The “Whys” of Charity Regulation

by

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Abstract

Why do we regulate charities? What is it about charities that requires them to be regulated because they are charities? What should charity regulation aim to achieve and why? These are the questions this thesis sets out to address. I begin by emphasising the need for critical analysis of the underlying purposes, or “whys”, of charity regulation. I then go on to identify two such purposes: encouraging the pursuit of charitable purposes; and holding those who pursue charitable purposes to account. The thesis outlines how these regulatory “whys” result from and can, thus, be justified by the particular problems charities face thanks to their legal definition, which I argue is the only possible basis for illuminating the purposes of charity sector specific regulation. I conclude by commenting on the further research needed to develop a more complete theory of charity regulation capable of informing institutional design.
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I. Introduction

This thesis is about charity regulation. In particular, it is about the reasons for regulating the charity sector, or the “whys” of charity regulation. In England and Wales, charities are primarily regulated by the Charity Commission for England and Wales (the Commission). The Commission’s history dates back to the 19th century, but it was instituted in its current form by the Charities Act 2006 (the 2006 Act). The reforms contained in the 2006 Act were intended to “provide a legal and regulatory environment that enables all charities… to realise their potential” and to “sustain high levels of public confidence in charities through effective regulation.” Many were optimistic. Debra Morris, for example, asserted that, once implemented, the reforms would “go far towards ensuring that charities are independently regulated in a manner that is open, consistent and proportionate.” Overseas, the charity law reforms in England and Wales were hailed as having “arguably set the ‘standard’ that a number of other jurisdictions have attempted to emulate in whole or in part.” But the reality has proved to be rather less rosy and, as Gareth

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2 Charities Act 2006 (UK), c 50.

3 Hilary Armstrong, then Minister for the Cabinet Office, as cited in Hodgson, supra note 1 at 13.


Morgan observed in 2015, in recent years, the Commission is “increasingly becoming used as the focus of criticism for everything that is wrong about charities.”

Under the 2006 Act (now consolidated into the Charities Act 2011 (the 2011 Act)), the Commission has five statutory objectives, namely: increasing “public trust and confidence in charities”; promoting “awareness and understanding of the […] public benefit requirement”; promoting “compliance by charity trustees”; promoting “the effective use of charitable resources”; and enhancing “the accountability of charities to donors, beneficiaries and the general public.” These objectives look relatively uncontroversial on paper, but this has not turned out to be the case in practice. The Commission’s pursuit of its public benefit objective has led to high profile litigation, as well as to criticism of the Commission in Parliament, the media, and the academic literature. Following the well-publicised Cup Trust controversy,
its pursuit of the public confidence objective has also been called into question. Reports published by the National Audit Office (NAO),\(^\text{14}\) and Parliament’s Public Accounts Committee (PAC)\(^\text{15}\) conclude that the Commission has not been an effective regulator, undermining the general public’s trust and confidence in charities. The PAC’s report adds that it has “little confidence in the Commission’s ability to put right its problems and failings.”\(^\text{16}\)

As Christopher Decker and Matthew Harding say, “[w]hile it is not unusual for new regulatory frameworks to experience teething difficulties, the experience of the implementation of the new regulatory framework for charities in England and Wales has been unusually tumultuous.”\(^\text{17}\)


\(^{16}\) PAC Report, \textit{supra} note 15 at 6.

Their discussion of three specific, practical challenges associated with the introduction of a new regulatory framework for charities under the 2006 Act leads them to conclude that, “there may be some underlying fault line in the design of the regulatory framework for charities in England and Wales, including ambiguity in the requirements that have been placed on the regulator.”

There is, then, a clear need for a critical examination of charity regulation. This must begin with the central challenge facing the Commission: namely, that different groups have very different views on what the purpose of charity regulation really is. This, in turn, leads to debate over what the Commission should do, and how it should go about doing it. It seems to me that the reasons for this ambiguity are threefold.

First, all five of the Commission’s statutory objectives are broadly drafted, leaving much room for interpretation. As one Parliamentary committee put it, “the objectives of the Charity Commission… are far too vague and aspirational in character… to determine what the Charity Commission should do.” For example, as we have seen, the compliance objective obliges the Commission “to promote compliance by charity trustees with their legal obligations.” But what does this mean in practice? Should the Commission promote compliance by using its statutory powers to crack down on cases of misconduct and mismanagement in the administration of charities? Or would its resources be better spent on educating and supporting charity trustees, helping them to understand and, thus, comply with their legal obligations?

18 Decker and Harding, supra note 17 at 335.
20 Charities Act 2011 (UK), c 25, s 14.
Second, the Commission’s five statutory objectives conflict with one another in some cases. For example, the Commission has the power to institute a statutory inquiry into a charity or group of charities, which it exercises in cases where there are serious regulatory concerns. As the Commission explains in its guidance:

The purpose of an inquiry is to examine the issues of regulatory concern in greater detail. It will investigate and establish the facts of the case so that the Commission can determine the extent of any misconduct or mismanagement; the extent of the risk to the charity, its work, property, or beneficiaries; and decide what action is needed to resolve the concerns.

Since these statutory inquiries are a matter of public record, the Commission generally publishes a report containing a statement of results for each inquiry on its website. In most cases, the report is accompanied by a press release. Inquiries, then, enable the Commission to hold charities and their trustees accountable for regulatory failings and to promote compliance, both in the charities concerned in the inquiry and in charities more generally, because charity trustees, managers and advisors can read the Commission’s reports and learn from their findings. The inquiries may also help to increase public trust and confidence in charities by showing the public how serious cases of abuse, misconduct or mismanagement are addressed. However, there is another side to the story. When the Commission opens statutory inquiries into a large number of

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21 Charities Act 2011 (UK), c 25, s 46.
23 CC46, supra note 22 at paragraph 4.1.
24 CC46, supra note 22 at paragraph 4.1.
charities, it is at least arguable that the inquiries undermine public trust and confidence in the charity sector as a whole, at least in the short term. The headlines over the past few years have made it clear that the media is much more likely to report on and give prominence to the charity sector’s failures than its success stories. This, in turn, affects how the sector is perceived. A report produced by Populus for the Commission in 2016 found that public trust and confidence in charities is at an all-time low. It goes on to explain that, “[a]mongst those who say their trust and confidence has decreased, a third attribute this to general media stories about a charity or charities (33%)”. Of course, this does not mean that the Commission should not open statutory inquiries where there are serious regulatory concerns. However, it illustrates the point that the Commission’s five objectives cannot each be pursued in isolation: pursuit of one objective will often impact on another, and not always favourably.

The third cause of debate over what the Commission should do is that the Commission simply does not have the resources it needs to pursue all five of its statutory objectives to the utmost. In November 2015, it was announced that the Commission’s annual budget would be frozen at £20.3 million until 2020, down from £32.6 million in 2007-08. This represents a budget reduction of approximately 48% in real terms, and has seriously impacted the Commission’s


26 UK, Charity Commission for England and Wales, supra note 25 at 14.


28 NAO Report, supra note 14 at 17.

29 NAO Report, supra note 14 at 17.
work. In its strategic plan for 2015 to 2018, the Commission explains, “we can no longer devote the same level of resource to each of [our] statutory objectives as we previously could. This means changing the way we operate, allocating resources by relative priority and risk and working with our partners.”

In their reports published in the wake of the Cup Trust controversy, both the NAO and the PAC challenged the Commission to become a more robust regulator. The report published by the PAC notes that, “it has not always been clear whether the Commission sees its primary purpose as supporting the voluntary sector or protecting the public interest.” It goes on to comment that the Commission has “placed insufficient emphasis on the monitoring and investigation of charities” and “has continued to make poor use of its powers.” Similarly, the NAO’s report states that the Commission “does not do enough to identify and tackle abuse of charitable status.” The underlying message is that an effective regulator should emphasise enforcement over support or enablement.

The Commission has responded to this political pressure. Its strategic plan for 2015 to 2018 begins with a clear statement that:

The role of the Charity Commission is crucial in upholding public trust and confidence in the charity sector. To fulfil this role to the standard that Parliament

31 PAC Report, supra note 15 at 3.
32 PAC Report, supra note 15 at 5.
33 PAC Report, supra note 15 at 5.
34 NAO Report, supra note 14 at 9.
and the public expects, the commission must become a risk-based regulator focussed primarily on enforcement and prevention.\(^{35}\)

As noted in the NAO’s more recent – and somewhat more positive – follow-up report, the Commission is now making greater use of its existing regulatory powers.\(^{36}\) It has also been granted new powers by Parliament, designed to enable it to do even more to tackle abuse and mismanagement in charities.\(^{37}\) However, inevitably, the Commission’s focus on enforcement and prevention has meant diverting resources away from its other regulatory activities.\(^{38}\) Its ability to provide charities with one-to-one advice and support, for example, is much reduced. Today, much of the Commission’s regulatory support is delivered through online guidance. It will only provide charities with one-to-one advice in cases where the guidance cannot be given online, the Commission is the only body which can give authoritative advice (other than the court), or failure to give advice would cause serious compliance difficulties for trustees, thereby impacting on public trust and confidence in the charity sector.\(^{39}\)

This regulatory shift has led to criticism from some in the sector. According to one charity chief executive, the sector needs a regulator that “supports and nurtures” it rather than one that acts as

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35 CC Strategic Plan, \textit{ supra} note 30 at 1.

36 UK, National Audit Office, “Follow-up on the Charity Commission”, HC 908 Session 2014-15 (22 January 2015), <online: https://www.nao.org.uk/wp-content/uploads/2015/01/Follow-up-on-the-charity-commission.pdf> at 8. The NAO reports that the Commission opened 64 statutory inquiries in 2013-14, up from 15 in 2012-13. It used its information gathering powers 652 times and its enforcement powers 56 times in 2013-14, compared with 200 and 3 times in 2012-13 respectively.

37 Charities (Protection and Social Investment) Act 2016 (UK), c 4, ss 1-12.

38 For comments on the impact of this, see Alison Dunn, “Regulatory Shifts: Developing Sector Participation in Regulation for Charities in England and Wales” (2014) 34:4 Legal Studies 660 at 663-664. See also Morgan, \textit{ supra} note 6 at paragraph 4.5.

“another police force.” Concerns have arisen, in part, because the Commission’s focus on enforcement and prevention has led to an increased focus on the legal duties and responsibilities of charity trustees. As the Commission’s outgoing Chief Executive recently acknowledged, “for some […] it feels as though we’re asking trustees to do too much, with too little time and too little support.” These comments reveal a further question for the Commission: who is it regulating for? The Commission ran a public consultation as part of its 2011 strategic review, to help it determine its regulatory priorities following cuts to its budget. One of its key conclusions arising from this review was that the Commission exists to “protect and serve the public interest in the integrity of charity,” not to serve individual charities (or, presumably, their trustees, managers or advisors). However, as Alison Dunn reports, the responses to the strategic review consultation nevertheless revealed “[e]xpectations that [the Commission] act as a champion, cheerleader, lobbyist and promoter of the sector.”

All this goes to show why the “whys” are so important. Lewis Carroll’s Cheshire Cat tells Alice that deciding on the right way to go “depends a good deal on where you want to get to.” This is a useful lesson for those of us with an interest in charity regulation. That is, until we understand where we want charity regulation to take us, there is little that we can meaningfully say about

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43 CC Strategic Review, *supra* note 42. See also NAO Report, *supra* note 14 at 18.

44 Dunn, *supra* note 38 at 662.

what the Commission (or, indeed, any charity regulator) should be doing, let alone whether or not it is any good at doing it. In other words, until we have a clearer sense of the purpose of charity regulation, the ambiguity relating to the role of the Commission identified by Decker and Harding and discussed further here will continue and the resulting “difficulties that have been experienced to date may persist”\textsuperscript{46} or perhaps even increase.

Dunn also identifies a clear need for a critical examination of the regulatory framework for charities in England and Wales. She concludes her detailed and thoughtful analysis of recent shifts in the Commission’s approach to charity regulation by highlighting “the need for a sector-wide debate on what charity regulation should set out as its goals and values.”\textsuperscript{47} As Dunn points out, many of the regulatory changes that have taken place to date have been prompted by the need for “resource efficiency”.\textsuperscript{48} I would add that some others seem to have been driven by political and media pressure to respond (or, at least, to be seen to respond) to high profile cases of abuse, misconduct or mismanagement in the administration of charities. All of these drivers for reform are short-termist in nature, making it unlikely that they can provide a suitable grounding for a theory of effective charity regulation. And, as Dunn says, “there is little long-term advantage in pursuing a regulatory shift without consensus on the role of regulation and the balance between different goals and regulatory choices.”\textsuperscript{49}

To date, there have been only limited attempts to understand the underlying justifications for charity regulation. As discussed, there are government reports that assess the Commission’s

\textsuperscript{46} Decker and Harding, supra note 17 at 335.

\textsuperscript{47} Dunn, supra note 38 at 678.

\textsuperscript{48} Dunn, supra note 38 at 676.

\textsuperscript{49} Dunn, supra note 38 at 677.
performance and make recommendations for improvement.  

However, these reports take the Commission’s statutory objectives as their starting point and, accordingly, fail to subject the underlying “whys” of charity regulation to any real critical scrutiny. There are an increasing number of rich and insightful academic texts on the regulation of the charity and/or voluntary sector. However, the majority are either comparative collections detailing the different regulatory experiences and approaches of different jurisdictions or analyses that focus on particular regulatory issues and challenges. As such, they tell us more about the “hows” and the “whos” of charity regulation than its “whys”.

Jonathan Garton’s monograph, The Regulation of Organised Civil Society, is a notable exception to this. His work has advanced the debate on regulatory justifications significantly, and I consider many of his arguments in this thesis. However, as discussed further in the following section, Garton’s work builds towards a clear recommendation that we eschew the legal concept of charity as a basis for understanding voluntary sector regulation altogether, in favour of a definition of “organised civil society” that looks to “the structural characteristics and social functions of its constituent organisations.” This means that, while some of Garton’s insights on the reasons for regulating can usefully be applied to charities in England and Wales, there are others than cannot.

50 See, for example, NAO Report, supra note 14 and PAC Report, supra note 15.


52 See, for example, Mark Sidel, Regulation of the Voluntary Sector: Freedom and Security in an Era of Uncertainty (Abingdon, UK: Routledge, 2010), which considers the impact of counter-terrorism law and policy on civil society and its regulation.

The lack of academic debate on the “whys” of charity regulation is particularly concerning in light of recent and continuing shifts in the Commission’s regulatory approach. The Commission continues to have limited resources, making it essential that its regulatory work is targeted appropriately. Accordingly, my goal in this thesis is to answer the call to action issued by Decker and Harding and by Dunn by articulating a theoretically robust rationale for regulating charities. In doing so, I will address questions such as: Why do we regulate charities? What is it about charities that requires regulation? What do we want charity regulation to achieve?

Section II begins with an overview of the legal definition of charity in England and Wales. It then goes on to discuss why it is necessary to use the legal definition as the basis for illuminating the underlying “whys” of charity regulation. In section III, I outline what I consider to be two core “whys” or goals of charity regulation: namely, encouraging the pursuit of charitable purposes, and holding those who pursue charitable purposes accountable. I argue that both of these goals can be derived from and are justified by the particular problems that charities face as a result of the legal definition of charity. These problems, in turn, illuminate the need for and, thus, the purpose of charity sector specific regulation. The thesis concludes with a discussion of the further questions raised by the “whys” I identify, and considers areas for additional research and debate.

Before I move on, two points should be made. First, the discussion in this thesis focuses on the Commission because it is the primary charity regulator in England and Wales and because the criticisms made of it in recent years serve to illustrate the need for a better understanding of the “whys” of charity regulation. However, the Commission is not the only regulator in town. As Mummery LJ has explained, in England and Wales:
a charity is subject to the constitutional protection of the Crown as *parens patriae*,
acting through the Attorney-General, to the state supervision of the [Commission]
and to the judicial supervision of the High Court.\(^{54}\)

Charities are also regulated by Her Majesty’s Revenue and Customs (HMRC), which oversees
most charity tax reliefs and exemptions, and by the Fundraising Regulator, which oversees
fundraising self-regulation. The two “whys” discussed here are intended to illuminate the
purposes of charity regulation generally, not the purposes of any particular charity regulator.
Accordingly, this thesis draws no conclusions on which body is best placed to deliver the
regulatory goals identified.

Second, given constraints of time and space, the discussion throughout is focused on charity law
and regulation in England and Wales. However, it is worth noting that, in recent years, Australia,
Ireland, New Zealand, Northern Ireland, and Scotland have all followed England and Wales in
introducing their own independent charity regulators. These regulators appear to have met with
varying degrees of success.\(^ {55}\) Yet, until we understand the underlying purposes of charity
regulation, it is difficult to evaluate the reforms that introduced them or to form a view on future
changes. Accordingly, I hope that the conclusions I draw here can be usefully applied in any of
the common law jurisdictions that recognise charity as a distinct legal concept.

\(^{54}\) *Gaudiya Mission v. Brahmachary* [1998] Ch 341 (CA) at 350.

\(^{55}\) For example, the New Zealand Charities Commission (established in 2005) was dis-established and its functions
merged back into the Department of Internal Affairs after only six years. The Australian Charities and Not-for-
Profits Commission (established in 2012) was also threatened with dissolution shortly after its establishment, but its
future now seems to be assured. For further discussion of the experiences in both New Zealand and Australia, see
Myles McGregor-Lowndes and Bob Wyatt, eds, *Regulating Charities: The Inside Story* (New York, NY: Routledge,
2017) 183.
II. The legal definition of charity

To understand the “whys” of charity regulation, we need first to be clear about what we mean by the word “charity.” This is particularly important because the legal definition of charity does not always accord with its popular meaning: as Lord Hailsham put it, “the words “charity” and “charitable” bear, for the purposes of English law and equity, meanings totally different from the senses in which they are used in ordinary educated speech.” 56

The job of the Commission is to regulate organisations that meet the legal definition of charity on a sector specific basis. Yet charitable status is a relatively broad church, held by a diverse range of organisations. Different charities can be very different from one another, and many initially appear to have more in common with equivalent non-charitable organisations. A charitable independent school, for example, is in many ways more like a non-charitable independent school (or, indeed, any kind of school) than it is like a local village hall charity, a shelter for the homeless or an international disaster relief organisation. However, the state takes the view that there is some common ground – a certain “charity-ness”, if you will – that merits a sector specific approach to regulation. So, what does this “charity-ness” amount to? In this section, I discuss the legal definition of charity in order to shed some light on this question. I then go on to explain why it is necessary to begin with the legal definition of charity to understand the “whys” of charity regulation.

In England and Wales, there is a statutory definition of “charity”. This definition was originally introduced by the 2006 Act, and makes it clear that purposes are central to the legal definition of charitable status.

56 Inland Revenue Commissioners v McMullen [1981] AC 1 (HL) at 15.
charity. It provides that, to qualify for charitable status, an organisation must be established for exclusively charitable purposes, and subject to the control of the English High Court “in the exercise of its jurisdiction with respect to charities.” An organisation’s purposes are exclusively charitable if first, they fall within one or more of the thirteen descriptions of charitable purposes now listed in section 3(1) of the 2011 Act, and, second, are for the public benefit.

The first part of the purposes test is generally thought to be the most straightforward. Section 3(1) of the 2011 Act lists out thirteen descriptions of charitable purposes. Most of the first twelve of these are derived from the case law, much of which refers back to the Preamble to the Statute of Charitable Uses of 1601 (the Preamble). Many have been accepted as charitable for some time. The relief of poverty, the advancement of education, and the advancement of religion, for example, were all recognised by Lord Macnaghten as three of the four established “heads” of charity in the leading 19th century House of Lords decision in Income Tax Special Purposes Commissioners v Pemsel (Pemsel). The thirteenth charitable purpose in the 2011 Act is a “catch-all” that includes any other purposes that the courts have recognised as charitable or that “may reasonably regarded as analogous to, or within the spirit of” a recognised charitable purpose. It has been deliberately left open-ended so that the courts and the Commission have the flexibility to recognise new charitable purposes from time to time.

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57 Charities Act 2011 (UK), c 25, s 1(1).
58 Charities Act 2011 (UK), c 25, s 2(1).
59 Charities Act 2011 (UK), c 25, s 3(1)(a)-(c). Note, however, that the 2006 Act confirmed that the prevention as well as the relief of poverty is a charitable purpose. See Charities Act 2011 (UK), c 25, s 3(1)(a).
60 [1891] AC 531 (HL) [hereafter “Pemsel”] at 583.
61 Charities Act 2011 (UK), c 25, s 3(1)(m).
position under the common law: the fourth of Lord Macnaghten’s “heads” of charity under
_Pemsel_ included any “other purposes beneficial to the community, not falling under any of the
preceding heads.”  

The second part of the purposes test, the public benefit test, is more complex. The test is often
described as having two aspects: the “benefit” aspect and the “public” aspect.  

With the exception of certain charities established for the relief of poverty, all charities must have
purposes that satisfy both aspects of the public benefit test. An organisation may have purposes
that fall squarely within one or more of the thirteen descriptions of charitable purposes
recognised under the 2011 Act, but if its purposes cannot be advanced for the public benefit, it
will not qualify as charitable.

Some examples may help here. The “benefit” aspect of the public benefit test looks to whether or
not a given charitable purpose benefits the community. In other words, is that purpose a good
thing?  

A school that educates children according to a mainstream curriculum will invariably
have purposes that pass the “benefit” aspect of the public benefit test. However, at the other
end of the spectrum, a school established to educate children in the art of pickpocketing would
not because the kind of education the school is set up to provide could never be beneficial to the
community.

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63 _Pemsel_, supra note 60 at 583.
64 ISC, _supra_ note 9 at paragraph 44.
66 I use similar wording in Rebecca Fry, “Charities: Legal Definition”, Westlaw Insight (26 June 2015) at 3.
67 ISC, _supra_ note 9 at paragraphs 69-70.
68 This example is taken from Lord Rigby’s judgment in _Re Macduff_ [1896] 2 Ch 451 (CA) at 474: “No one will
suggest, for instance, to take only one illustration, that the education of pickpockets in a thieves' kitchen to make
them fit for their profession is a charity. It must be education of a particular kind.”
Controversially, the “benefit” aspect of the public benefit test disqualifies many campaigning organisations from charitable status, on the grounds that their purposes are political. Organisations established to advance the policies of a particular political party are consequently excluded from charitable status, as are those whose purpose is to change the law, government policy or administrative practice in the UK or overseas. The stated rationale for excluding the latter group is that the courts are not well placed to determine whether or not a proposed change would benefit the community or not. Moreover, even where it is clear that the change would be desirable, the court “must still decide the case on the principle that the law is right as it stands, since to do otherwise would usurp the functions of the legislature.” Accordingly, whilst academic research conducted at a reputable university would normally be considered to advance education for the public benefit, research into a contentious law or government policy or practice conducted by a pressure group established for the purpose of influencing public opinion on that particular issue would not.

The “public” aspect of the public benefit test is designed to ensure that an organisation’s purposes benefit the public in general, or a sufficient section of it, rather than a closed or private

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69 Re Jones (1929) 45 TLR 259 (Ch).
71 See Bowman v Secular Society, supra note 70 at 442; and McGovern v Attorney General supra note 70 at 336-337.
72 McGovern v Attorney General, supra note 70 at 337.
73 See Southwood v Attorney General [2000] WTLR 1199 (CA), which concerned the charitable status of the Project on Disarmament, an organization looking to carry out and disseminate research into the benefits of nuclear disarmament. The decision in Southwood can be helpfully contrasted with that in Re Koeppler’s Will Trusts [1986] Ch 423, which confirmed that conferences designed to elicit a reasoned exchange of views on matters of public interest advanced education for the public benefit. See also Full Fact v Charity Commission for England and Wales Case no. CA/2011/0001.
This excludes the majority of organisations set up to benefit individuals who are linked by some form of “personal nexus”, such as their membership of a particular family or status as employees of the same employer. It also excludes organisations whose purposes exclude the poor from benefit. Again, it is possible for an organisation to advance a purpose that falls within one of the recognised descriptions of charitable purposes and yet fail this test. A mainstream school that is open to all children is likely to qualify as charitable on the basis that it advances education for the public benefit. However, a school that is only open to children from a particular family or to the children of employees of a particular employer would not be eligible for charitable status. Nor would a school whose purposes require it to charge very high fees, and to make either no provision or a merely tokenistic provision for poorer children.

The legal definition of charity makes it clear that the common ground that charities share is that they are all established to advance legally designated charitable purposes within the range of ways considered to be for the public benefit. Harding contends that these “general features of charity law suggest that the state’s project for that body of law is to mark out certain purposes as charitable in the legal sense and to extend legal privileges to those who pursue such purposes.” I would add that it also permits the state to mark out certain means of pursuing those purposes as charitable. As we have seen, the “charity-ness” of charities goes to the purposes for which a

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74 I use similar wording in Fry, supra note 66 at 4.
75 I use similar wording in Rebecca Fry, “Charitable Status and Fiscal Privileges: Time for a Conscious Uncoupling?” LLM Class Paper (20 May 2016).
76 ISC, supra note 9 at paragraph 178.
77 This example is based on the facts in Oppenheim v Tobacco Securities Trust [1951] AC 297 (HL).
78 ISC, supra note 9 at paragraphs 177-178.
given organisation is established, not to the activities it happens to carry out. However, an organisation that is established for purposes that fall within one or more of the thirteen recognised descriptions will not qualify for charitable status unless its purposes are also framed in a way that permits them to be advanced in one or more of the ways that the state accepts as being for the public benefit. If I want to run a school, for example, my school will only qualify for charitable status if its purposes permit it to advance the right kind of mainstream, politically neutral education for the benefit of a sufficiently broad section of the public. I cannot simply set up a school to teach whatever I please to whomever I please. The two key features of the legal definition of charity, then, concern both the nature of the purposes that charities are established to advance and the benefit to the public that arises from the ways in which they are permitted to advance those purposes.

At this point, I should stop and explain why it is necessary to use the legal definition of charity as the starting point for understanding the “whys” of charity regulation. The answer is that the normative question I look to engage with concerns the reasons for regulating charities on a sector specific basis and their underlying justifications. Charitable status in England and Wales hinges on an organisation’s purposes, not on its legal form, governance structure or activities. Indeed, a charity may have the same or similar legal forms and governance structures and/or carry out some of the same activities as a non-charitable organisation. A charitable school or art gallery or hospice presumably does many of the same things and may be structured in much the same way.

80 Note that this is not the case in every jurisdiction. Under section 7(1) of the Charities and Trustees Investment (Scotland) Act 2005, 2005 ASP 10, a body will only satisfy the test for charitable status if it actually “provides (or, in the case of an applicant, provides or intends to provide) public benefit in Scotland or elsewhere.” As Mary Synge points out, this means that the public benefit test in Scotland is very different from its English counterpart. As she explains: “Unlike the English test, charitable status in Scotland necessarily demands an inquiry into whether public benefit is, in fact, delivered, and that necessitates an examination of the organisation’s activities.” See Synge, supra note 12 at 180-181.
as a non-charitable school or art gallery or hospice. It is therefore essential to look to the legal
definition of charity as this is the only thing that reliably makes it possible to distinguish charities
from other organisations.

My point here becomes clear when we consider that charity regulation is not the only kind of
regulation imposed on charities. Most are also regulated based on their structure, function and
activities, in much the same way as their non-charitable counterparts. A charitable independent
school, for example, is likely to be obliged to comply with many of the same legal rules as a non-
charitable independent school. Like a non-charitable independent school, it will be subject to and
inspected against the Independent School Standards.\(^8\) Since it employs staff and works with
children, it will be required to comply with the same employment and safeguarding legislation as
any other school. And if it is structured as a company limited by guarantee, it will also be subject
to company law and regulated by Companies House. This shows us that the really interesting
question here is not: why shouldn’t I take non-charitable schools or art galleries or hospices or
any other kind of civil society organisation into account in developing my theory of charity
regulation? It is rather: why do charitable schools or art galleries or hospices, and indeed all
charities, require an additional layer of regulation that their non-charitable counterparts do not?
What is it about charities that requires them to be regulated \textit{qua} charities, and not because they
are schools or art galleries or hospices, and so on? This is the question I hope to address in the
following section.

\(^8\) In England, these are set out in the Education (Independent School Standards) Regulations 2014, SI 2014/3283.
Garton expressly rejects this approach for his own theory of civil society regulation for two reasons.\textsuperscript{82} His first objection is that, although charity exists as a distinct legal concept in many common law jurisdictions, the legal definition of charity differs in some respects from jurisdiction to jurisdiction. Accordingly, my reliance on it here must risk limiting the applicability of my conclusions on the “whys” of charity regulation to England and Wales.\textsuperscript{83}

Garton is, of course, right to acknowledge the differences in the legal definition of charity across different jurisdictions. However, these differences should not be overstated. Earlier in this section, I highlighted the two features of the English legal definition of charity that go to the core of what a charity is. As discussed above, a charity must have purposes that: first, fall within one or more of thirteen descriptions of charitable purposes set out in section 3(1) of the 2011 Act; and second, are capable of delivering public benefit. According to Harding, these features are not confined to charity law in England and Wales but are in fact features of charity law generally: “the criteria of charity law are twofold: first […] a purpose must fall within at least one of a set of legally prescribed general descriptions of charitable purpose; and second […] a purpose must be of public benefit.”\textsuperscript{84} This can be explained by the fact that, in most common law jurisdictions, charity law was originally a transplant from England and Wales. Indeed, Garton acknowledges this. He explains:

The [Statute of Charitable Uses of 1601] remained in force until 1853 and continues to form the basis of the modern common law concept of charity. A number of

\textsuperscript{82} Garton, \textit{supra} note 52 at 30-32.
\textsuperscript{83} Garton, \textit{supra} note 52 at 31.
\textsuperscript{84} Matthew Harding, \textit{Charity Law and the Liberal State} (Cambridge, UK: Cambridge University Press, 2014) at 7.
common law jurisdictions, such as Australia, still require that charitable purposes fall within the ‘spirit and intendment’ of the activities listed in its Preamble.\textsuperscript{85}

Of course, it is possible that, a particular description of charitable purposes may be recognised as charitable in England and Wales, but not in, say, Australia, or \textit{vice versa}. And different common law jurisdictions can and do take different approaches to the issue of public benefit.\textsuperscript{86} However, the underlying concept of charity as comprising both recognised charitable purposes and some element of public benefit remains the same in most, if not all, of the jurisdictions where charity law exists. I therefore remain confident that the relevance of the “whys” or goals of charity regulation I discuss in this thesis is not limited to England and Wales.

Garton’s second objection to relying on the existing legal definition of charity is that it may not be fit for purpose. Indeed, in his view, this is “unlikely given that the common law concept of charity predates the concept of organised civil society, and […] is the product of case law developed sporadically on an incremental basis, sometimes with hostile intent, over several hundred years.”\textsuperscript{87} In England and Wales, as in most common law jurisdictions, the legal definition of charity originates with the Elizabethan Preamble. It is therefore hardly surprising that the distinction between charities and other civil society organisations can appear “somewhat artificial and arbitrary”\textsuperscript{88} today. The non-charitable political activities conducted by campaigning organisations such as Amnesty International, for example, may fit better with many people’s

\textsuperscript{85} Garton, \textit{supra} note 52 at 3.
\textsuperscript{86} \textit{Supra} note 80.
\textsuperscript{87} Garton, \textit{supra} note 52 at 221.
general understanding of charity than, say, the education that takes place in an elite charitable independent school. Garton’s point here is, essentially, that seeking to base a theory of the “whys” or goals of charity regulation on the existing legal definition is ill advised because it will invariably rest on a shaky foundation that has no principled basis. As Garton puts it, “there are no existing theories of civil society regulation on which the [existing charity] laws could be based.”

There are some who would disagree with the latter claim. Harding, for example, contends that it is possible to ground a theory of charity law in the perfectionist “autonomy-based” liberalism associated with the work of Joseph Raz. This does not mean that Harding believes that every aspect of the existing legal definition of charity can be justified. Indeed, I suspect there are few who would deny that is has, at least, some flaws. However, justifying (or, indeed, critiquing) the existing legal definition of charity is not the normative focus of this thesis. As described above, my aim here is to illuminate the “whys” of charity regulation. To do this effectively, it is necessary to begin with the two features of the legal definition of charity I have highlighted, as they are the features that make it possible to distinguish charities from other organisations. In this way, the legal definition of charity provides the tools we need to understand what it is about charities that might make it necessary or desirable for them to be regulated. It does not matter for these purposes whether or not aspects of the existing legal definition are under or over inclusive,

89 Garton, supra note 52 at 30.
or perhaps lacking in some other way. That is a distinct normative question, best left for another day.

III. Two “whys” of charity regulation

We now know that the two common features that all charities share are that they are established exclusively for purposes that: first, the state has designated as charitable; and, second, are capable of being advanced in a way that the state deems to be for the public benefit. In this section, I seek to show how these two aspects of the “charity-ness” of charities can be used to illuminate the underlying reasons for regulating the charity sector. In doing so, I identify and discuss what I perceive to be the two key “whys” of charity regulation: encouraging or incentivising the pursuit of charitable purposes and holding those who pursue charitable purposes accountable to donors, beneficiaries, and the general public.

Before I get started, three clarifications are needed. The first concerns the meaning of regulation generally. Philip Selznick’s “central meaning” of regulation as “sustained and focused control exercised by a public agency over activities that are valued by the community”\(^\text{91}\) provides a useful starting point. Anthony Ogus provides further context. He explains that two systems of economic organisation can be seen in industrialised countries: the “market system”\(^\text{92}\) and the “collectivist system.”\(^\text{93}\) In the former, “individuals and groups are left free, subject only to


\(^{92}\) Ogus, *supra* note 81 at 1.

\(^{93}\) Ogus, *supra* note 91 at 1.
certain basic restraints, to pursue their own welfare goals."\textsuperscript{94} In the latter, “the state seeks to
direct or encourage behaviour which (it is assumed) would not occur without such
intervention.”\textsuperscript{95} According to Ogus, the term “regulation” can, broadly speaking, be used “to
denote the law which implements the collectivist system.”\textsuperscript{96} I would add that it may also be used
to denote non-legal means of implementing the collectivist system.

The second clarification goes to what I mean by charity regulation more particularly. It should be
apparent from the discussion in section II that my focus is on sector specific regulation. That is to
say, I am interested in the reasons it might be necessary or desirable to regulate charities purely
because they are charities, not because of the legal forms or governance structures they may
adopt or the activities they may carry out. As discussed above, the state uses the legal definition
of charity to mark out certain purposes as charitable. Harding puts it well when he says that, “the
function of the legal definition of charity might therefore be thought of as controlling the
conferral or withholding of a certain status in law, a status that is described using the word
‘charity’.”\textsuperscript{97} The legal definition of charity, then, acts as a kind of gatekeeper, entrusted with
determining which organisations merit the regulatory benefits and should be subjected to the
regulatory burdens associated with charitable status, and which do not.

Thinking about regulation as a means of pursuing collectivist goals is particularly helpful in this
context. As Nick Martin points out:

\textsuperscript{94} Ogus, supra note 91 at 1.
\textsuperscript{95} Ogus, supra note 91 at 1-2.
\textsuperscript{96} Ogus, supra note 91 at 2.
\textsuperscript{97} Harding, supra note 79 at 149.
…the legal recognition of charitable status is not a value-free decision. Such decisions tell us that the pursuit of particular conceptions of the good is worthy of special advantages that are not granted for the pursuit of other conceptions. Fiscal advantages, such as tax exemptions ease their pursuit while the granting of charitable status itself provides a level of approval from the state.98

On this view, charitable purposes are purposes that the state has determined are good purposes, and charities are vehicles for delivering the public goods that flow from the advancement of those purposes. Charity regulation, then, can be understood as a means of producing “behaviour or results in accordance with the public interest”99 or, at least, the state’s conception of the public interest.

The third clarification concerns the nature of the reasons for charity regulation that I aim to identify in this thesis. As Baldwin, Cave and Lodge point out, “Governments may regulate for a number of motives – for example, they may be influenced by the economically powerful […] or they may see a particular regulatory stance as a means to re-election.”100 This is undoubtedly true. However, these kinds of motives for regulating are not the “whys” I am looking for here. Rather, my aim is to develop a theoretically robust rationale for regulating the charity sector that is capable of illuminating the role charity regulation should play in England and Wales and, potentially, other common law jurisdictions. I therefore focus on normative and technical

100 Baldwin, Cave and Lodge, supra note 99 at 15.
justifications for regulation, rather than on the political, social or economic motivations that may exist in practice.

a. **Encouragement**

My first “why” of charity regulation is encouragement. I argue here that one of the objectives of charity regulation should be to encourage or incentivise the pursuit of charitable purposes for the public benefit.

This objective might initially seem surprising for two reasons. First, charity in its non-legal sense is frequently classified as a moral virtue, meaning that we may have a moral duty to act charitably in some circumstances.\(^{101}\) If this is correct, we should not need charity regulation to encourage us to pursue charitable purposes for the public benefit, as we already have a moral impetus for doing so. Second, many of us are naturally inclined to support charities, not because we are morally virtuous, but because charities deliver goods and services that we believe add value to our lives. I might, for example, be happy to pay tuition fees to an elite university,\(^{102}\) not because I wish to act charitably but because the education and other advantages I will gain by attending the university are benefits that I am willing to pay for. Similarly, you might be willing to pay a fee to attend an exhibition at an art gallery or in exchange for a cat adopted from an animal rescue centre because you perceive these things to be valuable. Put another way, because you would like to see the art exhibition or to acquire a pet cat (as applicable), you have your own internal reasons for supporting the charities that make these things possible.

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\(^{102}\) In England and Wales, the majority of universities have charitable status but are exempt from registration with the Commission pursuant to the Charities Act 2011 (UK), c 25, s 22 and Schedule 3.
Unfortunately, neither of these non-regulatory incentives to act charitably are likely to generate a sufficient volume of charitable activity needed to secure the collectivist public goods that flow from the pursuit of charitable purposes for the public benefit, for a number of reasons.

To begin with, even if we accept charity as a moral virtue, it does not mean that we will necessarily act charitably all of the time. Few, if any of us, can claim that we always act in a morally virtuous way. Even if we could, as John Gardner points out, charity is unlikely to be the *only* moral virtue: rather, “there are various moral targets to aim at, multiple ultimate moral values at stake that are not transitively ranked by importance.”\(^\text{103}\) Accordingly, charity’s status as a moral virtue would not necessarily compel us to act charitably in cases where we have other, competing moral priorities. Moreover, as we saw above, the legal definition of charity cannot always be equated with the ordinary understanding of charity, whether as a moral virtue or otherwise. For many people, charity has to do with the assistance or relief of those in financial or other need.\(^\text{104}\) Yet the charitable purposes recognised under the 2011 Act go well beyond this to encompass education in fee-paying schools and universities, the pursuit of the arts in opera houses and art galleries, and the preservation of stately homes and other sites of historical interest, amongst other things.\(^\text{105}\) It is by no means clear that a moral duty to act charitably in its non-legal sense is capable of providing an impetus for the pursuit of these legally recognised charitable purposes. As Gardner says, those who pursue them are perhaps better understood as exhibiting a certain “public-spiritedness” rather than the moral virtue of charity.\(^\text{106}\)

\(^{103}\) Gardner, *supra* note 101 at 6.

\(^{104}\) The definitions of “charity” given in the Oxford English Dictionary, for example, include: “Benevolence to one's neighbours, especially to the poor; the practical beneficences in which this manifests itself.”

\(^{105}\) Charities Act 2011 (UK), c 25, ss 3(1).

The second non-regulatory incentive – that is, our own inclinations to pursue charitable purposes because they add value to our lives – is similarly limited. This time it is because the support we would give to organisations established to further exclusively charitable purposes for the public benefit in an unregulated market is unlikely to be sufficient to sustain charitable activities at the levels needed to deliver the public goods associated with them. Most of us do not pay university fees every year throughout our lifetime, nor do we generally attend the same art exhibition or adopt a cat more than once or, perhaps, two or three times. In any case, a great many charities do not charge for their services at all, rendering them necessarily reliant on other sources of funding, including voluntary donations.

This is where the “why” of encouragement comes in. When we look at charities closely, it becomes clear that the legal definition of charity renders them particularly vulnerable to two problems that make it necessary for the state to incentivise the pursuit of charitable purposes for the public benefit: the free rider problem and the continuity problem. In what follows, I will seek to show how these problems can stand in charities’ way, justifying regulatory intervention.

The free rider problem is a classic market failure rationale for regulating.\textsuperscript{107} It arises because the pursuit of many, if not all, charitable purposes for the public benefit delivers public goods that bring shared benefits to society as a whole. The charitable purposes listed in the Preamble include “the repair of bridges… causeways… and highways.” In England and Wales, the state has now taken on direct responsibility for bridge and road maintenance. However, a significant number of valuable public goods continue to be delivered by the charity sector. Indeed, as we

\textsuperscript{107} For an overview of market failure rationales for regulation generally, see Baldwin, Cave and Lodge, \textit{supra} note 99 at Chapter 2.
have seen, the public benefit test requires that all charitable purposes are capable of delivering some form of benefit to the community or, at least, a sufficient section of it.

It is easy to come up with examples here. The descriptions of purposes recognised as charitable under the 2011 Act include “the advancement of health or the saving of lives.” Accordingly, the Royal National Lifeboat Institution (RNLI), works to save lives and promote safety at sea. Its annual report for 2015 records that in that year RNLI staff and volunteers were responsible for 8,882 lifeboat deployments and lifeguard patrols at 225 beaches, saving a total of 442 lives. Other charitable purposes recognised under the 2011 Act include, “the advancement of the arts, culture, heritage or science” and “the advancement of environmental protection or improvement.” The National Trust therefore works to preserve places of historic interest or outstanding natural beauty for the benefit of the nation. And charities such as the Royal Society for the Protection of Birds (RSPB) and the Zoological Society of London (ZSL) work, in different ways, to conserve and protect wildlife and the natural environments on which they depend.

None of this work is cheap. In 2015, the RNLI spent £140.1 million on its charitable activities. The most recently filed accounts for the National Trust, the RSPB, and ZSL show that their

108 Charities Act 2011 (UK), c 25, s 3(1)(d).
109 Registered charity no. 209603.
111 Charities Act 2011 (UK), c 25, s 3(1)(f).
112 Charities Act 2011 (UK), c 25, s 3(1)(i).
113 Registered charity no. 205846.
114 Registered charity no. 207076.
115 Registered charity no. 208728.
annual expenditure was £471.57 million,\textsuperscript{116} £98.8 million,\textsuperscript{117} and £46.8 million\textsuperscript{118} respectively. Yet it is difficult, if not impossible, to prevent those who do not pay to support these charities from benefiting from the work they carry out.

If, for example, I get into difficulties whilst swimming at a beach monitored by RNLI lifeguards, they will assist me regardless of whether I happen to have made donations to the RNLI in the past. Indeed, if the RNLI’s purposes required it to refuse assistance to anyone but its donors, it would have to be run as a kind of mutual benefit society or private lifesaving club. This would prevent the RNLI from passing the public aspect of the public benefit test, rendering the RNLI ineligible for charitable status. Thus, we can see that the legal definition of charity effectively precludes charities like the RNLI from preventing free riders from benefiting from their services. The same is true for charities like the National Trust, the RSPB and ZSL, albeit for a slightly different reason. In their case – though charities like the National Trust and ZSL can and do charge fees in exchange for entry to their heritage properties or zoos (as applicable) – the nature of heritage preservation and environmental protection or improvement as charitable purposes are such that work done to advance them must ultimately be capable of benefiting society as a whole. It is consequently very difficult, if not impossible, to exclude free riders who choose not to support these charities from benefit. In these circumstances, there is no real market incentive to donate funds or time to support charities. Without some form of regulation to encourage the


pursuit of charitable purposes, the market may therefore fail to deliver the public goods associated with them, leaving us all worse off.

According to Lester Salamon, a further difficulty for both charities and other civil society organisations caused by the free rider problem is that it can lead to “philanthropic insufficiency” and “philanthropic particularism.”

Discussing Salamon’s arguments, Garton explains:

The former [philanthropic insufficiency] will arise where the sector is unable to attract sufficient resources, either in general or in relation to specific activities, as a result of the free-riding phenomenon. This insufficiency may, in turn, lead to philanthropic particularism, whereby activists sidestep activity x, which is unable to attract sufficient resources, and move towards activity y, which is able to attract the necessary resources.

In other words, thanks to the free rider problem, there may be insufficient funding and/or volunteer support for certain public goods. This, in turn, can lead to overprovision of certain, better-resourced public goods and the underprovision of others. As Garton says, this means that “the donors who are willing to fund activity x may have no-one to deliver it.” It also risks

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120 Garton, supra note 52 at 108-109.

121 Garton, supra note 52 at 109.

122 Garton, supra note 52 at 109.

123 Garton, supra note 52 at 109.
the overprovision of activity $y$. Again, these problems help us to understand why encouragement through charity regulation is needed. By encouraging the pursuit of the public goods that the state has designated as charitable over those that have not been so designated, the state can reduce the risk that charities will be affected by philanthropic insufficiency. In doing so, the state may also reduce the risk of philanthropic particularism, at least as between charitable purpose $x$ and charitable purpose $y$.

Turning now to the continuity problem, this arises because of what Michael Walzer calls “fitfulness.” Charities are heavily reliant on public donations to finance its work: in 2014/15, approximately 45% of the voluntary sector’s income came from individual donors. However, while many of us make charitable donations, we cannot donate to every charity, nor can we necessarily make donations all of the time. Similarly, while some charities are able to employ staff, the majority are small organisations that rely on volunteers to carry out their activities. These volunteers can only give their time to a limited number of charities, and must fit their voluntary work around paid work, family commitments, and so on. Hence, as Walzer says, “[e]ven for the most conscientious, work in civil society is rarely a day-in, day-out commitment.”

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124 Garton, supra note 52 at 109.
126 The National Council for Voluntary Organisations (NCVO) reports that the voluntary sector’s total income was £45.5 billion in 2014/15. Of this, £20.6 billion came from individual donors. See NCVO, “UK Civil Society Almanac 2017”, online: https://data.ncvo.org.uk/almanac17/> [hereafter “NCVO Almanac 2017”].
127 As at 31 March 2016, 40.2% of registered charities had an annual income of £10,000 or less. A further 34.4% had an annual income of between £10,001 and £100,000. Just 6.6% had an annual income of over £500,000. See UK, Charity Commission for England and Wales, “Recent Charity Register Statistics: 31 March 2016”, online: <https://www.gov.uk/government/publications/charity-register-statistics/recent-charity-register-statistics-charity-commission#march-2016>.
128 Walzer, supra note 125.
of our plans to support charities as much or as often as we would like to. This lack of continuity – in donations of both time and money – can hamper charities’ ability to deliver public goods on a regular and consistent basis. If, for example, the RNLI loses too much funding or too many volunteers it would presumably have to shut down one of its lifeboat stations or cease to provide lifeguards at certain beaches. This may, in turn, adversely affect the charity’s ability to save lives at sea, with potentially tragic consequences.

Of course, continuity of funding and/or staff is a problem for many organisations, not just for charities. However, charities are particularly vulnerable thanks to restrictions imposed by the legal definition. As discussed above, charities must be established for exclusively charitable purposes for the public benefit. This means that certain means of raising funds are not open to them, preventing them from coming to the market and competing on the same terms as their non-charitable counterparts. Two examples illustrate the point.

First, the legal definition precludes charities from raising capital through equity finance, because they must be established for the public benefit and not for private profit. Accordingly, even a charity structured as a share company could not issue dividends to its shareholders. Instead, it would be required to re-invest its profits or spend them to further the charity’s purposes.

Second, although charities can and do charge fees in exchange for the delivery of goods or services designed to advance their purposes, the legal definition imposes certain restrictions.

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129 Re Smith’s Will Trusts [1962] 1 WLR 763 (CA).
130 This would be unusual: charitable companies are more commonly structured as private companies limited by guarantee.
As noted in Tudor, fee charging can impact directly on charitable status. The fact that an organisation’s constitution permits it to charge could, in theory, “indicate that in substance [it] was a commercial concern with private commercial purposes rather than public purposes.” Certainly, an organisation whose constitution required it to charge such high fees that those in poverty would be entirely excluded from benefit would not qualify for charitable status because it could not satisfy the public aspect of the public benefit test. Charity trustees must also think carefully about fee-charging once their charity has been established. In particular, they must ensure that those in poverty are not excluded from the opportunity to benefit from the charity’s work. If the trustees do not make adequate provision for the poor, they will be in breach of trust because they will have failed to advance their charity’s purposes for the public benefit.

When carrying out their purposes, charities cannot therefore simply charge the maximum fees that the market will bear: they must always provide more than a *de minimis* or token benefit to those who cannot afford to pay.

We can see from these examples that the legal definition of charity exacerbates the continuity problem faced by charities. This, in turn, helps to explain why encouragement through regulation is needed to encourage donors to give up their time and money to support charities. Otherwise, there is a risk that charities will be left unable to deliver public goods on a reliable or consistent basis.

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133 Tudor, *supra* note 132.
134 ISC, *supra* note 9 at paragraph 177-178.
135 ISC, *supra* note 9 at paragraph 222.
136 ISC, *supra* note 9 at paragraph 222.
b. **Accountability**

My second “why” of charity regulation is perhaps the most obvious: accountability. I argue here that a key purpose of charity regulation should be to ensure that charitable assets are properly and lawfully applied and managed, and that members of the public and government authorities have access to the information they need to be able to satisfy themselves that this is the case.

The need for accountability is clearly illustrated by both historical and recent reports of misuse and abuse in the charity sector. In his survey of early attempts to regulate English charities, James Fishman memorably describes the first quarter of the nineteenth century as “a golden era of chicanery involving charities.”

Anyone reading the UK newspapers over the past few years would be forgiven for concluding that this “golden era” has come again. In 2013, the headlines were full of the Cup Trust, a charity that submitted Gift Aid tax repayment claims worth £46 million, but spent just £152,292 on its charitable activities. In 2015, well-known children’s charity Kids Company collapsed following the launch of a police investigation into allegations of sexual abuse. The House of Commons Public Administration and Constitutional Affairs Committee reported that the trustees had “repeatedly ignored auditors’ clear warnings about Kids Company’s precarious finances.” This poor financial management made it impossible for the charity to survive: “when allegations of sexual misconduct emerged in July 2015 and threatened

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137 Fishman, *supra* note 1 at 730.
140 Kids Company Report, *supra* note 139 at 3.
to impede fundraising, the charity was obliged to close immediately.”\textsuperscript{141} The summer of 2015 also brought a series of reports that charities – including household names such as Oxfam, Save the Children and the RSPCA – had engaged in “exploitative and unethical fundraising methods”.\textsuperscript{142}

We can see from these controversies that it is important that charities are held accountable. But why does this need to be done through charity regulation? The answer is that the legal definition of charity renders charities vulnerable to two closely related problems: the check and balance problem and the information inadequacy problem.

Put simply, the check and balance problem is that, without charity regulation, the checks and balances on charities and those who run them would be inadequate to protect charity assets from misuse and abuse. This problem is helpfully illuminated by Kathryn Chan’s claim that the legal definition of charity – and particularly the public benefit test – is a public/private law hybrid.\textsuperscript{143} Chan argues that, although the law is often conceptually divided into public law and private law,\textsuperscript{144} the legal definition of charity is a hybrid that does not fall on either side of the divide. Rather, it is a common law doctrine “without a single or even primary site of belonging within either the public law or the private law sphere.”\textsuperscript{145}

\begin{itemize}
\item \textsuperscript{141} Kids Company Report, \textit{supra} note 139 at 3.
\item \textsuperscript{143} Kathryn Chan, \textit{The Public-Private Nature of Charity Law} (Oxford, UK: Hart Publishing, 2016). See, in particular, the discussion on the public benefit test in Chapter 3.
\item \textsuperscript{144} See for example Ernest Weinrib, \textit{The Idea of Private Law} (Cambridge, MA: Harvard University Press, 1995).
\item \textsuperscript{145} Chan, \textit{supra} note 143 at 75.
\end{itemize}
On the private law side, the legal definition of charity accords considerable importance to what Chan terms “the autonomy interests of benevolent property owners.”\textsuperscript{146} When setting up a charity or making a gift, charity founders and donors have significant discretion. Provided the test for charitable status is met, they can choose to advance the particular charitable purposes that interest them or that they have a connection with. As Chan explains, the law allows “considerable autonomy to define \textit{what type} of benefit the charity will provide and \textit{what ‘public’} will receive that benefit.”\textsuperscript{147} A charity founder whose husband died of prostate cancer, for example, can establish a charity to help prostate cancer sufferers. There is no need for the charity to benefit the public as a whole, or even cancer sufferers as a whole. In this way, charities are often established for purposes that are “in the advantage, profit or welfare of a particular group.”\textsuperscript{148} It does not matter if there are a number of pre-existing charities that already advance the same charitable purposes for the benefit of the same group,\textsuperscript{149} or if there are other charitable purposes in greater need of support, or even if the founder or donor proposes to advance the selected charitable purposes in a somewhat idiosyncratic manner.\textsuperscript{150} And, once a charity has been established or a charitable gift has been made, it will, for the most part, be administered in accordance with the private law rules set out by the founder in the charity’s governing document or by the donor in the instrument making the gift, as applicable.

\textsuperscript{146} Chan, \textit{supra} note 143 at 2.

\textsuperscript{147} Chan, \textit{supra} note 143 at 53.

\textsuperscript{148} Chan, \textit{supra} note 143 at 80.

\textsuperscript{149} However, note that the Commission encourages those wishing to set up new charities to consider alternative options, such as working with an existing charity. See UK, Charity Commission for England and Wales, “How to Set Up a Charity (CC21a)” (20 May 2014, updated 4 November 2014), online at: <https://www.gov.uk/guidance/how-to-set-up-a-charity-cc21a>. This is perhaps to be expected: Chan argues that the Commission is “institutionally oriented towards intervening in an identified public interest, namely the public interest in properly administered and effectively employed charity property.” See Chan, \textit{supra} note 143 at 50.

\textsuperscript{150} Provided, of course, that the public benefit test is met.
On the other hand, as we have seen, the charitable purposes the founder selects must be framed in a way that makes it possible for them to be advanced for the public benefit. As Chan explains, this requires charities “to be mostly ‘other-regarding’ and embodies public law thinking to this extent.”\textsuperscript{151} A charity cannot, for example, be established to advance charitable purposes for the benefit of a private class,\textsuperscript{152} nor can its purposes be drafted in a way that would exclude the poor from benefit.\textsuperscript{153} Accordingly, “[p]ublic law thinking prevails, such that the [public benefit] doctrine’s concern with protecting the ‘other-regarding’ quality of charitable projects outweighs its concern to protect the individual autonomy of charity founders and their appointed trustees.”\textsuperscript{154} Chan goes on to argue that the public benefit doctrine in English law has become increasingly public law focussed since the enactment of the 2006 Act. She backs up this claim with a thoughtful analysis of two key post-2006 cases: the Catholic Care litigation\textsuperscript{155} (which concerned a Catholic charitable adoption agency that wished to amend its objects so that it could refuse to provide services to homosexual couples) and the judicial review of the Commission’s public benefit guidance brought by the Independent Schools Council and the associated questions referred to the Tribunal by the Attorney General.\textsuperscript{156}

A more detailed discussion of Chan’s claims are beyond the scope of this thesis. However, her analysis of the legal definition of charity as a public/private law hybrid is both persuasive and relevant to the check and balance problem. In what follows, I will seek to demonstrate how this

\begin{itemize}
\item \textsuperscript{151} Chan, \textit{supra} note 143 at 53.
\item \textsuperscript{152} Note that there is a limited exception to this rule for certain charities established for the relief of poverty. See \textit{Attorney General v Charity Commission for England and Wales, supra} note 9.
\item \textsuperscript{153} ISC, \textit{supra} note 9 at paragraph 177-178.
\item \textsuperscript{154} Chan, \textit{supra} note 143 at 75.
\item \textsuperscript{155} \textit{Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales} [2010] EWHC 520 (Ch).
\item \textsuperscript{156} ISC, \textit{supra} note 9.
\end{itemize}
public/private hybridity causes charities and their trustees to be subjected to somewhat weakened versions of the checks and balances placed on entities that are governed wholly or mainly by private law doctrines. This, in turn, explains why charities need regulation to hold them to account in a way that other organisations may not.

The trust provides what is, perhaps, the clearest example of this discrepancy in checks and balances. It is a private law concept that is regularly used for private purposes. It is also the longest established of the four most popular legal forms for charities.157

An express private trust cannot be established unless three “certainties” are present.158 First, there must be certainty of intention. That is, the settlor must show a clear intention to create a trust. Second, there must be certainty of subject matter. That is, it must be clear what the trust assets are. And third, there must be certainty of object. In other words, the trust must be for named or ascertainable beneficiaries. The third certainty – often called the beneficiary principle – was first recognised in Morice v Bishop of Durham.159 Here, Sir William Grant MR held that, in order for a non-charitable trust to be valid, “[t]here must be somebody in whose favour the court can decree performance.”160 The rationale for this is that there must be someone who is able to enforce the trust. A trust is an obligation, and, as Roxburgh J explained in Re Astor’s Settlement

157 The others are the company limited by guarantee, the charitable incorporated organisation (a bespoke legal form for charities), and the unincorporated association. See UK, Charity Commission for England and Wales, “Charity types: how to choose a structure (CC22a)” (30 May 2014, updated 4 November 2014), online: <https://www.gov.uk/guidance/charity-types-how-to-choose-a-structure>.
158 Knight v Knight (1840) 3 Beav 148 at 173.
159 (1804) 9 Ves 399.
160 Supra note 159 at 404.
Trusts, “a trustee would not be expected to be subject to an equitable obligation unless there was somebody who could enforce a correlative equitable right.” 161

The rules relating to charitable trusts are slightly different. The first two of the three “certainties” discussed above must be present in order to create a valid express charitable trust. However, there is no need for the object of a charitable trust to be certain because charitable trusts are trusts for exclusively charitable purposes, not for named or ascertainable beneficiaries. This means that – unlike private trusts – charitable trusts do not have beneficiaries with the right to enforce the trustees’ obligation. Of course, charitable trusts do benefit individuals in practice. However, a potential beneficiary of a charitable trust has no equitable right to the trust property, nor does he or she have standing to bring an action against the charity trustees to enforce the trust. 162 As a result, the trustees of charitable trusts are not subject to the private law checks and balances imposed on the trustees of private trust. Put slightly differently, because charitable trusts must be for the benefit of a public class, the safeguards that exist at private law are not sufficient to ensure their enforcement. Regulation is therefore needed to hold charity trustees accountable.

In England and Wales, this regulation is conducted, in part, by the Attorney General, who represents the Crown as parens patriae and, in doing so, may act to enforce charitable trusts. 163 “Charity proceedings” concerning the internal administration of the charity may also be brought by “any person interested in the charity” or, if the charity is a local charity by “any two or more

161 [1952] Ch 534 at 541.
163 For a helpful overview of the Attorney General’s role in relation to charities see Tudor, supra note 132 at 13-013 and following.
inhabitants of the area of the charity", as well as by the charity or any of its trustees. However, this can only be done if the proceedings are authorised by order of the Commission or the court. The Commission is, of course the primary regulator of charities, including charitable trusts. As we have seen, its statutory objectives include both promoting compliance by charity trustees and enhancing “the accountability of charities to donors, beneficiaries, and the general public.”

A related check and balance problem arises for charitable companies. The Companies Act 2006 was primarily drafted with commercial companies in mind. Section 172(1) of the Companies Act 2006 provides that company directors have a duty to “act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole…”. In commercial companies the success of the company is generally equated with its financial growth and profitability. Here the interests of the company and the interests of its members are, broadly speaking, aligned: both are served by the company increasing in value. Accordingly, if a commercial company’s directors fail to discharge their section 172(1) duty, the members are likely to flag it up. This is, in part, because it is comparatively easy for members

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164 Charities Act 2011 (UK), c 25, s 115(1).
165 Charities Act 2011 (UK), c 25, s 115(2) and (5).
166 Charities Act 2011 (UK), c 25, s 14.
167 Note, however, that directors are required to have regard to the matters listed in section 172(1) of the Companies Act 2006 when discharging their duty to promote the company’s success.
168 This statement is intentionally simplistic. Of course, there will be cases where directors need to balance both short-term and longer-term interests of company members. For example, a hostile takeover bid may be in the best interests of the company’s existing members, whilst also being likely to undermine the company’s longer-term success, thereby prejudicing the interests of future members.
169 This does not mean that the members can necessarily enforce the duty. The duty in section 172(1) of the Companies Act 2006 is owed to the company, which means that only the company itself is generally able to enforce it. However, members can bring a derivative claim on behalf of the company in certain circumstances (see Companies Act 2006 (UK), c 46, s 260).
to compare the year-on-year financial success of the company or, at least, the value of their annual dividend. However, it is also because the members of a company have a direct financial interest in the company and its success.

This check on company directors works differently for the directors of a charitable company because the success of a charitable company is not (or, at least, not primarily) about its financial growth and profitability. Although the property of a charitable company is not – strictly speaking – held on trust, it must be applied for the exclusively charitable purposes set out in the company’s Articles of Association. Section 172(2) of the Companies Act 2006 recognises this, providing that:

Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, [the duty in] subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

This is important because the duty would otherwise be inconsistent with the legal definition of charity: a charitable company cannot be run for the benefit of its members, unless its membership is made up of a sufficient section of the public in charitable need. Thus, as Lord Goldsmith explained during the Parliamentary debates on the then Companies Bill, “for certain

170 Note that the directors of a charitable company will also be charity trustees for the purposes of the definition set out in s. 177 of the Charities Act 2011.
171 Though the Kids Company saga emphasizes the importance of good financial management in charities. See further Kids Company Report, supra note 139.
172 Bowman v Secular Society, supra note 70 at 440.
companies, such as charities …, [success] will mean the attainment of the objectives for which the company has been established.”

This difference in the meaning of success impacts the check on company directors imposed by section 172(1) in two ways. First, because the success of a charitable company is linked to the attainment of its charitable purposes, it is less obviously quantifiable than financial success. This is likely to make it more difficult for members to assess whether or not a given director is acting to promote the company’s success or not. This problem may be exacerbated in smaller charities: as Garton notes, “regular and close contact between the staff and the members” can lead to “problems of capture.” Second, because the members of a charitable company do not receive dividends, they may be slower to notice if the directors are acting improperly. Again, therefore, regulation is needed to hold charities and those who run them to account.

This brings us neatly to the second accountability problem: the problem of inadequate information. Like the free rider problem discussed above, this is a classic market failure rationale for regulating. Stephen Breyer explains that, for competitive markets to function properly, consumers must have the information they need to assess and evaluate the goods and services offered by rival firms. However, without regulation, the information made available to consumers may be inadequate for a number of reasons. First and most obviously, unscrupulous firms may seek to mislead consumers by providing false information or omitting key facts.
Second, the information that firms provide may be technical and not easily understood by consumers. As Breyer explains, “[t]he layman cannot readily evaluate the competence of a doctor or lawyer. Nor can he, unaided, evaluate the potential effectiveness or dangers of a drug.”\footnote{Breyer, supra note 176 at 28.} Third, obtaining the information that consumers need may be expensive for firms to produce in some cases, particularly information that relates to quality.\footnote{Breyer, supra note 176 at 27 and Ogus, supra note 91 at 41.} Fourth, collusion in the market or low levels of competition may incentivise firms to provide low levels of information to consumers.\footnote{Baldwin, Cave and Lodge, supra note 99 at 18-19. See further Ogus, supra note 91 at 38-41 and Breyer, supra note 176 at 28.} Breyer notes that, until the state intervened, most US consumers did not have access to information on matters including the “durability of light bulbs, nicotine content of cigarettes, fuel economy for cars, or care requirements for textiles.”\footnote{Breyer, supra note 176 at 28.}

The causes of information inadequacy that Breyer identifies may apply to both commercial organisations and to charities. However, there are two further causes that make it particularly likely that the information inadequacy problem will arise in the charity sector. First, in many cases, there is a separation between those who fund charities and those who benefit from them.\footnote{Garton, supra note 52 at 106.} This is particularly true for charities that advance certain types of charitable purpose. The UK donors who contributed to the Disaster Emergency Committee’s 2015 Nepal Earthquake Appeal, for example, are themselves unlikely to have benefited directly from the emergency aid delivered in Nepal by the Committee’s member agencies. Similarly, those who sponsor rooms at a homeless shelter are unlikely to need to use the shelter’s services themselves. As Garton rightly
says, this separation between charity beneficiaries and charity funders will “hinder the latter’s ability to evaluate the quality and quantity of the goods or services they have financed.”\textsuperscript{183} Put more bluntly, without going to Nepal or staying in the homeless shelter yourself, how can you be sure that the money you have donated has been properly applied for charitable purposes?

The separation between funders and beneficiaries is less apparent in some other types of charity, such as those established to advance the arts or culture. It is likely that many of those who make donations to, say, the Royal Opera House,\textsuperscript{184} also attend its operas and ballets. Similarly, a significant part of the income of most charitable independent schools comes from the fees paid by the parents of the pupils who attend. However, there is at least some separation between funders and beneficiaries, even in these charities. As Garton points out, legacies are an important income stream.\textsuperscript{185} In 2014/15, UK legacy income totalled £2.46 billion, which represented 5\% of the charity sector’s total income.\textsuperscript{186} In these cases, “evaluation by the testator is, of course, not merely impractical but impossible.”\textsuperscript{187}

Government contracts and grants are another, increasingly significant, income stream for many charities, worth 34\% of the sector’s total income in 2014/15.\textsuperscript{188} The government is, of course, a relatively sophisticated funder that is likely to be better placed than most to evaluate the success of the charitable projects it supports. However, as the Kids Company saga shows, this is not always the case. The rather damning summary at the beginning of the Public Accounts

\textsuperscript{183} Garton, supra note 52 at 106. \\
\textsuperscript{184} Registered charity no. 211775. \\
\textsuperscript{185} Garton, supra note 52 at 106-107. \\
\textsuperscript{186} NCVO Almanac 2017, supra note 126. \\
\textsuperscript{187} Garton, supra note 52 at 107. \\
\textsuperscript{188} NCVO Almanac 2017, supra note 126.
Committee report into the government’s funding of the charity reports, “[i]t is staggering that the government has given over £40 million to Kids Company over the past 13 years and still has no idea what it was getting for taxpayers’ money.”

Of course, Kids Company is an extreme example. However, the point stands that, because government ministers and officials are, in most cases, unlikely to benefit directly from the charitable projects the government funds, they may be hindered in their ability to assess the quality of the services those charities deliver. The government is also under financial pressure itself, which may impact on the resources it is willing and/or able to devote to assessing the efficacy of externally funded organisations. Certainly, this seems to have been true in the Kids Company case. One of the conclusions drawn in the Public Accounts Committee’s report was that:

> Until 2013 the government relied heavily on Kids Company’s own assessments of its performance… The metrics government used to assess Kids Company’s performance were severely ill-judged and the Department [for Education] seems to have taken Kids Company’s claims at face value.

The second reason that information inadequacy is a particular problem for the charity sector is that the public benefits delivered by certain charitable purposes are not always easy to assess. This is partly because – as with any organisation that delivers complex, specialist services – the information that (some) charities provide about their work may be technical in nature and, thus,

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190 Supra note 189 at 5.
difficult for non-specialist supporters to understand. However, it is also because the public benefit doctrine recognises that the benefits that flow from the advancement of charitable purposes may be intangible in certain cases. This makes it difficult for government authorities and members of the public to hold them to account.

By way of illustration, it is difficult to assess the benefit or impact that, for example, a religious charity has on its adherents and on the wider community in an objectively quantifiable fashion. This point emerges clearly from the judgment of Sir John Romilly MR in *Thornton v Howe*.\(^{191}\) The judge was prepared to accept that a gift to publish and circulate the works of religious leader Joanna Southcote could be charitable, even though he personally considered Mrs Southcote to be nothing more than “a foolish, ignorant woman, of an enthusiastic turn of mind.”\(^{192}\) He went on to explain that English charity law “makes no distinction between one sort of religion and another.”\(^{193}\) There was therefore no need to ascertain whether or not the views set out in Mrs Southcote’s works were true: it was enough that her followers believed the teachings to be of some value. The court took a similar approach in *Funnell v Stewart*, in which a bequest to further faith healing for the public benefit was upheld without any need for “evidence of actual public benefit in the form of the demonstrable efficaciousness of the healing work of the group.”\(^{194}\)

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\(^{191}\) (1862) 31 Beav 14.

\(^{192}\) *Thornton v Howe*, supra note 191 at 18. The description of the case here is similar to that set out in Fry, *supra* note 90. The approach taken in *Thornton v Howe* is often contrasted with that in *Gilmour v Coats* [1949] AC 426 (HL). In the latter case, the House of Lords held that a trust for the benefit of a Carmelite Roman Catholic convent of cloistered nuns was not charitable because it did not pass the public benefit test, in part because the public benefit flowing from the nuns’ intercessory prayers “is manifestly not susceptible of proof” (Lord Simonds at 446). However, as Mary Synge argues, the more “fundamental principle” illustrated by this case is that “no amount of benefit, whether capable of proof or not, can confer the necessary public character on a trust with is construed as essentially private.” The case should not therefore be taken as authority that “every benefit must be shown to have a demonstrable impact on the community.” Synge, *supra* note 12 at 64.

\(^{193}\) *Thornton v Howe*, supra note 191 at 19.

\(^{194}\) *Funnell v Stewart* [1996] 1 WLR 288 (Ch) at 297.
cases like these, an information deficit is more or less inevitable. This information deficit is, perhaps, more likely to cause difficulties for the government and for the general public than for the charity’s supporters who are, presumably, likely to subscribe to the beliefs the charity espouses and, consequently, to be convinced of their benefit.

IV. Conclusion

The 21st Century has seen significant change to the regulatory framework for charities in England and Wales. Indeed, according to Myles McGregor-Lowndes and Bob Wyatt, “English charity law and its regulation have undergone more change in the last 25 years than during the previous century.” These changes look set to continue: amongst the strategic priorities set out in the Commission’s strategic plan for 2015 to 2018 is a commitment to reducing the Commission’s existing “dependence on taxpayer funding.” To achieve this, the Commission plans to explore “alternative funding options”, including proposals to charge the charity sector for its own regulation. If these proposals come to fruition, they will, inevitably, impact both the Commission’s regulatory approach, as well as on its relationship with the sector it regulates. Changes in charity regulation are not limited to England and Wales: as noted above, many other common law jurisdictions have also implemented major reforms to their respective regulatory frameworks for charities. Against this background, the underlying purposes of charity regulation undoubtedly merit closer analysis. This thesis has sought to contribute to that analysis by identifying two “whys” or goals of charity regulation: encouragement and accountability.

195 McGregor-Lowndes and Wyatt, supra note 51 at 1.
196 CC Strategic Plan, supra note 30 at 4.
197 CC Strategic Plan, supra note 30 at 4.
I am conscious that the two “whys” I have identified do not yet represent a complete theory of charity regulation. Indeed, in many ways, they are just as “vague and aspirational in character” as the Commission’s existing five statutory objectives. As with the Commission’s objectives, both “whys” leave much room for interpretation and provide limited practical guidance on what the Commission, or any charity regulator, should do to regulate charities effectively in practice. It is easy to imagine situations in which the two regulatory “whys” or goals – encouragement on the one hand and accountability on the other – might conflict. It is also easy to imagine a world in which the Commission does not have the resources it needs to devote to the pursuit of both goals.

However, the crucial distinction between the two “whys” I have identified in this thesis and the Commission’s existing statutory objectives is that only the former are supported by a theoretical analysis that explains why they are goals of charity regulation. In other words, the advantage of the two “whys” is that we know why they are “whys”. Both of the “whys” discussed here can be justified by reference to particular problems that charities face as a result of the legal definition of charities. In other words, they explain why charities require regulation *purely because they are charities*. This is important because, as noted above, charities are already subject to regulation based on matters including their particular legal form or activities, in much the same way as their non-charitable counterparts. A theoretically robust rationale for regulating charities needs to be able to explain why charity sector specific regulation is necessary or desirable in addition to these other regulatory requirements. To my knowledge, there is no such underlying rationale for the Commission’s statutory objectives: to date, their status as purposes of the charity regulator in England and Wales seems simply to have been assumed.

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198 *Supra* note 19.
A closer inspection of the Commission’s statutory objectives reveals that some of them are not purposes or “whys” of charity regulation at all. They are, rather, “hows” or means of achieving regulatory goals. For example, the Commission’s second statutory objective is to “promote awareness and understanding of the operation of the public benefit requirement.”

Public benefit is one of the two key features of the legal definition of charity. It is therefore important that charity trustees and others involved in the management and administration of charities understand it, so that they can operate their charity for exclusively charitable purposes for the public benefit. However, this does not make promoting awareness and understanding of public benefit a “why” or goal of charity regulation. Rather, the Commission’s public benefit objective is best seen as a tool that the Commission uses to ensure that charity trustees comply with their legal obligations and are held accountable for doing so. It is a means of achieving another regulatory goal, not a regulatory goal or end of charity regulation in itself.

As noted above, I certainly do not claim that the “whys” presented in this thesis amount to a complete theory of charity regulation. They may not even amount to a complete theory of the “whys” of charity regulation. However, they do, at least, amount to a good start. The academic debate in this area is very much at a nascent stage, and my hope is that this thesis will prompt discussion and further development of the ideas I have put forward. I will therefore use the remainder of this conclusion to identify possible areas for further research and debate.

One of the most obvious questions raised by my first “why” of charity regulation – encouragement – is as follows: if charitable purposes are really purposes that the state has determined are good purposes, then why doesn’t the state advance those purposes itself? Why

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199 Charities Act 2011 (UK), c25, s 14.
leave it to charities that, in turn, require regulation? As Harding points out, this question is “not quite right” because it ignores the fact that the state does deliver many public goods – such as education and healthcare – to citizens directly. But for the charity law rule that requires charities to be independent from the state, many of the purposes entailed in these activities would qualify as charitable. The better question is therefore: why does the state wish to encourage the pursuit of charitable purposes by individuals and groups other than itself? This question takes us too far from the central focus of this thesis, which has been to improve our understanding of the purposes of charity regulation. However, it is highly relevant to the broader question of the underlying purposes of charity law more generally.

Even if we take the existence of charities at face value, a number of further regulatory issues present themselves for consideration. This thesis has looked to answer questions such as: why do we regulate charities? What is it about charities that requires regulation? What do we want charity regulation to achieve? However, the next step must be to develop a more complete theory of charity regulation that is capable of both informing the design of the regulatory framework for charities in practical terms and enabling us to subject existing regulatory frameworks to critical scrutiny. Now that we have a clearer understanding of the purposes of charity regulation, we can start to think about what it is that charity regulators should do and how they should go about doing it. In doing so, we will need to consider a number of further questions, including: How should the regulatory goals of encouragement and accountability be pursued? Which regulatory

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200 Harding, supra note 84 at 79.
201 Harding, supra note 84 at 77-85.
strategies would be most suitable and/or effective? Who is best placed to carry out those regulatory strategies? How are they best enforced?

We have followed the advice given by Lewis Carroll’s Cheshire Cat, and can now describe where we want charity regulation to take us and why we want it to take us there. But we still have a good deal more planning to do before we will be ready to embark on the journey entailed in the institutional design of an ideal regulatory framework for charities.
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