

1 Legal and regulatory context

What a charity is in law: the key legal factors that make an organisation a charity

Being a charity is a legal status, attained by meeting the applicable legal conditions. It is a status that is potentially open to many – but not all – different types of organisation. For example, community interest companies cannot be used for charitable purposes. This special legal status must be justified – it is a legal privilege rather than a legal right.

The legal test of what a ‘charity’ is for charity law and charity regulatory purposes should not be confused with:

- the individual organisation’s *legal form* (i.e. what kind of legal organisation it is); or
- other legal tests relevant to charities, such as the tax law test that must be met for an organisation to seek charity tax relief and tax exemptions.

Under the law of England and Wales, the legal conditions that must be met, in order to be a charity, are:

- the organisation has exclusively charitable purposes (these fall within the ‘descriptions’ of potentially charitable purposes set out in the Charities Act 2011); and
- that the organisation’s specific purposes are ‘for the public benefit’.

If these conditions are met, the organisation is, in law, a charity. Significant consequences flow from that legal status, particularly in relation to the provision of public benefit, the protection and proper use of the charity’s funds and assets, the duties and responsibilities of its charity trustees, the regulation of the organisation and its public accountability.

A charity’s charitable purposes are normally specified in its constitution (which is sometimes described as its governing instrument or governing document). They are specific to that charity and it must pursue those purposes but not go beyond them.

The legal test of what is a charity in Scotland is known as ‘the charity test’ (see section 7 of the Charities and Trustee Investment (Scotland) Act 2005). Only organisations that meet this test can be registered on the Scottish Charity Register as charities under the law of Scotland.

The charity test will be met if:

- the organisation's purposes consist only of one or more of the charitable purposes listed in the 2005 Act; and
- the organisation provides public benefit in Scotland or elsewhere (or, for new applicants, intends to do so).

In determining whether an organisation seeking to be registered as a charity in Scotland meets the test, the Office of the Scottish Charity Regulator (OSCR) is required by the 2005 Act to 'have regard to' benefits to the organisation's members or others (in the capacity other than as a member of the public) and to any 'disbenefit' to the public.

The public benefit must outweigh any 'disbenefit' (the 2005 Act does not define this word).

There is no legal presumption of public benefit. The question of whether the legal criteria are met must be demonstrated on a case-by-case basis, in the context of the organisation's activities (or proposed activities, for a new organisation).

Scots law excludes an organisation from meeting this test if:

- its constitution allows its property to be applied for non-charitable purposes; or
- its constitution allows Scottish or UK Ministers to direct or otherwise control the organisation's activities; or
- the organisation has party political purposes.

In Northern Ireland, the Charities (Northern Ireland) Act 2008 provides that an organisation is a charity if:

- it is established for charitable purposes for the public benefit (the purposes must be within the list of purposes set out in the Act); and
- it is within the jurisdiction of the courts in Northern Ireland with regard to charities.

Charitable purposes: England and Wales (Charities Act 2011)

The Charities Act sets out descriptions of purposes *capable* of being charitable, in the right set of circumstances. Not every organisation with a relevant purpose will, in fact, be a charity. In addition, the lists are not definitive. The law is flexible, so that the legal meaning of 'charity' can develop as needs alter, society and social conditions change, and new means to provide charitable benefits evolve.

This list set out in the Act is as follows:

- The prevention or relief of poverty.
- The advancement of education.
- The advancement of religion. Religion can include:
 - (i) a religion that involves belief in more than one god; and
 - (ii) a religion that does not involve belief in a god.
- The advancement of health or the saving of lives. This includes the prevention or relief of sickness, disease or human suffering.
- The advancement of citizenship or community development. This can include rural or urban regeneration, and the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities.
- The advancement of the arts, culture, heritage or science.
- The advancement of amateur sport. This can include sport or games that promote health by involving physical or mental skill or exertion.
- The advancement of human rights, conflict resolution or reconciliation, or the promotion of religious or racial harmony, or equality and diversity.
- The advancement of environmental protection or improvement.
- The relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage. This can include relief given by the provision of accommodation or care to the relevant persons.
- The advancement of animal welfare.
- The promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services.
- Any other purposes that:
 - (i) are not within 1–12 above but are recognised as charitable under section 5 of the 2011 Act (recreational and similar trusts) or under the old law (i.e. the law relating to charities in England and Wales in force immediately before 1 April 2008);
 - (ii) are analogous to or within the spirit of 1–12 above;
 - (iii) may reasonably be regarded as analogous to or within the spirit of any purposes which have been recognised, under the law relating to charities in England and Wales, as falling within (ii) above or this sub-paragraph (iii).

This 'sweeper' category is important in carrying forward all pre-existing charitable purposes not explicitly set out in the list. It also provides future flexibility so that the law can change and expand as society changes.

Recreational and similar trusts

Provision of facilities for recreation or leisure-time occupation, in the interests of social welfare, can be charitable, provided that these conditions are met:

- (a) the facilities are provided with the object of improving the conditions of life for persons for whom the facilities are primarily intended;
- (b) those persons have need of the facilities by reason of their youth, age, infirmity or disability, poverty or social and economic circumstances; or
- (c) the facilities are to be available to the public at large or to male or female members of the public.

The Charities Act specifies that this applies in particular to village halls, community centres and women's institutes, as well as the provision and maintenance of grounds and buildings for recreation or leisure-time occupation, always subject to the requirement that the facilities are provided in the interests of social welfare.

The purposes of the specific organisation must be for the public benefit in order for it to qualify as a charity.

Community amateur sports clubs (registered sports clubs)

A 'registered sports club' is a club registered by Her Majesty's Revenue & Customs (HMRC) as an amateur sports club (known as a community amateur sports club or CASC). Such a club cannot be a charity.

Charitable purposes: Scotland

Charities and Trustee Investment (Scotland) Act 2005

The list of potentially charitable purposes for the charity test under the law of Scotland is as follows:

- The prevention or relief of poverty.
- The advancement of education.
- The advancement of religion.
- The advancement of health. This can include the prevention or relief of sickness, disease or human suffering.

LEGAL AND REGULATORY CONTEXT

- The saving of lives.
- The advancement of citizenship or community development. This can include rural or urban regeneration, and the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities.
- The advancement of the arts, heritage, culture or science.
- The advancement of public participation in sport (involving physical skill and exertion).
- The provision of recreational facilities, or organisation of recreational activities, with the object of improving the conditions of life for the persons for whom they are primarily intended. This applies only to recreational facilities or activities that are:
 - primarily intended for persons who have need of them because of their age, ill-health, disability, financial hardship or other disadvantage; or
 - available to members of the public at large or to male or female members of the public at large.
- The advancement of human rights, conflict resolution or reconciliation.
- The promotion of religious or racial harmony.
- The promotion of equality and diversity.
- The advancement of environmental protection or improvement.
- The relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage. This can include relief given by the provision of accommodation or care.
- The advancement of animal welfare.
- Other purposes reasonably analogous to any of the purposes above. The advancement of any philosophical belief (whether or not involving belief in a god) can be analogous to the purpose set out at 3 above.

Charitable purposes: Northern Ireland

Charities (Northern Ireland) Act 2008

The list of potentially charitable purposes under the law of Northern Ireland is as follows:

- The prevention or relief of poverty.
- The advancement of education.

- The advancement of religion. ‘Religion’ includes:
 - a religion that involves belief in one god or more than one god; and
 - any analogous philosophical belief (whether or not involving belief in a god).
- The advancement of health or the saving of lives. The advancement of health includes the prevention or relief of sickness, disease or human suffering.
- The advancement of citizenship or community development. This includes rural or urban regeneration, and the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities.
- The advancement of the arts, culture, heritage or science.
- The advancement of amateur sport, i.e. sports or games that promote health by involving physical or mental skill or exertion.
- The advancement of human rights, conflict resolution or reconciliation, or the promotion of religious or racial harmony, or equality and diversity (this includes the advancement of peace and good community relations).
- The advancement of environmental protection or improvement.
- The relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage (this includes relief given by the provision of accommodation or care to the persons mentioned).
- The advancement of animal welfare.
- Any other existing purposes, and analogous purposes.

Charity essentials: charitable purposes, activities and outcomes for the public benefit

The individual charity’s purposes are all-important. It is these purposes that the organisation must pursue for the public benefit and it may not lawfully go beyond its own purposes.

If a charity does go beyond its own purposes, this amounts to a breach of trust and can have serious legal consequences. These can include personal liability for the trustees, regardless of whether the charity has limited liability.

There is an important distinction between purposes and activities – advancing education is a purpose; running a school is an activity in pursuit of that educational purpose. The trustees have a prime responsibility to ensure the charity pursues appropriate activities in pursuit of its stated charitable purposes, in order to deliver relevant public benefit. Pursuing the specific charity’s purposes for the public benefit is critical to retaining charitable status and is the very essence of what being a charity is all about.

Charities are therefore obliged to provide public benefit from their activities in pursuit of their charitable purposes and they must demonstrate how they do so.

Trustees and those involved in the governance and the legal administration of charities should be particularly careful to stay true to the charity’s charitable purposes. It is important to guard against ‘mission drift’.

Key consequences of charitable status

Having the legal status of being a charity has key consequences for the organisation, for its funds and assets and for the people involved in the organisation – any members (if it has a membership structure) and, particularly, its charity trustees. These key consequences include the following:

- The organisation is inherently outward focused.
- It must pursue its charitable purposes and provide charitable public benefit.
- Its funds and assets must be protected and used correctly, towards the charitable purposes and in accordance with charity law restrictions and requirements.
- No significant private or commercial benefits must arise from the organisation’s activities.
- The organisation is regulated by charity law and overseen by the relevant charity regulator(s).
- It is publicly accountable and must provide detailed annual accounts and an annual trustees’ report (unless it has specific exemptions from reporting obligations).
- The members have no commercial interests and they do not ‘own’ the charity, in the way that the members of a commercial company do.

- The trustees are stewards and custodians, with legal duties (in charitable incorporated organisations (CIOs) and Scottish charitable incorporated organisations (SCIOs) the members also have some legal duties).

Registration of charities

The obligation to register with the Charity Commission is a key legal consequence of being a charity under the law of England and Wales. The obligation applies unless the particular organisation is subject to an exception from the registration requirement, which many charities are (there are around 167,000 main registered charities on the register and the Charity Commission estimates that there are around 330,000 charities in total in England and Wales).

Failure to register when obliged to do so does not remove charitable status, but it is a breach of charity regulation.

The main reasons for formal legal exemption from charity registration are:

- the charity is beneath the registration income threshold (currently £5,000 annual income);
- the charity is legally ‘excepted’ from registration; or
- the charity is legally ‘exempt’ from registration.

Although charity law reforms were intended to remove ‘excepted’ and ‘exempt’ status from the vast majority of charities, this has only partially been achieved during a slow, and as yet incomplete, period of change.

Small charities

While there are arguably some benefits of being exempt from charity registration as a small charity (such as not having to file accounts and returns with the Charity Commission), there are very real practical disadvantages for these organisations, especially in relation to how they prove their charitable status. They are not listed on the register of charities and do not have a charity number. If a small charity has registered with HMRC for Gift Aid and other charity tax reliefs and exemptions, it will be given a charity tax reference number by HMRC. This may help it to demonstrate its charitable status to third parties.