Charities which charge for their services: an examination of *In Re Resch Will's Trust* [1969] 1 AC 514

Presentation at the Landmark Cases in Charity Law Conference at the UK Supreme Court, 23 January 2025

Philip Sales*

1. Introduction

Lord Simonds once remarked of charity law that "few, if any, subjects have more frequently occupied the time of the court".[1] Through the legal concept of "charity", the state marks out for special legal treatment a range of purposes that promote "public benefits" of various kinds. In this context, charity law has become an increasingly prominent but complex subject. The complexity is largely a product of the use of the concept as the vehicle to serve a number of public policy objectives and of its history in the light of this, developing through centuries of incremental judicial activity from the beginning of the 17th century, with occasional legislative interventions that at times have purported to restate the common law, at times have reshaped the boundaries of the law, and at times have effected more radical change in response to changing political, economic and social environments.[2]

Some of the complexity of charity law arises because the modern *legal* understanding of charity, deriving from that history, diverges significantly from the non-legal meaning of that concept as having to do with alleviating human suffering. In addition to helping the disadvantaged, the legal understanding of charity has increasingly taken in a large and diverse range of public benefit purposes, many of which may incidentally benefit the well off in society. The law comes under pressure from this dissonance.

Finally, charity law is complex because the modern legal understanding of charity is deployed in a range of legal settings, such as in ascertaining the validity of trusts for purposes, in determining the availability of legal and tax privileges, and in generating a legal status that opens the door to a variety of regulatory consequences. It has been the entitlement to tax exemptions and benefits, afforded by the state both to the charities themselves and to charitable donors, that has been one of the primary underlying reasons for the considerable amount of litigation in charity law and why it can be so controversial. The point has become especially acute in circumstances where the courts have held that the charging of fees, even significant fees, by a charity for its services does not necessarily prevent charitable status from being recognised. In other words, a charity's services may still be deemed to be available for a sufficient section of the public, and thereby satisfy one aspect of the "public benefit" test,[3] even though in practice a large section of the public will be unable to pay for such services. The practical effect may be that it is the rich, rather than the poor, who obtain the benefit of subsidised services which are delivered through a charity.

---

* Lord Sales, Justice of the Supreme Court of the United Kingdom. I am indebted to my former Judicial Assistant, Alex Hughes, for his excellent assistance in preparing this paper.

[1] *Gilmour v Coats* [1949] AC 426, 443.

[2] Matthew Harding, *Charity Law and the Liberal State* (CUP, 2014), 1.

[3] As most recently codified in section 4 of the Charities Act 2011.

In Re Resch Will's Trust[4] is an important decision in this context in determining the extent to which fee-charging remains compatible with the legal understanding of charitable status. At the time, however, the decision did not appear to make much of an impression on legal practitioners. Described in Parliament in 2005 as a "blancmange … a foundation for nothing but a sinking feeling",[5] the case previously received a different interpretation. Only more recently has it emerged as a landmark case on the scope of the public benefit requirement in charity law.

It is important to place *Re Resch* in context and to understand the light it shines on the historical development of charity law in changing political, economic and social environments. Historically, charities and non-profitmaking entities more generally were independent from government and operated as forms of community self-help to supplement a non-existent or absolutely minimal welfare state. Nowadays, however, charity law is located in a fundamentally different policy environment. The state has grown dramatically and has assumed most of the functions previously carried on by private charitable undertakings. It also promotes a capitalist economy generally grounded in free competition between undertakings with equal status, in relation to which government adopts a stance of neutrality.

In circumstances where there exists a comprehensive welfare state alongside a capitalist economy based on free competition, charity law can have distorting effects. Why should the state promote the supplementary provision of welfare services for limited groups in society who benefit from "charitable" vehicles, in particular where charges are levied for such services which may exclude the poor from benefiting from them and where the charitable status of some providers may give them a market advantage over others? *Re Resch* highlights these tensions.

The potential distorting effects can be pronounced in light of the tax privileges the state affords to charities. In the first place, the idea that charging for services does not negate their characterisation as charitable is in tension with the democratic ethic of equality between citizens. Is there an argument that the notion of equal citizenship should preclude preferential state treatment for the delivery of enhanced services to some groups which is not available to others? To what extent is it acceptable for the state to subsidise, through tax breaks and privileges, superior provision for the rich who can afford to pay for the supplementary services tendered by a charity, in apparent violation of the equality principle?

Secondly, tax exemptions for charities which provide services in return for payment appear to be in tension with the principle of equal competition in a capitalist society. Why should the state subsidise, through privileged tax treatment, the provision of paid-for services by charities when those services may be in competition with those provided by commercial undertakings?

In public policy terms, the issue then arises to what extent society should accept these tensions and distorting effects of charity law and trade them off against the potential realisation of other public goods. If the welfare state is imperfect and offers only incomplete protection for the vulnerable, continued state encouragement for supplementation through private charitable enterprise may be justified. But it is open to question whether an approach based on judicial interpretation of the accretion of existing case-law, as laid down over history and in very different social environments, offers the best way of approaching this issue. Consideration of *Re Resch* might help to inform the answer to this question.

---

[4] [1969] 1 AC 514 ("*Re Resch*").

[5] (Amendment 28) HL Deb 9 February 2005, vol 669 col GC120 (Lord Phillips of Sudbury).

Section 2 begins with a discussion of the decision in *Re Resch* and its initial reception. Section 3 then turns to the historical development of charity law to place the decision in its contemporaneous context. Section 4 identifies the gradual extension of the welfare state, from minimal state provision and an emphasis upon encouraging altruism in the private sector through broader tax privileges. Section 5 discusses the emerging tension between charity law and the modern welfare state, in the context of which *Re Resch* has significance as a judicial attempt to develop a principled approach to the "public benefit" test in the context of fee-charging by charities. Section 6 then addresses the question of the extent to which one can, and should, tolerate a degree of inevitable tension with principles of equality in a liberal democratic and capitalist society. Finally, section 7 provides a brief discussion of charity law today, highlights that the issues raised by *Re Resch* are more acute than ever before, and questions whether the approach adopted by the Privy Council can survive in the future in an environment that is far-removed from the political, economic and social landscape of almost 60 years ago.

2. *The decision in* Re Resch

The appeal was brought against a decision of the Supreme Court of New South Wales in respect of, *inter alia*, a testator's direction to his trustee, by his will dated 5 December 1960, to pay from time to time two-thirds of the income from his residuary estate "to the Sisters of Charity … so long as they shall conduct St. Vincent's Private Hospital…", for a period up to 200 years. The Supreme Court held that this was a valid charitable bequest. This was challenged on appeal to the Privy Council.

Despite its name, the Sisters of Charity was not itself a charity. It was an unincorporated association which was free if it chose to seek to fulfil purposes some of which were charitable, and some not.[6] The association provided hospital services at two locations, a private hospital (St. Vincent's) where fees were charged and at a public hospital. Therefore, in order to decide whether the testamentary gift was charitable it was necessary to consider whether the purposes for which the Sisters of Charity carried on the private hospital (as opposed to its public hospital) were charitable, since those were precisely the purposes identified in the gift. If they were not, the gift would have failed, for there could not be a non-charitable purpose trust.

Delivering the decision for the Privy Council, Lord Wilberforce observed that the purposes of the private hospital were *prima facie* charitable, on the basis that it was clearly established both in Australia and in England that "the provision of medical care for the sick is, in modern times, accepted as public benefit suitable to attract the privileges given to charitable institutions."[7] He then went on to describe two "disqualifying indicia" that might render those purposes non-charitable: first, whether the hospital was run "commercially, i.e. with a view to making profits for private individuals" and, second, whether "the benefits it provides are not for the public, or a sufficiently large class of the public to satisfy the necessary tests of public character".[8] The Privy Council held that the purposes of the private hospital were not disqualified from being charitable on either count. Although fees were charged, the evidence showed that the private hospital was not run for private profit.

---

[6] see *Re Resch* (n 4) 541.
[7] Ibid., 540.
[8] Ibid., 540-541.

It is the Privy Council's conclusions on the second count that are most significant. The private hospital provided health care services in exchange for substantial fees and the question arose whether the charging of such fees, thereby excluding persons of modest means who were not in receipt of medical benefits from access to its services, meant that the services were not for the public benefit. Lord Wilberforce was keen "to dispose of a misapprehension" and said that "it is not a condition of validity of a trust for the relief of the sick that it should be limited to the poor sick … there is no warrant for adding to the condition of sickness that of poverty".[9] The first part of this statement is narrow and not contentious, but the second is much broader: whilst it clearly envisages a class of rich and poor, logically it also embraces the possibility that all beneficiaries could be rich. Indeed, Lord Wilberforce considered that while a nursing home that limited its admission to the rich would not be charitable, a trust for the provision of medical facilities could be charitable, despite the fact that "by reason of expense they could only be made use of by persons of some means".[10] There was evidence in *Re Resch* that some patients had been treated for nothing or for reduced fees "from time to time",[11] but there was no constitution or written rules for the private hospital (nor provision in the will) which required some services to be given *gratis*, or for reduced rates, and so the position could have varied from year to year and fees covering the full cost might legitimately have been charged to all.

Lord Wilberforce went further in holding that indirect as well as direct benefits had to be taken into account in determining whether the public benefit requirement was satisfied, apparently on the basis that this was as much to do with the sufficiency of the section of the public to whom the services were provided as with the charitable nature of the purpose; and that in the case at hand the indirect element of public benefit was "strongly present", for reasons that included a degree of relief of pressure on the public healthcare system (in particular, on the public hospital run by the Sisters of Charity) that flowed from the provision of services by the private hospital.[12]

Re Resch therefore stands as authority for the proposition that fee-charging is not in itself incompatible with charitable status. However, it should be observed that it was by no means the first decision of its kind. For example, over 40 years earlier, the House of Lords accepted without question the charitable status of Brighton College, which charged substantial fees, without any mention of the limits this placed on the school's provision of education or other opportunities to people unable to afford its fees.[13] Similarly, in the *Scottish Burial Reform* case Lord Upjohn observed: "It is quite clear that the mere making of a charge for the services rendered does not prevent an organisation, otherwise charitable, from being charitable".[14] In fact, the point had been put even more forcefully in the earlier case of *Re Estlin*, where Kekewich J held that a bequest to found a rest home for female teachers was charitable despite finding that the testatrix set the fees at a level so as deliberately to exclude the poor.[15]

This may therefore go some way to explaining why *Re Resch* did not make much of an impression at the time. The 6th edition of *Tudor on Charities*, published prior to *Re Resch*, included a section entitled "Relief must be by way of bounty"[16] where it cited Rowlatt J's conclusion in *IRC v Society*

---

[9] Ibid., 542.
[10] Ibid., 544.
[11] Ibid., 539.
[12] Ibid., 544.
[13] *Brighton College v Marriott* [1926] AC 192, 204.
[14] *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138, 149; see also *Ltd v Ministry of Local Govt. & Planning* [1951] Ch 728.
[15] (1903) 72 LJ Ch 687, 689.
[16] Douglas McMullen, Spencer Maurice and David Parker (eds), *Tudor on Charities* (6th ed, Sweet & Maxwell, 1967) 15.

of Widows and Orphans of Medical Men that to be charitable the relief of poverty must be given by way of bounty and not by way of bargain.[17] However, the 7th edition, published 15 years after *Re Resch*, had changed the title of this section to "A charitable gift need not be made solely by way of bounty";[18] but instead of citing *Re Resch* in support of this proposition, the section included a discussion of Peter Gibson J's subsequent decision in *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General*[19] where he said that Rowlatt J's remarks in *Society of Widows* must be understood in their limited context (and merely cited *Re Resch* without further discussion). Similarly, the 1st edition of Picarda's textbook published in 1977 cited the *Scottish Burial Reform* case as the key authority for the proposition that charities may charge fees for their services without losing their charitable status.[20]

It was only relatively recently that the decision in *Re Resch* became the central focus in the Charity Commission's interpretation of the law relating to fee-charging charities. As Picarda observes in the latest edition of his textbook, "after languishing without much academic or other comment for many years, [*Re Resch*] has now become the touchstone for new generalised doctrine or dogma".[21] To attempt to explain this change in the perception of *Re Resch*, it must be placed in the context of the historical development of charity law.

3. Historical development of charity law

The common law model of charity is traced back to the preamble to the Statute of Charitable Uses 1601 of Elizabeth I. The law on charities developed from consideration of the preamble, which set out a (non-exhaustive) list of purposes which were taken to be charitable. These included the "releife of aged impotent and poore people", the "maintenance of sicke and maymed Souldiers and Marriners" and to provide "schooles of learninge".[22]

At the turn of the 19th century, the preamble became equated with the legal definition of charity,[23] although it had long since been recognised that uses outside the statute could be charitable in law.[24] From the outset "public benefit" was regarded as inherent in the concept of charity, even if not expressly mentioned,[25] with the relief of poverty its principal manifestation. So, in *Fisher v Hill* it was held that "where no use is mentioned or directed in a deed, it shall be decreed to the use of the poor".[26] Yet, as Moore recognised in his *Reading on the 1601 Statute*, as long as the use benefited the poor it was within the equity of the statute, even though it incidentally benefited the rich.[27] At the same time, Moore was careful to distinguish a trust which incidentally benefited the rich from one whose sole object was to benefit them or was for the benefit of an individual or group of individuals as distinct from the public.[28] These observations laid the initial foundations for the

---

[17] (1926) 136 LT 60, 65.
[18] Spencer Maurice and David Parker (eds), *Tudor on Charities* (7th ed, Sweet & Maxwell, 1984) 13-14.
[19] [1983] 1 All ER 288.
[20] Hubert Picarda, *The Law and Practice Relating to Charities* (1st ed, Butterworths, 1977) 26.
[21] Hubert Picarda, *The Law and Practice Relating to Charities* (4th ed, Bloomsbury, 2010) 155.
[22] (1601) 43 Eliz 1 c.
[23] See *Morice v Bishop of Durham* (1805) 10 Ves 521, 542–43 (Lord Eldon).
[24] See Francis Moore, *Reading on the 1601 Statute* (1607), reproduced in George Duke, *The Law of Charitable Use* (first published in 1676, expanded in 1805, W Clarke and Sons), at 26.
[25] See, e.g., *Jones v Williams* (1767) 27 ER 422.
[26] (1612) Duke, 82.
[27] Moore (n 24) 27.
[28] Ibid.

view among the judiciary that relief of poverty was not to be considered as the determinative test of public benefit but sat alongside all other manifestations of public benefit, which had equal status.

The 1601 statute operated alongside minimal state provision to protect the vulnerable. It was introduced in the same year as the Poor Relief Act 1601. The function of the state was strictly circumscribed. Under the Poor Relief Act, public support would be provided only in the most desperate cases. This meant that the main responsibility for the relief of suffering and the promotion of public goods such as education lay with the private sector, including through community efforts and with support from philanthropists. Private charity thus fulfilled a vital role in society, and it was assumed to be a permanent and even indispensable element in such welfare system as existed. Moreover, whereas state aid was very limited, standardised and mechanically administered, the charity of individuals could be as discretionary as they might wish.[29] Charitable giving was regarded as a form of moral discipline for the donor him- or herself. In making a choice among possible objects of their benevolence – indeed, in having to decide whether to contribute at all – individuals were receiving the kind of moral training that they would not get merely by paying their poor rates.[30]

It was only in the late 1800s that there was a change in social temper and this dominant view of the role of charity law came under serious challenge, driven in part by the growing accumulation of data on the conditions of life of the lower classes.[31] In this respect, it is important to consider the landmark case of *Commissioners for Special Purposes of Income Tax v Pemsel*,[32] decided in 1891. The case is well-known for identifying "public benefit" as a separate and distinct requirement which had to be satisfied before a purpose could qualify as charitable in the eyes of the law. The central question was whether the meaning of the word "charitable" in section 61 of the Income Tax Act of 1842 (applicable throughout the United Kingdom) was the same as the meaning developed by English Chancery judges administering the law of trusts over centuries, so as to cover support for the missionary purposes of the Protestant Episcopal Church. A majority of the House of Lords ruled that the tax statute tracked the meaning of the term in the general law of trusts. Significantly, the majority considered that the idea of charity does not necessarily require some element of relieving poverty, even where the issue was the availability of tax allowances rather than the validity of a charitable trust. After identifying the fourth and final head of charity, namely any other purposes beneficial to the community, Lord Macnaghten observed that trusts within that category "are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly."[33] Thus, the majority adopted a technical approach to the concept of charity that accorded with the traditional perception of charity law as being a private sector concern, with wealthy philanthropists being at liberty to support a wide range of causes as they saw fit.

In contrast, Lord Bramwell, in a forceful dissenting judgment, echoed the conclusion of Lord Esher MR in the Court of Appeal, that charity (as a general term as used in the statute) necessarily implies the relief of poverty and that the testator had to be found to have had an intention to provide such relief.[34] In other words, these judges saw the word "charitable" in section 61 as bearing a meaning closer to the lay understanding of charity as relief for the poor. The majority,

---

[29] David Owen, *English Philanthropy: 1660-1960* (The Belknap Press of Harvard University Press, 1965), 500.
[30] Ibid.
[31] Ibid., 503.
[32] [1891] AC 531.
[33] Ibid., 583.
[34] Ibid., 565.

however, dismissed such a "restricted" view[35] and found the purposes to be charitable, notwithstanding that there was no intention to discriminate between rich and poor in fulfilling the purposes of the trust.

One can see, therefore, that the tensions that arose again in *Re Resch* had been brewing in the case-law for some time. It is also relevant to consider the changing political, economic and social landscape between the date of the decision in *Pemsel* and the decision in *Re Resch*. During this period, not only did hard times and high taxes affect charitable giving, but drives to raise money to fund the state to fight two World Wars, which had been very successful, seemed to have drained off some of the support that would normally go to voluntary organisations.[36] More significant perhaps were the shifting proportions among the components of charity income. Charitable contributions – donations and subscriptions – tended to lag behind the increase in costs incurred by charities. By 1934, it has been estimated that around 37% of the total income of English charities was being received as payment for services.[37] Significantly, the pressure and demands of the First World War resulted in financial plight for voluntary hospitals, with many lacking the funds even to maintain their buildings and equipment. A special Committee on Voluntary Hospitals was appointed which rejected any proposals for unconditional state aid; instead, it recommended provision of temporary assistance from public funds, but even then the government provided only half the recommended amount, exhorting the hospitals to develop "fresh and permanent sources of revenue".[38]

Despite the funding pressures voluntary organisations, and voluntary hospitals in particular, continued to serve a vital role alongside public bodies. In particular, these organisations enjoyed "freedom to experiment, to carry on pioneer activities which, for one reason or another, a government department is unable to undertake".[39] They met "a major need in supplementing, quantitatively and qualitatively, the regular statutory system … They may contribute funds and workers to round out the statutory arrangements, filling gaps or reaching into corners unoccupied by the statutory services".[40] In the years leading up to *Re Resch*, therefore, it was being increasingly recognised that fee-charging was often essential for voluntary hospitals to survive and continue to provide their important services. In this context, it is perhaps unsurprising that the Privy Council adopted an attitude that generally favoured the validity of charitable gifts to private hospitals.

4. The extension of the minimal state

In parallel with these developments in the first half of the 20th century, there was a growing role for the state itself in determining what was needed for the public good and then – to some extent - providing it. A number of public provision schemes were established alongside the voluntary sector. Of most significance for present purposes was the enactment of the National Health Service Act 1946. However, that did not signal the end of the voluntary health sector. The public finances remained constrained and state provision could not meet all needs. For example, to this day St John's Ambulance remains a significant first aid charity, offering training courses, advice, volunteering opportunities, event support, and other services in the health sector. Donors have

[35] Ibid., 571 (Lord Herschell)
[36] Owen (n 29) 527.
[37] Constance Braithwaite, *The Voluntary Citizen* (London, 1938), ch VII.
[38] Voluntary Hospitals Commission: Terms of Appointment (Cmd. 1402) (1921).
[39] Owen (n 29) 533.
[40] Ibid.

remained motivated to support medical research, training and other services that cannot realistically be performed by the public sector, at least at a level to meet all demand for them. More generally, private health care remained an attractive complement to the national health regime that was often hampered by inadequate funding, with consequential delays in treatment.

Thus, what emerged was something of a partnership in terms of provision. No longer were charities seen as "Junior Partner[s] in the Welfare Firm",[41] and as "Auxiliaries of the Welfare State".[42] The existence of the voluntary services, with their financial resources and their staffs of workers, professional and voluntary, saved the state money and reduced the administrative complications inherent in setting up fully comprehensive statutory systems. Conversely, cooperation with the public authorities relieved some voluntary bodies of the necessity of "penny-pinching" and enabled them to improve their services and facilities.[43] Indeed, in certain areas this was a requirement in order to qualify for publicly funded grants.

In recognition of the continued importance of a well-funded voluntary sector, the state began to encourage private altruism through broader tax privileges. Thus, the modern version of charity law sees the state forgo tax revenue by subsidising the private pursuit of certain purposes by private individuals via the tax privileges accorded to charities and to charitable giving, revenue that it might otherwise have used directly to pursue activities that the state itself has identified as being for the public good. Charities have enjoyed exemptions from income tax for as long as income tax has been raised,[44] but in the years leading up to *Re Resch* tax relief had become broader and more significant. So, for example, partial exemption for charities from business rates in section 43(6) of the Local Government Finance Act 1988 can be traced back to section 11 of the Rating and Valuation Act 1961 which conferred relief on "any hereditament occupied by, or by trustees for, a charity and wholly or mainly used for charitable purposes (whether of that charity or of that and other charities)" at a rate of 50%. That relief was increased further to 80% in section 43(6).

As a matter of public policy, this approach merits attention. Instead of the government receiving increased revenue through taxation which it could then direct towards activities that it, as a body of democratically-elected officials, has determined to be for the benefit of the public as a whole, it has adopted a position in which it forgoes a portion of such revenue in the hope that this encourages significant altruism in the private sector to provide benefits that go above and beyond what the state itself could have achieved. The state accepts a reduction in revenue in the hope that, in return, the private sector is financially incentivised to donate an even greater sum towards services that the state recognises as being for public benefit. One could describe this approach as encouraging forms of self-selected hypothecated giving by the private sector in place of imposition of non-hypothecated general taxation by the state which might not be so effective in meeting social needs. However, even assuming that such a policy is effective in encouraging wide-ranging altruistic activity, such a regime inevitably allows private individuals of significant financial means (and with no democratic mandate) to skew the direction of funds towards activities that they themselves consider to be of importance and/or to be in their own interests. This has given rise to tensions between competing values in a liberal democratic and free market society such as the United Kingdom.

---

[41] Ibid., ch XIX.
[42] Ibid., ch XX.
[43] Ibid., 541.
[44] See Ann O'Connell, "Charitable Treatment? – A Short History of the Taxation of Charities in Australia" in John Tiley (ed), *Studies in the History of Tax Law: Volume 5* (Hart Publishing, Oxford, 2012) 91–124.

5. The emerging tension between charity law and the modern welfare state

The charitable trust was developed as a matter of private enterprise within a light-touch regulatory regime. The common law, building on the preamble to the 1601 Act, recognised the unique and important function of charities by creating a facultative regime in which charitable purpose trusts were treated as valid in order to promote aspects of the public good (whereas non-charitable purpose trusts were generally invalid) and were enforceable by an officer of the state (the Attorney General) as representative of the public interest. Historically, the facultative nature of the regime meant that charity law was regarded as an aspect of private law, like the law of contract and as part of the general law of trusts.

However, since the primary aim of this facultative regime is to further the public interest and the forms of public support for it now include tax subsidies, it can no longer be seen as only a concern of private law. On the other hand, the regime has a hybrid quality and is not purely a matter governed by public regulation. Charity law neither requires charities to benefit a particularly large or representative section of the political community, nor does it prohibit them from conferring private benefits. The modern conception of the charitable trust therefore sees it as a public law–private law hybrid in the general sense that it represents the adaptation of a private law institution (the trust) to a form which also has a public law aspect, in cases where there is deemed to be a public interest in, or public benefit arising from, the trust. Where the public benefit test is satisfied, the common law recognises the validity of the purpose trust created by the donor. The donor's chosen project is permitted to endure forever, and the state supports its enforcement; but at the same time the project is specifically regulated through the operation of trust law in ways similar to those in which the projects of public authorities are controlled by public law.[45]

In this context, it is important to consider certain potential distorting effects of charity law on the modern welfare state. The proliferation of charities addressing similar issues to those addressed by public bodies has sometimes led to fragmentation of services and duplication of effort. This can make it difficult for individuals to navigate the support available and for policymakers to coordinate provision effectively, potentially resulting in inefficiencies and gaps in coverage. Even where there is no duplication, the charging of fees for charitable services can lead to a two-tiered system where those who can access charity services receive better support than those who rely solely on state provision. This is exacerbated by the fact that charities may end up being more prevalent in wealthier areas or may prioritise certain groups over others based on their mission or donor preferences, leading to inconsistent coverage and unequal access to support. More generally, charities may become captured by special interests or donor agendas, leading to "mission drift" or the neglect of certain groups or issues.

Tax privileges enjoyed by charities further contribute to this dissonance. As identified above, reduction in revenue may limit the state's ability to fund welfare programmes and other essential services, leading to inconsistent standards and gaps in provision. Charities may also be incentivised to prioritise activities that maximise tax benefits rather than those that align most closely with the objectives of the welfare state. More generally, excessive reliance on tax privileges for charities to deliver social services can lead to a de facto privatisation of welfare provision. This may shift responsibility for addressing social needs from the state to private actors, potentially resulting in inequalities in access to services and undermining the universality of the welfare state. This is an

[45] Kathryn Chan, *The public-private nature of charity law* (2016, Hart Publishing), 23

ironic twist in light of the lay understanding of the function of charities as being to assist disadvantaged persons, especially those of the most modest means.

These distorting effects are most acute when organisations charge substantial fees for their services, from which therefore only the well off can benefit, but in line with the *Re Resch* line of authority such organisations are still able to maintain their charitable status. The state is in effect tolerating the supplementary provision of welfare services for a limited subgroup of society and more startling still, through tax privileges, is subsidising superior provision for the well off who can afford to pay. This creates a barrier to access based on socioeconomic status, which contradicts the liberal democratic principle of equality of citizens that emphasises equal opportunity and access to essential services regardless of a person's financial means. In turn, it risks reinforcing social hierarchies by perpetuating the notion that certain services are only accessible to those who can afford them.

At the same time, the charging of fees for services provided by charities is in tension with the principle of free and equal competition in a capitalist society. In effect, the state is subsidising, through tax privileges, provision of services by charities in return for payment (that is, in the market) when those services may well be in competition with those provided by commercial entities. An example of this is the recent decision in *London Borough of Merton Council v Nuffield Health*.[46] This involved a challenge by a local authority to the charitable status of services provided by Nuffield Health, which at that time operated some 31 hospitals, 112 fitness and wellbeing centres, five medical centres and over 200 further gyms and health assessment facilities in workplaces across the United Kingdom. Nuffield Health had acquired a gym in the area of Merton council from a commercial company which had been liable to pay local business rates in relation to the premises. But Nuffield Health claimed an exemption from rates on the grounds that it was providing charitable services (for the promotion of health) at the location, albeit they were similar services associated with the operation of a gym as had been provided by the commercial operator and were provided in return for payment of fees. Merton council argued that Nuffield Health should not be entitled to the tax relief on the basis that the public interest requirement was not satisfied with respect to the services at the gym because the fees being charged to its members were set at a level which excluded those of modest means from enjoying its facilities. In dismissing the authority's challenge, the Supreme Court observed that "the 'scope' element of the public benefit requirement is satisfied by reference to the whole of the section of the public thereby benefitted, rich and poor alike", and that this remains so "[e]ven if this may perhaps not accord with the perception of every modern-thinking person untrained in charity law".[47] On the facts, even though "only token provision was made for the poor at the … gym", viewed overall Nuffield Health's health-related purposes satisfied the public benefit requirement.[48] In the light of established authority the Supreme Court observed: "the rich are as much a part of the section of the public benefited by Nuffield Health's charitable activities as are the poor".[49] Nuffield Health was therefore entitled to benefit from significant tax reliefs, putting it at an advantage against any commercial competitors providing gym services.

[46] [2023] UKSC 18.
[47] Ibid., [26].
[48] Ibid., [30].
[49] Ibid., [64].

The decision in *Re Resch*, which directly informed the result in *Nuffield Health*, demonstrates the acute tension with the principles which underpin both the modern liberal democratic state and the free market.

6. Managing the tension between charity law and social welfare

Notwithstanding legitimate concerns arising from the dissonance in the relationship between charities, the welfare state and the due operation of the market, there remains judicial recognition of the important function of charities in society and therefore of the legitimacy of encouragement by Parliament of charitable giving. *R(Z) v Hackney London Borough Council*[50] concerned the application of anti-discrimination law to a charity established to provide benefits (social housing) primarily for a particular group (the Orthodox Jewish community) which was the focus of its charitable objectives. Under the Equality Act 2010, a person is not prevented from taking positive action to alleviate disadvantage[51] nor is a charity prevented from restricting the provision of benefits to particular groups of persons if it can be justified as a proportionate means of achieving a legitimate aim or is for the purpose of "preventing or compensating for a disadvantage linked to the protected characteristic".[52] In holding that the charity housing association's "positive action" allocation policy was proportionate and lawful, the Supreme Court made the following observation:

> "Charitable status is a way of recruiting private benevolence for the public good (subject to the public benefit test in the Charities Act), and charities focus on providing for particular groups since that is what motivates private individuals to give money, where they feel a particular link to or concern for the groups in question. It is for the public benefit that private benevolence should be encouraged for projects which supplement welfare and other benefits provided by the state, even though those projects do not confer benefits across the board."[53]

The Court accepted that Parliament could legitimately decide that charitable giving by private individuals should be encouraged, even if the only means of incentivising such benevolence was to allow charities to choose, in their discretion, to benefit certain groups at the exclusion of others, and even if that was done in a manner that a public authority would have been prohibited from doing in the allocation of publicly provided social welfare benefits. The Court reiterated the point:

> "The degree to which charities are given freedom to pursue objectives which their donors regard as important affects the extent to which donors will provide private resources to supplement provision by the state. If donors are not given reasonable assurance that what they give will reach the persons they intend to benefit, they will not give at all."[54]

The Court also recognised the legitimacy of Parliament enacting a clear rule in this context insofar as charities, in supplementing the welfare system, have scarce resources that should so far as possible be channelled through to those who need them rather than being diverted to meet the

---

[50] [2020] UKSC 40.
[51] Equality Act 2010, s.158.
[52] Ibid., s.193.
[53] *R(Z)* (n 50) [80].
[54] Ibid., [109]

costs of administration and legal proceedings.[55] At the same time, a charity's activities remain limited by the application of the public benefit test,[56] overseen by the Charity Commission, which "ensures that the benefits to be provided by a charity are balanced against any detriment from its activities."[57]

More generally, social housing is a commonly cited area in which it is recognised that charities play an important role in supplementing the welfare system, particularly for vulnerable groups. While social housing services are primarily the responsibility of the welfare state, requiring significant public investment to meet the needs of all those of modest means, if charities did not supplement these services then the sector would be "even worse off".[58] But the benefits associated with charitable provision extend more widely. In the social housing sector, they include that charities are value-driven, trusted, responsive, and innovative in delivery.[59] Charities also have local knowledge and a history of effective, multi-agency working to provide care and services,[60] and are accountable, both to regulatory bodies and to the legal framework of rules that ensures they carry out charitable purposes for the public benefit.[61] More generally, charities can draw attention to flaws in the public social housing regime through campaigning and advocacy. As such, while charity law may have certain distorting effects, including that certain groups are benefited to the exclusion of others, this is seen as a price worth paying if the overall benefit to the public exceeds that which could have been provided by the state with increased tax revenue - even assuming, which may be very doubtful, that there was the political will to increase taxes to generate the necessary revenue to replace charitable provision.

Turning back to *Re Resch*, as mentioned above Lord Wilberforce sought further justification for his conclusions by referring to the indirect benefits to the public. These included the relief in respect of the pressure on the beds and medical staff of the public hospital, the availability of a certain type of nursing care and treatment supplementing that provided by the public hospital and the benefit to the standard of care in the public hospital resulting from the juxtaposition of the two hospitals.[62] However, this justification should be treated with caution. As Wigram V-C observed in *Nightingale v Goulburn*:

> "[M]any things of general utility may not fall within the definition of charity, as the term is understood in the Court; for many things of general utility may be strictly matters of private right, although the public may indirectly derive a benefit form them. The expenditure of money to promote the construction of railroads or canals (for example), which are private property, in no respect under the control of the Attorney-General, might often be an expenditure in the encouragement of things of general utility, but could not be said to be an expenditure for a charitable purpose."[63]

---

[55] Ibid., [105] and [109].
[56] Now enshrined in section 4 of the Charities Act 2011.
[57] *R(Z)* (n 50) [103].
[58] Warran Barr, "Social Housing – Charities and Vulnerable Groups" in John Picton and Jennifer Sigafoos (eds) *Debates in Charity Law* (Hart Publishing, 2020), 279-300, 281.
[59] See Nicola Glover-Thomas and William Barr, "Re-examining the Benefits of Charitable Involvement in Housing the Mentally Vulnerable" (2008) 59(2) NILQ 177, 184-5.
[60] William Barr, "The Big Society and Social Housing: Never the Twain Shall Meet?" in Nicholas Hopkins (ed), *Modern Studies in Property Law: Volume 7* (Oxford, Hart Publishing, 2013), 39-58, 45.
[61] Barr (n 58) 284.
[62] *Re Resch* (n 4) 544.
[63] (1847) 5 Hare 484, 490-1.

In line with this cautionary attitude, in the *Independent Schools Council* case the Upper Tribunal was reluctant to extend this aspect of the reasoning in *Re Resch* to educational trusts so as to allow an independent school to point to the resource implications of removing pupils from state education as evidence of public benefit provided by it, although the tribunal did not rule it entirely irrelevant: "There is obviously something in that point, although it must not be taken too far … We think this factor would be likely to make very little, if any, difference."[64] In particular, suggested benefits of this kind are "highly speculative" and there was no evidence on the facts of that case that local authorities could not cope with the increase in students subject to state-funded education.[65]

Instead, it could be argued that charity law in its current form remains consistent with the state's interest in altruism. As a motivation for action, altruism typically accompanies the unconditional giving of money and is usually inconsistent with the expressly conditional exchanges that constitute commercial bargains. However, charity law demands at a minimum that a charity is not-for-profit. In that light, where fee-charging is deployed as a means to achieve a charitable purpose that does not aim at the generation of private profit, as in circumstances like those in *Re Resch* where a charitable purpose entails the provision of a service and the cost of providing that service cannot be met except by charging fees for it, fee-charging might be consistent with altruism. The not-for-profit nature of the undertaking is only a factor, but all else being equal that factor may indicate the contrast with self-interest that is characteristic of altruism, making it possible that any fee-charging deployed as a means to the achievement of the not-for-profit purpose is itself altruistic, notwithstanding that fee-charging entails the sorts of bargains that are more usually associated with self-interested motivations.[66] Charity law has recognised the fundamental importance of the not-for-profit element in so far as it has generally rejected models which seek to achieve both for-profit and not-for-profit purposes.[67]

The argument might be stronger in circumstances where charities offer sliding scale fees or financial assistance programmes to mitigate against unequal access dependent upon means. Although it was not central to the decision, in *Re Resch* there was evidence that some patients had been treated for nothing or for reduced fees "from time to time".[68] Even though there was no requirement for the hospital to do so, it seems unsurprising that this occurred in practice given the hospital's charitable purpose was the provision of healthcare. In other words, the motivational power behind a charity's mission should not be underestimated; it may charge fees to ensure financial sustainability but it is rarely, if ever, a charity's intention deliberately to conduct its activities on an unequal basis absent an identified specific need of a particular group. So in *Re Resch*, it appears that the Sisters of Charity offered reduced or nil rates to those most in need whenever there was a surplus of funds that allowed for it.

That said, there remains the arguably greater concern that charity law has strayed too far from its original purposes insofar as it benefits the self-serving interests of the wealthy. Why should the state endorse or even tolerate such effects at all? In this respect, Matthew Harding has sought to frame the argument from the perspective of autonomy-based liberalism. Harding recognises the "regressive effect" of tax privileges in light of the fact that, since taxpayers with higher incomes generally pay higher rates of tax, tax exemptions systematically benefit the rich.[69] However, he

---

[64] R *(Independent Schools Council) v Charity Commission* [2012] Ch 214, [206]-[207].
[65] Ibid., [207].
[66] Harding (n 2) 99.
[67] See, e.g., *Re Smith* [1962] 1 WLR 763, 768 (Upjohn LJ) and 769 (Russell LJ).
[68] *Re Resch* (n 4) 539.
[69] Harding (n 2) 140-1.

argues that power over the expenditure of revenue is not *necessarily* the sort of good that must, on a sound understanding of the requirements of distributive justice, be distributed equally. A regime of tax privileges enables (and encourages) more people to pursue charitable purposes, and if that regime serves autonomy to a greater extent than any autonomy lost by the unequal distribution of power in allocating revenue, such a regime may in principle be justifiable.[70] Space precludes full consideration of this argument, but suffice to say here that it would seem that such a balancing exercise will inevitably involve the sort of weighing up of incommensurable factors and values that is most suited for a democratically-elected legislature to resolve, and for the common law and the courts then to facilitate. The respective roles of the legislature and the courts are discussed in the next section.

7. Looking forward: will the approach in Re Resch *survive in the future?*

Today, the charity sector presents challenges for the regulatory state, as it comprises a large part of the economy for provision of important services. As of 31 March 2023, there were 168,893 registered charities in England and Wales; and in 2022/23, the their total income was approximately £88 billion.[71]

In England and Wales, charities are governed by the Charities Act 2011 ("the 2011 Act"). Section 2(1) provides that to be established for charitable purposes, each of a body's purposes must satisfy two main conditions: (i) it must fall within section 3(1) (which sets out the list of qualifying purposes), and (ii) it must be for the public benefit (as enshrined in section 4). Section 4 did not introduce a new definition of the public benefit requirement. In fact, in 2013 the Government rejected calls to define it in statute, determining that "public benefit is best left to case law".[72] The two-limb test of the common law therefore continues to apply, namely (i) the benefit aspect, which considers whether the nature of a particular purpose is of benefit to the community at large, and (ii) the public aspect, which considers whether the public in general, or a sufficient section of the public, benefits. The Charity Commission exercises regulatory oversight in relation to the activities of charities, to ensure, among other things, that the public benefit requirement is satisfied.[73]

Today, *Re Resch* continues to inform the second limb of this test and was followed most recently in the *Nuffield Health* case where, as noted above, the Supreme Court expressly acknowledged that the legal understanding of charity may "not accord with the perception of every modern-thinking person untrained in charity law."[74] Judicial recognition of this dislocation is by no means a recent trend. In the early 19th century the Vice-Chancellor, Sir John Leach, dismissed outright an argument by counsel that a free school "for the sons of gentlemen" could not be charitable. Conceding that such an object would not be charitable "in popular language", he stated that "in the view of the statute of Elizabeth, all schools for learning are so to be considered."[75]

---

[70] Ibid., 142.
[71] Charity Commission, Annual report and Accounts 2022 to 2023 (HC 1458, 10 July 2023).
[72] See "Government Response to: 1) The Public Administration Select Committee's Third Report of 2013-14: *The role of the Charity Commission and "public benefit": Post-legislative scrutiny of the Charities Act 2006*; 2) Lord Hodgson's statutory review of the Charities Act 2006: *Trusted and Independent, Giving charity back to charities*" (Cm 8700, September 2013), para 4.
[73] See the discussion in *Independent Schools Council* (n 64).
[74] Ibid.
[75] *Attorney-General v The Earl of Lonsdale* (1827) 57 ER 518, 520.

Yet, such dissonance with public perception means that charity law is coming under increased scrutiny, with the tensions discussed above becoming more acute than ever. In particular, in the United Kingdom there has been a rise in public disquiet at the idea of charities charging substantial fees while at the same time benefiting from tax exemptions. The *Independent Schools Case* is indicative of this. Public sentiment has changed since *Re Resch* was decided almost 60 years ago.

Similar concerns have also been raised recently in Scotland. In 2014, a petition to the Scottish Parliament called for the removal of "charitable status, and thus taxpayer support, from private, fee-paying schools".[76] The petition cited "the inherent inequity of taxpayer subsidy for these elitist institutions whilst their financially strapped state counterparts receive no such financial support".[77] In 2018, *Third Force News*, the magazine of the Scottish Council for Voluntary Organisations, gave prominence to a survey of readers in which 77 per cent thought that private schools should not be charities.[78] The report quoted a survey respondent's remark that independent schools "are not providing a public benefit and only serve a minority of the population who are given an unfair advantage in life because of their wealth and privilege".[79] The petition and survey thus focused on egalitarian concerns: independent schools are socially divisive, they divert resources from the main state system, and the manifest unfairness of their receiving rates relief while state schools pay in full highlights the deeper injustice that access to the best and best-funded schools depends on a family's ability to pay fees. For the egalitarian, while it might be conceded that independent schools registered with the Scottish Charity Regulator must provide at least some public benefit, the Scottish Charity Regulator has not extracted enough in public benefit in return for the tax reliefs conceded, and the public funds absorbed by the reliefs would be better spent on state schools.[80]

In this context, in 2017 the Barclay Review of Non-Domestic Rates in Scotland recommended that the existing relief from non-domestic rates accorded to charities should be withdrawn from independent schools, which would otherwise retain their full charitable status and entitlement to other tax reliefs. The report concluded that it was "unfair" that such schools benefited from reduced or zero rates bills, whereas state schools do not qualify for relief, and that this "inequality" must therefore end.[81] With some adjustment, the Scottish Government accepted that recommendation which later resulted in the enactment of the Non-Domestic Rates (Scotland) Act 2020. Section 17 amends section 4 of the Local Government (Financial Provisions etc.) (Scotland) Act 1962 so that independent schools are no longer eligible for the 80% relief on business rates previously afforded to them.

While these concerns were raised in the context of independent schools, many of the arguments apply with equal force to fee-charging charities more generally. It may no longer be appropriate, therefore, to continue to apply the approach in *Re Resch* in a political, economic and social environment far removed from the 1960s in which public sentiment has shifted. But the institutional limits on decision-making by the courts suggest that it is not for them to make the sort of social or political judgment required for the law to be changed. There may be scope for affording a more significant role to the Charity Commission to scrutinise more closely the use of

---

[76] Public Petition No PE01531, 2014. The petition garnered 310 signatures in support.
[77] Ibid.
[78] Susan Smith, "Is the charity brand tarnished?" (*Third Force News*, 28 August 2018). The survey was of 148 readers; 14% thought private schools should be charities, while 9% were not sure.
[79] Ibid., 12.
[80] Patrick Ford, "Independent Schools in Scotland: Should they be Charities?" in John Picton and Jennifer Sigafoos (eds) *Debates in Charity Law* (Hart Publishing, 2020), 179-206, 195.
[81] Kenneth Barclay, *Barclay Review of Non-Domestic Rates in Scotland* (Scottish Government, 2017), para 4.120.

funds by charities who charge fees for their services. In fact, it appears that the aim of the Home Office when introducing the Bill which became the Charities Act 2006 ("the 2006 Act") was to enable the Charity Commission to reconsider the charitable status of organisations that provide only limited access to their services because they charge high fees.[82] In this respect, section 3(2) of the 2006 Act removed the presumption of public benefit, a provision that was then preserved in section 4(2) of the 2011 Act. The Charity Commission went so far as to issue guidance suggesting that it could subject a charity's fees to a reasonableness test, to ensure that access to benefit was not unreasonably restricted by a person's ability to pay, and setting out various ways of meeting the test which chimed with the underlying social democratic objectives for independent schools. However, when the guidance was judicially examined in the *Independent Schools Council* case, it was held, in effect, that the former presumption of public benefit was illusory, so that its supposed removal had no impact on the substance of established case-law, and that the cases provided no warrant for the Charity Commission's adoption of a test of reasonableness.[83] More recently, the Court of Appeal in the *Nuffield Health* case mentioned that the Charity Commission should be paying closer scrutiny to the use of funds by fee-charging charities to determine whether they are satisfying the public benefit requirement.[84]

The Home Office and the Charity Commission issued a joint statement when the Bill which became the 2006 Act was introduced which said that the Charity Commission would "continue to follow the approach of the court when determining public benefit", but also stressed that:

> "the law on public benefit will evolve and develop over time. This evolution will have regard to both the particular charitable purposes and the social and economic changes in society. It is in this context that the Commission will, in considering the application of the principles which apply to fee-charging charities, including independent schools, be mirroring the court's approach and encouraging the law to develop as appropriate in pace with modern society".[85]

The Charity Commission has recognised that the law needs to reflect contemporary social and economic conditions as well as keep pace with modern society more generally. This might indicate that the approach in *Re Resch*, though sound as a matter of "logic and authority",[86] may be coming to be regarded as no longer appropriate in light of rising public disquiet about the inequitable effects of charity law in modern society.

However, the Charity Commission has said that its intention is to mirror the approach of the common law. This raises a general question regarding the role of the legislature vis-à-vis that of the courts in this area. The questions arising from the *Re Resch* line of authority are ultimately matters of social welfare policy and distributive justice that, under the United Kingdom's constitution, are properly for Parliament to resolve. As observed by the Supreme Court in the *Z* case: "It is … a matter of social and economic policy for Parliament to decide how best to stimulate private benevolence which will allow charities to supplement state provision of welfare benefits."[87]

---

[82] See Prime Minister's Strategy Unit, *Private Action, Public Benefit: A Review of Charities and the Wider Not-for-Profit Sector* (Cabinet Office 2002) paras 4.26-4.28, 7.75; Home Office, Charities and Not-for-Profits: A Modern Legal Framework (Home Office 2003) para 3.26; Report of the Joint Committee on the Draft Charities Bill (2004, HL Paper 167-1, HC 660-1) para 64.

[83] *Independent Schools Council* (n 64) [230].

[84] *London Borough of Merton Council v Nuffield Health* [2021] EWCA Civ 826. See, e.g., [150] (Nugee LJ).

[85] Reproduced in 2004, HL Paper, 167-1, HC 660-1 at 24-5.

[86] *Nuffield Health* (n 46) [26].

[87] *R(Z)* (n 50) [109].

Across the common law world judges have repeatedly emphasised that the legal conception of charity must develop and adapt as social, economic, political, and cultural circumstances change.[88] It is possible that the common law notion of public benefit might be subject to incremental development by the courts, giving attention to the views of the Charity Commission and taking into account expert and stakeholder input from time to time. However, change of the law in this area would be a major step and it seems doubtful that the courts would feel confident that public perceptions and public policy had shifted so decisively that, without intervention by Parliament, it would be one they could properly take on their own initiative.

However, it is interesting to note that while *Re Resch* has risen to prominence in recent years in terms of legal analysis, the Charity Commission has now chosen to refer primarily to the *Independent Schools Council* decision to inform its view going forwards as to the legitimacy of fee-charging by charities. In fact, *Re Resch* was not relied on at all in this respect in the Charity Commission's analysis of the law relating to public benefit in 2013.[89] A subtle adjustment may be taking place in terms of the Charity Commission's approach to assessment of public benefit. It seems that it will now expect organisations to go further than simply not excluding the poor, but instead should positively include provision (even if modest) for such persons, in order to attain and maintain charitable status. The element touched on in *Re Resch*, that services were occasionally provided for nothing or for reduced fees, may in practice become more important in terms of Charity Commission assessment.

8. Conclusion

The permissibility of fee-charging by charities is a challenging question that continues to arise in the highest courts across the common law world. *Re Resch* remains a leading case in determining the extent to which fee-charging impacts on a charity's ability to meet the second aspect of the public benefit test. The case was not regarded as a landmark at the time. Indeed, it reflected a body of previous caselaw extending back centuries. But it has assumed prominence as a decision which is emblematic of deep tensions in charity law in modern society. In that sense, it has acquired the status of being a landmark.

The legal meaning of charity has diverged significantly from the modern non-legal understanding of that concept. Charity law is also in tension with the principle of equality of citizens in a modern liberal democratic state which assumes responsibility for basic welfare provision and with the principle of equality of economic undertakings in a capitalist economy based on free competition. These tensions are particularly acute where charities, which enjoy public subsidies by way of tax privileges, charge fees for the provision of their services.

Nonetheless, it may be argued that there are valid reasons why private benevolence should continue to be encouraged to supplement state provision of services for the vulnerable, even if that cannot be achieved on a basis of full equality. At the same time, in order to maintain a sense of its legitimacy in the eyes of the public, it can also be argued that charity law ought to keep pace with changing social and economic conditions and avoid departing too far from modern societal attitudes about what is fair. This raises the question of whether the approach in *Re Resch* ought to survive in the future, or whether it may require modification to widen the perceived public benefit associated with provision of services for which charges are made. The decision of the Upper

---

[88] See, e.g., *Bathurst City Council v PWC Properties Pty Ltd* (1988) 195 CLR 566, 582 (High Court of Australia).
[89] Charity Commission, "Public benefit: Analysis of the law relating to public benefit" (September 2013).

Tribunal in the *Independent Schools Council* case and the focus of the Charity Commission on that case in setting out its approach to assessment of public benefit might indicate something of a shift in that direction.[90] It seems likely, however, that intervention by Parliament may be required to bring about such a change in the law with authoritative and durable effect. Given the weight of authority behind *Re Resch*, and the strong element of policy in terms of when and to what extent the law should support charitable enterprises, the institutional limitations on lawmaking by the courts make it difficult for them to respond to changing, but contested, social attitudes.

[90] *Independent Schools Council* [2012] Ch 214.