, the consequences for the corporate property of the company are similar to those described in [paragraphs 30 to 34](#).

## **C. Objects no longer charitable as a result of a constitutional change**

40. An institution may have been correctly placed on the Register but may later have made valid constitutional changes which mean that it is no longer established for exclusively charitable purposes.
41. The steps to be taken by the trustees and by us in these circumstances are similar to those described in [paragraphs 30 to 37](#) above. A statutory charitable trust is imposed on the corporate property of a company<sup>7</sup> in these circumstances<sup>8</sup> so the discussion in [paragraphs 38 and 39](#) is not relevant here.

<sup>7</sup> other than its capital

<sup>8</sup> now by section 198(1) of the 2011 Act.



## Annex A Removal of institutions from the Register

**A1.** Section 29(1) of the Charities Act 2011 provides:

“The Commissioners shall continue to keep a Register of charities, which shall be kept by them in such manner as they think fit.”

This sets out our specific obligation to keep a Register of institutions that are charities.

**A2.** Section 37(1) of the 2011 Act provides:

“An institution shall for all purposes other than rectification of the Register be conclusively presumed to be or to have been a charity at any time when it is or was on the Register of charities.”

This makes clear that the Register should not contain institutions that are not charities.

**A3.** Section 34(1) of the Charities Act 2011 provides:

“The Commission must remove from the register (a) any institution which it no longer considers is a charity, and (b) any charity which has ceased to exist or does not operate.”

**A4.** This section requires us to remove an institution which - for whatever reason - no longer appears to us to be charitable. Five types of institution must be removed from the Register under this duty:

1. Institutions which were, at the time of registration, correctly considered by us to be charitable but which have since made valid constitutional changes which prevent the institutions from continuing to appear to us to be established for exclusively charitable purposes. In this circumstance, the loss of charitable status occurs as from the date of the changes.
2. Institutions which were originally charitable, but which, without any constitutional change, no longer appear to us to be charities because of changes in the values of society which have led to a different perception of the nature and effect of the institutions' purposes. In this circumstance, the loss of charitable status occurs as from the date the institution is removed from the Register.
3. Institutions which were never charitable, but which were mistakenly regarded as charitable at the time of registration, where the mistake has since been recognised.
4. Institutions which have ceased to exist: for example, a company or unincorporated association which winds up, or a trust which is terminated, in pursuance of appropriate powers.
5. Institutions which do not operate, for example an institution which carries out no activities and is dormant.

## Annex B Sham charities

- B1.** On some rare occasions the Commission will have to consider the possibility that a body which has been registered as a charity is, in fact, a sham.
- B2.** The court will decline to enforce a trust if this would involve it in lending its assistance to the furtherance of an ulterior anti-social purpose on the part of the promoters of the trust. But the courts' response to sham trusts has been flexible. Treating the trust as unenforceable has not been the only solution adopted by the courts to ensure that they do not assist in the misuse of trusts.
- B3.** There does not appear to be any decided case in which a court in England and Wales has come to the conclusion that an institution formed as a charity is in fact a sham. But the courts have recognised the need to be aware of sham documents in the charity context. In *Re McDougall* [1957] 1 WLR 321 the judge was faced with a trust for charitable purposes expressed in unambiguously plain language and was not prepared to construe the trust as one for a political purpose because the trustees were to be members of a political party.
- B4.** In that case the judge noted that no one had suggested that the governing document of the trust was 'a sham deed to hide the real purpose'. However, the judge clearly contemplated, as a legal possibility, that, on different evidence, he would have had to reach a decision which did not involve the court assisting an institution formed as a charity to achieve a non-charitable purpose.
- B5.** If a purportedly charitable trust is unenforceable, an institution established for charitable purposes does not exist<sup>9</sup>. An institution which has been registered as a charity and which is subsequently shown to be a sham will be removed from the Register on the basis that the original registration was a mistake.
- B6.** In some cases evidence has become available to the Commission that the governing document of an institution which has been registered as a charity is a sham deed to hide the real objects of the institution. In some cases those real purposes are clearly not only non-charitable, but also immoral, fraudulent, dishonest or otherwise contrary to public policy. In this context "contrary to public policy" can include exploiting charitable status for commercial purposes and undertaking political propaganda.
- B7.** On occasion we have had to consider the steps that should be taken to ensure that the recognition of such an institution as a charity does not assist it to further the underlying non-charitable purposes. Regarding the trust as unenforceable means that the institution must be removed from the Register - [see paragraph B5](#) - but in some circumstances it may be appropriate to first give the institution the opportunity to terminate the activities which are considered to be non-charitable.
- B8.** A conclusion that an institution registered as a charity is a sham is not one which the Commission would reach lightly. The distinction between a sham charity and a genuine charity which is being abused by those managing it has to be kept firmly in mind. It is not appropriate to treat a genuine charity which is being abused by those managing it in the same way as we would treat a sham charity. We have a statutory responsibility to check abuses in charities, and we discharge this duty through the exercise of our monitoring, advisory, and supervisory functions. We would be failing in our responsibility if we were to treat unauthorised non-charitable activity as conclusive evidence that the institution is not a genuine charity but a sham.
- B9.** Any person who knowingly supplies us with false or misleading information so as to obtain the registration of an institution which is subsequently shown to be a sham, may be committing an offence - section 60(1) of the Charities Act 2011.

<sup>9</sup> That is, an institution subject to the control of the High Court in the exercise of the Court's jurisdiction with respect to charities – Section 1(1) Charities Act 2011.

## Annex C Charities mistakenly registered

- C1.** In our view, the registration of an institution which later appears to us never to have been a charity (we made an error, or we were supplied with false or mistaken information, or because a widely held view of the law is shown by a subsequent court decision to have been wrong, or because the institution has, since registration, been shown to be a sham) is an act outside our powers.
- C2.** This is because our duty under section 29(2) of the 2011 Act is “to enter on the Register every charity” (unless excepted from registration) and no other institution. The relevant principle<sup>10</sup> suggests that the registration of an institution which was not, at the time of registration, legally charitable, has some legal effect only until such time as the mistake has been corrected, for example by removal of the institution from the Register<sup>11</sup>.
- C3.** After removal, no legal consequences follow from the original mistaken decision to register. Specifically the institution is treated as if it had never been on the Register, and so the conclusive presumption of charitable status in section 37(1), at any time “when it was on the Register” can have no continuing application to it. An example of an institution entered on the Register by mistake is one which was registered in reliance on a judicial case later held to be wrongly decided<sup>12</sup>.
- C4.** Removal from the Register is not conclusive that the institution is not a charity. It simply means that the institution no longer appears to us to be a charity. But, in our view, where a charity has been removed from the Register, and its original registration was a mistake, property and status issues relevant to that institution which arise after removal will be legally decided without reference to the fact that it was once registered as a charity.
- C5.** This means that the property of the institution which has been removed from the Register on the basis that it was never a charity will not be regarded as being irrevocably dedicated to charitable purposes. Such property may include the benefit of any tax reliefs and donations which it has obtained on the basis of a mistaken understanding that it was a charity, during the period when it was actually on the Register.
- C6.** It is possible that the Revenue Departments will, in certain circumstances, have and wish to enforce statutory and/or restitutionary claims against the institution for the recovery of reliefs which it has obtained on the basis of a mistaken understanding that it was a charity. Donors may also have restitutionary claims in respect of gifts which they have made on the basis of a similar misunderstanding. But these are matters on which the Commission cannot offer detailed advice: the premise is that the property of the institution is not held for charitable purposes.
- C7.** If this analysis (that no legal consequences follow from the original mistaken decision to register) is not correct, the removal decision would only have a prospective effect ie only from the point at which removal takes place. This would give rise to two difficulties.
  - The first is that the presumption that assets held on a charitable trust are irrevocably dedicated to charity may then apply to the institution’s assets and the assets would have to be applied *cy-près*. This would amount in effect, where the institution was never a charity, to an enforced gift of its assets to charity.
  - The second is that there can be no satisfactory basis for deciding for which charitable purposes that enforced gift should be applied. As the institution was never legally a charity, there would be no starting point for determining what charitable purposes would be *cy-près*.

<sup>10</sup> The principle of “retrospective nullity of the ultra vires acts of public authorities”.

<sup>11</sup> See for example Lewis, “Judicial remedies in Public Law”, chapter 5 (1<sup>st</sup> Edition).

<sup>12</sup> For example, had the current regime of registering charities existed in 1895 (which it did not), it is possible that an anti-vivisection society could have been registered in reliance on the judgement of the High Court in *Re Foveaux* [1895] 2 Ch 501. That judgement was held wrongly decided in 1948 by the House of Lords in *National Anti-Vivisection Society v IRC* [1948] AC 31. The society would have been removed from the hypothetical register in 1948 because it was mistakenly placed on it.

## Annex D Application of assets cy-près

**D1.** The circumstances in which the property of charities should be applied cy-près are set out in section 62(1) of the Charities Act 2011. Section 62(1)(e)(ii) provides that the purposes of a charitable gift can be altered to allow the property given to be applied cy-près:

“Where the original purposes, in whole or in part, have, since they were laid down, -

(i) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable;”

**D2.** This section of the Act covers the circumstances where an institution has ceased to be charitable either because it has changed its constitution to have non-charitable purposes<sup>13</sup> or because its purposes are no longer considered in law to be charitable because of a change in social circumstances or values<sup>14</sup>.

**D3.** The duty of trustees to take positive action to apply their property cy-près where their institution had ceased in law to be charitable was originally declared by Lord Simonds in **National Anti-Vivisection Society v IRC [1948] AC 31**, 74 where he said:

“If by a change in social habits and needs, or, it may be, by a change in the law the purposes of an established charity becomes superfluous or even illegal, or if with increasing knowledge it appears that a purpose once thought beneficial is truly detrimental to the community, it is the duty of trustees of an established charity to apply to the Court or in suitable cases to the Charity Commissioners ... and ask that a cy-près scheme may be established.”

**D4.** The duty of trustees to apply for a cy-près scheme was placed in statutory form in what is now section 61 of the Charities Act 2011 which provides:

“It is hereby declared that a trust for charitable purposes places a trustee under a duty, where the case permits and requires the property or some part of it to be applied cy-près, to secure its effective use for charity by taking steps to enable it to be so applied.”

**D5.** The law stresses the importance of applying property cy-près in relevant circumstances by providing the Commissioners with powers to make a scheme, even if the trustees do not willingly apply for a scheme to be made.

<sup>13</sup> IRC v. Yorkshire Agricultural Society [1928] 1 KB 611, 633.

<sup>14</sup> National Anti-Vivisection Society v. IRC [1948] AC 31,74.

## Annex E Property held by charitable companies

- E1.** How should the corporate property of a company be treated when the objects which are declared in its memorandum of association no longer appear to be charitable because of a change in social circumstances and values? Article 1 of the First Protocol of the European Convention on Human Rights which concerns the protection of property does not provide any guidance on this as it would fall within the State's "margin of appreciation".
- E2.** In our view the objects of the company, declared in its memorandum of association, are unaffected by the change in the character of the company, unless and until those objects are altered in accordance with the provisions of the Companies Act 1985.
- E3.** The possibility that the objects of a charitable company (declared in its memorandum of association) which found itself in this position would be automatically transformed into exclusively charitable purposes by operation of law was considered in the public consultation paper, but was not supported by respondents. We maintain the view that changes to the objects of a company by the operation of law is incompatible with company law. Section 2(1)(c) Companies Act 1985 says that the memorandum of association must state the objects of the company, which, of course, it may not do if the objects are open to change by operation of law.
- E4.** One of the intentions of the Companies Act 1985 Act is to ensure that there is an adequate public record of the current objects of companies. This is accomplished through the requirement that companies give particulars to the Registrar of Companies of any changes they make to their objects by resolution. The provisions of this Act do not appear to contemplate the possibility of an objects change by operation of law: indeed, in view of the metaphysical nature of any such change, it is difficult to see how any provision about giving notice to the Registrar of Companies of any such change could be workable.
- E5.** Therefore the real question for consideration is whether, when the objects of a company which are declared in its memorandum of association no longer appear to be charitable because of a change in social circumstances and values, a trust for charitable purposes is attached to the property which is in the company's beneficial ownership. If there is no such trust, that property will continue to be applicable for the objects of the company, despite the fact that their legal effect is no longer charitable.
- E6.** In **James v Williams (1999) 3 All ER 309** Aldous LJ said  
"As a general rule a constructive trust attaches by law to property which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property."
- E7.** If this is such a case then the corporate property of a company<sup>15</sup> whose objects once were, but no longer seem to be, charitable will continue to be applicable for charitable purposes, and should (unless the company chooses to adopt objects which continue to be charitable) be applied *cy-près*. This would, of course, make the treatment of the corporate property of charitable companies consistent with the treatment of other types of charity property.
- E8.** The argument that the corporate property of a charitable company is irrevocably dedicated to charitable purposes is based on judicial statements in two relatively recent cases. In **Liverpool and District Hospital for Diseases of the Heart v Attorney-General [1981] 1 Ch 193**, 214 Slade J said:

<sup>15</sup> other than its subscribed or guaranteed capital. It is difficult to see how such a trust could be imposed upon the subscribed or guaranteed capital of a company without conflicting with fundamental requirements of company law. Indeed, such capital is excluded from the scope of the statutory trust which is imposed generally by section 198(1) Charities Act 2011 on the corporate property of a company which loses charitable status as the result of constitutional change.

“In the present case, as I have indicated, I do not think that the assets of the Association were held by them subject to a trust in the strict sense. Nevertheless, under the terms of its constitution, they were at all times held subject to a legally binding obligation, which bound it to apply them for exclusively charitable purposes. It can therefore further be said that the position of the Association in relation to its assets has at all times been analogous to that of a trustee for charitable purposes. This in my judgment suffices to give rise to the jurisdiction of the Court to order a cy-près scheme in the events which have happened.”

- E9.** In coming to the conclusion that the assets of a charitable company on its winding up should be applied cy-près, Slade J referred to and relied on the judgment of Buckley J in **Re Vernon’s Will Trusts [1972] Ch 300** where he said:

“Whether and how far it would be right to regard the funds of the incorporated Guild as subject to a charitable trust, I do not pause to consider beyond pointing out that any assets which it took over from the unincorporated Guild would appear to have been subject to such a trust. Trust or no trust, however, it is true to say that the assets of the incorporated Guild were all effectually dedicated to charity. In no circumstances - at least without the intervention of Parliament - could any of those funds have been used otherwise than for charitable purposes the kind for which the Guild existed so long as those purposes remained practicable. Even if those purposes cease to be practical, the charity would not cease to exist, although its funds would be applied cy-près. Such a charity, considered as a charity and apart from the mechanism provided for the time being and from time to time for holding its property and managing its affairs, could never cease to exist except by exhaustion of all its assets and cessation of its activities. A change merely in its mechanical aspect could not involve the charity ceasing to exist. The principle of the decision in **Re Faraker [1912] 2 Ch 488** and **In re Lucas [1948] Ch 424** is, in my judgment, equally applicable to an incorporated charity of this kind as to a charity constituted by means of a trust. In such cases the law regards the charity, an abstract conception distinct from the institutional mechanism provided for holding and administering the fund of the charity.”

- E10.** It now seems reasonably clear that the corporate property of a charitable company, like that of any other company, is not generally held on a trust. In **Rabin v Gerson Berger Association Limited** (1987 - not reported on this point) Ralph Gibson LJ said:-

“The principle of law, as I understand it, is that a company for exclusively charitable purposes does not, by reason only of that attribute, hold all its property on trust; it may own property beneficially which, by reason of its constitution, it must apply to its charitable purposes...”

- E11.** Although neither of the judges in the **Liverpool Hospital** and **Vernon** cases articulated the point in this way, it would seem that the only conceptual basis for depriving a company of the beneficial ownership of its corporate property (so as to ensure that the property is irrevocably dedicated to charitable purposes, notwithstanding the fact that the objects of the company are no longer regarded as charitable) is by the imposition of a trust.
- E12.** In the public consultation paper we referred to a number of concerns about the view of the law that a trust was imposed on the corporate property of a company which found itself in these circumstances. These concerns were not, however, shared by the respondents; the consensus was that a charitable trust **would** be imposed by the Court so as to ensure that the property remained applicable for charitable purposes. The general feeling was that it **would** be inequitable for a non-charitable company to assert the beneficial ownership of property which was presumed to have accumulated on the strength of the former, correct, recognition of the company as a charity.
- E13.** The underlying question for the Commission in all this is whether or not, when a company ceases to be charitable in this way, the Commission should assert the existence of, and take any necessary steps to enforce, a trust over the corporate property of the company.

- E14.** There is no definitive legal answer to this question at present. The question has not, in practice, arisen, and may, of course, never arise.
- E15.** If a trust is imposed on the corporate property of a company which has ceased to be charitable as the result of changed social circumstances and values, the Commission would have a duty to enforce that trust, subject, obviously, to the practicalities of the situation, and so to ensure that the property of the company remained applicable for charitable purposes.
- E16.** But it would be unrealistic to imagine that a company which found itself in this position would never challenge the claim that a trust had been imposed by law on its corporate property. A company which had been formed for the furtherance of a specific purpose the social value of which was generally considered to have evaporated might still be anxious to continue pursuing that purpose. The company might be in a position to:
- argue that its property had accumulated less on the strength of its previous recognition as a charity and more on the enthusiasm of its supporters for the particular purpose with which the company is concerned; and
  - dispute the contention that “it would be inequitable to allow it to assert full beneficial ownership of its corporate property”.
- E17.** The extent to which the Commission asserts and seeks to enforce a trust in these circumstances will, plainly, have to depend on the legal advice which it receives if and when they ever arise.





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