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## STIFTEN IN ENGLAND

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# LAW & ASSOCIATIONAL LIFE in BRITAIN

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## 1. Introduction

There is a long history of 'associational life' in Britain. Much of this has consisted of informal local activity, whether in pursuit of private objectives of a social or recreational nature, or serving a more public interest. Linked to, and growing out of, informal action are a wide range of organised associations and other citizen bodies. It has become fashionable, especially in academic circles, to refer to all of this activity, both informal and organised, as civil society. The British experience is characterised by the fact that historically the state accepted only a minimal responsibility for social provision, looking to individual citizens and communities to undertake much of that which is regarded as the function of the public sector in modern states.

The 20<sup>th</sup> Century was marked by the growth of state involvement, culminating in the creation of the Welfare State in the mid-century, under which government, central and local, took lead responsibility for welfare and other social provision, for education, health and other services necessary to the public well-being in the modern world. In recent years however the contribution of the citizen, individually and in the community, has become increasingly important. The development of the legal and institutional framework – and its continuing reform, a matter very much on the current political agenda – is determined by this experience. This paper aims to trace this influence in describing the situation in Britain now.<sup>1</sup>

In Britain the most widely used term covering the sphere of organised citizen activity is 'the voluntary sector', at least among those involved in it. The wider public and the media most often refer to charity, which is in many respects a narrower term, both in law and colloquial usage. There is no agreed definition of what the voluntary sector covers; nor, except for statistical purposes, is one

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<sup>1</sup> At the time of writing, a Charities Bill is before parliament. It will give effect to proposals for fundamental legal and institutional reforms.

needed since it is neither an administrative or governmental term nor is it a legal concept. It may be helpful at the outset to set out the main terms used in Britain, with an indication of their commonly accepted meanings.

**Voluntary sector** itself refers to organisations which are voluntary in one or more respect. The main components of voluntary bodies are voluntary governance, either by trustees or members; the use of volunteers, either entirely, or alongside paid staff; and reliance on voluntary funding, either from public fundraising or other forms of independent funding, regardless of whether public or governmental funds are used as well.

**Voluntary action** is linked to the notion of voluntary bodies, and refers to activities and programmes started on independent 'citizen' initiative. 'Civic engagement' and 'community action' are other ways of expressing similar ideas. The reforms planned by the present government place much emphasis on this dimension, and seek to encourage 'active citizenship'. The department of government with lead responsibility is called the 'Active Communities Directorate' in the Home Office.

**Charity**, and the related notion of philanthropy, refer, in ordinary usage, to 'doing good', in particular to helping to relieve poverty, sickness and other ills of life. Charitable activity has a long history and has been through many forms. Its reputation, and its role in British life, has likewise fluctuated, particularly in relation to the role of the State. Charity is underpinned by an old and complex legal code. The legal meaning of charity is however significantly different from the popular meaning, being much broader in important respects.

**Mutuality** covers a parallel, and to some extent overlapping, tradition of self-help. This refers to a range of organisations in which the members cooperate together to achieve common ends – hence the alternative name of cooperatives. Such bodies may also be called friendly societies or benevolent societies.

The terms **not-for-profit** (or non profit) organisations and non-governmental organisations (NGOs) are used. Not-for-profits is, however, more commonly used in the USA which, though having the same common law legal system, does not retain the charity law system to the same degree as Britain. NGO tends to be used to refer to charities and other voluntary bodies operating overseas.

To avoid making the distinctions set out above the term **third sector** is sometimes used, as a distinction from the public and market sectors.

## 2. The Extent of the British Voluntary Sector

It is impossible to give a precise figure for the size of the voluntary sector in Britain. Most obviously this is due to the fact that there are no registration or administrative requirements which have to be undertaken in order to set up a voluntary body as such. Less obviously it is impossible to establish a precise figure because, in the absence of any legal or administrative requirements for establishing a voluntary body, the point at which an informal grouping of citizens constitutes a voluntary body is an arbitrary judgment.

It is estimated that there are over half a million voluntary bodies in the United Kingdom. The largest group, discussed at length below, are registered charities – there are nearly 190,000 based in England and Wales. The restriction to England and Wales is due to the fact that registration is the responsibility of the Charity Commission, whose responsibilities are confined to England and Wales. When allowance is made for charities based in Scotland and Northern Ireland, and charities which for various reasons are exempt from registration, the total number of charities (which can only be an estimate) in the whole of the United Kingdom is about a quarter of a million.

There are a great many local community bodies in Britain. For the reasons given above no precise figure can be given for such bodies, but is estimated that they amount to around a quarter of a million in total.

Many voluntary bodies do not have charitable status since they do not meet the public benefit requirements described below. The largest category are sports clubs, which are not regarded as charitable because they are for their members' benefit, rather than that of the wider public. They are estimated to amount to some 150,000. Other categories of non charitable voluntary organisations include some 30,000 cultural and arts organisations and 20,000 social clubs. Thus, altogether there are over 200,000 non charitable voluntary organisations, and a grand total of up to three quarters of a million voluntary organisations in the

United Kingdom. (The Charities Bill, referred to in footnote 1, may alter this, especially in respect of sports clubs.)<sup>2</sup>

### 3. Civil Society

The term civil society has old historical and philosophical origins. It has been revived and promoted by students of the voluntary sector, including some practitioners, to refer to the whole of the 'third sector'. There is no agreed definition of 'civil society'. It does however exclude government, the public sector and profitable commercial organisations (the market sector). The term is used to cover a variable range of institutions. At its widest, it refers to the sphere of life which is not determined by government or the market. It often means the extension of family and neighbourhood, as the sphere which individuals determine among themselves. In Britain political parties are normally regarded as part of the political process, distinct from civil society.<sup>3</sup> Trade unions are also not normally regarded as part of civil society. They are given legal rights and status under special legislation.<sup>4</sup>

'Civil Society' often refers to organisations within it. In that usage it is comparable to such terms in the voluntary sector and third sector (though, as discussed in the next paragraph, with an added nuance of virtue). A convenient definition of civil society is provided by the social philosopher Ernest Gellner: 'that set of diverse non-governmental institutions which is strong enough to counterbalance the State.'<sup>5</sup>

Civil society is part of political debate. It is regarded as a necessary component of a healthy and diverse society, counterbalancing the power of the State and of profit making organisations. Exaggerated claims have been made for the superior values of civil society organisations and it is increasingly becoming recognised that the mere fact of being non-governmental and non-profit-making does not of itself give civil society organisations a higher virtue than public or

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<sup>2</sup> An authoritative survey of the 'charitable and wider not-for-profit sector' is contained in chapter 2 (and supporting paper) of the UK Government's Strategy Unit report 'Private Action, Public Benefit' (Cabinet Office 2002).

<sup>3</sup> Political parties are subject to separate electoral law, though participation in the political process is open to any lawful organisation and indeed to individuals not backed by any organisation.

<sup>4</sup> This is a relatively recent development – securing employment rights was an important part of the history of associational life in Britain during and beyond the Industrial Revolution.

<sup>5</sup> Ernest Gellner, *Conditions of Liberty*. Penguin ed 1996 p5.

market bodies. That there should continue to be freedom to pursue private ends, provided they are compatible with the wider public well-being, is however a fundamental principle of the British constitution. It has now become an established part of public policy that 'civil society' organisations in the community should play an important role in providing services. How civil society should be underpinned and encouraged through the legal and regulatory framework is the basic issue. As noted in the introduction, present government policy widely reflects this concern.

#### **4. Principles of law and regulation for civil society**

The fundamental principle of civil society as it has developed in Britain is freedom of association. People can come together to pursue legitimate ends freely. The role of the law is seen as underpinning and encouraging the responsible exercise of that right. Processes of registration and accountability should reflect that principle and facilitate, not inhibit and control, the creation and operation of civil society organisations.

The qualification that ends pursued by civil society organisations must be legitimate highlights the fact that the right to create associations is not absolute. Organisations which promote purposes which run contrary to the public interest, for example because they are criminal or create civil disharmony, cannot claim the right to freedom of association. How the balance is struck between the right to pursue private purposes and the wider public interest is one of the most sensitive issues in the law and regulation of civil society. It is especially topical in the post 9/11 world in relation to terrorism.

The right of free expression is another fundamental principle of civil society. Again it cannot be absolute. Constraints on, for example, inflammatory language that threatens communal harmony counterbalance freedom of expression. But limitations on the involvement of civil society organisations in the political process must be balanced against the principle of free expression.

The need for integrity and good practice in civil society organisations, and the legal and regulatory arrangements to secure it, must reflect the principles of freedom of association. The starting point is the need for self-regulation, whereby the civil society sphere promotes its own standards. Constitutional arrangements

that secure independent accountability, thus maintaining public confidence, are complementary to the development of good standards within the sector.

In recent decades the European Convention on Human Rights (ECHR) has come to play a fundamental role in safeguarding the responsible exercise of the basic human freedoms. The ECHR gives legal backing to the exercise of freedom of association and the other freedoms. States like the United Kingdom, which are signatories to the ECHR, are bound by it and alleged breaches may be challenged in the European Court of Human Rights. At the same time the ECHR recognises that the exercise of the freedoms cannot be absolute. It contains qualifications which permit action which overrides freedom of association and the other freedoms in the interests of public safety and similar public considerations. However, the standard of proof required by the Court before it will allow the exercise of the basic freedoms to be set aside is high. In the United Kingdom, the Human Rights Act 1998 was enacted recently to give effect in domestic law to the rights and freedoms expressed in the ECHR.

## 5. Charity

Charity is the 'dominant form' for civil society organisations in Britain. That is to say, charity is both the most common legal form for voluntary organisations to take, and it is also the most highly developed in legal and regulatory terms. Colloquially, the word 'charity' means helping the poor and needy. In law, the essence of charity is public benefit. Thus voluntary organisations which serve the public benefit may be charities.

The British legal system is based on common law. That is to say, the legal tradition developed by the courts over centuries determines the law as it is in the present and how it develops with changing circumstances. Britain no longer has a pure common law system, in so far as statutes passed by Parliament set the framework within which the courts apply common law principles. In the case of charity law, however, the role of Acts of Parliament is less than it is, for example, in the criminal law. A description of charity law must therefore describe its historical origins and growth.

The principles of common law are important in understanding charity law. It does not operate on the basis of a definition of charity, even in legal terms.

Rather, it is based on a set of principles applied and adapted by the courts, and by the Charity Commission, which in this respect has the powers of a court. This makes charity law a complex area to describe.<sup>6</sup> The advantage, in the view of common law practitioners at any rate, is that the underlying principles of charity law can be adapted to changing circumstances as the needs of society, and indeed the role of charities, change. This capacity of charity law to grow and change 'organically' is an important feature of the common law system. In the view of charity lawyers this virtue outweighs the disadvantages of complexity and obscurity – complaints levelled at the system by reform-minded critics. The proposals for reform currently under consideration in the Charities Bill introduced into Parliament at the end of 2004 envisage giving charity law a statutory basis, but stop short of replacing charity law entirely by a statutory system.

The law on charity as currently applied is conventionally dated to the Preamble to the Charitable Uses Act 1601. Charity and charity law did not of course start in 1601. Many charitable foundations go back much further than 1601. The Sheffield Town Trust, for example, celebrated its 700<sup>th</sup> anniversary in 1998. This is a good example of a civic foundation with a continuous, if varied, history of philanthropy going back over centuries. Its role has essentially been to help the poor of the city of Sheffield. Many foundations in the housing, health and educational field long predate 1601: many schools, hospitals and almshouses (providing accommodation for the poor) all have a history going back many centuries.

The history is important in understanding the 1601 Act and its relationship to present day law. Throughout Europe charitable foundations were an important part of that which we would now call social provision, reflecting then as now the wish of rich benefactors to contribute to the well being of society by helping the needy – and their wish to preserve their names as benefactors. What is distinctive in British history was the consequence of the Reformation and the dissolution of the monasteries marking the end of the Middle Ages, and the distinctively religious based social provision of that era. 1601 was a period of social and economic change and upheaval. The 1601 Act was part of a set of

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<sup>6</sup> Being based on common law charity law is set out in textbooks rather than statute law. There are a number of authoritative textbooks, in particular Hubert Picarda 'The Law and Practice Relating to Charities', Butterworths 3<sup>rd</sup> ed 1999, and Peter Luxton 'The Law of Charities', Oxford University Press 2001.

measures, of which the Poor Law was the most prominent, by which Elizabeth I sought to secure good order in Tudor England.

The 1601 Act itself, long ago repealed, was designed to strengthen the law against the abuse of charitable resources, to ensure that they were used for the intended charitable purpose in the public interest. The Preamble to the 1601 Act is a list of charitable purposes. It is neither a definition of charity, nor a comprehensive enumeration of all that was regarded as charitable then. What the Act did was restate what were regarded as purposes which served the public interest in post medieval society. It covered such issues as maintaining highways and bridges, as well as more obviously charitable purposes like tending for the sick and needy. The Preamble was thus a distinctive initiative of the monarch to harness to public policy ends the commitment and wealth of public spirited citizens.

It is worth examining the origins of charity law, not merely because they have a bearing on the present content of charity law, but also because they highlight a feature of the common law tradition which remains distinctive. This is that charity is the natural partner of the State. Indeed the legal concept of charity, embracing what is in the public interest, encompasses the purposes of the State. The relationship of charity to government in British history, and in Britain today, is a dialogue between what the State itself seeks to secure directly by government action and what it leaves to be delivered by the charitable endeavour of citizens individually or collectively. The dialogue has always involved advocacy of new policies and criticism of government, alongside service provision; however the partnership differs in principle from the Continental European civil law tradition of foundations as private bodies, and indeed the notion that public purposes are secured by the State. Thus the notion of charity, as a public sphere, is at contrast with the current notion of civil society, as a sphere of activity that counterbalances the State. This contrast has an important bearing on the role of and policy towards charity in the modern world.

There has been much change during the 400 years of common law development of charity law since 1601. A key date is 1891, the *Pemsel* judgement of the great judge, Lord MacNaghten. This shows the common law at work, in drawing together what by then were nearly 3 centuries of charitable law under the Preamble, and in particular a century and more of engagement of

charity, and philanthropy, with the economic and social consequences of the Industrial Revolution. In what, significantly, was a tax judgment, Lord MacNaghten categorised charity, as it had developed over the centuries, as comprising 4 'heads': relief of poverty; advancement of education; advancement of religion; and other purposes beneficial to the community.<sup>7</sup>

As the last, open-ended, 'head' makes clear, Lord MacNaghten was not providing a definition of charity. Under the common law there is no definition. Some common law jurisdictions, notably Barbados,<sup>8</sup> have sought to provide a definition of charity in legislation, but most still regard the lack of a definition as an essential virtue of charity law on account of the flexibility that its open-endedness affords. Nevertheless the lack of a clear and up-to-date legal concept of charity set out in legislation, together with other technical considerations, has led most common law jurisdictions to contemplate introducing legislation to modernise the basis for charity law. How this is being approached in Britain is discussed in more detail below.

## 6. The Distinctive Characteristics of Charity

That an organisation, be it a foundation, trust, association or limited company, has a public benefit purpose is only one of the fundamental characteristics required for charitable status. Three other essential features of charities, which make them appropriately regarded as a core part of civil society, are that they are independent, non-profit-making and non-political bodies.

Independence, in particular independence from government and the State, is characterised, and given legal underpinning, by the role and duty of the charity's trustees. Every charity, whatever its legal form, has trustees. They have absolute legal responsibility for the activities their charity undertakes in pursuit of its purposes. Their overall duty is to use their powers, and resources, in the best interests of their charity and its purposes. Practical issues arise of course, particularly in the modern world, where charities often contract with public authorities to deliver public services using public resources. But the principle that

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<sup>7</sup> Income Tax Special Purposes Comrs v Pemsel [1891] AC531.

<sup>8</sup> Barbados Charities Act 1978.

it is the trustees, and they alone, who are legally responsible is legal guarantee of the independence of charities.

The non-profit requirement, strictly speaking non-profit distribution, is the legal requirement that ultimately, all a charity's resources must be devoted, directly or indirectly, to the charity's purposes. Charities may incur administrative costs, and they may devote resources to activities such as fundraising, campaigning and publicity; but the ultimate justification for expenditure must be the contribution it makes to the charity's charitable purposes. Furthermore, the trustees must be able to justify their expenditure on that basis, as being reasonable expenditure towards fulfilling their purposes. Commercial activity, such as trading, is permissible within this framework, though again it must meet the test that it helps to achieve the charitable purpose.

The non-political requirement is more complicated, with technical, and indeed reform issues in charity law. But in essence the law requires charities and their trustees to avoid activity which is inappropriately political; and no charity may have a political purpose. The contention that charities should not be party political, in the sense of being associated with or supporting a political party, is uncontroversial. Charity law goes further, in interpreting the concept of 'political' as including seeking to change the law or government policy. The law does, however, allow charities to campaign and contribute to public debate on issues of political concern provided they are relevant to the achievement of their charitable purposes. This is important as charities play a significant part in public debate and the formation of public policy.

The basis for this principle of charity law reflects its origins in trust law. The courts have a historic role of ensuring that the purposes of a charity are fulfilled. Traditionally in Britain the courts have regarded issues concerning changes in the law or government policy as matters for Parliament over which the courts are not competent to pass judgment. Thus an organisation whose purpose is specifically to bring about changes in the law or government policy has been regarded as political and not charitable. But charity law, as now interpreted, does give charities extensive rights to engage in political action including advocacy, lobbying and campaigning, providing such action is intended to further the charitable objects of the organisation. Thus children's charities can and do

campaign on the government policies and laws that affect children and their interests.

Charity law affects organisations active in the field of human rights in particular. Provided they are not operating outside the law there is no restraint on the establishment of voluntary bodies to pursue the protection of human rights. But while Amnesty International, for example, is active in campaigning in support of the human rights of individuals in Britain, a court judgment in 1982<sup>9</sup> determined that it is not a charity, on the basis that its purpose is political. Recently, however, following the passing of the Human Rights Act in 1998, voluntary organisations with human rights objectives can now be more freely regarded as charities, the legal reasoning being that human rights is now enshrined in British law.

To summarise, one may characterize charities as bodies with a public benefit purpose, governed by independent trustees, whose resources are devoted to that purpose on a non-profit distribution basis and which are non-political.

## 7. Institutional Forms of Charities

Charities take many forms, ranging from unincorporated associations to bodies established by statute or Royal Charter. The three standard 'models' are association, trust and charitable company. It is a striking characteristic of charity in Britain that the institutional forms that charity takes are not specific to charity. There is no separate area of law that regulates charitable form, or indeed, that is specific to voluntary action or civil society. Thus the nature and form which associations, trusts and companies may take covers a wide range of activities and extends into both the public and market sectors as well as the not-for-profit sector. This is not a satisfactory situation and one of the reforms will create a new form, the charitable incorporated organisation (CIO).

While it is the purpose which defines charities, the basic forms that charities take are association and trust. Historically, they were the basic legal forms which private individuals could adopt under the common law system to undertake voluntary action (association), or devote wealth to a purpose of their choosing (trust). Naturally the State has, over the centuries, been concerned to regulate

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<sup>9</sup> McGovern v Attorney General [1982] Ch 321.

private sources of power. The growth of the legal framework for charity reflects the privileged status and legal protection which government, Parliament and the courts have given to citizen action in the public interest. That is the essence of the concept of charity. Association reflects the principle of freedom of association which is at the heart of modern concept of civil society, and trust is the traditional form for philanthropic benefaction. Associations and trusts have continued to provide a secure legal basis for charitable activity; however, the need for incorporation, to limit the liability of board members, has become an increasingly important issue, hence the growth of 'charitable company' status alongside association and trust.

In English law associations are the loosest legal form. An association consists simply of a group of individuals who come together to pursue a common purpose. It may have a written constitution, and in spheres where associational activity is well developed, such as sports and leisure, there are often model constitutions, provided by umbrella bodies for their member organisations. But associations as such have no legal personality in their own right. Legal form is provided by the governing rules of the association, which set out the purpose, powers and membership of the body. Legal liability, however, rests with the members, individually and collectively. Thus any transactions, such as property purchases, are the responsibility of all the members. For the pursuit of common private interests, such as sports, the association form is ideally simple and uncomplicated. Under the common law no legal process, such as court or government registration, is involved. Association, for philanthropic as well as other purposes such as cultural and political, became common in the 18<sup>th</sup> and 19<sup>th</sup> centuries.

Association form was, and remains, ideally simple for informal groups without complicated structures and resources. But even for small bodies the lack of legal personality becomes a difficulty once property ownership becomes involved. For charitable associations, that was long ago remedied by enabling them to incorporate for such purposes as property title, thereby enabling the association, as distinct from its members, to own property. This does not however provide the association trustees with protection from personal liability for the debts and losses that their associations may incur. For this reason, limited company form has become a common form for charities to adopt. Thus many charities are

formed as companies and accordingly registered with and subject to the requirements of Companies House, the public body responsible for the oversight of companies. This gives the trustees the protection of limited liability, but at the expense of legal complexity. The trustees are the directors and therefore subject to dual forms of legal obligation, under both companies and charity legislation. The Charities Bill provisions for the CIO, referred to above, will simplify this situation by creating a new institutional form of charitable incorporated organisation, giving trustees all the protection of incorporated status but overseen only under charity legislation, outside company legislation.

The trust is the original legal form of charity, long predating the 1601 Act. It derives from early English Law, particularly ecclesiastic law, forming a branch of law known as equity law. The basic concept is the simple notion of enforceable promise – money or property given (or ‘entrusted’) to one person to hold on behalf of a third person rather than as a personal possession. This form lent itself to charitable benefaction, whereby a donor established a trust to be applied for a specified purpose by its trustees according to the donor’s stated intentions. In principle the legal form is flexible and informal. The normal way of establishing a trust is through a will or deed – the document setting out the intended purpose of the donation. This should of course be a carefully drawn up legal document but this need not, in law, be so. Many trusts have been established by informally drafted deeds in wills and indeed much difficulty and subsequent litigation has arisen through imprecise drafting.

The will of Sir Henry Wellcome, establishing the Wellcome Trust, now by far the largest charity in Britain, is an example of an idiosyncratic founding document – now rewritten to meet its modern needs. The Wellcome Trust’s charitable purpose, reflecting Sir Henry Wellcome’s intentions, is medical research. Distributing over £400m a year, it is the largest source of funding for medical research in Britain, exceeding that spent by the Government.

A trust may be formed without any written document at all. All that is necessary is money or property to be given for a particular purpose. Thus it has been said that trust defines a relationship – between donor, trustee and beneficiary – rather than an organisational structure. This is important in establishing control and regulation over collections made, for example, in response to disasters or emergencies. Such monies are ‘impressed with charity’

on the basis that the purpose of the donation is to give money to a charitable purpose. It thus constitutes a charitable trust, subject to the requirements of charity law. Naturally it is normal practice to establish a charitable trust by means of a properly drawn up legal deed or will; but the protection of the law from the outset can be important. For example, the deed drawn up for the Diana Princess of Wales Memorial Trust was made in response to the spontaneous giving which arose after her death.

## **8. The Registration of Charities**

It is a principle of association under the common law that there is no legal process or registration requirement. For many years the same held true for charities as well. The Charities Act 1960, which restructured the Charity Commission (see below), created a registration requirement for charities. The Act set up a register of charities under legislation for the first time. Though the Act strengthened the regulation of charities the register was designed not merely as a mechanism of control or supervision, it was equally for public information and to benefit charities themselves. Indeed registration is a right as well as an obligation. Maintaining the register remains one of the prime functions of the Charity Commission.

With certain exceptions charities established in England and Wales are required to register with the Charity Commission. The Commission is obliged to register any organisation which meets the requirements of charity law, in particular having exclusively charitable objects. The consequence of registration is an authoritative confirmation of charitable status, which is binding in law. One of the reasons why sponsors are keen to obtain charitable status is the fiscal relief which charities are automatically accorded through that status. The Inland Revenue are legally required to accept, and benefit accordingly, all bodies registered as charities by the Commission. The Commission's determination is final, and subject only to legal appeal, though in novel or unusual cases the Commission does give the Inland Revenue the opportunity to comment before it makes a decision.

The Register of Charities has nearly 190,000 charities registered. Most are small – local voluntary or community bodies with low financial turnover. The

largest are multi-million pound enterprises. Charities range from national institutions like the National Trust, responsible for the maintenance of heritage buildings, Oxfam and the Royal Society for the Prevention of Cruelty to Animals (RSPCA) through specialist bodies, such as the Samaritans, providing a helpline for potential suicides, Arthritis Care, one of many charities dealing with particular medical conditions, and Help the Aged, providing help and assisting the elderly. The largest 200 have an annual turnover of over £10m with another 2,500 or so in the £1-£10m bracket. At the other extreme well over 100,000 registered charities fall below the Charity Commission's monitoring threshold of £10,000 turnover a year.

The requirement for charities to register reflects the fact that they are both civil society and public bodies. As part of civil society charities are independent; but they have charitable status because they are dedicated to a purpose which is in the public interest. They are not, therefore, the concern only of their members and supporters. There is no legal or administrative requirement for the generality of voluntary bodies, such as social clubs, to register either with the courts or a government department or agency.

The main benefits of charitable status are security of legal status, tax relief and access to funding. Additionally, many foundations make grants only (or preferentially) to registered charities; and public confidence in charities makes charitable status desirable for fundraising. Registration is the basis for accountability in return for the benefits of charitable status.

In deciding whether an application for registration meets the legal requirements the Commission applies the tests developed under common law principles since the 1601 Preamble. The *Pemsel* judgment still provides the current framework within which the Commission operates. Applications which fall within the poverty, education and religious headings are presumed to fulfil a public benefit purpose, though that can be rebutted in the particular cases. For other issues, under the so called '4<sup>th</sup> head,' the public benefit requirement has to be satisfied case by case.

Under the proposals in the Charities Bill for the reform of charity law the scope of charity will be defined in legislation; and all charities, regardless of their purpose, will have to satisfy a public benefit test, set out in Charity Commission guidelines. The Bill sets out a list of purposes which are charitable. These are

derived from the decisions of the courts and Charity Commission, rather than being a new list; and, as under present law, the list will not be an exhaustive definition of charity in any comprehensive sense.

The list proposed by the government is as follows:

- Prevention or relief of poverty;
- Advancement of education;
- Advancement of religion;
- Advancement of health or the saving of lives;
- Advancement of citizenship or community development;
- Advancement of the arts, culture, heritage or science;
- Advancement of amateur sport;
- Advancement of human rights, conflict resolution or reconciliation, or promotion of religious or racial harmony or equality and diversity;
- Advancement of environmental protection or improvement;
- Promotion of animal welfare;
- Relief of those in need by reason of youth, age, ill-health, disability, financial hardship, or other disadvantage;
- other purposes beneficial to the community.

The legislation involves complex technical provisions to cover the relationship between the new statutory list and the common law processes of determination which the Bill preserves. The final open-ended category is essential. An important function fulfilled by the Charity Commission is to determine novel applications. In the words of a distinguished Law Lord, Lord Wilberforce, the courts and the Commission 'have to keep the law moving as new ideas arise or old ones become obsolete or satisfied.'<sup>10</sup> In this way the common law basis for charity allows for the changing needs and circumstances of society. The Charities Bill retains this power by giving a statutory basis for the Charity Commission's approach of relating novel purposes to ones already accepted by analogy. Examples of novel decisions made under the existing law by the Charity Commission reflecting this principle include: the promotion of good community

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<sup>10</sup> Scottish Burial Reform and Cremation Society v Glasgow Corporation [1968] AC138.

relations; the promotion of ethical standards in business; fair trade for third world producers; and the removal of charitable status from gun clubs.

The fact that tax relief is an automatic consequence of charitable status is an important, and much prized, privilege (though, as noted above, by no means the only benefit of charitable status.) The rationale is that charitable status is, by definition, in the public interest and should be given encouragement by the government. It is for the charities themselves to decide how to fulfil their public benefit purpose, whether or not that accords with government policy or priorities. While government naturally chafes against this from time to time it is an important part of the diversity of civil society.

## **9. The Charity Commission**

The Charity Commission was established as a public body in 1853. Since then its role has been redefined a number of times. It is now both the registrar and regulator of charities and exercises a number of functions in fulfilment of a number of purposes. The Register of Charities is now a more accessible source of public information about charities, and is displayed on the Commission's website. The Register's principal purpose however is, as the basis for the Commission's core responsibility, the regulation of charities. Registration with the Commission is, in effect, entry to a support and supervisory relationship with the Commission. The rationale for this relationship requires separate discussion.

The distinctive regulatory role of the Charity Commission has grown up in parallel with the development of charity law and has common origins in the 1601 Act. The Charity Commission as an organisation was established in 1853. At that time its functions were those of the courts: to modify charities' trust deeds where changing circumstances required modernisation, and to redress abuse or mismanagement of charitable trusts. The need for the Commission arose from the fact that the Chancery Court, as well described by Charles Dickens, the specialist court for charity issues, was hopelessly clogged up by archaic rules and procedures. The Commission was simply an agency set up to free up the charity legal process.

The concept of charity regulation was already established under the 1601 Act – itself an Act passed to provide correction for the abuse of charitable trusts. In effect, the premise for the regulation of charities was the need to ensure that the purposes of the charitable benefaction were complied with. Under English law the Attorney General, as *parens patriae*, had responsibility for protecting the public interest in compliance with the charitable purpose of trusts. From time to time Parliament appointed roving Charity Commissioners to survey charitable trusts and report on abuse. Extensive reports in the early 19<sup>th</sup> century which revealed widespread abuse and neglect of charity led to the creation of the standing Commission. Thus, the fundamental principle underpinning charity regulation, translated to modern circumstances, is that charitable resources are devoted to the public interest and must be safeguarded for that public purpose.

The Charity Commission, as constituted at present, is a public body of some six hundred staff with an annual budget approaching £30m. At present it is a non-ministerial government department that exercises statutory powers under the Charities Act 1993. It is under the direction of five Commissioners, the Chief Commissioner who is full-time head of department (an administrator rather than a lawyer), two legal Commissioners, one full-time and one part-time, a part-time accounting Commissioner and a part-time Commissioner from the voluntary sector. The Commissioners are appointed by the Home Secretary, by open competition in accordance with the requirements for public appointment. They are answerable, through him, to Parliament. The Commission's budget is met out of public funds, and the Commissioners are accountable to the Home Secretary for the efficient running of the department. The Commission is independent of the political process in the exercise of its statutory powers, being answerable to the courts for the actions it takes over charities.

The government's reform proposals envisage retaining this constitutional basis for the Commission. (This is controversial since it rejects the recommendation of the Parliamentary Committee which scrutinised the Bill on publication that the Commission should be statutorily independent of Government. At the time of writing the outcome is uncertain.) The Commission's governance is modernised, with a board of nine members, more of whom will be drawn from the charitable sector (but appointed by the Home Secretary under the same process as at present) overseeing a staff lead by a chief executive.

The Commission has five broad functions: registration, accountability, monitoring, support, and enforcement. The distinctive nature of the Commission, in contrast to jurisdictions where regulation is tax led, is that its overriding objective, to be strengthened by the new Bill, is to increase public trust and confidence in charity. It is thus an independent partner of the charitable sector, using its powers to maintain trust in the concept and law of charity, and promoting integrity and good standards in charities. As described below the focus of the Commission's work – and the bulk of it in terms of activities – is devoted to encouraging good standards of governance, administration and financial management in charities. Thus while it is properly regarded as a regulatory authority, its interpretation of its regulatory responsibilities is broad, with much emphasis on preventative work rather than investigation and enforcement.

The Commission's registration function, as described above, is both legal and administrative. The role of the Commission in determining what organisations have charitable status makes it the first and principal determinant of the law of charity. Relatively few charity status cases are the subject of appeals to the courts so the Commission's role is crucial. This is important since the common law concept of charity is that it develops in response to changing needs and circumstances. As described above the Commission has instituted a long running review of charitable status as embodied in the register. Important issues of legal and public policy arise over the role and authority of the Commission in developing the law. This is a central concern in the reform of charity law.

The legal determination of status is the essence of the Commission's registration decision – once it is satisfied registration is required. However, following the strengthening of the Commission's powers the registration process also involves establishing that a charity is properly formed, with a viable constitution and governance arrangements. While the right to registration cannot be made dependent on satisfying this check, it is the necessary first step to the on-going supervision required by the new legislation.

A key part of the strengthening of the Commission has been to improve the accountability of charities. The law now requires charities to prepare an annual report of activities and accounts, in a prescribed form. This is graduated according to the size of the charity, small charities having to produce a simple

statement of what they have done in the year, supported by a simple statement of payments and receipts. These must be available for inspection by the Commission or any bona fide enquirer, but do not have to be sent to the Commission on a matter of routine. The report and accounting requirements, together with audit requirements, increase in complexity with the scale of a charity's activities. For charities with a turnover of £10,000 or more a year (some 60,000) the reports must be sent in to the Commission. They are thus available automatically for public inspection and for Commission monitoring.

The rationale for charity accountability is that charities owe their status and privileges to their commitment to the public interest. The public at large is therefore entitled to know what use charities are making of the resources they have and how they are seeking to fulfil their charitable purposes. The framework of accountability which the Commission has established is based on the Statement of Recommended Accounting Practice for Charities (SORP). It is designed to meet a number of objectives. The graded sophistication of the requirements is designed to reflect the governance and management needs of the charity, so that the reporting requirements encourage good management. As mentioned, the requirements are also designed to encourage transparency by charities. This is reflected in the detailed reporting requirements, for example for openness in reporting grants made by grant-making foundations. Finally the requirements are designed to enable the Charity Commission to fulfil its supervisory responsibilities over charities.

The Charities Bill builds on the recent strengthening of the Commission's supervisory role. Reflecting the measures undertaken by the Commission under the powers conferred by the 1993 Act, the new legislation puts responsibilities on charities and the Commission designed to make the contribution of charities to the public interest more subject to public accountability. This reflects the rationale for the regulation of charities, namely that their special status and privileges are based on the fact that they serve the public interest.

The core of the Charity Commission's supervisory role, as now constituted, is the monitoring of the annual returns from the 60,000 or so registered charities above monitoring threshold of £10,000 turnover. There are two parts to this: examining the returns to make sure they comply with the SORP requirement ('compliance'), and following up issues which, on the face of the returns, appear

to give rise to questions ('monitoring'). The compliance stage is part of the process of ensuring that registered charities meet the accountability and transparency requirements of reporting. It is, in effect, part of ensuring that, in recognition of their public status, charities are appropriately open about their circumstances and activities. Progressively the register on the Commission's website will contain information about the activities and finances of charities, thereby enabling people to see instantly what charities are doing with the money they receive. Monitoring is part of the ongoing active relationship the Commission maintains with registered charities. It focuses on identifying issues on which the Commission's powers or experience can be brought to bear. These may concern the legal framework or the powers of the charity, or its governance, management or financial arrangements. The essence of supervision is to ensure that charities operate within the law – and have a constitution which best enables them to meet their objectives; and adopt good practice in the way they conduct their affairs. The Commission does not – and cannot – directly supervise the effectiveness of how charities seek to achieve their goals. Indeed the principle of independence of charities means that it is for the trustees, not the Commission, to determine how they are going to fulfil the purposes which make them charities.

Most of the Commission's day-to-day work with charities comes under the broad heading of regulatory work. This however covers a wide range of constructive activities working in cooperation with and support of charities. It includes using legal powers, which avoid costly and time-consuming hearings in court, and giving advice on matters of law and good practice. A particularly important legal role of the Commission is to make what are called 'schemes' to amend a charity's constitution. This may involve giving it new powers, modernising its procedures or even amending its purposes. Under charity law the original purposes of a charity, as set out in its founding document, may only be changed on strictly limited conditions. The extent to which changes can be made depends on the precise form of constitution, it being easiest in the case of charitable companies and most restrictive in the case of charitable trusts. The mechanism is the long established doctrine of cy pres, under which purposes which can no longer be fulfilled can be adapted to enable a charitable trust to continue to function. It is a fundamental principle of the concept of trust, like

foundation, that the intentions of the benefactor should be protected. Indeed that is the heart of the regulation of trusts and foundations, both historically and conceptually. Balancing respect for a founder's wishes with changing needs and values is a delicate issue of law and policy, as relevant and difficult today, as we try to attract the 'new rich' to set up philanthropic initiatives, as in the past. English law allows a measure of flexibility, enabling trusts to be modified wherever the original intention has become obsolete or ineffective. The Charity Commission has the power to devise schemes for this purpose. A striking example of how far this can go is the scheme which amended the foundation document which established the Bridge House Estate Trust to maintain the bridges, like Tower Bridge, over the Thames at the City of London. Its powers have been modified to enable it to give charitable grants throughout the whole of the Greater London area, making it, thanks to the valuable property the Trust owns in London, one of the major grant-giving trusts in the country.

The Commission's advisory support function is multifarious. As can be seen from the Commission's website, it provides a wide range of guidance material on matters of charity law and practice, written in plain non-technical English to make it accessible to voluntary trustees with neither professional legal nor accountancy skills. This supports the role of the Commission in giving advice on request to individual charities. But the Commission is developing a systematic programme of visits to charities, based on monitoring and risk assessment factors, in order to identify issues in which the Commission's powers and expertise can help. The support function thus incorporates a preventative role, seeking to identify, in the light of Commission experience, potential problems.

The Commission's regulatory support role thus links in with its enforcement role – a combination which has been questioned. From its origins the Commission has had the powers of the courts to intervene in charities where there is mismanagement, or risk to resources. These have been strengthened, enabling the Commission to investigate suspected abuse or mismanagement and take remedial measures, such as the removal of trustees and the freezing of assets. The use of such powers of intervention is however a last resort and the Commission seeks to identify problems early and seek corrective action before enforcement is necessary. To avoid the confusion of 'friend' and 'policing' roles

feared by critics the Commission maintains a separation of support and investigation functions, with an evaluation process before cases are assigned.

The Charity Commission's remit (and competence) is concentrated on legal, governance and financial matters. It is not responsible for – nor, given the breadth of issues covered by charitable status, could it have the expertise to – pass judgment on the effectiveness and efficiency of charities (though the Charities Bill envisages it playing a more active role in requiring charities themselves to account for the impact they make).

The Commission's fundamental aim is to maintain public confidence in the integrity of charities. This means providing a framework within which a charity's compliance with the legal and accounting requirements of charity law and regulation can be monitored. The reporting requirements are thus directed at ensuring that a charity gives sufficient account of its activities and finances so that the Commission – and other interested parties – can check that it is operating prudently within its legal framework.

The Commission's first objective is thus to ensure that charities are able to maximise their potential within an effective legal, accounting and governance framework. This is supported by two additional objectives, namely 'to promote sound governance, better working and accountability' and 'to secure compliance with charity law and deal with abuse and poor practice.'<sup>11</sup>

What a charity achieves in its field is not a matter which the Charity Commission can or should assess. This has to be left to those concerned and knowledgeable in the field concerned. Since trustees are not accountable for the performance of their charity in this respect, there are concerns about holding charities to account for efficiency and effectiveness. The new reforms will address this to some extent by making charities report on what they achieve. But it is an important principle that charities should be independent and that diversity and innovation should be encouraged within the charitable sector, even at the expense of dubious outcomes (which is in any case a subjective judgement).

Those bodies that provide funding, both government and private, play an important role in testing the effectiveness of charities. The accountability of the recipients of grants, or the parties receiving contracts, for achieving results that

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<sup>11</sup> Charity Commission: Corporate Plan 2003-06. Charity Commission website: [www.charitycommission.gov.uk](http://www.charitycommission.gov.uk).

meet the expectations of their financiers is a tangible way in which the substantive performance of charities is assessed.

## 10. Mutuality

Running parallel to charity, there is, in Britain, a well established tradition of 'self-help' organisations. In contrast to the tradition of charity, which emphasises the altruistic principle of 'doing good for others', the principle of self-help focuses on the needs of the members of the organisation. In the 19<sup>th</sup> century the working class response to the challenges of the industrial revolution was to establish member groups in which people clubbed together to make provision jointly for the community collectively. Retail provision, especially of food, through cooperative shops is one important example which continues. This tradition of cooperatives, mutuals, housing associations, building societies and friendly societies is of growing interest in Britain as the principle of self-help has attracted more emphasis in the voluntary sector. One example is the development of the credit union movement, in which banking services are provided on a member, community basis in deprived areas in which commercial banking facilities are inadequate.

The need for separate legal forms for self-help organisations alongside charities has diminished in recent years as the strict interpretation of charity law as excluding beneficiaries from being trustees of charities has been relaxed. The old interpretation held that any benefit, whether remuneration in the form of money or receiving the services of the charity, was forbidden to trustees. It has become increasingly accepted that it is good practice that users should play a part in the governance of voluntary organisations. Following this principle the Charity Commission now allows users to be trustees of a charity provided there are adequate arrangements to prevent conflict of interest. Thus self-help organisations can qualify for charitable status – an example of the role of the Commission in modernising charity law under its own powers. A good example of this development is the standard principle that housing associations, providing social housing, include tenants on their management boards.

Nevertheless there is scope to encourage mutuals as an alternative to charities and the government's reform proposals envisage the creation of a new form of cooperative to be called Community Benefit Societies.

## **11. Voluntary Sector and the State**

The relationship between voluntary bodies, especially charities, and the State has always been close. This reflects the origins of modern charity – as a partnership between the public spirited citizen (especially the well-to-do) and the State both pursuing the public interest. It also reflects the fact that, until the creation of the Welfare State in the mid 20<sup>th</sup> century, most social provision was left to voluntary action. The tradition that voluntary bodies met social needs in cooperation with the public authorities, and at the same time took a public position on policy issues continued over a long period, a key example being the Charity Organising Society (COS) which oversaw relief of the poor in cooperation with the local parish relief. The reforms of the Welfare State switched the balance, so that for most, social policy provision became the responsibility of public authorities. But the partnership continued, and, with changing circumstances, has developed and changed – the COS, for example, continues to be active in supporting poor families under the name of the Family Welfare Association. The role of voluntary bodies in promoting and campaigning for policy initiatives and changes has always been an important function. Examples include disability, housing and homelessness, and criminal justice. The restrictions of charity law which prevent political bodies from being charities do not apply to activities in pursuit of charitable ends. In fact, one of the roles of the Charity Commission is to give guidance on political campaigning by charities and their right to engage vigorously in such activity provided that it does contribute to their charitable aims.

The essence of charitable status combines commitment to the public interest with independence. It thus provides a suitable legal and institutional form for many bodies which might be regarded as part of the public sector (rather than civil society or the 'third' sector). For example the British Council, promoting interest in and understanding of British culture and society, and the Arts Council, responsible for allocating public (and national lottery) money to arts bodies, are

both charities. Although much of their funding comes from Government, and Government plays a role in their governance, charitable status reflects the fact that their responsibility is for the public interest as they interpret it, rather than as determined by the government of the day.

Many charities have been set up at the request of or with the encouragement of Government. Examples are the Women's Royal Voluntary Service (WRVS), set up originally to harness women's voluntary movement for men as well as women (still with government funding); the Citizens Advice Bureaux (CAB), set up with government support to provide an advice service on provision and entitlements available for social and economic need; and the Immigrants' Advisory Service (IAS), providing independent advice to would be immigrants on immigration rules and procedures.

It has become common in recent years for government, at local level in particular, to establish charitable bodies to fulfil statutory responsibilities, in particular for housing and recreation. These charitable bodies operate at 'arms length' from the government, and on an independent basis, but with public funding. In parallel, contractual partnerships have become increasingly common between public authorities and voluntary bodies, under which services are provided independently by the voluntary body at the expense of the public authority. A framework of principles, setting out the basis on which this partnership should be developed, has been established as a result of negotiations between government and representatives of the voluntary and community sector. This is known as the 'compact', which is established at national level (separately for England, Wales, Scotland and Northern Ireland) with local compacts developed at local authority level.

This is an important development which the government is encouraging with a number of initiatives designed to strengthen the voluntary sector and its capacity to work with public authorities. This does however raise issues of striking a balance, between the independence of voluntary bodies and the spirit of voluntary action, and the danger of being co-opted as an agency of the State, determined by the policies (and politics) of government, and controlled by financial considerations. In order to underpin the legal independence of charities the Charity Commission has issued guidance on good practice by charities

entering into contracts with public authorities designed to safeguard their independence.

## **12. Enterprise and Commercial activity**

Voluntary bodies, including charities, have always been able to engage in commercial activity in Britain. Schools, for example, have always been able to charge well-to-do parents of pupils, while also providing free or subsidised education. In recent years the role of entrepreneurial activity on a public interest, non-profit basis has become increasingly emphasised. Many charities reflect this. One well established example is the Jorvik (Viking) Centre, a highly successful visitor attraction maintained by the York Archaeological Trust. More recently the Wildfowl and Wetlands Trust (WWT) has redeveloped redundant reservoirs in West London in collaboration with the Thames Water Board and local property developers to form an environmental resource in West London.

To facilitate this development, and in particular to encourage a public interest contribution to the economic regeneration of deprived areas, the Charity Commission has published guidance on charitable status for regeneration bodies, using the flexibility of charity law to widen the scope for charities engaging in 'profit-making' activity in pursuit of the public interest. The essential test is that surpluses ('profit') made through commercial activity must be devoted to the public purpose.

Some commentators, while welcoming the development of charity law in this way, argue that a new form of non-profit organisation is needed. Proposals for a 'public interest company' were put forward. The concept is to create a new legal and institutional form of company with all the financial, commercial and governance freedom of company form, but with the overriding principle that its activities are dedicated to a public interest purpose. Examples are provision of public utilities (such as water) and broadcasting. This has been given effect by the creation of a new form of company under the name of 'Community Interest Company.'

## 13. Conclusion

This is an exciting moment of development for voluntary, charitable and community activity in Britain. After a period in which core public services were financed and provided more or less exclusively by public authorities, with voluntary action largely confined to supplementary provision and innovation, Government is now looking to community organisation at all levels to engage in partnership to meet public needs. This has opened many opportunities for voluntary bodies but also raised many issues both of principle and practice. Reform debate, both within Government and in the voluntary sector, is live now.

## Glossar

Association	Vereinigung ohne eigene Rechtspersönlichkeit <i>unincorporated body</i>
Charitable Company	Gesellschaft, die gemeinnützig tätig ist und keine Gewinne an ihre Anteilseigner ausschüttet (vergleichbar mit der gGmbH) <i>nonprofit-distributing public benefit company</i>
Charitable Incorporated Organisation (CIO)	im „Charities Bill“ zur Neueinführung vorgeschlagene Rechtsform für gemeinnützige Organisationen, die eine eigene Rechtspersönlichkeit vorsieht <i>proposed incorporated form for charities</i>
Charity	allgemeiner Oberbegriff für alle Arten selbständiger und gemeinnütziger Non-Profit-Organisationen <i>basic English legal form for independent nonprofit-distributing organisations</i>
Charity Commission	Register- und Aufsichtsbehörde für gemeinnützige Organisationen in England und Wales <i>regulatory body for charities in England and Wales</i>
Common law	überkommenes, durch Gerichtsentscheidungen statt durch die Legislative entwickeltes englisches Recht <i>old form of English law developed by court judgment not Parliament</i>
Community Interest Company	neue Rechtsform für Non-Profit-Organisationen, die mit sozialer Zielsetzung ein Unternehmen betreiben <i>new nonprofit form of public interest company</i>

Compact	<p>formale Rahmenvereinbarung zwischen dem englischen Dritten Sektor und dem Staat</p> <p><i>formal framework agreed between government and the voluntary sector</i></p>
Foundation	<p>Organisation, die Zuwendungen gewährt (es handelt sich aber um einen rein deskriptiven Begriff; eine Rechtsform „Foundation“ gibt es nicht)</p> <p><i>grant-giving bodies (not a legal form)</i></p>
Register of Charities	<p>von der Charity Commission geführtes öffentliches Register der gemeinnützigen Organisationen; die Eintragung ist Voraussetzung des Gemeinnützigkeitsstatus</p> <p><i>Charity Commission's authoritative public record of charities</i></p>
Statute law	<p>legislativ geschaffenes Recht</p> <p><i>laws made by the Westminster Parliament</i></p>
Third sector	<p>Dritter Sektor; gängige Bezeichnung für den nicht-staatlichen und nicht-privatwirtschaftlichen Sektor</p> <p><i>general term for non-government, non-market sector</i></p>
Trust	<p>Rechtsform für gemeinnützige Tätigkeiten (vergleichbar mit der Treuhandstiftung)</p> <p><i>a legal form for charitable philanthropy</i></p>
Trustee	<p>die für die gemeinnützige Organisation verantwortlich handelnde Person (der Begriff umfasst auch das Geschäftsführungsorgan der „charitable company“, die „directors“)</p> <p><i>person responsible for a charity (includes directors of charitable company)</i></p>

Voluntary organisation

allgemeine Bezeichnung für die – nicht-staatlichen  
und nicht-privatwirtschaftlichen – Organisationen  
des Dritten Sektors

*general term for any non-government, non-market  
organisation*