THE CHARITIES ACT (NORTHERN IRELAND) 2008 – CAUSE FOR CONCERN?

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Abstract

The Charities Act (Northern Ireland) 2008 brought charities law in Northern Ireland into line with England, Wales and Scotland by requiring all charities to register and establishing a Charities Commission. In line with the rest of the United Kingdom, the Act also reversed the presumption of public benefit, requiring all charities to prove a benefit to the public. When the Charity Commission published its draft guidance on public benefit an anomaly was discovered and the legislation was referred back to the Department of Social Development. At the same time, religious leaders expressed discontent at the removal of the presumption of public benefit fearing firstly, that some religious charities would be denied registration as charities depending on the interpretation given to public benefit, and, secondly, that they would be subject to surveillance by the Charity Commission. This article assesses the current situation, concluding that while religious charities are in a state of flux as regards public benefit requirements, a number of provisions in the Act have the potential of placating the religious communities in the face of concern arising as a result of the actions of the English Charity Commission and its guidance.

1. Introduction

Prior to the Charities Act (Northern Ireland) 2008 charity law was governed by the Charities Act (Northern Ireland) 1964 and the Charities (Northern Ireland) Order 1987. Unlike the Charities Act 1960 for England and Wales which set up a register of charities[2] that was to be established and maintained by the Charity

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2 Charities Act 1960, s 4(1), repealed by Charities Act 1993, s 98(2), Schedule 7.

Commissioners,[3] no such register existed in Northern Ireland's (NI) legislation.[4] In addition, there was no Charity Commission for NI; responsibility for charity law regulation largely lying instead with the Ministry of Finance.[5] Nonetheless, its powers were relatively limited in comparison with its counterpart in England and Wales, relating to giving opinions in doubtful cases, examining charity records, appointing new trustees where necessary and devising cy-près schemes where warranted. The 2008 Act rectifies this situation, bringing charity law regulation into line with the rest of the United Kingdom (UK). A Charity Commission for Northern Ireland (CCNI) is established with wide-ranging powers,[6] including the right to determine whether institutions are charities, the maintenance of a register of charities, the investigation of alleged misconduct on the part of charities and any necessary remedial action, and generally the encouraging of better administration of charities. The Act also lists a number of objectives of the Commission which work towards increasing public confidence in charities and accountability of charities to their donors, beneficiaries and the general public.[7] In part this is to be achieved by requiring registered charities to produce annual reports and accounts on their activities. An independent Charity Tribunal is also established[8] with jurisdiction to hear appeals on decisions of the Charity Commission or by reference from the Commission.

While the Charities Act (NI) 2008 reformed charities law in NI with the aim of making it more transparent and accountable, it has caused considerable concern among charities as a result of the registration requirement[9] and the fact they are now open to scrutiny by the CCNI. However, their concerns with the Act are not limited to these and relate also to the changes to the substantive law that the Act has made. The Act requires that in order for a purpose to be considered charitable it must fall within the definition of charity found in section 2(2) and be for the public benefit. Section 3 contains the 'public benefit test' and states that 'it is not to be presumed that a purpose of a particular description is for the public benefit.' As a result of this section charities will be required to demonstrate that they are,

firstly, beneficial and, secondly, beneficial to a sufficient section of the public. This is in contrast to the currently applicable law where there is a rebuttable presumption of benefit and the requirement of demonstrating a benefit to a sufficient section of the public only comes into play where the facts warranted it. According to section 4

3 Now the Charity Commission.

4 Charities and Trustee Investment (Scotland) Act 2005, s 3(1) required the establishment of a register of charities by the Office of the Scottish Charities Regulator.

5 Following devolution the Department of Social Development took responsibility for charity law regulation in 1999: The Departments (NI) Order 1999.

6 Charities Act (Northern Ireland) 2008, ss 6-11.

7 Ibid, s 7(2).

8 Ibid, ss 12-15.

9 Unlike England and Wales, all charities are required to register.

of the Act, the CCNI must issue guidance on the public benefit test and must carry out any public or other consultation that it considers appropriate on the test. It was following this public consultation in 2009 that an anomaly was discovered in the wording of the public benefit test and since then the law has been in a state of uncertainty, further complicated by religious leaders taking issue with the removal of the presumption of public benefit for charities with religious purposes.

Section Two describes the problems surrounding the Charities Act (NI), namely the discovery of the anomaly and the concerns of the religious community and provides an update on the current state of play. Section Three considers the historical context of the public benefit test, assessing its application in the neighbouring jurisdictions of Ireland, Scotland and England and Wales. Section Four discusses the Guidance of the Charity Commissions in England and Scotland, highlighting the problems the CCNI may face in drafting its new Guidance. Section Five debunks the belief of religious leaders that religious charities are harmed in some way by the introduction of the Act and that the CCNI has too much power because of the inclusion of designated religious charities in sections 165 and 166 of the Act. Section Six concludes that religious charities are still in a state of flux until the CCNI issues new draft Guidance following the Charities (Amendment) Bill becoming law. However, it emphasises that while there have been concerns raised in relation to the Guidance from England and Scotland provisions in the NI Act Charities Act that are not in the English legislation could potentially work to alleviate all concerns of the religious communities.

2. The Situation in Northern Ireland

i) Discovery of Legal Uncertainty

In line with the requirement under section 4, the CCNI issued its draft guidance on public benefit for public consultation and it was at this point that confusion arose. The Charities Act (NI) attempted to marry elements of both the Scottish and English[10] public benefits requirements but the two were not compatible. Section 2(1)(b) borrows from the English legislation[11] by defining a charitable *purpose* as one which is for the public benefit. The English Act contains no statutory test of public benefit bar the statement that 'any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law

10 Reference to the English Charity Act or English charity law includes Welsh law in the area as the two are a single jurisdiction for charities law.

11 Charities Act 2011. The Charities Act 2011 came into effect in March 2012 and consolidates four other Acts to make the law easier to understand: the Charities Acts 1992, 2003 and 2006 and the Recreational Charities Act 1958.

relating to charities in England and Wales', in other words the case law built up by the courts. In contrast section 3 of the Charities Act (NI) adopts the approach of section 8 of the Scottish legislation in instructing the CCNI when assessing any public benefit of an organisation to consider:

> (a) how any
>
> (i) benefit gained or likely to be gained by members of the institution or any other persons (other than as members of the public), and
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> (ii) detriment incurred or likely to be incurred by the public, in consequence of the institution *exercising*[12] its functions compares with the benefit gained or likely to be gained by the public in that consequence, and
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> (b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.

As a result, the definition of public benefit refers to the English purposes test, but the statutory test is equivalent to the Scottish activities test;[13] a hybrid that is allegedly unworkable. When the responses to the CCNI's draft guidance on public benefit highlighted this anomaly and contradiction in terms, it referred the issue to the Department for Social Development (DSD) for its consideration. At no point in the legislative passage of the Act had the public benefit test been raised as a potential problem; instead submissions to the Calls for Evidence were more concerned with how smaller charities would be affected by the accounting requirements[14] and the lack of obligation on the part of CCNI to consult on any major revision to the public benefit guidance than the actual substance of the test itself.

ii) Religious Outcry

At the same time, concern was raised as to the removal of the presumption of public benefit from religious charities; religious leaders feared that having to actively demonstrate public benefit would have a detrimental impact on their charities. Initially it appeared that religious charities in general supported the proposal of a generally applicable public benefit test with the Evangelical Alliance[15] voicing their

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12 Emphasis added.

13 The only difference being the use of the word 'disbenefit' in the Scottish Act and 'detriment' in the Northern Ireland Act.

14 Section 64(3) of the NI Act permits those charities with a gross income of less than £100,000 in any financial year to prepare a receipts and payments account and a statement of assets and liabilities instead of a full statement of accounts.

15 Evangelical Alliance is a Christian organisation founded in 1846 with the motto 'Uniting to change society'. The Northern Ireland office was established in 1987 and aims to 'offer a

support in principle of the concept, believing that religious organisations deserved no special exemption on the premise that 'Christian groups by definition should not fear such a test given the societal focus of their faith.'[16] However, with the dissemination of the draft guidance on the public benefit test, religious organisations have largely acted as one in opposing the removal of the presumption and demonstration of the test, highlighted by the solicitor-advocate Sam Webster for the Christian Institute[17] who stated:[18]

> We believe that churches and Christian charities could be put at risk of deregistration over matters which are wholly unjust. This was never the intention of the Assembly. We raised our concerns with the Commission during the consultation process but they have not been adequately addressed.

Discontent has arisen because of the definition accorded to 'benefit' and 'detriment' and the issue of ensuring the requirement that a sufficient section of the public must be able to benefit. The Christian Institute stated that unless the concepts of 'detriment' and 'harm' are clearly defined then religious charities could be victim to an increase in the number of vexatious complaints as 'complaints to the Commission are used as a campaign tactic by those opposed to particular religious charities.'[19] In addition, the CCNI proposed that 'detriment' should be interpreted to include increased friction between groups in society. Arguably, it is religious charities and religious groups that create the most friction in NI given the historic divisions and so using this as a potential benchmark for gauging 'detriment' has the potential of not only removing charitable status from religious groups but also stirring up relatively dormant tensions. Equally, it is not only religious charities that may feel the weight of this proposal; the Christian Institute identifies a number of activities that increase friction among groups with opposing opinions, from the British Pregnancy Advisory Services in their provision of abortion services, to the NSPCC's campaign to ban parental smacking of children. The Evangelical Alliance emphasised that any definition of 'benefit' should not be limited to tangible, discernible benefits, but should recognise, in line with the case law, the 'broader societal value and benefit in the purely spiritual aspects of faith which directly address the spiritual and moral dimensions to human life and existence.'[20] The Christian Institute also reiterated this point, highlighting

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prophetic and evangelical voice to those at Stormont and in the media'. See, further, http://www.eauk.org/northern-ireland/index.cfm?page_no=1.

16 Evangelical Alliance NI, *Briefing Paper: Charities Bill*, February 2008, section 6.

17 The Christian Institute is a nondenominational Christian charity committed to upholding the truths of the Bible. See, further, http://www.christian.org.uk.

18 The Christian Institute News, 8 April 2010.

19 Response of the Christian Institute, *Meeting the Charity Test – Demonstrating Public Benefit Draft Guidance for Consultation*, pp 12-13.

20 Evangelical Alliance NI, *Briefing Paper: Charities Bill*, February 2008, section 6.

that it was a concern of the Assembly Committee for Social Development that guidance from the CCNI should acknowledge the intangible, spiritual benefits that religious faith and charities bring about.[21]

However, of most concern to charities was how the Commission proposed to define 'public' and 'sufficient section of the public' in order to meet the overall criteria of public benefit. As the response of the Christian Institute explained:[22]

> All churches hold public acts of worship. Any member of the public can attend, but most churches will have rules about who can be a member, take the sacraments or be involved in leadership. In a sense these rules restrict some benefits.
>
> Church membership depends on the individual's beliefs being in conformity with the church's doctrine, and their behaviour conforming to the church's teachings. When someone applies to be a member of a church those in spiritual authority make an assessment.

The guidance recognises that 'It is reasonable for a charity which advances religion that provides a place of worship to restrict access to the followers or adherents of that religion, *provided that the definition of who can be a follower or adherent is sufficiently open*.'[23] Concerns were raised that the CCNI would attempt to 'adjudicate on the membership policies of churches and Christian organisations.'[24] It was not only debated in responses to the draft guidance, but also in the media, with Reverend William Park writing in an open letter to the Belfast Telegraph that 'churches must be free to admit into membership only those whose beliefs and behaviour are consistent with the Bible's teaching.'[25] If the CCNI decides to examine church membership closely then matters such as the status of homosexuals, divorcees and single parents may all come under scrutiny and raise potential equality issues as such people may act, or have acted, in such a way as to contravene the religion's teachings.

In addition, the CCNI stated in its guidance that it 'will take account of evidence from all sources, including evidence in the public domain and from members of the public or other organisations, about possible detriment from the activities of an

21 Response of the Christian Institute, *Meeting the Charity Test – Demonstrating Public Benefit Draft Guidance for Consultation*, p 5.

22 The Christian Institute News, 8 April 2010.

23 CCNI (2009), *Meeting the Charity Test – Demonstrating Public Benefit Draft Guidance for Consultation*, p 43.

24 Pastor Eric McComb, Superintendant of the Elim Church in Ireland, The Christian Institute News, 8 April 2010.

25 Belfast Telegraph, 7 June 2010.

applicant body or charity, or any other aspect of the charity test.'[26] While public opinion is important as it reflects the social and economic conditions of the time, a concept with which charity law has always grappled, religious charities are concerned that the guidance could amount to a 'popularity test'[27] that could shift favour away from churches. In this vein, the Christian Institute states that 'Religious beliefs are not primarily concerned with what is popular or current at the time, but with what is true. What is held to be true may well run counter to popular thinking.'[28] The CCNI, however, does not envisage public opinion as a 'final arbiter' and recognises that '[p]ublic opinion can be both deeply divided on an issue and liable to change, and charities may often be working in controversial areas or have activities which are not popular or well understood...'[29]

Finally, many charities feel that the Commission has accorded itself extensive powers and fails to make clear that the guidance it has issued is not a statement of law but simply guidance to aid trustees in carrying out their duties. Nigel Dodds MP MLA has said, '[t]he draft guidance is not a statement of law, but the Charity Commission needs to make this clear so that trustees and others involved in running charities are not misled as to the legal tests that apply to charitable bodies. There are serious concerns that the Commission may be exceeding its remit set out in the 2008 Charities Act.'[30] While these concerns are valid, they are perhaps being blown out of proportion given that the Charities Act contains appeals mechanisms; first to the CCNI itself and, second, to the independent Charity Tribunal.[31] However, it has to be acknowledged that while there is no fee or charge for appealing to the Tribunal, it will incur the necessary legal costs in case preparation and representation, which only the wealthier charities are likely to be able to access. In addition, as the Church of Ireland highlighted in its response to the draft Guidance, it 'squanders valuable resources necessary to advance the purpose of the charity in the first place'.[32]

iii) Legislative proceedings

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26 CCNI (2009), *Meeting the Charity Test – Demonstrating Public Benefit Draft Guidance for Consultation*, p 24.

27 Reverend Professor David McKay, Belfast Telegraph, 5 June 2010.

28 Response of the Christian Institute, *Meeting the Charity Test – Demonstrating Public Benefit Draft Guidance for Consultation*, p 24.

29 CCNI (2009), *Meeting the Charity Test – Demonstrating Public Benefit Draft Guidance for Consultation*, p 24

30 The Christian Institute News, 8 April 2010.

31 See Charities Act (Northern Ireland) 2008, Schedule 3 for the grounds on which appeal can be made.

32 www.ireland.anglican.org/index.php?do=information&id=193; last accessed 9 August 2012.

At the time the anomaly was discovered there was considerable debate as to whether to amend the Act or whether to leave it open to legal challenge. If it was decided, as it ultimately was, that the Act would be amended then the CCNI would be unable to start registering new charities until the amendment had been passed. Once the decision had been taken to amend the Act, the question was whether to adopt the English purposes approach or the Scottish activities test. It was stated that when the legislation was being drafted 'we wanted a robust public benefit test, and decided the Scottish test was more robust. For that reason, we included the Scottish provision about making sure charities provided or intended to provide public benefit, rather than just making sure their purposes were charitable.'[33] The then Minister for Social Development, Alex Attwood, advised the NI Assembly Committee for Social Development (CSD) that a legal uncertainty had been identified and instructed that the NI Charities Act should be amended in order to clarify the law on public benefit. In order to do so, accelerated passage of the amendment was requested and granted[34] so as to maintain the momentum of the CCNI in implementing the Act and allow it to exercise its full range of powers under the Act.[35]

33 Roy McGivern, Head of Charity Policy at the NI Department for Social Development, http://www.thirdsector.co.uk/news/1022200/ last accessed 23 November 2012.

34 Under the normal procedure there are 6 stages – introduction and first stage, second stage, committee stage, consideration stage, further consideration stage and final stage with a minimum interval of 5 working days between each. Accelerated passage removes the minimum 5 days' interval and also skips the committee stage. It means that a Bill can be passed in a minimum period of 10 days.

35 CSD, *Charities (Amendment) Bill: Accelerated Passage: Ministerial Briefing* (9 December 2010). It should be noted that since the anomaly has been discovered and pending the introduction of amendments to address it, the CCNI has continued to operate, but has been able to do very little.

Ultimately, amendment was to bring the NI Act into line with the English Act in leaving the specifics of the public benefit test to be determined by the CCNI. In considering why the English definition was preferred it has been commented that retaining the English definition was more 'straightforward because it would not necessitate further amendments to the act.'[36] Amending the Act in line with the Scottish test would have required the removal of references to existing charity law as an activities test would replace any case law by requiring the CCNI to act prescriptively in assessing each body's activities. Under the Scottish legislation, existing case law is purely of persuasive value with no binding effect. In contrast, adopting the English approach simply meant amending the public benefit test which 'would just mean that we could rely on case law in other jurisdictions, making our job an awful lot easier.'[37] However, this statement sits somewhat uneasily with the proposed amendment which specifically makes reference to the 'law relating to charities in NI.'[38] In addition, and as elaborated on below, there are certain areas of charity law that were decided in pre-partition Ireland that have never come before the courts in Northern Ireland and so questions can still be raised as to the direction that may be taken if the relevant issues do come before the courts.

In February 2011 the NI Executive considered the proposed amendment and decided to also reinstate the presumption of public benefit for religious charities only, against the advice of the Minister for Social Development, Alex Attwood, who expressed his view to the CSD:[39]

> The Executive are minded to go down the road of re-introducing the presumption of public benefit, certainly for one category of charity. I did not recommend that, because that is a material change to the legislation, and as such, and because it is contrary to the intention of the legislation, it requires a full consultation because it is, in my view, essentially new law.

Nevertheless, he was compelled to comply with the Executive's decision as a member of it and arranged for new legislation to be drafted incorporating this change. In March 2011, the Northern Ireland Council for Voluntary Action (NICVA)[40] wrote to Alex Attwood with its concerns on the reintroduction of the

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36 Roy McGivern, Head of Charity Policy at the NI Department for Social Development, http://www.thirdsector.co.uk/news/1047185/ last accessed 23 November 2012.

37 Mrs Frances McCandless, Chief Executive CCNI, Report on the Charities Bill NIA 11/11-15, Minutes of Evidence 13 September 2012, last accessed 26 November 2012.

38 Charities Bill (2012), s 3(4).

39 CSD, Ministerial Briefing: Draft Charities (Amendment) Bill (17 February 2011).

40 NICVA is a representative umbrella body for the voluntary and community sector in NI. It currently represents approximately 1,000 members comprising a cross-section of charities in NI and covering most, if not all, of the charitable purposes found in Charities Act (NI) 2008, s 2(2).

presumption of public benefit for religious charities. It stated that all charities should be treated equally and the reinstatement of the presumption of public benefit for religious charities would 'create an unfair advantage for these types of organisation. It would also undoubtedly create confusion for charities operating in Northern Ireland.'[41]

Of political concern was the potential use of accelerated passage as initially this had been granted to solve the legal uncertainty caused by attempting to marry provisions of the English and Scottish legislation, but a decision on this was subsequently deferred until the draft amendment was produced. However, because of the impending General Election in May 2011, the Assembly dissolved on 7th March 2011 before the Executive's request could be introduced. Following the General Election, a new Minister for Social Development, Nelson McCausland, was appointed. He was due to report on the intended course of action in September 2011 but in a briefing to the CSD on 20th October 2011, tabled three options as potential solutions. First, every charity would have to demonstrate public benefit as per the Charities Act (NI) 2008, but no public benefit test would be enshrined in the statute. Instead, as in England and Wales, the CCNI would determine whether a benefit to the public is present. Secondly, the presumption of public benefit would be restored for charities for the relief of poverty, the advancement of education or the advancement of religion. Finally, the presumption of public benefit would only be restored for those charities that advance religion.

It was only in February 2012 that a decision was reached to require every charity to demonstrate public benefit but not to have a public benefit test enshrined in the legislation. The draft Amendment Bill was introduced to the Assembly under the normal legislative passage on the 2nd of July 2012 before the summer recess. As of 20th November 2012 the Consideration Stage was completed. The public benefit clause essentially replicates that of England and, if enacted, will apply retrospectively. It states:

> 3(1) In this Act 'the public benefit requirement' means the requirement in section 2(1)(b) that a purpose falling within section 2(2) must be for the public benefit if it is to be a charitable purpose.
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> 2) In determining whether the public benefit requirement is satisfied in relation to any purpose falling within section 2(2), it is not to be presumed that a purpose of a particular description is for the public benefit.
>
> (3) In this Act any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in Northern Ireland.
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> (4) Subsection (3) is subject to subsection (2).

41 www.nicva.org/news/charity-law-reform. (11 March 2011), last accessed 12 July 2012.

While movement on the issue is welcome, it has to be asked whether in opting to follow the English approach and leaving public benefit to be determined entirely by the Commission and its interpretation of the term through existing case law, the draft Amendment Bill may solve a problem by introducing another problem as the draft Amendment Bill fails to address concerns relating to the Commission's powers and how public benefit will be interpreted for religious charities. The following section examines public benefit in relation to England and the problems that have arisen there. It then assesses the approaches taken in Scotland and Ireland to ascertain if the processes in those jurisdictions would be a better option to take for NI. It will be seen below in the discussion that debate has arisen in relation to the published guidance on public benefit in England: similar issues could also arise in NI.

3. The Public Benefit Test at Common Law

i) Overview

Given that all the jurisdictions under discussion have enacted new charities legislation in the last decade, and that each considers that public benefit is to be understood as 'the law relating to charities in [the jurisdiction in question]', it is useful to consider public benefit generally in the courts before analysing how each jurisdiction differs. Certain elements of the rules surrounding public benefit are identical in all the common law jurisdictions, but there are some important differences where problems may arise. The general rule of charity law is that a purpose is not considered charitable unless it is for the public benefit; the only possible exception to this is the charitable purpose of relief of poverty.[42] There are two elements to this test; first that there is a benefit to the community and secondly that the benefit is public, in other words that a sufficient section of the public can avail, or has the opportunity to avail, of the benefit. However, questions arise as

to what constitutes a benefit and what is meant by a sufficient section of the public. In pre-Reformation England, all heads of charity were considered charitable with no question being raised as to public benefit. Until the Charity Act 2006 in England and Wales and the 2008 NI Charity Act, for the first three heads of charity, benefit to the public was presumed unless there was evidence to the contrary. If there was evidence to the contrary, or if the purpose fell within the fourth head, it was for the court to decide based on evidence before it.

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42 In *Dingle v Turner* (1972) AC 601 (HL) a more liberal view was taken in gifts for the relief of poverty so that a gift to 'poor employees' was considered valid in spite of the judgment in *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 (HL) which held that an educational trust for the benefit of employees' children was not considered valid because it was not sufficiently 'public'. It has been suggested that relief of poverty is 'of so altruistic a character that the public benefit may be necessarily inferred.' Picarda, H, *The Law and Practice Relating to Charities* (Bloomsbury Professional: 2010, 4th ed), p 40; see also *Re Scarisbrick* [1951] Ch 622 (per Evershed MR).

The standard of public benefit varies from head to head[43] and over time. It has already been seen above that charities for the purpose of relief of poverty could be said to be free from the requirement of providing public benefit. Equally so, courts have construed the concept of benefit broadly in relation to religious charities on the premise that it is not for courts to favour one religion over another and that 'any religion is at least likely to be better than none.'[44] Thus, at no point have the courts had to undertake extensive scrutiny of individual religions and the public benefit gained, or not, from them. It can also be seen that the concept of public benefit has varied over time in the courts. In *National Anti-Vivisection Society v IRC* the court considered that such a society was not charitable, in contrast to a ruling 50 years[45] previously, stating, 'the test may vary from generation to generation as the law successfully grows more tolerable.'[46]

While a benefit has to be to the public, an element of private benefit is permitted provided that it is incidental to the public benefit. In *IRC v City of Glasgow Police Athletic Association*,[47] the Glasgow Police Athletic Association sought recognition as a body established 'for charitable purposes only'; if found to be so it would be exempt from the payment of income tax arising from profits made at an annual athletic sports event. The House of Lords looked to the rules of the association which stated that the objects were to encourage and promote all forms of athletic sports and general pastimes as well as to the fact that the subscriptions paid by members were spent solely on furthering their own sports and recreations. While it acknowledged that the association had additional objectives of enhancing the efficiency of the Police Force and encouraging recruitment, both of which would be to the public's advantage, the House of Lords ultimately found:[48]

> The private benefits to members are essential. The recreation of the members is an end in itself, and without its attainment the public purpose would never come into view. If the result of establishing the Association had been that the members had, instead of being interested, found themselves involved in wearisome and lifeless activities, their efficiency would have suffered, the membership would have fallen off, and there would have been public detriment instead of public benefit. The private advantage of members is a purpose for which the Association is established

43 For the purposes of this piece, consideration is only given to how public benefit has been interpreted for religious charities. For an examination of the other heads of charity, see generally, Picarda, above n 42, pp 41-257.

44 *Neville Estates v Madden* [1962] Ch 832, 853

45 *Re Foveaux, Gross v London Anti-Vivisection Society* [1895] 2 Ch 501.

46 *National Anti-Vivisection Society v IRC* [1948] AC 31 (HL), 42 (Lord Wright).

47 [1953] AC 380, [1953] UKHL 1.

48 [1953] UKHL1, 5 (per Lord Normand).

and it therefore cannot be said that this is an Association established for a public charitable purpose only.

Similar reasoning was also applied in *IRC v Oldham Training and Enterprise Council,*[49] where an ancillary objective to provide support services and advice to new businesses was considered to outweigh the alleged public benefit objectives to the community as a whole and so the purposes were not purely charitable. In contrast, the courts have also found that the dissemination of law reports by the Incorporated Council of Law Reporting was a charitable objective because 'it facilitates the study and ascertainment of the law.'[50] The fact that it also provided lawyers with the necessary tools to earn a living was considered an ancillary private benefit.

Related to the previous two discussions are 'self-help' arrangements and charities which make a profit. Self-help arrangements are generally identifiable by being funded primarily by their members who also receive the benefits. As a result of this personal nexus, '[s]uch an arrangement seems to me to stamp the whole transaction as one having a personal character, money put up by a number of people, not for the general benefit, but for their own individual benefit.'[51] As charity is often equated with altruistic acts,[52] it can also be said that self-help arrangements appear to be contrary to the very ethos of what is considered charitable. In spite of altruism being an element of charitable, charities are permitted to make a private profit, provided that the profits are used only for charitable purposes. In *Incorporated Council for Law Reporting v Attorney-General* it was considered that 'the mere fact that charges on a commercial scale are made for services rendered by an institution does not of itself bar that institution from being held to be charitable - so long, at any rate, as all the profits must be retained for its purposes and none can endure to the benefit of its individual members'.[53] Similarly in *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd,*[54] members of a charity, Wycliffe Bible Translators Australia, founded a body, Word Investments Ltd, in order to raise money and give the money to Wycliffe to allow Wycliffe to carry out its purposes. The Australian Tax Office (ATO) refused to register Word as an Income Tax Exempt Charity stating that it was a commercial enterprise and its profit-making activities went beyond what is incidental. ATO's decision was overturned and an appeal from ATO eventually reached the High Court where the

49 [1996] STC 1218.

50 *Incorporated Council for Law Reporting v Attorney-General* [1972] Ch 73 (CA), 103 (per Buckley LJ).

51 *Re Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] Ch 194 (CA), 200 (per Lord Greene MR).

52 See Luxton, Peter, *The Law of Charities* (Oxford, Oxford University Press: 2001), p 191,

53 [1972] Ch 73 (CA), 91 (per Sachs J).

54 [2008] HCA 55.

majority dismissed it stating **'**the charitable purposes of a company can be found in a purpose of bringing about the natural and probable consequence of its immediate and expressed purposes, and its charitable activities can be found in the natural and probable consequence of its immediate activities.'[55]

The second element, that of benefitting a sufficient section of the public, has generated more debate. This does not simply require a numerical count of how many people can, or are, benefitting, but requires an assessment of 'whether the group constitutes a recognisable section of the community.'[56] Of key importance to the courts is the *relationship* between the potential beneficiaries. The general rule arising from the case law is that where there is a personal link between the members of the class who stand to benefit from a purpose being carried out then the class in question will be considered private and therefore fail the public benefit test and not be considered charitable. In *Oppenheim*, Viscount Simonds summarised the position as, '[T]he potential beneficiaries must not be numerically negligible, and secondly, that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual.'[57] The only exception to this is purposes for the relief of poverty where a very small number can benefit with seemingly a personal link to the donor.[58] This test, however, has not been without its critics, most notably Lord MacDermott in his dissenting opinion in *Oppenheim* who considered it arbitrary and artificial in light of its general application.[59]

55 Ibid, para 38.

56 Morris, D, 'The Long and Winding Road to Reforming the Public Benefit Test for Charity: A Worthwhile Trip or 'Is Your Journey Really Necessary?' in McGregor-Lowndes and O'Halloran (eds), *Modernising Charity Law* (Cheltenham, Edward Elgar, 2010) p 107.

57 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 (HL), 306.

58 See above n 42.

59 *Oppenheim*, 317-319.

In considering public benefit, courts in England and Wales have striven to make their findings based on the objectivity of the facts at hand rather than the subjective viewpoint of the donor, which has been given more weight in Ireland. In support of the objective approach Lord Simonds in *National Anti-Vivisection v IRC* stated, 'Where on the evidence before it the court concludes that, however well-intentioned the donor, the achievement of his object will be greatly to the public disadvantage, there can be no justification for saying that it is a charitable object.'[60] In contrast to this approach, the Irish authorities apply a subjective approach, essentially enquiring as to whether the donor believed they were giving to a charitable purpose. In *Re Cranston, Webb v Oldfield*,[61] the judge considered that if the donor believed a gift to be charitable the court would hold it to be so provided that it was neither immoral nor illegal. This has been endorsed more recently in *Re the Worth Library*, where it was stated that the 'intention of the testator is paramount'.[62] In the particular context of religion in NI the potential for friction because of the differing approaches of the courts to public benefit in England and Wales and Ireland because of the fact that 'many diocesan trusts straddle the political border',[63] thus potentially causing problems for those charities that operate on an all-Ireland basis.

Even with this brief overview of how public benefit has been applied by the courts it is apparent that the NI Charities Act 2008 does not sit well with it. It is evident that there is no judicial support for a uniform public benefit test, yet the Act attempts to delineate a public benefit test in section 3, supplemented with guidance from the CCNI. As Dawson states, '[c]harity of purpose and benefit to the public are thus not two separate issues for the court to decide, because the former has a bearing on the latter, and a search for a universal test to public benefit [is] bound to fail.'[64] Furthermore, the draft guidance from the CCNI indicated that it could 'look to case law including that generated in relation to case law in other jurisdictions (for instance in England and Wales or Scotland) to assist us in the interpretation of any of the concepts used in the Act.'[65] Given that the case law all points to no single public benefit test, it would have been difficult for the CCNI to glean any useful information from the case law in light of what the statute set down. In addition, the phrasing of the section makes it quite clear that it was entirely up to

60 [1948] AC 31 (HL), 65 (per Lord Simonds).

61 [1898] 1 IR 431

62 [1994] ILRM 161, 193.

63 Brady, James C, *Religion and the Law of Charities in Ireland* (W&S Magowan, 1976: Belfast), p xv. The Archdiocese of Armagh comprises the following dioceses: Ardagh and Clonmacnaoise (Ireland), Clogher (Ireland and NI), Derry (Ireland and NI), Down and Connor (NI), Dromore (NI), Kilmore (Ireland and NI), Meath (Ireland) and Raphoe (Ireland).

64 Dawson, N, '"Old Presbyterian Persons" – A Sufficient Section of the Public?' [1987] Conv 114, 120.

the CCNI to determine the attention to be paid to case law thus highlighting once more the concerns that it was granting itself far-reaching powers.

ii) Defining the Advancement of Religion and the Application of Public Benefit - England

Religion and the advancement of religion have been considered liberally in both the case law and the Charities Act 2011,[66] although this was not always the case.[67] It has been considered that faith and worship are two key elements of religion, 'faith in a god and worship of that God',[68] with both elements having to be present. Debate has arisen, however, as to the various methods by which religion can be advanced and provide the necessary public benefit. The difference in application of the law between the jurisdictions can best be seen in relation to gifts for the celebration of religious services and gifts for religious communities. In general, England has adopted a narrower, objective approach to public benefit than Ireland's more liberal, subjective approach. The situation in NI is more complicated due to much of the case law dating pre-Partition and the question never having then arisen in the NI courts.

Prior to the Roman Catholic Charities Act 1832, gifts for saying masses were illegal and even after this Act they were considered void for superstition. It was only in 1934 in *Re Caus*[69] that it was held that gifts for saying masses did advance religion on two grounds; firstly, saying mass was a ritual act that was a central facet

65 CCNI (2009), *Meeting the Charity Test – Demonstrating Public Benefit Draft Guidance for Consultation,* p 3.

66 Neither the Charities Act 2011 nor the Charities (Northern Ireland) Act 2008 actually define religion; instead, each states what religion *includes*: in England this is '(i) a religion which involves belief in more than one god, and (ii) a religion which does not involve belief in a god,' and in Northern Ireland '(i) a religion which involves belief in one god or more than one god, and (ii) any analogous philosophical belief (whether or not involving belief in a god)'.

67 Initially, under the Statute of 1601, the advancement of religion was found to be within the equity of the Act (the only specific reference to religion occurring in the Preamble with 'repair of churches'), but the only religion considered valid was the 'Established Church'. The Toleration Act 1688 extended charitable status to protestant dissenters of the Established Church, but it was only in the nineteenth century that Unitarians, Roman Catholics and Jews were granted the same charitable rights. See, further, Picarda, above n 42, pp 89-91; Blakeney, 'Sequestered Piety and Charity – A Comparative Analysis.' (1981) 2 Journal of Legal History 207. The Irish equivalent was the Statute of Pious Uses 1634 but this was significantly more concerned with trusts for religious purposes than the 1601 Statute, stipulating 'the building, re-edifying, or maintaining in repaire any church...or for the maintenance of any minister and preacher of the Holy Word of God'. For a deeper analysis on the differences between the two statutes and how they potentially arose, see Brady, Above n 63, pp 49-65.

68 This definition has changed as a result of the Charities Act 2011, see below.

69 *Re Caus* [1934] Ch 162.

of the religion and secondly, the gift assisted in the endowment of priests who had a duty to perform the act. In reaching this conclusion weight had been given to the judgment in the Irish case *O'Hanlon v Logue*[70] which had ended the distinction made in *AG v Delaney*[71] that only masses said in public could be said to have the requisite public benefit and had overturned previous case law[72] that had found both public and private masses conferred a public benefit.[73]

However, the Court of Appeal in *Re Coats' Trusts*[74] expressed doubt as to the validity of following the Irish courts, stating that it was acceptance of the Roman Catholic doctrine on the nature of mass[75] rather than a reasoned judgment and this was similarly said in the House of Lords (HoL).[76] In the most recent case on the validity of bequests for masses, *Re Hetherington's Will Trusts*[77] it was stated that if a religious service was held in private then it lacked the necessary public benefit as firstly, legal proof of the benefit of prayer is impossible and secondly, any edification arising from the service is limited to those who are present at the celebration. If the celebration is in public then the edification is to those members of the public who choose to attend and so the public benefit element is present. The case also introduced a presumption that where there is a gift for masses which fails to stipulate whether the mass should be said in public or private then it will be presumed that they were to be said in public. This saves most mass bequests as the majority do not actually make any express provision.[78]

A similar approach has been taken in relation to gifts to religious communities. The general premise stands: gifts for religious orders are charitable unless the presumption can be rebutted. In the case of enclosed or cloistered orders this has

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70 [1906] 1 IR 247.

71 [1876] 10 I Ch R 104.

72 *Commissioners of Charitable Donations v Walsh* [1823] 7 Ir Eq Rep 34 and *Read v Hodgens* [1842] 7 Ir Eq Rep 17.

73 While Palles CB stated in *AG v Delaney* that if a will expressly stated that a mass was to be said in public then the gift would probably be charitable it was only in *AG v Hall and Byrne* [1896] 2 IR 291; affirmed [1897] 2 IR 426 that gifts for saying public masses were accepted as charitable.

74 [1948] Ch. 340.

75 This was described by the defendant Dr Delaney, the Roman Catholic Bishop of Cork, as an 'offer[ing] to God in the name of his Church to propitiate his anger, to return thanks for his benefits and to bring down his blessings on the whole world.'

76 *Gilmour v Coats* [1949] AC 426.

77 [1990] Ch 1.

78 'Most mass bequests are silent on the question of public/private celebration. This affords the courts a basis for upholding such bequests as valid charitable gifts, whatever their view on the broader question [of whether Northern Ireland should follow the approach in England and Wales or that of Ireland].' Dawson, N, Grattan, S, Lundy, L, Glenn, R, & Cran, G, *Dying to Give? Trends in Charitable Giving by Will* (The Statutory Office, 2003), p 104.

been the case. In *Cocks v Manners*[79] two bequests were made in favour of two religious communities. The first bequest was declared valid as the religious community existed for purposes of teaching and nursing in the community and so there was a public benefit. However, the second bequest was not valid as the community was an enclosed, contemplative order associated with retirement and devotion to prayer. It was said, '[R]eligious purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or edification of the public...'[80] In other words, there were no external charitable works and so the gift did not have any public benefit. This approach was subsequently confirmed by the HoL in *Gilmour v Coats*[81] where a gift to an enclosed Carmelite convent was not charitable because of the lack of public benefit. A number of arguments were made highlighting the benefit that the convent did bring, including the value of intercessory prayers for all of mankind and that the lives led by the enclosed nuns were a source of inspiration and edification to all Catholics. The HoL rejected all of these arguments, stating that, 'A gift to two or ten or a hundred cloistered nuns in the belief that their prayers will benefit the world at large does not from that belief alone derive validity any more than does the belief of any other donor for any other purpose.'[82] Thus the HoL cemented the requirement of a 'publicness' to both religious services and the work of religious communities before a gift can be held to be valid. The judgment also highlighted the objective approach of the English courts by refusing to acknowledge the belief of the donor in the value of the benefit provided by the enclosed order; an approach that has been accepted by the Irish courts. Instead, the English courts require actual tangible proof of the benefit.

iii) Defining the Advancement of Religion and the Application of Public Benefit – Ireland

As with England, Ireland has defined religious benefit broadly, not wishing to stand in judgment on particular beliefs or credences. However, as mentioned above the Irish courts have reacted differently in determining the public benefit of

a gift. In contrast to England, Ireland recognised, in *O'Hanlon v Logue* all religious services, whether said in public or in private as being beneficial to the public. *O'Hanlon* adopted a subjective approach to the question as to public benefit and 'defer[ed] to the belief of the testatrix that saying masses for the dead conferred a spiritual benefit on the public.'[83] The situation as regards public benefit of gifts to religious orders is less clear cut. In light of the decision in *O'Hanlon* of the public

79 (1871) LR 12 Eq 574.

80 Ibid at 585 (per Sir John Wickens VC).

81 [1949] AC 426 (HL).

82 *Gilmour v Coats* [1949] AC 426 (HL), 446 (per Lord Simonds).

83 Harding, M, 'Trusts for Religious Purposes and the Question of Public Benefit' (2008) 71(2) MLR 159, 175.

benefit of private masses as well as public masses, it should follow that gifts to enclosed communities should be valid 'since the Roman Catholic Church teaches that benefits flow to the whole body of mankind from the spiritual activities of cloistered nuns and monks.'[84] However, this has not been the case and case law exists in support of the logical application of *O'Hanlon* and maintaining the decision in *Cocks v Manners*. In *Munster & Leinster Bank v Attorney-General and Others*,[85] it was stated:[86]

> There are perhaps few forms of human activity, good in themselves, but solely designed to benefit individuals associated for the purpose of securing that benefit, which may not have some repercussions or consequential effects beneficial to some section of the general community; and unless a further and sweeping inroad is to be made on the rule against perpetuities, the line must be drawn somewhere. Cocks v Manners has drawn it…

In contrast, in *Maguire v Attorney General*,[87] a case involving a bequest to found a convent for the perpetual adoration of the Blessed Sacrament, Gavan Duffy J opined, '[I]t is a shock to one's sense of propriety and a grave discredit to the law that there should, in this Catholic country, be any doubt about the validity of a trust to expend money in founding a Convent for the perpetual adoration of the Blessed Sacrament.'[88] He held the bequest valid, making reference to the fact that, at the time, the Irish Constitution recognised the special position of the Catholic Church.[89]

Following the HoL judgment in *Gilmour v Coats*, there was a fear that the High Court judgment of Gavan Duffy J had the potential of being overruled by the

Supreme Court if a case arose. To prevent this, section 45(1) of the Charities Act 1961 gave statutory effect to Gavan Duffy J's decision stating, 'In determining whether or not a gift for the purpose of the advancement of religion is a valid charitable gift it shall be conclusively presumed that the purpose includes and will occasion public benefit.' In addition, section 45(2) places on a statutory footing the argument of Palles CB in *O'Hanlon v Logue* that the charitable nature of a religious service must be determined by that religion's doctrines:

> For the avoidance of the difficulties which arise in giving effect to the intentions of donors of certain gifts for the purpose of the advancement of religion and in order not to frustrate those intentions and notwithstanding that certain gifts for the purpose aforesaid, including gifts for the celebration of Masses, whether in public or in private, are valid charitable gifts, it is

84 Brady, above n 63, p 87.

85 [1940] IR 19.

86 Ibid at 30 (per Black J).

87 [1943] IR 238.

88 Ibid at 244 (per Gavan Duffy J).

89 Article 44(1)(2). This was subsequently removed by referendum in 1972.

> hereby enacted that a valid charitable gift for the purpose of the advancement of religion shall have effect and, as respects its having effect, shall be construed in accordance with the laws, canons, ordinances and tenets of the religion concerned.

These sections have since been replicated in the as yet uncommenced section 3 of the Charities Act 2009. As a result, in Ireland, proof of tangible benefit to the public is not required and a subjective approach has been taken in assessing public benefit brought about by advancing religion. No definition of religion is offered, although reference is made as to what is *not* a gift to a religion in section 3(10) including cults and organisation where the principal aim is profit making or involves the use of psychological manipulation in order to recruit or maintain its followers.

As with the legislation in NI, England and Scotland, a Charities Regulatory Authority was to be established that would 'promote understanding of the requirement that charitable purposes confer a public benefit',[90] but the relevant provision in the Act has never come into effect and in May 2012 it was confirmed by the Minister for Justice, Mr Alan Shatter, that the body would not be established 'given the likely scale of the financial and staffing resources implied.'[91] In light of the legislation failing to define 'religion' and the subsequent failure to establish a Charities Regulatory Authority, it would appear that in order for a gift to be charitable for religious purposes a claimant simply has to show that religion is advanced in accordance with the religion's own laws. As Breen[92] remarks, this leaves a situation whereby the definition of religion becomes increasingly important and, in spite of the safeguard provision in section 3(10), there is the possibility that newer religions will forum shop as to where to establish themselves as a charitable organisation, particularly in light of the removal of the public benefit presumption for purposes of advancing religion in England and NI and the different approach of assessing the activities of an organisation in Scotland, discussed below.

iv) Defining the Advancement of Religion and the Application of Public Benefit – Northern Ireland

The situation in NI is somewhat uncertain due to the fact that the NI courts have never had to rule on the charitable status of masses. As *O'Hanlon* dates from 1906 it is a pre-partition case and thus still has persuasive authority in NI. An opportunity to put the *O'Hanlon* principle on a statutory footing was considered by the Newark Committee in 1956, established to report on Northern Ireland charity law. The general consensus, including from the then Lord Chief Justice, was that the status

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90 Charities Act 2009, s 14(1)(e).

91 Dail Deb 8 May 2012, Vol 764(3), p 44. As a result, the existing body, the Commissioners for Charitable Bequests and Donations, still operates.

92 Breen, Oonagh, 'Neighbouring Perspectives: Legal and Practical Implications of Charity Regulatory Reform in Ireland and Northern Ireland' (2008) 59(2) NILQ 223, 235.

quo should remain and only when O'Hanlon was challenged in the courts should it be considered whether to endorse the principle in legislation.[93] However, the ultimate court of appeal for NI is the Supreme Court (formerly the HoL) and therefore it may be that the English cases are more persuasive than the Irish judgments. In light of the fact that the NI Charities (Amendment) Bill adopts the approach of the English Act by removing the presumption of public benefit and providing a definition of religion, the question will perhaps be a moot one in the near future.

In contrast, in respect of gifts to religious communities, the NI courts have clearly followed the English objective approach of public benefit for the advancement of religion being a question of fact to be decided on an individual case by case basis. In the joined cases *Commissioner of Valuation v Trustees of the Redemptorist Order* and *Commissioner of Valuation v Trustees of the Newry Christian Brothers,*[94] the majority were of the opinion that, '[t]he presence of the object of personal sanctification does not prevent the purposes of a religious Order which performs works of charity from being exclusively charitable, since this object is from the Order's point of view either wholly ancillary to or wholly coincident with the paramount charitable purpose.'[95] In other words, although there was an element of self-sanctification in both cases[96] it was ancillary to the charitable work

carried out in the community at large. As a consequence of section 3(3) of the Charities (Amendment) Bill, the NI case law will remain relevant in ascertaining public benefit, particularly in light of the fact that the presumption of public benefit has not been reinstated. However, the CCNI is still obligated to consult with the public and provide guidance on the interpretation of public benefit and so Charity Commission Guidance in Scotland and England on public benefit is of interest.

4. Charity Commission Guidance

i) Office of the Scottish Charity Regulator (OSCR)

Unlike England, Scotland has fully embraced a so-called 'activities' test approach to determining public benefit. In order to be considered charitable an organisation's purpose must fall within the charitable purposes as defined in section 7 of the Charities and Trustee Investment (Scotland) Act 2005. However, in contrast to

93 For further discussion on the Newark Committee, see Brady, above n 63, pp 96-98.

94 [1971] NI 114.

95 Ibid at 171.

96 The Redemptorist buildings were used by the priests and brothers for accommodation but they performed religious ceremonies for the wider community. The Christian Brothers similarly used their buildings for accommodation but the brothers worked in primary and grammar schools in the community.

England, an organisation must *provide*[97] a public benefit rather than its purpose[98] being for benefit of the public. In addition to the Act setting down in section 8(2) what the OSCR must take into account in assessing public benefit, the OSCR has also published Guidance indicating that when weighing up public benefit it will pay attention to any private benefit, disbenefit and unduly restrictive conditions.[99] The Guidance also provides that any 'benefit' can be direct, indirect, tangible or intangible.[100] While the Guidance acknowledges that intangible benefits are going to be difficult to define and identify it does highlight that religion can have intangible benefits, while defining the indirect benefits of religion as the 'wider benefits to society in terms of increased social solidarity or relief to those in need.'[101]

By looking at the actual activities of the charity in question rather than the stated purposes and objectives, the OSCR is subjecting it to a much more stringent test than that of the English Act. In effect, it is requiring the charity to carry out what it states it is doing and the OSCR may withhold or withdraw charitable status if it

fails to actually provide a public benefit. In doing so, the OSCR is ultimately helping to ensure that the charity is not a front for some other purpose and established as a charity solely to avail of the exemption from a variety of taxes, including income tax, corporation tax, capital gains tax, council and other local taxes. As will be seen below, the English Act refers solely to the purposes of the charity in assessing public benefit but its General Guidance proposes the Commission will also consider benefits brought about by the *carrying out* of a charity's aims. This inevitably raises the question of whether it is possible, or practicable, to attempt to separate out a charity's purposes and activities. Given that one of the many objectives of the Charity Commissions in all jurisdictions is to help increase public confidence in charities, considering a charity's purposes and ensuring that its activities matches those purposes could be said to be the best way in which to increase public trust.[102]

A further, important point of divergence between Scotland and England is that the English Act expressly includes existing case law as a point of reference in its

97 Charities and Trustee Investment (Scotland) Act 2005, s 7(1)(a).

98 Charities Act 2011, s 2(1)(b).

99 OSCR (2010), *Meeting the Charity Test: Initial Guidance for Applicants and for Existing Charities*, pp 14-26.

100 Ibid, p 16.

101 Ibid, p 16.

102 Data published by the OSCR relating to its work indicates that in December 2011 there were over 23,000 charities registered with it and that it had removed 4979 charities from the register since it started operating in April 2006. The OSCR does not mention failing to meet the public benefit test as a reason for the removal of a charity from the register so it is impossible to comment on the actual effect of an activities test in Scotland.

interpretation of public benefit in section 4(3). The Scottish Act is silent on the subject with the Guidance simply stating:[103]

> [i]n applying the charity test OSCR will follow standard principles of legal interpretation. This will include looking at:
>
> - the 2005 Act
> - case law in Scotland
> - other relevant material including case law in other jurisdictions (for instance in England and Wales).
>
> Case law from jurisdictions other than Scotland will be persuasive rather than binding.

As Ford remarks:[104]

> The criteria are intended to "encapsulate" the pre-revisal case law, but are expressed so generally the quirks and nuances of the accumulated case law
>
> can scarcely be represented. It is clear that the OSCR can look to the public benefit case law for persuasive guidance on the meaning of the statutory formula but is not bound by it.

This particular element of the Scottish Act and accompanying Guidance would have been an interesting inclusion in the NI Act as it would have essentially amounted to statutory permission for NI courts to diverge from both English and Irish case law in relation to the public/private debate.

ii) Charity Commission for England and Wales

Under section 4 the Charity Commission must issue guidance in order to 'promote awareness and understanding' of the public benefit requirement. It has produced general guidance on the subject,[105] as well as supplementary guidance that focus on specific charitable purposes, one of which is the advancement of religion.[106] According to the General Guidance, when evaluating whether the public benefit requirement has been met it will not only take the aims of the charity in any governing instruments but will also 'take into account any benefits that arise from

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103 OSCR (2010), *Meeting the Charity Test: Initial Guidance for Applicants and for Existing Charities*, p 4.

104 Ford, Patrick, 'A Statute of Unintended Consequences: The Impact of the Charities and Trustee Investment (Scotland) Act 2005 on Non-Scottish Charities Operating in Scotland' (2008) 59(2) NILQ 201, 212 (footnotes omitted).

105 Charity Commission, 2008, *Charities and Public Benefit: The Charity Commission's General Guidance on Public Benefit* (hereafter *Charities and Public Benefit*).

106 Charity Commission, 2008, *The Advancement of Religion for the Public Benefit.*

carrying out those aims.'[107] In spite of the Charity Commission's assertion that it will consider the aims of a charity when considering its benefit, its Guidance proposes a test more indicative of the Scottish activities test rather than the purported factors based on existing case law. While the Scottish activities test results from legislation the use of an activities test in England is unfounded in that neither the 2011 Act nor the common law permits its use in this manner.[108]

The religion-specific guidance further defines benefit as 'the existence of an identifiable, positive, beneficial moral or ethical framework that is promoted by a religion which demonstrates that the religion is capable of impacting on society in a beneficial way.'[109] It also stipulates that '[t]he benefits to the public should be capable of being recognised, identified, defined or described'[110] but acknowledges that in the case of charities advancing religion benefits may not be tangible. In

order to assess non-tangible benefits in such cases, religious charities may find the substance of their religious doctrines being scrutinised by the Charity Commission with the potential of certain religions being favoured over others. This is exacerbated by the Charity Commission failing, or being unable, to set down objective criteria by which the public benefit of religious bodies can be assessed. To this end, Smith has commented that, 'any objective criteria may be very difficult to establish so that these may become essentially subjective decisions taken about a particular structure with the result that one religion set, or faith may be preferred to others when according charitable status.'[111]

In the case of religious charities, benefit must be to the wider community and not simply to adherents of the religion.[112] The actual number of adherents can be small provided that the *opportunity* to benefit is still open to the public or a sufficient section of the public and there are no unreasonable restrictions on access.[113] One such restriction identified by the Commission in its religious-specific guidance relates to payments to the organisation on a voluntary or mandatory basis. The guidance states 'If the level of the payment is such that people in poverty are unable

107 *Charities and Public Benefit*, section E3.

108 According to the case law activities of a body can be examined where no written statement of purposes exist, or where they are ambiguous, and where there is a suspicion that the expressed purpose is a sham – see *Southwood v Attorney General* [2000] WTLR 1199 (CA) and *Re Hopkinson* [1949] 1 All ER 346 (Ch).

109 Charity Commission, 2008, *The Advancement of Religion for the Public Benefit*, section D2.

110 Ibid.

111 Smith, PM, 'Religious Charities and the Charities Act 2006' [2007] 9(3) CL & PR 57, 72.

112 Charity Commission, 2008, *The Advancement of Religion for the Public Benefit*, section E2. The Guidance explains that this can occur by followers conducting themselves in a particular manner in society which puts the religion's values into practice.

113 The problems in ensuring restrictions are reasonable in relation to access to the benefit of religious charities have been discussed above in relation to the draft guidance of the CCNI.

to access the services and facilities offered by the organisation, its public benefit may be called into question.' One such religion where followers are expected to pay a tithe of 10% of their income is Mormonism and so if this is considered to be beyond those in poverty the religious charity may potentially fail the public benefit test. However, it has been asserted that this principle is legally unsound and based on a misinterpretation of the common law, which indicates that excluding the poor will only prevent charitable status for those organisations concerned with the first group in the Preamble to the 1601 Statute: 'the relief of aged, impotent and poor people.'[114]

Finally, there are human rights discrimination issues that could be raised if the Commission Guidelines are applied along the lines stated. The issue has been well documented elsewhere,[115] but it is important to note that a religious organisation

only has to conform to the legislation if they want to meet the public benefit requirement and be considered charitable with the advantages that charitable status brings, namely tax law privileges. As Smith has stated:[116]

> If fiscal benefits are to be conferred on some religions as a result of registration as a charity but not others where a value judgment has been made that they are not of sufficient merit to justify charitable status, then it is arguable that in so far that this may amount to an unequal treatment of one religion as against another, it could potentially construe a breach of a combination of Articles 1 and 14 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms].

The European Court of Human Rights has been willing to find States and public authorities in breach of the Convention's rights relating to non-discrimination of religious beliefs[117] and so the Commission will have to take care in assessing the public benefit of a potential charitable religious organisation. The failure to recognise public benefit and, therefore, to bestow charitable status on a body, could have a detrimental impact on that body's ability to carry out its activities effectively through the denial of tax law privileges associated with charitable status and the ultimate loss in income. This then would have a knock on effect to the adherents of the religion if they can no longer access the same teaching or facilities as a result of not having charitable status. In turn, the adherents' rights would also be affected.

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114 Luxton, Peter, 'A Three-Part Intervention: Public Benefit Under the Charity Commission' (2009) 11(2) CL & PR 19, 27.

115 See, for example, Quint, F, & Spring, T, 'Religion, Charity Law and Human Rights' (1999) 5(3) CL & PR 153; Quint, F, & Hodkin P, 'The Development of Tolerance and Diversity in the Treatment of Religion in Charity Law' (2007) 10(2) CL & PR 1; Smith, above n 111; and the general discussion in Picarda, above n 42, pp 139-144.

116 Smith, above n 111, 75.

117 *Mannousakkis v Greece* (1996) 23 EHRR 387; The *Moscow Branch of the Salvation Army v Russia* (2006) 44 EHRR 912; *Church of Scientology Moscow v Russia* [2007] 46 EHRR 16.

At present the Plymouth Brethren in England are embroiled in a legal battle with the Charity Commission following the refusal of the Commission to grant charitable status to Preston Down Trust, a Brethren meeting hall. The media appear to have widely reported this as having refused charitable status to the Plymouth Brethren *as a whole*. However, the Commission's letter to the Trust's solicitor makes clear that it relates only to Preston Down Trust, 'As a matter of law, we are not able to satisfy ourselves and conclusively determine that Preston Down Trust is established for exclusively charitable purposes for public benefit and suitable for registration as a charity.'[118] The Charity Commission's decision is based on a number of potentially dubious findings that go against existing case law on public benefit and access to religious services by the general public, including the facts that contact information and times of public worship is only available on a notice board at the meeting hall, the lack of public access to Holy Communion and

evidence that adherents limit their engagement with the wider community at the encouragement of Preston Down Trust. Consequently, the Commission was unconvinced of any benefit to the wider public. The Plymouth Brethren are currently awaiting a hearing before the First-tier Tribunal (Charity) and have stated that they are willing to fight this finding at the European Court of Human Rights. The issue has been raised in the NI Assembly by Mr Nelson McCausland who made reference to the lack of social integration of the adherents, but *not* the refusal of Holy Communion to non-adherents, 'My understanding is that the issue hinges on the withdrawal from contact with general society and the absence of any wider public benefit. The courts have generally recognised religion as being for the public benefit, precisely because of the moral improvement in society that it is thought to encourage. That might be undermined if there were no or very limited societal interaction.'[119] He continues by hoping that sections 165 and 166[120] may help to mitigate any concerns within the religious communities in Northern Ireland. However, the lack of reference to the issue of Holy Communion and the fact that many places of worship only advertise their services at the relevant church or meeting hall could mean that this optimism is misguided and misplaced. Should the issue arise in NI, the CCNI will have to have regard to the judgment of the Tribunal as it will ultimately lead to a clarification on the application of public benefit for the advancement of religion.

It would appear then that by opting to follow the English approach to public benefit that the CCNI may very well run into the same problems that have been raised in relation to the Public Benefit Guidance published by the Charity Commission for England and Wales. In particular, the human rights issues have the potential to cause consternation in some religious quarters given the antagonism that can exist in relation to religion in Northern Ireland. It would be easy to conclude that a more

118 http://www.charity-commission.gov.uk/Library/about_us/Preston_down_070612.pdf last accessed 26 November 2012.

119 Official Report (Hansard) 20 November 2012, Vol 79, No 6, p 60.

120 See below, section 5.

satisfactory approach would have been that of the Scottish Act by looking at the activities of charities to assess public benefit rather than purposes and by not expressly invoking existing case law. This approach would have avoided a potential stand-off between the current public/private dichotomy in existence between England and Ireland. However, the Executive has not chosen to adopt this approach, and so the CCNI, if the Bill is passed, must proceed with caution, bearing in mind the issues raised during the first consultation period on the draft Guidance as well as the copious commentary on the English Guidance. In particular the outcome of the Plymouth Brethren case will be of interest and importance to the CCNI when it begins its registration of charities.

Francesca Quint has spoken out in favour of the public benefit requirement, 'A number of charities [in England and Scotland] have already risen to the challenge

and provided quite inspiring accounts in their annual reports of their aims and achievements in the delivery of the public benefit, and (though I realise I may be unpopular for saying it) I believe in the end it will boost confidence in and respect for charities of all kinds.'[121] It is noteworthy here that Quint refers to both 'aims and achievements', indicating perhaps that charities are automatically recounting how they have achieved their aims when seeking to prove their benefit to the public, irrespective of what the legislation or guidance requires of them. Thus, it is possible that any debate over the differing public benefit tests in the jurisdictions is largely a moot point if charities are referencing both their aims and their activities when highlighting how they provide public benefit.

5. Debunking the status of religion in the Charities Act 2008.

The Charities Act (NI) contains a section by which faith based organisations can apply for Designated Religious Charity Status from the CCNI if certain criteria are met. The effect of designated religious charity status is that the powers of the CCNI in relation to acting for the protection of charities do not apply.[122] The main rationale behind the inclusion of the section is to avoid duplication of regulation as any organisation seeking designated religious status must have sufficient internal regulatory structures in place. To be a designated religious charity, a body must meet the criteria found in section 166,[123] which reads:

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121 Quint, F, 'Public Benefit – Where Next?' Charities Property Association, AGM: Eton College, 13 October 2009.

122 Charities Act (Northern Ireland) 2008, s 165(1).

123 The criteria contained in section 166 was the subject of much debate during the consultation on the Charities Bill and eventually a number of provisions were amended or removed entirely, including reducing the length of time the charity had to be established in Northern Ireland, from 10 years to 5, and omitting the requirement that the charity had at least 1000 members. See evidence from the Evangelical Alliance, the Presbyterian Church in Ireland, Magheraknock Mission Hall, Kingdom Life Faith Centre, Moira Pentecostal Church, Mount Zion Free Methodist Church and Jordan Victory Church, Appendix 2, Committee for Social

(1) The Commission may, on receiving an application from the charity trustees of a charity, make a designation under this section in relation to the charity.

(2) Subject to subsection (4), the Commission must not make such a designation unless it appears to the Commission that the conditions set out in subsection (3) are satisfied in relation to the charity.

(3) Those conditions are that the charity—

(a) has the advancement of religion as its principal purpose;

(b) has the regular holding of public worship as its principal activity;

(c) has been established in Northern Ireland for at least 5 years; and

(d) has an internal organisation such that—

(i) one or more authorities in Northern Ireland exercise supervisory and disciplinary functions in respect of the component elements of the charity, and

(ii) those elements are subject to such requirements regarding the keeping of accounting records and auditing of accounts as appear to the Commission to correspond to those required by Part 8.

While the bodies still have to be charities in order to receive the status, and therefore must still meet the public benefit requirement, it recognises that where internal regulatory structures exist that the same degree of oversight by the CCNI is not necessary. This is the case in relation to inquiries instigated by the Commission into charities either generally or a specific charity under section 22. It means that the Commission cannot appoint any new trustees or make any of the orders found in sections 33-36 in respect of designated religious charities. In addition, the DSD may also by order provide that other provisions of the Act either do not apply to designated religious charities or apply in modified form. Whether this provision potentially means that the DSD could attempt to make an order that the public benefit requirement does not apply to religious charities falling into the designated status remains to be seen, but it is likely that such an attempt would receive little support. In addition, it would change little on a practical level as one of the requirements for designated religious status is that regular public worship is held which falls within the NI case law on public benefit. Thus it appears implicit within section 166 that churches should never have had any real concerns as long as their services were open to the public. Under section 165, however, the Commission still has the power to remove designated status from any charity if it considers that it no

Development (2008) *Report on the Charities Bill.* Available at http://archive.niassembly.gov.uk/social/2007mandate/reports/report30_07_08.htm, last accessed 10 August 2008.

longer meets the stated criteria so a designated religious charity is by no means entirely self-regulating.

Section 166 has no counterpart in the English Act but section 65 of the Scottish Act relates to designated religious charities. It offers essentially the same relief from regulation as the NI Act does, but the criteria for qualifying for the status are more rigorous. A body's main purpose must be the advancement of religion and its main activity must be the holding of public worship. However, in contrast to the requirement in NI that the body must have been established for 5 years, the Scottish equivalent requires the body to have been established for 10 years as well as having a membership of at least 3,000 people over the age of 16. The more lax

criteria applicable in NI is arguably representative of the importance attached to religious bodies in the jurisdiction, particularly in light of the changes made to the provision during the passage of the Act which took into account many of the concerns voiced. Thus the NI Act can be said to actually *favour* religious charities over any other type of charity.

The provision, however, could be said to fall short in relation to setting down how faith based charities are to apply for designated religious status. No indication is given in the Act as to whether the bodies must apply on an individual basis or whether application is made by faith. In addition, there is no requirement on the CCNI to clarify this by issuing guidance on the matter. In the event, the bodies are applying largely on ad hoc basis, with some opting for the individual application and others according to faith. In light of this, it becomes all the more important to ensure that those applying on an individual basis have the requisite internal regulatory structure in place given that there is no minimum membership requirement as with the Scottish Act. This, however, is a criticism that applies equally to the Scottish Act.

6. Conclusion

Thus it appears from the discussion above that, at least until the Charities (Amendment) Bill is passed and the CCNI has issued its draft guidance for public consultation, that religious organisations are still in a state of flux as regards the provision of public benefit and the proof required of them. If the Bill is passed as it stands, which seems likely, then the CCNI should try to ensure that the uncertainties created by the English Guidance are not replicated in NI. In particular, given the importance placed on religion in the jurisdiction, it will have to tread carefully as regards potential human rights infringements as a public authority, as detailed in relation to England. Of particular importance will be the outcome of the Plymouth Brethren appeal against the finding that Preston Down Trust was not a charity. While this has been acknowledged within the Assembly during the Bill's debates, the confidence that the English Charity Commission's finding will not cause problems in NI may be mistaken. On the face of it, Preston Down Trust appears to

have satisfied the common law criteria of public benefit of their services being open to the general public and not just adherents by providing contact details and service times at their meeting house. Yet the English Charity Commission has pointed to the fact that Holy Communion is not available to non-adherents, an issue that goes to the heart of a number of faiths and echoes the concerns of the religious communities in NI that all 'churches will have rules about who can be a member, take the sacraments...'[124] If the CCNI should choose to adopt the same stance as its English counterpart then the fears of the religious community will have been well merited.

Finally, the Act grants sufficient latitude to religious charities by allowing them to apply for designated religious status and so be exempt from some of the more invasive of the CCNI powers. While public benefit still has to be proven in order to benefit from this status, the fact that one of the qualifying criteria for the status is the regular holding of public worship would imply that religious charities do not have as much to fear in relation to public benefit as perhaps they initially feared. Combined with the fact that the amended Act will make reference to 'the law relating to charities in Northern Ireland', it would seem to put religious charities on a stronger footing than in England in the absence of a designated religious status there. Whether, in light of the recent actions of the English Charity Commission, this is enough to mollify religious leaders remains to be seen when the CCNI publish their new draft guidance on public benefit in early 2013.

124 The Christian Institute News, 8 April 2010.