

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(CHARITY)

BETWEEN:-

MERMAIDS

Appellant

and

(1) THE CHARITY COMMISSION FOR ENGLAND AND WALES
(2) THE TRUSTEES OF LGB ALLIANCE

Respondents

VOLUME 4: SUBMISSIONS BUNDLE

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READING LIST

It is respectfully suggested that the Tribunal should take 1-1.5 days of pre-reading.

- | | |
|------------------------------------|-------|
| 1. List of Issues | [4/3] |
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Core Documents

- | | |
|--|---------|
| 4. Decision of Charity Commission dated 20 April 2021 | [2/2] |
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| 6. Charities Act 2011, ss.1-4 | [Auths] |

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- | | |
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| 7. Grounds of Appeal | [1/38] |
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Appellant's Witness Statements

- | | |
|-------------------|---------|
| 12. Paul Roberts | [1/100] |
| 13. Belinda Bell | [1/123] |
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Second Respondent's Witness Statements

- | | |
|---|---------|
| 15. Bev Jackson | [1/162] |
| 16. Kate Harris | [1/216] |
| 17. Eileen Gallagher | [1/234] |
| 18. <i>(If admitted in evidence)</i> Second Statement of Eileen Gallagher | [1/243] |

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AGREED LIST OF ISSUES

GOA: Grounds of Appeal; RR1: Annex A to Response of First Respondent; Rep: Appellant's Reply to First Respondent; RR2: Annex A to Response of Second Respondent; FRep: Appellant's Further Reply.

Preliminary issue

- a. Should the Second Respondent be 'the trustees of LGB Alliance' or 'LGB Alliance'? (*See directions of 5.4.22, para 14 [1/30].*) If the former, which individuals have at all material times been 'the trustees of the LGB Alliance', and by what means are they to be identified?

Substantive issues

1. What are the purposes for which LGB Alliance is established for the purposes of the Charities Act 2011? (*GOA 4; 7-9; RR1 20-23; 27-30; Rep 4-7; RR2 14-19 & 28; FRep 5-7*)
2. Do those purposes fall exclusively within the descriptions in section 3(1) of the Charities Act 2011?
3. Is the nature of those purposes beneficial to the community ('public benefit in the first sense')? In particular:
 - 3.1. Do they include essentially political purposes which are not ancillary to recognised charitable purposes?
 - 3.2. Is there a common understanding of enlightened opinion that the attainment of the relevant purposes by LGB Alliance would benefit the public?
 - 3.3. Does the pursuit of the relevant purposes by LGB Alliance give rise to significant disbenefits which outweigh any benefits? (*GOA 11; RR1 32-39; Rep 8-9; RR2 33-39; FRep 16-21*)
4. Do those purposes benefit the public or a sufficient section of the public ('public benefit in the second sense')? (*GOA 12; RR1 48-51; RR2 18 & 37-39;*
5. As a matter of fact, what are the effects or potential effects of the decision to register LGB Alliance on the Appellant? Are these effects such that the Appellant "*is or may be affected by the decision*" on a proper application of Schedule 6 to the Charities Act 2011? (*GOA 14; RR1 7-16; RR2 5-10 & 40-41*)

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CHRONOLOGY AND AGREED FACTS

The Second Respondent does not dispute the accuracy of the entries in red and marked (*) but does not agree that they should be included in the table below.

<i>Date</i>	<i>Event</i>	<i>Document</i>
(*) 22 October 2019	A meeting is held at Conway Hall in London, organised by Kate Harris and Beverley Jackson. Around 70 people attend.	Jackson WS @ 16-22 [1/168-9] Harris WS @ 51-61 [1/228]
28 November 2019	LGB Alliance is incorporated as a company limited by guarantee. Its founding members and directors are (1) Beverley Jackson; (2) Ann Sinnott; (3) Kate Harris; (4) Malcolm Clark. Article 2 of the Articles of Association gives a list of “objects”.	[2/14] [2/16-18] [2/26]
11 March 2020	LGB Alliance (through its former solicitors, Bates Wells & Braithwaite London LLP) writes to Charity Commission indicating it intends to apply for charitable status	[2/124]
13 March 2020	LGB Alliance submits completed online application form to register as a charity.	[2/126-151]
March 2020 onwards	Charity Commission receives various communications from members of the public and organisations regarding LGB Alliance’s registration.	[2/152-499]
23 April 2020	LGB Alliance’s solicitors write to the Charity Commission asking to expedite the application for charitable status.	[2/500-501]
4 May 2020	Charity Commission writes to LGB Alliance’s solicitors seeking information on LGB Alliance’s policies and decision-making.	[2/504-506]

~May 2020 (undated)	Kate Harris emails the Charity Commission regarding expedition and intended use of a charity bank account.	[2/507-508]
May – June 2020	Charity Commission receives various further communications from members of the public.	[2/509-681]
18 June 2020	LGB Alliance’s solicitors write to Charity Commission with further information to support LGB Alliance’s application.	[2/686-692]
31 July 2020	LGB Alliance’s solicitors write to Charity Commission seeking an update and repeating request for expedition.	[2/682]
7 August – 7 September 2020	Charity Commission indicates it is still considering the application.	[2/696-702]
18 – 29 September 2020	Charity Commission asks for assurances regarding social media policies and LGB Alliance’s point of view and activities.	[2/703-726]
15 December 2020	LGB Alliance’s solicitors indicate they will respond shortly.	[2/727-731]
21 December 2020	LGB Alliance’s solicitors write to Charity Commission on social media activity and charitable status, enclosing its new Social Media Policy.	[2/732-737]; [2/738-744]
12 January – 12 April 2021	Further exchanges between LGB Alliance’s solicitors and Charity Commission regarding registration and amendments to the Social Media Policy	[2/747-749]
15 April 2021	Charity Commission indicates it has decided to register LGB Alliance and provides draft decision for LGB Alliance’s solicitors’ comments.	[2/745]
29 April 2021	Charity Commission publishes its decision to register LGB Alliance as a charity.	[2/2-12]
1 June 2021	Mermaids lodges Notice of Appeal with Tribunal.	[1/31]
14 June 2021	Tribunal gives directions for Charity Commission to file its Response and give disclosure.	[1/3]
13 July 2021	Charity Commission’s Response to Grounds of Appeal.	[1/44]
3 August 2021	Tribunal lists case management hearing to take place remotely on 22 September 2021.	
4 August 2021	Application to intervene by trustees of LGB Alliance (filed 6 August 2021, received by Tribunal 21 August 2021 and by the parties on 14 September 2021).	[1/70]
10 August 2021	Appellant’s Reply to Charity Commission.	[1/67]
14 September 2021	Tribunal sends the parties and LGB Alliance directions regarding the intervention application; this is the first time the parties become aware of it.	[1/5]
14 – 20 September 2021	Correspondence between parties and Tribunal, resulting in an email from the Tribunal indicating the hearing on 22 September 2021 has been vacated and directions will follow.	
23 September 2021	Tribunal gives directions adding trustees of LGB Alliance as Second Respondent, and directing a 2-day final hearing in the window 28 February – 27 May 2022.	[1/8-11]
8 October 2021	Second Respondent’s Response.	[1/77]

(*) 21 October 2021	LGB Alliance holds its inaugural conference at Queen Elizabeth II Centre in Westminster.	[2/980]
22 October 2021	Appellant's Further Reply in Response to Second Respondent.	[1/86]
27 October 2021	Tribunal gives directions regarding bundles and data protection issues.	[1/13]
10 December 2021	Ruling by Judge Alison McKenna deciding that standing should not be heard as a preliminary issue.	[1/14-19]
24 January 2022	Tribunal gives directions for final hearing on 10-11 May 2022 and for identity of Second Respondent to be decided at the hearing as a preliminary issue.	[1/20-23]
25-31 January 2022	Appellant files its evidence.	[1/100-161]
2 – 24 February 2022	Correspondence between parties regarding appropriateness of 2-day time estimate for final hearing.	
25 February 2022	Charity Commission informs Tribunal that it does not envisage significant involvement in the factual disputes between the Appellant and the Second Respondent; and is likely to view its role as akin to that of an <i>amicus curiae</i> .	
4 March 2022	Tribunal extends time for Second Respondent's evidence, retaining hearing date of 10 and 11 May 2022 but requiring parties to confirm their views on a time estimate.	[1/24-27]
9 March 2022	Parties inform Tribunal that they agree a listing of 5-6 days is required for the final hearing.	
16 March 2022	Tribunal emails parties giving a further extension of time for Second Respondent's evidence from 16 to 18 March 2022.	
18 March 2022	Second Respondent files its evidence.	[1/162-242]
5 April 2022	Tribunal confirms vacation of original 10-11 May 2022 hearing; and gives revised directions for a final hearing of 6 days from 9-16 September 2022.	[1/28-30]
9 –16 September 2022	Final hearing due to take place.	[2/28] para 1

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**APPELLANT’S SKELETON ARGUMENT
for hearing on 9 – 16 September 2022**

Bundle references are in the form [bundle/page].

The parties will liaise with a view to agreeing (i) a reading list, (ii) a chronology, (iii) a schedule of agreed facts, (iv) a list of issues and (v) an authorities bundle by 2 September 2022. See the Tribunal’s directions at [1/30]. Following exchange of skeleton arguments the parties may also be able to discuss a timetable, subject to the Tribunal’s approval.

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A. Introduction

1. This is an appeal against the decision (“**the Decision**”) of the Charity Commission for England and Wales (“**the Commission**”) dated 20 April 2021 to register LGB Alliance, a company limited by guarantee, as a charity under s.30 of the Charities Act 2011 (“**the 2011 Act**”).
2. The following points as to Mermaids’ case should be emphasised at the outset:
 - 2.1. This appeal does not require the Tribunal to take sides in discussions in wider society concerning the rights of transgender persons, or any ‘gender-critical’ groups or views more generally. The Tribunal is dealing with the charitable status of one specific organisation, LGB Alliance. As will be seen, LGB Alliance holds its own set of views. It takes a combative stance on transgender issues (on which it principally focuses) and is in practice (and was intended to be) a vehicle for social media activity, publications and lobbying of government in this area.
 - 2.2. This appeal is not about whether LGB Alliance’s purposes are lawful. If the Tribunal directs LGB Alliance’s removal from the register, LGB Alliance will be in the same position as countless campaigning bodies in the UK that are not registered as charities, and will enjoy the same rights and freedoms as those bodies.
 - 2.3. It is no part of Mermaids’ case that charities cannot be properly constituted to tackle the problems facing lesbian, gay and bisexual people without a specific focus on transgender issues. Of course they can; many such charities appear on the register. On the facts, however, LGB Alliance is not actually tackling problems facing lesbian, gay and bisexual people, but rather is seeking to prevent the resolution of problems facing transgender persons (which can be characterised as an ‘anti-trans’ focus).
 - 2.4. The Tribunal is not asked (or required under s.319(4)) to find fault with the Commission. Mermaids recognises that it was doing its best in a difficult case, and acting on more limited information than is now available to the Tribunal.
 - 2.5. The Tribunal is not asked to find that LGB Alliance sought to mislead the Commission when drawing up its constitution and seeking registration. The question is simply whether, on full consideration of the facts, LGB Alliance meets the legal tests for charitable status.
3. Mermaids’ factual case appears from the Grounds of Appeal and its witness statements. Non-controversial matters will be the subject of an Agreed Chronology, and other matters will be explored in the course of the hearing. Accordingly, and to avoid repetition, this skeleton does not recite the facts in detail.

B. Preliminary matters

(i) Note on language

4. Many issues in the case relate to transgender rights, and there are fundamental differences between the parties as to how to discuss and frame such issues. For example, Mermaids exhibits a glossary at [2/1008] whereas LGB Alliance sets out its preferred terminology at WS of Beverley Jackson para 3 [1/163].
5. Mermaids' case is that much of LGB Alliance's language serves to obscure its fundamentally anti-trans focus. It contends that terms such as "*same-sex attraction*" and "*sex-based rights*" are effectively euphemisms for LGB Alliance's negative stance on trans issues, as set out in more detail in the WS of Paul Roberts at paras 27-30 [1/106ff]. A more specific example is that LGB Alliance uses "*self-diagnosis of gender dysphoria*" to include diagnosis of gender dysphoria by medical professionals using criteria that depend on a truthful account being given by the patient (see para 108 of Beverley Jackson's WS [1/196]). That is not "*self-diagnosis*" on any view (a diagnosis of depression, deafness or toothache is equally dependent on the patient's account and is not labelled "*self-diagnosis*").
6. Such matters will need to be explored on the evidence, but a marker should be laid down that the language used by LGB Alliance is at times loaded (when understood in the context of its campaigning agenda).
7. During the hearing the Tribunal will wish to be sensitive to the nuances of language. For an example of a mutually respectful approach taken by a tribunal in a related sphere, see the introductory remarks of the Employment Appeal Tribunal ("**EAT**") in *Forstater v CGD Europe* [2022] I.C.R. 1 at [1]-[4] (a decision cited by LGB Alliance and therefore, it is to be hoped, unobjectionable in this regard). The Tribunal may also wish to review Chapter 12 of the Equal Treatment Bench Book, "*Trans People*" (itself cited in the opening remarks in *Forstater*).

(ii) Identity of Second Respondent

8. The Tribunal has directed that it will determine, as a preliminary issue, whether the Second Respondent should remain 'the trustees of LGB Alliance' or instead be changed to 'LGB Alliance'. See para 14 of the directions at [1/30]. Pending resolution of that issue, this skeleton simply refers where appropriate to "**R2**" to mean the person(s) represented by Doyle Clayton.
9. The background to this is:
 - 9.1. On 6 August 2021 Doyle Clayton lodged an application to intervene on behalf of the "*trustees of LGB Alliance*" [1/70]. The application referred interchangeably to LGB Alliance and its individual trustees as 'the Applicant' (see e.g. para 13 at [1/72]).

- 9.2. There is no office of ‘trustee’ in LGB Alliance’s articles of association, and no clarity has been given as to the criteria by reference to which a person is named as a ‘trustee’. The Tribunal will be aware that ‘charity trustee’ has a specific meaning under s.177 of the 2011 Act. In the case of a charitable company it would normally mean the directors, but LGB Alliance has previously included among its ‘trustees’ various individuals who are not directors (see Further Reply at para 3.2 [1/87]).
- 9.3. On 23 September 2021 the Tribunal added “*the trustees of LGB Alliance*” as a fully-fledged respondent, on the basis that it was apparent from correspondence that LGB Alliance wished to make representations beyond the usual role of an intervener [1/8].
- 9.4. There remained significant confusion as to the identity of the persons claiming to be parties: Further Reply para 3 [1/86]. Mermaids sought to obtain clarity in correspondence but was unable to do so. Mermaids understands that, since 6 August 2021, the make-up of LGB Alliance’s board has changed on occasion, although no applications have been made to substitute new respondents.
10. Mermaids is neutral on whether LGB Alliance or its individual directors and/or other officers should be respondents provided that all parties are identified with precision. Mermaids (and the Tribunal) are entitled to have clarity about the parties to these proceedings and the client(s) of Doyle Clayton. There are understandable reasons for this including (i) LGB Alliance’s separate legal personality and the possibility that its interests may diverge from those of its directors/trustees; (ii) the need to know who holds appeal rights; and (iii) the potential costs issues that may arise (including who bears liability for R2’s own costs; and the parties to any costs orders if they are sought under r.10(1) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (“**GRC Rules**”).¹

(iii) *Evidence*

11. The Tribunal will hear from six witnesses and notices of cross-examination have been served in respect of each of them:
- 11.1. **John Nicolson MP [1/149]**. Member of Parliament for Ochil and South Perthshire and Deputy Chair of the All-Party Parliamentary Group on Global LGBT+ Rights. His evidence focuses on LGB Alliance’s political campaigning.
- 11.2. **Dr Belinda Bell [1/123]**. Chair of trustees of Mermaids. Her evidence focuses on LGB Alliance’s approach towards (and impact on) trans people. She also addresses the facts

¹ Doyle Clayton has threatened to seek such orders under r.10(1)(b), e.g. by email dated 21 October 2021. Clarity will be needed on the persons seeking their costs if this is pursued. The same point applies if costs orders are sought against R2.

relevant to Mermaids' standing, including why it has felt the need to bring this appeal and the effects that the Decision has had on it.

- 11.3. **Paul Roberts OBE [1/100]**. CEO of LGBT Consortium, an umbrella body for LGBT groups in the UK. His evidence focuses on LGB Alliance's approach towards (and impact on) lesbian, gay and bisexual people.
 - 11.4. **Beverley Jackson [1/162]**. Co-founder and trustee of LGB Alliance. She addresses LGB Alliance's philosophy, history, objectives and activities in a range of fields.
 - 11.5. **Kate Harris [1/216]**. Co-founder and trustee of LGB Alliance. Her evidence largely focuses on giving a more detailed account of LGB Alliance's history.
 - 11.6. **Eileen Gallagher OBE [1/234]**. Chair of trustees of LGB Alliance, having joined in May 2021. Her evidence focuses on LGB Alliance's current activities.
12. The Tribunal will note the significant length of the hearing and the large volume of documentary evidence before it, totalling over 4,000 pages or half a gigabyte in electronic form.
 13. This is regrettably the result of the direction set by R2 and its representatives. They sought to join the appeal without prior warning in correspondence (as noted at [1/91] paras 1-2). They immediately generated a satellite dispute over whether standing should be heard as a preliminary issue (contrary to directions already agreed between Mermaids and the Commission) [1/14] and failed to cooperate on matters such as the names of the trustees (e.g. [1/87] para 3.2 & [1/91] fn.2). In general, they made clear from the tone of the submissions and correspondence that they intended to take an obstructive approach to the appeal.
 14. To give an idea of what has generated the volume of material in Bundle 2:
 - 14.1. The first c.100 pages were lodged with Mermaids' Notice of Appeal. They include the Commission Decision and LGB Alliance's articles of association.
 - 14.2. The next c.750 pages are largely taken up by the Commission's secondary disclosure under r.29 of GRC Rules. No objection is made to this (although it includes some repetitive materials which do not need to be read individually).
 - 14.3. 490 pages (pp.872-1362) are taken up by Mermaids' witnesses' exhibits.
 - 14.4. The remaining 2,545 pages (pp.1363-3907, i.e. two-thirds of the bundle) are taken up by material exhibited to R2's witness statements (especially Exhibit BJ which runs to nearly 2,000 pages). Much of this material is peripheral or duplicative. To take some scattered examples, this includes: (i) ten blank pages in a row (pp.1557-1566); (ii) three judgments which properly belong in an authorities bundle (pp.1567-1627; pp.1818-1844; pp.2221-2258); (iii) the 112-page interim Cass Report into NHS gender identity services, which

appears twice in its entirety (pp.1867-1978 and pp.3752-3862); (iv) a 114-page set of medical guidelines on transgender health (pp.2377-2496); (v) an entire volume of an academic journal running to 351 pages (pp.2697-3049) from which only a 1-page article is relied on (at p.2835, itself duplicated at p.3050);² and (vi) a 217-page report by an employment barrister relating to cancellation of a criminology seminar at the University of Essex (pp.3421-3531).

15. Most of these 2,545 pages make no mention whatsoever of LGB Alliance, or indeed LGB rights. Their inclusion serves to strengthen the impression that LGB Alliance is near-exclusively focused on transgender issues. It is suggested that R2/LGB Alliance have decided to treat this appeal as another front in a wider political and communications campaign, and a forum to seek to determine questions reaching well beyond its charitable status.

(iv) *Standing*

16. Mermaids' standing is considered towards the end of this skeleton. This is not because it is unimportant, but because it is a mixed question of fact and law that must be understood against the wider factual landscape (as the Tribunal has already ruled: see (iii) at [1/17].)

(v) *Equality and discrimination law*

17. The statements of case and evidence touch on certain issues of equality and discrimination law including:

- 17.1. Is LGB Alliance's campaigning activity (and its definition of "*same-sex attraction*") underpinned by and/or seeking to enforce the Equality Act 2010? (R2's Annex A para 13 [1/80]; Jackson WS para 32 [1/172]).

- 17.2. Conversely, is LGB Alliance operating on a fundamental misreading of the Equality Act 2010, e.g. by misreading s.7 of the Equality Act 2010,³ and/or by neglecting the position of trans people who are also LGB? (Further Reply to R2 para 2; 8-9 [1/87]); Roberts WS para 29(a); (d) [1/107ff]; Nicolson WS para 13(b) & para 19 [1/153ff]).

- 17.3. Is the pursuit of LGB Alliance's objects contrary to any "*public policy recognised in equalities legislation*" (e.g. the policy reflected in s.7 of the Equality Act 2010)? (Notice of Appeal para 11.3, last sentence [1/42]).

² For R2's reliance on this article, see WS of Beverley Jackson at para 154(a) [1/208].

³ S.7 has the effect that people with the protected characteristic of gender reassignment should be treated on an equal basis except where unequal treatment is a proportionate means of achieving a legitimate aim (including in the provision of single-sex services, where providers should usually "*treat transsexual people according to the gender role in which they present*" - see §13.57 of the [EHRC's Services, Public functions and Associations: Statutory Code of Practice](#))

18. None of these are likely to be determinative of the appeal. Mermaids does not therefore propose to develop what has already been said in the passages cited above, unless (a) the Tribunal wishes to hear submissions on the topic, or (b) it becomes necessary to reply to points made by other parties. In taking this approach, Mermaids is mindful of the limited hearing time and the Tribunal's recent comments in *Afariogun v Charity Commission* (CA/2021/0001/P) at [47]:

“... the submissions of the parties as to the public benefit requirement were heavily influenced by a dispute between them concerning the Equality Act 2010. I have been asked to decide that issue, but this Tribunal is not the relevant forum to rule authoritatively on such matters. I note the disagreement between the parties on this point, and I agree with the Respondent that a charity which would be operating in breach of the law would not be for the public benefit. However, I am unable to determine whether the proposed CIO would be breaking the law as the Respondent suggests or complying with it as the Appellant suggests. In any event, I do not need to decide this point in order to dispose of this appeal...”

19. In this regard a brief word should be said on the EAT's decision in *Forstater* (on which LGB Alliance relies). In that case, the EAT held that the claimant's views were capable of enjoying a degree of qualified protection under the Equality Act 2010. As explained at Further Reply para 12 [1/89], the EAT was considering a very undemanding test, namely whether the relevant beliefs were “*akin to Nazism or totalitarianism*” and therefore intolerable in a democratic society (and accordingly not protected against discrimination). In areas of controversy, equality law errs in favour of recognising all competing views. In charity law, that position is reversed. There is a positive requirement to show public benefit, and (as explained below) that requirement cannot be met by relying on purposes that are fundamentally contested. In any event *Forstater* depended on specific findings of fact about the claimant's philosophical beliefs (see [14] of the EAT decision). LGB Alliance's beliefs must be determined on the evidence before the Tribunal, and it should not be assumed they are identical.

C. Relevant legislation

(i) Jurisdiction of the Tribunal

20. The appeal is brought under s.319 of the 2011 Act, which provides:

“(1) Except in the case of a reviewable matter (see section 322) an appeal may be brought to the Tribunal against any decision, direction or order mentioned in column 1 of Schedule 6.

“(2) Such an appeal may be brought by—

(a) the Attorney General, or

(b) any person specified in the corresponding entry in column 2 of Schedule 6.

“(3) The Commission is to be the respondent to such an appeal.

“(4) In determining such an appeal the Tribunal—

(a) must consider afresh the decision, direction or order appealed against, and

(b) may take into account evidence which was not available to the Commission.

“(5) The Tribunal may—

(a) dismiss the appeal, or

(b) if it allows the appeal, exercise any power specified in the corresponding entry in column 3 of Schedule 6.”

21. Schedule 6 includes, so far as material:

1 Decision, direction or order	2 Appellants/applicants (see sections 319(2)(b) and 321(2)(b))	3 Tribunal powers if appeal or application allowed
...
<i>Decision of the Commission under section 30 or 34—</i>	<i>The persons are—</i>	<i>Power to quash the decision and (if appropriate)—</i>
<i>(a) to enter or not to enter an institution in the register of charities, or</i>	<i>(a) the persons who are or claim to be the charity trustees of the institution,</i>	<i>(a) remit the matter to the Commission;</i>
<i>(b) to remove or not to remove an institution from the register.</i>	<i>(b) (if a body corporate) the institution itself; and</i>	<i>(b) direct the Commission to rectify the register.</i>
...	<i>(c) any other person who is or may be affected by the decision.</i>	...

22. Under s.30(1) of the 2011 Act, “[e]very charity must be registered in the register” unless certain exceptions apply which are not relevant here. The Commission is therefore required to decide whether or not an institution is a charity. If so, it “must” register it, and there is no discretion.

23. The Tribunal can determine the question of charitable status afresh, and may have regard to material that was not before the Commission. It must, however, apply the same test for charitable status, which is a factual and legal exercise rather than a discretionary one.

24. In charitable status appeals, *prima facie* it is for the body claiming charitable status to prove it has such status, although the outcome of the appeal is highly unlikely to turn on who bears the burden of proof. In *R (Independent Schools Council) v Charity Commission* [2012] Ch 214 (UT) (“ISC”) at [110] the Upper Tribunal stated:

“It is for the alleged charity to establish its status. The judge or tribunal will assess all the circumstances and decide whether or not the purposes in question are for the public benefit in both senses. It is highly unlikely that a judge or tribunal will ever have to decide an issue on the burden of proof. It is certainly not something which we need to do in the present proceedings in relation to public benefit in the first sense.”

(ii) *The test for charitable status*

25. The necessary elements of charitable status are set out in ss.1-4 of the 2011 Act:

1 Meaning of “charity”

(1) *For the purposes of the law of England and Wales, “charity” means an institution which—*

- (a) is established for charitable purposes only, and*
- (b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities. [...]*

2 Meaning of “charitable purpose”

(1) *For the purposes of the law of England and Wales, a charitable purpose is a purpose which—*

- (a) falls within section 3(1), and*
- (b) is for the public benefit (see section 4). [...]*

3 Descriptions of purposes

(1) A purpose falls within this subsection if it falls within any of the following descriptions of purposes—

- (a) the prevention or relief of poverty;
- (b) the advancement of education;
- (c) the advancement of religion;
- (d) the advancement of health or the saving of lives;
- (e) the advancement of citizenship or community development;
- (f) the advancement of the arts, culture, heritage or science;
- (g) the advancement of amateur sport;
- (h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
- (i) the advancement of environmental protection or improvement;
- (j) the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage;
- (k) the advancement of animal welfare;
- (l) the promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services;
- (m) any other purposes—
 - (i) that are not within paragraphs (a) to (l) but are recognised as charitable purposes by virtue of section 5 (recreational and similar trusts, etc.) or under the old law,
 - (ii) that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of paragraphs (a) to (l) or sub-paragraph (i), or
 - (iii) that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised, under the law relating to charities in England and Wales, as falling within sub-paragraph (ii) or this sub-paragraph.

[...]

(4) In subsection (1)(m)(i), “the old law” means the law relating to charities in England and Wales as in force immediately before 1 April 2008.

4 The public benefit requirement

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

26. In *ISC* the Upper Tribunal explained at [44] that public benefit has two aspects. First, “the nature of the purpose itself must be such as to be a benefit to the community.” This is ‘public benefit in the first sense’, also known as the ‘benefit aspect’ (a term used in the Commission’s publications). Second, “those who may benefit from the carrying out of the purpose must be sufficiently

numerous, and identified in such manner as, to constitute what is described in the authorities as 'a section of the public'." This is 'public benefit in the second sense', or the 'public aspect'.

27. At [45] of *ISC* the Upper Tribunal emphasised that what satisfies the public benefit requirement may differ markedly between types of allegedly charitable purposes. Caution must be exercised in applying authorities from one area of charity to another. For instance, the approach towards public benefit in the context of religious charities will not necessarily apply to political or human rights charities.⁴
28. The correct approach for the Tribunal to follow is helpfully set out at [82] of *ISC*. In summary:
- 28.1. It should start by identifying the purposes for which the institution has been established (within the meaning of s.1(1)(a) of the 2011 Act). In *ISC*, these were described as its "*particular purposes*": [82]. The same expression will be used in this skeleton argument.
- 28.2. Having identified the "*particular purposes*", the Tribunal must assess whether each of them falls within the categories in s.3(1) and is for the public benefit within the meaning of s.4(1).
29. This skeleton argument follows that structure, dealing first with the law on 'particular purposes' (paras 33-39 below), then with the law on public benefit in the context of human rights and educational/research charities (paras 40-61 below), and finally applying the principles to the facts (paras 62-77 below).
30. The Commission's position (with which LGB Alliance agrees) is that an institution's purposes must be determined exclusively within the four corners of the charity's governing document unless that document is 'ambiguous' or a 'sham'. A sham is, of course, a high legal bar to surmount.
31. Mermaids contends that this approach is inconsistent with authority, and indeed with the approach taken by the Commission in previous cases before this Tribunal.⁵ It cannot be right that "*established for charitable purposes*" is analysed by looking at the governing document in a vacuum. If that were the case, it would effectively become a matter of 'self-certification' rather than objective scrutiny. As noted by Scott J in *Attorney General v Ross* [1986] 1 WLR 252 at 263, the courts and tribunals are mindful that:

⁴ See *Neville Estates Ltd v Madden* [1962] Ch 832, 853 (Cross J): "*As between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none... it is dangerous to reason by analogy from one head of charity to another.*" At 854: "*the law of charity has been built up not logically but empirically, and there is a political background peculiar to religious trusts which may well have influenced the development of the law with regard to them.*"

⁵ E.g. in *Yeats v Charity Commission* (discussed below).

*“The skill of Chancery draftsmen is well able to produce a constitution of charitable flavour intended to allow the pursuit of aims of a non-charitable or dubiously charitable flavour.”*⁶

32. Extrinsic evidence is, therefore, relevant at both of the overlapping stages of the Tribunal’s analysis—in identifying the institution’s purposes (see paras 33-39 below) and in deciding whether those purposes are for the public benefit (see para 42 below).

D. Identifying purposes – relevant principles

33. There is no dispute that the starting-point for identifying an institution’s purposes is its written constitution. This was emphasised in *ISC* at [187]-[188]. However, the authorities establish that extrinsic evidence is important both (1) as a matter of ordinary construction; and (2) when identifying the institution’s purposes as a matter of charity law. These two exercises overlap.
34. As to construction, the modern approach is that the language in all legal instruments conveys meaning according to its context. While older authorities often imposed a threshold of ‘ambiguity’ before resorting to background material, that is now recognised to be wrong: *R (Westminster City Council) v National Asylum Support Service* [2002] 1 W.L.R. 2956 (HL) at [5]. In this case, the Tribunal is interpreting the articles of a limited company. In that context, it may legitimately have regard to material that would have been reasonably available to a reader at the time of incorporation: *Cosmetic Warriors Ltd v Gerrie* [2015] EWHC 3718 (Ch); [7]; [15] & [27] (approved on appeal at [2017] 2 BCLC 456, [23]).
35. The absence of an ‘ambiguity’ threshold applies to charity constitutions as it does to any other document: *Trustees of the Celestial Church of Christ, Edward Street Parish v Lawson* [2017] EWHC 97 (Ch); [2017] PTSR 790 at [20].
36. A useful example of such an approach is *Southwood v Attorney General* (unrep., Court of Appeal, 28 June 2000) (“**Southwood (CA)**”). In that case, the trust deed was “*redolent with the flavour of charity*”; it provided for the “*advancement of the education of the public in the subject of militarism and disarmament and related fields*”: [3]-[4]. Nevertheless, it fell to be construed against its context “*like any other written instrument*”: [7]. The Court of Appeal therefore upheld the decision of the first-instance judge (Carnwath J) that, having regard to the background material, the term “*militarism*” was meant to connote “*the current policies of the Western governments*” and that the institution’s particular purpose was “*to challenge those policies*”: [23].
37. In suitable cases it may also be relevant to consider the ‘private dictionary’ principle, whereby terms in a written document may have a special meaning within a particular community. An example is *Shore v Wilson* (1842) 8 E.R. 45 in which a trust was established to support “*godly*

⁶ In saying this, Scott J was not suggesting that such drafters are engaged in a dishonest exercise. Rather, they have sought to achieve a particular legal effect, but have not succeeded in doing so (cf. the drafter of a tax scheme which turns out not to comply with legislation, or the drafter of a contract which is found to be void).

preachers of Christ's holy Gospel". The court admitted evidence to establish that somebody holding the religious beliefs of the testator would have understood "*godly preachers*" as having a specific meaning. A similar approach may be appropriate when handling expressions such as 'lesbian, gay and bisexual' in LGB Alliance's articles (see paras 64.3 and 69 below).

38. Second, pinpointing the purposes of a putative charity is not just an exercise in construction. It often requires the use of background material, especially where an institution has adopted objects that are ostensibly charitable, but are imprecise or broadly worded. Examples include:

38.1. *McGovern v Attorney-General* [1978] 1 Ch 321: Slade J had extensive regard to policy documents published by Amnesty International (a related unincorporated organisation) when determining the purposes of the Amnesty International Trust.

38.2. *Attorney-General v Ross* [1986] 1 W.L.R. 252: a students' union had a variety of stated objects. Scott J had regard to the wider factual background to identify which of these objects were the primary or predominant ones, and which were ancillary only.

38.3. *Yeats v Charity Commission* (FtT, CA/2017/0007, decision of 19 March 2018): the institution's objects included "*mental and moral improvement of human rights through cultivation of opinion and sentiment... Advancement to human rights and maintained standard of human rights for children...*": [3]. The Tribunal was prepared (on the Commission's invitation) to consider the wider factual matrix. In light of that, it concluded that the founder's "*primary motivation*" was "*to address his concern about a nationwide child trafficking operation in which the government is complicit*": [28(ii)]. Despite the foundation's "*ostensibly charitable purposes*", its "*main purpose*" was therefore not charitable: [34].

38.4. In appropriate circumstances, the courts have considered the institution's post-incorporation activities (i.e. activities post-dating the governing document). This is on condition that (a) those activities are 'intra vires' i.e. they fall within the stated objects, and (b) they have probative value in determining the main purpose of the organisation. The principles were explained by Scott J in *Ross* at 263F-H and 264C-G and have been applied since, e.g. in the first-instance decision in *Southwood v Attorney General* (Carnwath J, unrep., 9 October 1998) ("**Southwood (HC)**").

39. Accordingly, contrary to what is assumed in the Decision at paras 5-6 and 40-42 [2/5; 10], an institution's purposes do not solely depend on the governing document; it will be seen that the courts adopt a variety of justifications in these cases for looking beyond it. In *McGovern* it was

on the basis of a readiness to hold that a broadly worded objects clause was “*ambiguous*”.⁷ In *Ross* extrinsic evidence was used to pick out the “*predominant*” purposes from a long list of assorted objects.⁸ In *Yeats* it was similarly to identify the “*main purpose*” from broad wording. However, in none of these cases could the institutions’ purposes be determined by their governing documents alone.

E. Public benefit – relevant principles

(i) Overview

40. Rather than fixing a definition of public benefit, charity law provides examples of purposes in particular contexts which have been held to be charitable: *ISC*, [80]. Public benefit should be decided on a case-by-case basis paying regard to the decided cases: *ISC*, [81]. As mentioned at para 27 above, the assessment of public benefit is likely to differ between different areas of charitable activity.
41. It is well established that extrinsic evidence is important at this stage. The court must form its own view of whether a particular purpose will operate for the public benefit. It will reach such a view on the evidence: e.g. *McGovern* at 333H; and *ISC* at [68].
42. Public benefit is not an abstract question; it depends on how the institution proposes to implement its objects in practice. The Upper Tribunal in *ISC* described this as an assessment in the “*particular context of the institution concerned*”: [84], especially [84(7)-(8)]. This is why the Commission’s standard registration paperwork requires applicants to give details on how they propose to advance their objects in actuality: see e.g. [2/131-133] (standard questions for educational charities) and [2/134-139] (standard questions for all charities). See also *Southwood* (CA) at [5] (pursuit of the objects “*in the manner intended*”).

(ii) Political purposes

43. The ‘political purposes’ rule is that a political purpose does not meet the public benefit requirement unless it is purely ancillary to other recognised charitable purposes.

⁷ See Slade J in *McGovern* at 348H. The relevant clause was: “*Procuring the abolition of torture or inhuman or degrading treatment or punishment*”.

⁸ See Scott J in *Ross* at 260C (“*If the right question is whether the union was established for the predominant purpose of furthering the educational purposes of the polytechnic an answer cannot be found by concentrating on any one individual sub-paragraph of clause 3. For the purpose of answering that question the union’s constitution must, in my judgment, be read as a whole and considered in the context of its relevant factual background.*.”); 263E (“*The question whether under its constitution the union is or is not charitable must, in my view, be answered by reference to the content of its constitution, construed and assessed in the context of the factual background to its formation. This background may serve to elucidate the purpose for which the union was formed*”); and 264H (“*extrinsic evidence as to the real or main purpose for which the organisation was formed would, in my view, be admissible*”).

44. Many charities do engage in political activity. This is legitimate provided it is no more than ancillary, i.e. if it is a means of advancing a purpose which is for the public benefit. For instance, a charity which is established to support homeless people might properly seek to do so, in part, by influencing housing policy. By contrast, if an institution is set up primarily to change housing policy, it will not be a charity.
45. There are sound practical and constitutional reasons for this restriction. The practical reason is that the court has no means of deciding whether a political goal will benefit the community. As Lord Parker said in *Bowman v Secular Society Ltd* [1917] AC 406, 442 (cited in *McGovern* at 334D):

“a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore, cannot say that a gift to secure the change is a charitable gift.”

46. The constitutional reason for the ‘political purposes’ rule is that deciding such questions encroaches on the functions of the legislature, whilst also risking undermining the impartiality of the judiciary: *McGovern*, 336H-337D. The more controversial the issues, the greater these risks become: *McGovern*, 337F-G.
47. Slade J explained in *McGovern* at 340D that the rule is not confined to matters of party politics, but extends to:

“... trusts of which a direct and principal purpose is either (i) to further the interests of a particular political party; or (ii) to procure changes in the laws of this country; or (iii) to procure changes in the laws of a foreign country; or (iv) to procure a reversal of government policy or of particular decisions of governmental authorities in this country; or (v) to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country. This categorisation is not intended to be an exhaustive one...”

48. While not listed by Slade J, the rule also extends to institutions whose main purposes involve preserving the political status quo, i.e. opposing legislative changes or maintaining an existing line of government policy. See e.g. *Re Hopkinson (decd)* [1949] 1 All ER 346 at 350 (Vaisey J).
49. As noted by Lord Parker in *Bowman* (above), an organisation may fall foul of the political purposes rule whilst nevertheless being entirely lawful. Like the Secular Society in 1917 and Amnesty International in 1981, LGB Alliance will be free to pursue its goals by any lawful means if this appeal is allowed.

(iii) Human rights and anti-discrimination

50. If LGB Alliance’s main or particular purposes include the advancement of human rights and promotion of equality and diversity, then there is no doubt that such purposes fall within s.3(1)(h) of the 2011 Act. But this is only the first step in the analysis, as it does not lead to any presumption of public benefit (see s.4(2)).

51. Some human rights institutions are established for the public benefit, but others are not. Organisations in this field claiming to be charities fall to be treated with some caution for two reasons:

51.1. They run an obvious risk of falling foul of the ‘political purposes’ rule as described above.

51.2. The recognition of such institutions as charities is recent in historical terms. In the pre-2006 case-law, they fell within the residual category of trusts for “*other purposes beneficial to the community*”, also known as the ‘fourth head of charity’ from *Pemsel*’s case (see *ISC* at [56]). As a result, they typically require proof of objective and tangible benefits. In *McGovern*, advancing human rights was recognised as a potentially charitable object only insofar as it operated for the relief of suffering and distress: 333.

51.3. To the extent the benefit from advancing human rights is intangible, this gives rise to further difficulty. Such benefits will only be recognised if they are supported by a broad social consensus (see para 56 below).⁹ This ensures, in broad terms, that charities are not established for causes that are inherently controversial.¹⁰

(iv) Education

52. As with human rights, the courts recognise that education (and research) purposes can be used as a means of introducing political purposes by the back-door.

53. For instance, in *Re Hopkinson (decd)* [1949] 1 All ER 346 a trust was established to advance education by reference to the ideals of the Labour Party. Vaisey J held that this fell foul of the ‘political purposes’ rule. At 350 he commented: “*Political propaganda masquerading—I do not use this word in any sinister sense—as education is not education within the Statute of Elizabeth... In other words, it is not charitable.*”

54. The key distinction is between genuine education of the public (which requires providing balanced information so that the public can make up their own minds) and dissemination of materials that are skewed towards a controversial point of view. In *Re Bushnell (decd)* [1975] 1 WLR 1596, the objects included “*the advancement and propagation of the teaching of socialised medicine*”. Goulding J concluded that this was not charitable because (1605F):

“The testator never for a moment, as I read his language, desired to educate the public so that they could choose for themselves, starting with neutral information, to support or oppose what he called

⁹ The placing of the *Pemsel* categories on a statutory footing in s.3(1) does not affect this. As is clear from s.4(2), public benefit must be individually proved even if the relevant purpose is expressly listed in s.3(1). See further *ISC* [64]; [72]; [104]-[105].

¹⁰ It should be noted that this only applies to the ‘fourth head’ of charity (and possibly also the ‘second head’, i.e. education, based on the case-law discussed below). So the analogy to religious charities at paras 35(a) and 36 of the Second Respondent’s Response [1/83] is not apt. LGB Alliance is not a religion; it deals with human rights and therefore falls under the ‘fourth head’.

“socialised medicine”. I think he was trying to promote his own theory of education, if you will by propaganda, but I do not attach any importance to that word.”

55. Similarly, in *Southwood* (CA) the court distinguished at [29] between a number of different possible educational trusts:

55.1. A trust which “*begins from the premise that peace is generally preferable to war*” is for the public benefit, as it is “*difficult to believe that any court would refuse to accept, as a general proposition, that it promotes public benefit for the public to be educated to an acceptance of that premise*”. But a trust which begins from “*the premise that peace at any price is always preferable to the war*” is not for the public benefit, as that proposition “*plainly is controversial*”.

55.2. A trust “*to educate the public to an acceptance that peace is best secured by ‘demilitarisation’*” is not for the public benefit. Nor is a trust “*to educate the public to an acceptance that war is best avoided by collective security through the membership of a military alliance – say, NATO*”. There are differing views on how best to secure peace; the court has “*no material on which to make that choice*” and “*to attempt to do so would be to usurp the role of government.*”

(v) *Weighing up benefits and disbenefits*

56. In the context of purposes under the ‘fourth head’ in *Pemsel*’s case (i.e. outside the context of poverty, religion and education) it is normally necessary to show benefits that are tangible and objective. While intangible benefits can be recognised in principle, where they are new, there must be a broad social consensus that they are a ‘good thing’. See Lord Wright in *National Anti-Vivisection Society v IRC* [1948] AC 31 (HL) (“**Vivisection**”) at 49:

“I think that the whole tendency of the concept of charity in a legal sense under the fourth head is towards tangible and objective benefits and at least that approval by the common understanding of enlightened opinion for the time being is necessary before an intangible benefit can be taken to constitute a sufficient benefit to the community to justify admission of the object into the fourth class...”

57. It was held in the *Vivisection* case that the courts may weigh up the benefits and detriments caused by an institution’s particular purposes. Further guidance on the correct approach in this regard was given by the Upper Tribunal in *ISC* at [94]-[110], and in particular [106]:

“The court, we conclude, has to balance the benefit and disadvantage in all cases where detriment is alleged and is supported by evidence. But great weight is to be given to a purpose which would, ordinarily, be charitable; before the alleged disadvantages can be given much weight, they need to be clearly demonstrated. There is, we think, a considerable burden on those seeking to change the status quo.”

(vi) *Public benefit in the second sense*

58. Having considered the first sense, the Tribunal must also consider whether the institution benefits the public or a sufficient section of it. In *ISC* at [145] the Upper Tribunal noted that “*what*

constitutes a sufficient section of the public cannot be considered separately from the particular nature of the charitable purpose”.

59. In its decision on consequential matters in *ISC* [2011] 12 WLUK 67 at [9] the Upper Tribunal said:

“... it is ultimately a matter for the tribunal and the court to decide whether the class of potential beneficiaries identified in an institution’s objects is a sufficient section of the public. This requires an overall assessment and is not, on the authorities, a test of reasonableness, although reasonableness may come into the picture. For instance, a wholly capricious restriction – nothing to do with an ability to pay - unrelated to the objects of the charity might not be valid even if the restricted class was numerically very large... what is a sufficient section of the public varies with the nature of the trust and... the class of potential beneficiaries and the particular nature of the trust are interdependent.”

60. In short, there must be a rational connection between the institution’s purposes and the class of potential beneficiaries. This is likely to depend on the correct identification of the institution’s purposes, and the benefit (if any) generated by the pursuit of those purposes.

61. Mermaids accepts that a human rights or anti-discrimination institution is likely to meet the second sense of public benefit if it is established to meet the specific unmet needs of a minority group. On the other hand, it does not meet the second sense if it confines itself to a minority group (or a sub-set of a minority group) just because they agree with its worldview. The restriction bears no rational relationship to any benefits conferred.

F. Application of the principles to LGB Alliance

(i) Identifying LGB Alliance’s purposes

62. In identifying LGB Alliance’s purposes, the Tribunal can legitimately take into account the background to LGB Alliance’s formation as well as its post-incorporation activities for the reasons given at 33-39 above. Indeed, it would be artificial not to do so.

63. A useful cross-check for this is the point made by Kate Harris at para 64 of her WS that the objects clauses of LGB Alliance and Stonewall are framed in similar terms [1/229]. A table of comparison appears at [2/3622]. Yet, on Ms Harris’ own evidence, LGB Alliance was set up out partly of a desire to resist and oppose Stonewall. It would be unreal to claim that these two institutions were established for the same purposes.

64. As will be explored in evidence and developed as appropriate in closing submissions:

64.1. One of the main motives for LGB Alliance’s foundation was its founders’ intense disagreement with existing LGBT organisations, and the founders’ desire to undermine them and their work in support of trans people.

64.2. The centre of gravity of LGB Alliance’s activities has always been essentially ‘anti-trans’, and not ‘pro-LGB’. Since its foundation, it has carried out eight campaigns and

each has focused on trans issues. To that end, it has allied with a range of gender-critical organisations that have nothing to do with supporting those who are LGB.

- 64.3. LGB Alliance gives specific meanings to terms such as ‘sexual orientation’, ‘sex-based rights’ and ‘lesbian, gay and bisexual people’ which are used to signal a particular position on trans rights in a way that is not obvious to the casual reader. See Paul Roberts’ WS at paras 27-30 [1/106ff].
- 64.4. One of LGB Alliance’s core beliefs is that transgender persons (and organisations advocating for them) pose a threat to society and are engaged in a campaign that endangers women, children, lesbians and gay people. The alleged tools in this campaign include (among other things) (a) self-ID laws, (b) trans people using public facilities according to their identified gender, (c) medical support provided to trans children, and (d) education on gender identity in schools. All these, according to LGB Alliance, are part of a deliberate concerted effort to erase LGB people by means of “*gender ideology*”. Paul Roberts describes such claims as “*conspiracy theories*” (Roberts WS, para 34 [1/113]). Many of the factual claims are demonstrably false. To take one example, as Belinda Bell explains at paras 29-31 [1/131], Mermaids does not push transition on gay and lesbian children (or any children). The suggestion that it does so is, in her view, “*absurd and offensive*”.
65. With these principles in mind, Mermaids invites the Tribunal to consider the text of article 2 of LGB Alliance’s articles of association [2/26]. It contains three main purposes, set out in articles 2.1, 2.2 and 2.3. The first two are divided into various sub-headings.
66. The whole of art.2 is couched in terms that are redolent of recognised concepts in charity law (as in the cases discussed at para 38 above). Much of the wording is directly lifted from s.3(1) of the 2011 Act. The length of art.2 suggests that the Tribunal ought (as in *Ross* and *Yeats*, discussed above) to stand back and identify the overarching ‘main’ purpose, or purposes, for which LGB Alliance was formed.
67. Despite its length, the striking thing about art.2 is what is missing from it. It makes no mention of the words “*gender-critical*”, “*biological sex*” or “*same-sex attraction*” even though (on LGB Alliance’s own case) those concepts are at the core of its philosophy. The fact that these concepts have not been included strongly suggests that one needs to look beyond the four corners of this document to understand what LGB Alliance’s purposes actually are.

68. The most useful secondary source is probably the Mission Statement published on LGB Alliance’s website shortly after its foundation, which may be found at [2/1021].¹¹ It indicates that the primary reason for LGB Alliance’s existence is to counter a perceived “*threat [to LGB people] from concerted attempts to introduce confusion between biological sex and the notion of gender*”. It adds: “*we believe these ideologies are confusing and dangerous to children*”. A variety of similar material will be explored at the hearing.
69. The language of art.2 must be understood against that highly specific worldview. As in *Yeats*, the founders of LGB Alliance hold a genuine belief that they are combatting a veiled global threat to human rights (as they perceive them). Hence, on a proper understanding of art.2 in its context:
- 69.1. The references to “*lesbian, gay and bisexual people*” and “*sexual orientation*” should be interpreted as referring exclusively to “*same-sex attraction*” as this is how LGB Alliance employs such terms. (For an analysis of this concept, see Further Reply paras 6-7 [1/87] and WS of Paul Roberts para 29(b) [1/108].)¹²
- 69.2. “*Discrimination on the grounds of sexual orientation*” (arts. 2.1.1; 2.2) refers to LGB Alliance’s unsubstantiated theory (as mentioned at para 64.4 above) that there is an ongoing campaign of discrimination against lesbians and gay people at the hands of ‘gender identity groups’. Accordingly, the stated purposes of combatting anti-LGB discrimination actually relate to intended campaigns by LGB Alliance to roll back or prevent advancements in trans rights.
- 69.3. “*Equality and diversity in respect of lesbian, gay and bisexual people*” (arts. 2.1.2, 4) relates to LGB Alliance’s belief that equality for LGB people is endangered unless trans rights are not expanded and preferably reduced.
- 69.4. “*Human rights abuses*” (arts. 2.2.1, 2.2.2, 2.2.3 & 2.2.12) (and other references to “*human rights*”) refer to alleged risks to human rights which are said to be posed by the advancement of trans rights and healthcare for transgender persons. For instance, LGB Alliance wrote to the Welsh Government stating that its LGBTQ+ Action Plan would “*damage sex-based rights for lesbian, gay and bisexual people*” [2/969] (see e.g. WS of Beverley Jackson, paras 78; 82; 114-5 [1/186ff] and WS of Kate Harris at para 65 [1/229]).

¹¹ [2/1021] was archived in February 2020. A slightly earlier variation of the Mission Statement, archived in January 2020, appears at [2/59].

¹² As set out in Grounds of Appeal para 8 [1/87], Mermaids’ view is that LGB Alliance’s definitions do not track those under the Equality Act 2010. That Act does not contain the expression “*biological sex*” and adopts a broad definition of “*gender reassignment*” at s.7, reflecting a legislative policy of protecting trans people from discrimination regardless of the stage or nature of their transition.

69.5. The references to public education and research (arts. 2.1.2 & 3; 2.2.4 & 5) refer to the provision of information that is designed to persuade readers of LGB Alliance's own point of view. This is admitted by Beverley Jackson at para 41 of her WS [1/175]. Examples of such material will be explored at the hearing.

70. Therefore, on the totality of the evidence, the Tribunal will be asked to conclude that LGB Alliance was established for the purposes in para 8 of the Grounds of Appeal [1/39], namely (1) promoting its anti-trans worldview, principally through social media; (2) seeking or opposing changes in the law and/or lobbying government bodies on transgender issues (a goal which has been so dominant within LGB Alliance from the start that it cannot possibly be seen as merely ancillary); and (3) impeding the work of registered charities that work for the benefit of transgender people (which it claims are engaged in eroding LGB people's rights).

(ii) LGB Alliance's public benefit in the first sense

71. Having identified LGB Alliance's particular purposes, the Tribunal should first ask whether any of them are political in the sense described at para 48 above. It is Mermaids' case that LGB Alliance falls at this hurdle:

71.1. LGB Alliance was essentially set up to influence legislation and government policy on trans issues. LGB Alliance's very first action on the day after its inaugural meeting on 22 October 2019 was writing to the Equality and Human Rights Commission to lobby it [2/57]. Such activities are plainly not ancillary to some other overarching objective: they are LGB Alliance's main purpose.

71.2. As for claimed educational purposes, there is no real intention to present a balanced set of neutral information. LGB Alliance is established to share propaganda relating to a particular, controversial worldview masquerading as education (see para 53 above) and therefore cannot be for the public benefit. For example, Ms Jackson described one of LGB Alliance's four top priorities as being to "*stop the rollout of Stonewall's 'LGBT-inclusive curriculum' for primary schools*" [2/64]; and LGB Alliance's former solicitors told the Commission that its educational purposes were premised on a "*position... that there are only two sexes and gender is a social construct*" [2/136].

72. If (contrary to the above) LGB Alliance's political and educational activity is purely ancillary to broader gender-critical purposes, such purposes equally do not meet the public benefit test. There is no evidence to suggest that such purposes provide tangible benefits to the community. As for alleged intangible benefits, LGB Alliance cannot rely on them because the benefit or otherwise of gender-critical goals is highly controversial. There is certainly no "*common understanding of enlightened opinion*" that they are beneficial.

73. Finally, even if LGB Alliance is somehow able to demonstrate that all its purposes give rise to a recognisable benefit, the Tribunal will need to consider whether they are outweighed by detriments or disbenefits (see paras 56-57 above). It is Mermaids' case that LGB Alliance's chosen approach is fundamentally unpleasant, confrontational and damaging. This is detailed in Mermaids' witness statements and will be explored further at the hearing.

(iii) *LGB Alliance's public benefit in the second sense*

74. Based on the articles of association, the Commission has identified the class of beneficiaries as either 'all LGB people' or 'the wider public' (Decision paras 18-21 [2/7] and First Respondent's Response, Annex A, paras 47-51 [1/63ff]). It is accepted that 'all LGB people' would constitute a sufficient section of the public. However, as explained at para 42 above, public benefit is assessed on the evidence in the context of the particular institution. Accordingly:

74.1. LGB Alliance cannot be said to benefit 'all LGB people'. No evidence has been offered of concrete benefits to LGB people, or indeed of attempts to benefit anyone beyond LGB Alliance's ideologically committed supporters. LGB Alliance claims that "*all the LGBTQ+ groups around the country are essentially now homophobic*": [2/912] at para 3. An institution which makes allegations of this kind about much of the LGB community can hardly claim them as beneficiaries.

74.2. LGB Alliance similarly does not benefit the whole community. It does not even purport to do so. Its approach is inherently divisive, defined by its opposition to those who support trans rights.

75. In reality LGB Alliance's class of intended beneficiaries is much smaller. It may be characterised as 'those who share LGB Alliance's views', or perhaps 'lesbian, gay and bisexual people who share LGB Alliance's views'. Kate Harris accepts this at para 51 of her WS: "*LGB Alliance seeks to give a voice and to provide services and help to and for those who believe, like I do, that LGB rights are the rights of people who are same-sex attracted and who consider that "same gender attraction" is something different*" [1/227].

76. It is difficult to see how such a class could survive the capriciousness test set out at paras 59-60 above. It is not rationally connected to the benefits that arise out of advancing human rights or eliminating discrimination. A requirement that beneficiaries should subscribe to a particular belief system may be acceptable for a religious charity, but there is no reason why it should be acceptable for a charity operating in the field of human rights and anti-discrimination. The Tribunal may also reach the view that LGB Alliance's narrow definition of terms such as 'gay' and 'bisexual' is likely to exclude potential trans beneficiaries (or beneficiaries who are attracted to trans people) in a manner that is capricious. Such questions will need to be considered in light of the oral evidence.

(iv) *Summary*

77. Accordingly, LGB Alliance is not established for purposes that are for the public benefit, both because they are not beneficial in manner recognised by charity law, and because they do not serve the community at large or a sufficient section of it. It follows that LGB Alliance is not a charity within the meaning of s.1(1) of the 2011 Act.

G. Standing

(i) *Nicholson*

78. It is common ground that the leading authority on the phrase “*is or may be affected*” in Schedule 6, column 2 of the 2011 Act is Asplin J’s judgment in *Nicholson v Charity Commission* [2016] UKUT 0198 (TCC).

79. *Nicholson* concerned a refusal to deregister several existing charities under s.34 of the 2011 Act. Those facts were quite different from the present case. The charities in *Nicholson* had not been established to target Mr Nicholson personally, to interfere with his daily activities or to seek to deprive him of his finances. There was no evidence of any loss to him caused by the registration. In short, there was no nexus between Mr Nicholson and those charities akin to the one between LGB Alliance and Mermaids (discussed at paras 95-103 below).

80. Mr Nicholson claimed to be an ‘affected person’ on the grounds that (1) he was an ‘addressee’ of the decision who had engaged in correspondence with the Commission about the registration application; (2) the issue was of considerable public interest and, in effect, he was acting in a quasi-representative capacity on behalf of others; and (3) although he was not affected financially, the decision affected him “*emotionally and socially*”. See [23] of the decision.

81. Asplin J rejected these arguments and held that Mr Nicholson had no standing. As her decision is relatively concise, it is respectfully submitted that the Tribunal will wish to read it in full.

82. At [17] Asplin J cited *R (International Peace Project 2000) v Charity Commission* [2009] EWHC (Admin) 3446 (another deregistration case under what is now s.34 of the 2011 Act) in which Lord Carlile QC (sitting as a deputy High Court Judge) suggested the following approach:

“A person who is or may be affected, in my judgment, means someone who has an interest that is materially greater than, or different from, the interests of an ordinary member of the public. This is a question of fact rather than a question of law.”

83. At [22] Asplin J considered *Colman v Charity Commission* CA/2014/0001 and CA/2014/0002 (a decision of the FtT concerning orders under s.76(3)(d) and (g) of the 2011 Act). In that case Principal Judge McKenna had held that:

83.1. There was no “*one-size-fits-all way to decide*” who is or may be affected by decisions of the Commission. The decision was “*highly fact-sensitive and will depend on the nature*

of the decision made and the individual's relationship to it". Lord Carlile QC's formula in *International Peace Project* (quoted above) was not determinative, although it was a good starting point for assessing each case: [16].

83.2. The appellant claimed to be "*affected*" due to risks of financial loss and reputational damage. These were, in principle, capable of giving him an interest greater than ordinary members of the public. But, on a proper analysis of the facts, the orders under s.76(3)(d) and (g) did not actually cause such risks: [17].

83.3. A "*wide and inclusive approach*" should be taken if a person's legal rights are affected. In order for a person to be affected in the sense identified by Lord Carlile, there should be "*an identifiable impact upon that person's legal rights at the time the order is made*". In order to be a person who "*may*" be affected, there should be "*an identifiable impact on that person's legal rights which is sufficiently likely to occur to make it fair to allow them a right of appeal*": [18].

84. Asplin J's conclusions (having had regard to these authorities, and the statutory wording and context) may be summarised as follows:

84.1. The category of affected persons in each case "*is not prone to a definitive definition*": [43]. It is fact-sensitive and "*should not be approached on a prescriptively narrow basis*": [45].

84.2. It is necessary to focus solely on the particular decision and to determine whether in all the circumstances it has had an effect on the particular person in question: [44].

84.3. For a person to be affected by the decision, "*first the decision itself must relate to the person in some way. Secondly, the person's legal rights must have been impinged or affected by the decision and to be a person who 'may' be affected, there must be an identifiable impact on the person's legal rights which is likely to occur...*": [44].

84.4. A person is not "*affected*" solely (1) by virtue of being an "*addressee*" of the decision (as decisions may be sent to a variety of people who may or may not be affected by it): [46]-[47]; or (2) by virtue of disagreeing with the decision emotionally, politically or intellectually, or being a concerned taxpayer: [47]. The other factors relied on by the appellant also did not assist him: [53]-[58].

85. A few qualifications should be made to this summary.

86. First, as will be discussed below, the facts of this case are different. Mermaids is not just an aggrieved taxpayer or busybody. It has suffered, and continues to suffer, real harm as a result of the decision.

87. Second, while *Nicholson* is binding on the Tribunal, Asplin J’s decision should not be read as if it were a statute. As she acknowledged in [42], she was not laying down a definitive definition, and therefore her comments should not be read as detracting from the wording of Schedule 6.

88. Among other things, Asplin J’s choice of expression “*likely to occur*” at [44] does not replace the statutory test “*may*”. The term “*likely*” could create confusion: it can have a wide range of meanings, ranging from “*possible*” to “*more probable than not*”. The latter cannot apply here; it would impermissibly upgrade the threshold from “*may be affected*” to “*will be affected*” (on the civil standard of proof). The phrase “*may be affected*” is simple and does not require any gloss. As the Divisional Court put it in *Green v Turkington* [1975] R.T.R. 322 (in the context of a magistrate who had construed “*may suggest*” as “*reasonably likely to suggest*”):

“when you have simple statutory language such as that comprised in the two simple English words ‘*may*’ and ‘*suggest*’, I think that one must set about construing those words and not set up alternatives as a possible meaning for the phrase.”

89. Third, Asplin J’s emphasis on the need for caution should (like *International Peace Project*) be understood in the context of a decision not to deregister charities under s.34. Such challenges are uniquely disruptive to charities and the integrity of the register, especially if they are combined with third-party requests to deregister the charity under s.36. With around 168,000 charities on the register, there are good grounds for concern about the ‘floodgates’ opening if too many people can bring challenges under s.34. That rationale does not necessarily carry across to other types of challenge, a point made by B. Crumley and J. Picton, “*Still Standing?*”: *Charitable Service-Users and Cy-Pres in the First-tier Tribunal (Charity)* (2018) 82 Conv 262 (“**Crumley and Picton**”).¹³

90. With challenges under s.30, there is less concern about upsetting the status quo since the institution is newly registered. Disruption is minimised by need to bring an appeal within 42 days of the decision or its publication (see r.26(1) of the GRC Rules). So any analogy with ‘non-deregistration’ cases is limited.

91. Fourth, it should be borne in mind that there are good policy reasons in favour of promoting access to the Tribunal in appropriate cases. As explained by Crumley and Picton at pp.264-265:

“The policy justification for the existence of an appeals process against Commission decisions feeding into the First-tier Tribunal (Charity) is two-fold. First, the right of appeal is intended to encourage litigation and prevent legal ossification. Second, like any other tribunal, it is intended to provide redress. It ‘puts right’ bad decision-making. These policy goals lean heavily towards a wide right of standing. The wider the right, the more cases will feed into the legal system, so allowing the twin aims to be achieved.”

¹³ *Colman* (which does not have precedential status but was cited with approval in *Nicholson*) concerned appeals against interim orders under s.76(3)(d) and (g) of the 2011 Act. Here, too, there may be good reasons for restricting access to the Tribunal. Such orders do no more than essentially preserving the status quo against potential risk of mismanagement or loss of charity property, and excessive challenges to such orders undermine the Commission’s ability to take swift protective action. Some of this reasoning can be seen in *Colman* at [16]-[17] (quoted at [22] of *Nicholson*).

92. Such factors are especially important in appeals against registration. As to the first, the Commission's published registration decisions are (whilst not binding) often cited as persuasive indications of how the law on charitable status has developed over time.¹⁴ As to the second, it is especially important to ensure a means of redressing a bad decision if it results in the admission of a new type of charity to the register for the first time, with severe consequences for third parties.
93. Fifth, nothing in *Nicholson* detracts from the need to apply "*is or may be affected*" in Schedule 6 in a manner that does not frustrate Parliament's intention to create an effective system of accountability and redress. By s.319(1) (read with Schedule 6) Parliament provided that registration decisions were subject to appeal to the Tribunal. Those appeals have various features that are more user-friendly than judicial review. They are quicker, cheaper, have limited adverse costs risks, and are determined by a specialist tribunal taking a fresh decision on the evidence. It is therefore legitimate (albeit not determinative) to consider who else might bring a challenge if those in the position of Mermaids could not do so:
- 93.1. In *Nicholson*, Asplin J placed considerable emphasis on the fact that the Attorney General had a right of appeal under s.319(2)(b): [43] and [55]. That is not a realistic possibility here. There is no evidence of a desire by government to have an extensive role in policing registration decisions. Since the formation of the First-tier Tribunal (Charity) in 2009, the Attorney General has never (so far as Mermaids is aware) appealed against a charity's registration.
- 93.2. The putative charity trustees and the institution itself are expressly listed in Schedule 6, column 2. But they are only likely to bring appeals against decisions not to register their charity.
- 93.3. HMRC could be said to be "*affected*" if LGB Alliance claims tax reliefs. In principle it seems unlikely that HMRC would take a proactive stance at registration stage. Like the Attorney General, HMRC has never brought a registration appeal in practice.
- 93.4. Local authorities could be said to be "*affected*" if LGB Alliance claims relief from business rates. But they may not wish to get involved in areas of political controversy, and they may have limited resources. There is also no evidence that LGB Alliance has claimed such relief; and moreover Mermaids is unaware of such an appeal ever having been brought by a local authority.
- 93.5. In *Nicholson*, counsel suggested at [37] that disappointed residuary legatees and significant beneficiaries and donors may be "*affected*". The former are only relevant

¹⁴ The Commission acknowledges on its website that charity registration decisions "*set a legal precedent*": <https://www.gov.uk/government/collections/charity-commission-registration-decisions>.

where the charity is a trust established under a will; and the latter have no reason to want to challenge registration.

94. Therefore, if the Tribunal takes an unduly prescriptive approach to “*affected persons*”, the only real check on the Commission’s inadvertent registration of institutions such as LGB Alliance as charities will be central government. That would place it under pressure to bring appeals in controversial cases and drag charity registration into the political arena. It may also create risks for the Commission’s independence from central government—an important policy reflected in s.13(4) of the 2011 Act: “*In the exercise of its functions the Commission is not subject to the direction or control of any Minister of the Crown or of another government department.*”

(ii) *The facts – effects of the Decision on Mermaids*

95. The WS of Dr Belinda Bell [1/123ff] addresses the facts relevant to Mermaids’ standing.

96. Mermaids exists to relieve the distress of children and young people who are affected by gender identity issues (and their families). At paras 6-10 [1/124ff], Dr Bell explains the concrete forms of support provided by Mermaids for its beneficiaries, and emphasises that it does not itself advise children on the appropriateness of any particular medical treatment.

97. There is a unique relationship between LGB Alliance and Mermaids. One of LGB Alliance’s most persistent activities since its foundation has been attacking Mermaids and a handful of similar organisations. Mermaids sits alongside Stonewall at the top of LGB Alliance’s ‘hit list’. It has faced accusations of “*child abuse*” and “*chemically castrating*” children [2/1145]. As explained by Dr Bell at paras 28-48 [1/131ff] and 51-52 [1/137ff], LGB Alliance has published a stream of misinformation about Mermaids’ policies and functions.

98. Not only does LGB Alliance attack Mermaids as an organisation, it directly undermines its core charitable activities (and thereby, at least to some extent, the ability of its trustees to fulfil their duties). One of the four original “*Aims*” recorded on its website was to “*protect children and young people from being taught unscientific gender doctrines, particularly the idea that they may have been born in the wrong body, which may lead to life-changing and potentially harmful medical procedures*” [2/1021].¹⁵ Its major activities include a “*Schools Campaign*” focused on preventing children’s education from exploring gender issues [1/84] including a page accusing Mermaids of child abuse [2/89]. It appears that LGB Alliance lobbies government ministers against Mermaids, both openly and in secret (see paras 24 and 27 of Dr Bell’s WS [1/130]).

¹⁵ As with other language in this sphere, the use of “*born in the wrong body*” is nuanced and evolving over time. An article from 2020 sets out Mermaids’ broad position on it [2/2194], in essence that (1) “*no child is born in the wrong body*” and transgender children should not “*be encouraged to reject*” their bodies; but (2) the phrase has been useful in the past, and many transgender people still find it personally meaningful.

99. In concrete terms, LGB Alliance has sought to inflict direct financial loss on Mermaids by seeking to cut off its sources of funding and intimidate bodies that work with it (see paras 53-57 of Dr Bell's WS [1/140ff]).
100. There is every reason to believe that the Decision makes such events more likely, and accordingly that Mermaids "*is or may be affected*" by the Decision for the purposes of the fact-sensitive assessment under Schedule 6 to the 2011 Act. This is not a matter of speculation; there is documentary evidence of a direct causal link between the Decision and the continued waging of attack campaigns against Mermaids (including attempts to inflict financial loss on it):
- 100.1. In an undated letter to the Commission, LGB Alliance's former solicitors asked for the registration to be expedited on the basis that registration was crucial to its ongoing activities and it was "*increasingly difficult to obtain funding*" until registration was effected: [2/500]. As consequences of registration, the letter cited attracting donors whose "*funding is vital to continue operating the Charity*" (giving two concrete examples of donors whose gifts would be conditional on charitable status); obtaining Gift Aid relief (which was said to be essential to running the October 2021 conference) and putting discussions with government bodies on a "*formalised*" footing.
- 100.2. LGB Alliance's October 2021 conference was made possible by the Decision: [2/1158] (conference venue allowing the event due to LGB Alliance being "*a government registered charity*"); and defended on the basis of the Decision: [2/1161]. The headline topics at the conference included whether affirming trans children's gender identity amounted to "*child abuse*" and "*child conversion*", in the same vein as previous accusations levelled against Mermaids: [2/980].
- 100.3. By January 2022, LGB Alliance had been invited to meet two government ministers and spoke to them about young people with gender dysphoria, repeating (it can be inferred) the same myths that they had previously levelled against Mermaids' policies on social media: [2/1171].
101. LGB Alliance's other false claims about Mermaids are now inevitably taken more seriously, including by those in positions of power and potential supporters. Dr Bell explains at paras 68-70 of her WS how this is already having a concrete effect on Mermaids' work, and is likely to continue doing so in future.
102. This case is, therefore, a long way from the 'public interest'-based challenges shut out in *International Peace Project* and *Nicholson*. The appellant is a body directly threatened by the Decision, and is likely to suffer detriment of various kinds including concrete financial loss, abusive communications and fortified campaigns to undermine its own charitable activities.

Mermaids both “*is*” affected by the Decision and “*may be*” affected further in future. This extends to existing and potential interference with its income, its legal entitlements (such as its entitlements to be free from interference with contracts, and from defamatory statements) and its trustees’ legal obligation to seek to relieve the suffering of children facing gender identity issues.

103. The Tribunal is therefore respectfully invited to conclude that Mermaids has standing to appeal against the Decision on a proper application of Schedule 6 and the guidance in *Nicholson* to the facts of the case.

H. Conclusion

104. The Tribunal is asked to find that LGB Alliance is not a charity, to quash the Decision and to direct the Commission to rectify the register.

Michael Gibbon Q.C.

Ted Loveday

Maitland Chambers

15 July 2022

B E T W E E N:-

MERMAIDS

Appellant

- and -

**(1) THE CHARITY COMMISSION FOR
ENGLAND AND WALES**

(2) THE TRUSTEES OF LGB ALLIANCE

Respondents

CHARITY COMMISSION'S SKELETON ARGUMENT

For Hearing on 9-16 September 2022 (6 days)

The Tribunal's attention is invited to the following relevant guidance published by the Commission:

- (1) *Public benefit: the public benefit requirement (PB1) (September 2013)*
- (2) *Analysis of the law relating to public benefit (September 2013)*
- (3) *The Promotion of Human Rights (RR12) (January 2005)*
- (4) *Promotion of Equality and Diversity for the Benefit of the Public (July 2003)*
- (5) *Campaigning and political activity guidance for charities (CC9) (March 2008)*
- (6) *Equality Act guidance for charities (February 2013)*

I. INTRODUCTION AND SUMMARY

1. The First Respondent ("**the Commission**") is the statutory regulator and registrar of charities in England and Wales under the Charities Act 2011 ("**the 2011 Act**"). The Appellant ("**Mermaids**"), itself a registered charity, appeals against the Commission's decision published on 20 April 2021 ("**the Decision**") to register LGB Alliance as a charity. The Trustees of LGB Alliance have been joined as a Second Respondent.
2. As set out below, the appeal against the Commission's Decision is a full merits appeal. The Tribunal must consider afresh whether it is appropriate to register LGB Alliance and may take into account evidence which was not available to the Commission (2011 Act, section 319(4)). It is apparent from the evidence filed by Mermaids and LGB Alliance that the Tribunal is being invited to take into account a large volume of evidence which was not available to the Commission and of which the Commission has no direct knowledge. There is evidently a considerable area of disagreement between Mermaids and LGB Alliance on a wide range of factual issues. Further, each of them has indicated an intention to test the other's evidence by way of cross-examination. This hearing, originally set down for 2 days, has been relisted for 6 days as a result.

3. In these circumstances, the Commission views its own role in this appeal as a limited one. In particular, it does not envisage being involved in the factual disputes between Mermaids and LGB Alliance. Instead, it intends to focus on assisting the Tribunal with the applicable law on charitable status and on standing to bring an appeal.¹

II. LEGAL FRAMEWORK

4. A “charity” is an institution which is established for charitable purposes only, and falls under the High Court’s jurisdiction on charities: see section 1 of the 2011 Act. A “charitable purpose” is a purpose which falls within one of the descriptions of purpose in section 3(1) of the 2011 Act and which is for the public benefit: see sections 2, 3 and 4.
5. The Commission’s functions in respect of the registration and names of charities are set out in Part 4 of the 2011 Act. Section 29 provides that there continues to be a Register of Charities, to be kept by the Commission in such manner as it sees fit, which must contain the name of every registered charity. Section 30 requires that every charity must be registered (subject to exemptions and exceptions that are not relevant). Section 34 requires the Commission to remove from the register any institution which it no longer considers is a charity and any charity which has ceased to exist or does not operate.
6. Section 36(1) provides that a person who is or may be affected by the registration of an institution as a charity may, on the ground that it is not a charity, (a) object to its being entered by the Commission in the Register, or (b) apply to the Commission for it to be removed from the Register. The Commission also has power to consider removal of its own motion. Under section 36(3)-(4) and 37(2), if there is an appeal to the FTT against a decision to enter an institution in the Register, the charity is treated as not being on the Register until the appeal is determined. This has a bearing on the issue of standing to bring an appeal: see *Nicholson v Charity Commission* [2016] UKUT 198 (TCC) at §43.
7. As to appeals, section 319 provides that (except in the case of a ‘reviewable matter’) an appeal may be brought to the FTT against any decision, direction or order mentioned in column 1 of Schedule 6. The potential appellants are (a) the Attorney General or (b) any person specified in the corresponding entry in column 2 of Schedule 6. In respect of a decision under section 30 to enter an institution in the Register, the entry states:

“The persons are –

- (a) the persons who are or claim to be the charity trustees of the institution,
- (b) (if a body corporate) the institution itself, and

¹ The Tribunal will note that at an early stage in these proceedings, before the Second Respondent was joined and before the parties filed their evidence, the Commission filed Grounds of Defence which more directly opposed the appeal. For the reasons explained above, the Commission now adopts the position set out above.

- (c) any other person who is or may be affected by the decision”.
8. The Tribunal’s function in determining an appeal is specified in section 319(4):
- “In determining such an appeal, the Tribunal–
- (a) must consider afresh the decision, direction or order appealed against, and
- (b) may take into account evidence which was not available to the Commission.”
9. The Tribunal’s remedial powers are specified in section 319(5):
- “(5) The Tribunal may –
- (a) dismiss the appeal, or
- (b) if it allows the appeal, exercise any power specified in the corresponding entry in column 3 of Schedule 6.”
10. The relevant ‘corresponding entry’ in column 3 of Schedule 6 for this case provides the Tribunal with the following powers if it allows the appeal:
- “Power to quash the decision and (if appropriate) –
- (a) remit the matter to the Commission
- (b) direct the Commission to rectify the register.”

III. ISSUES FOR DETERMINATION

11. In this appeal, the Tribunal will firstly need to decide whether Mermaids has standing to bring the appeal, and, if so, the Tribunal will need to take a fresh decision on whether LGB Alliance is a charity, having regard to the evidence that is before the Tribunal.
12. As noted in the Commission’s Grounds of Defence, the issues for determination are therefore as follows:
- 12.1. Whether Mermaids has standing to bring the appeal, which turns on whether Mermaids “*is or may be affected by the decision*”, meaning the Commission’s Decision dated 21 April 2021 to register LGB Alliance as a charity.
- 12.2. What are the purposes for which LGB Alliance was established?
- 12.3. Are the purposes of LGB Alliance exclusively charitable?
- (a) Do the purposes fall within the description of charitable purposes in section 3(1) of the 2011 Act?
- (b) Are the purposes for the public benefit?

IV. STANDING

13. The issue to be determined is whether the Appellant “*is or may be affected by the decision*”, meaning the Commission’s Decision dated 21 April 2021: see Schedule 6 to the 2011 Act.

14. The correct approach to this issue was set out by the Upper Tribunal (Asplin J) in *Nicholson v Charity Commission* [2016] UKUT 198 (TCC) (“*Nicholson (No.1)*”):

“44. In my judgment when read in context and having taken account of the fact that the purpose of the statutory provision must be found in the words of the statute itself, the ordinary and natural meaning of the phrase is that a person with standing is one who is or may be “*affected by the decision*.” It is necessary therefore, to focus solely upon the particular decision and to determine whether in all the circumstances it has had an effect upon the particular person in question. It seems to me that in order to be affected by the decision, first the decision itself must relate to the person in some way. Secondly, the person’s legal rights must have been impinged or affected by the decision and to be a person who “may” be affected, there must be an identifiable impact on the person’s legal rights which is likely to occur, a matter to which I shall return.

45. The relevant question therefore, is a narrow one. Is the person affected by the particular decision? In order to determine that question it is necessary to consider the nature of the decision and all the surrounding circumstances...

47. ... [I]n order to be *affected* a person’s rights need to have been altered or impinged by the decision itself in some way and in order to be someone who “may” be affected there must be an identifiable impact upon that person’s legal rights which is likely to occur. It is insufficient that he disagrees with the decision emotionally, politically or intellectually and as a result is affected emotionally and/or socially, however sincere his concerns. It seems to me that had the legislature intended all interested and concerned taxpayers who receive a copy of the Commission’s decision from it, to be able to appeal that decision, it would have chosen different language entirely. There would have been no need to have referred to being *affected by the decision*.

48. This construction is consistent with the Attorney General’s role as a result of section 319(2)(a) in relation to decisions pursuant to section 34 [T]he standing of the Attorney General in relation to an appeal and therefore, his ability to proceed in the public interest militates against a wide construction...

49. If section 319(2) together with the corresponding entry in Column 2 of Schedule 6 is read as a whole, it is clear that the purpose of the statute was to enable those “affected” by “the decision” to appeal. The other categories of persons in the corresponding entry, being the charity itself or its trustees, have a very direct and immediate connection with the decision and otherwise, the Attorney General has standing and is in a position to bring an appeal in the public interest. In context therefore, it seems to me that “*affected by the decision*” should be construed to connote circumstances in which the decision in question has a direct, or the potential for a direct, effect upon a person’s legal rights.

50. Such a construction is also consistent with the fact that serious issues of charity law are relevant to a decision under section 34 and that there are serious consequences for a charity whilst an appeal is pursued. Both those matters militate against a construction which would include all addressees of the decision who are also concerned taxpayers.”

15. *Nicholson (No.1)* was an appeal by Dr John Nicholson against a decision taken by the Commission in 2014 under section 34 of the 2011 Act not to remove from the register

certain charities known as the “JNF Charities”. The Upper Tribunal held that Dr Nicholson did not have standing to bring the appeal.

16. In 2018, Dr Nicholson attempted to solve his difficulty as to standing by inviting the Commission to take a fresh decision on whether to remove the JNF Charities from the register, and then bringing an appeal not only in his own name but also in the names of Kholoud Al Ajarma and Annie O’Gara: *Nicholson and others v Charity Commission* (CA/2018/0011, 24 April 2019) (“*Nicholson (No.2)*”). The appellants argued that Ms Al Ajarma had standing because (so they alleged) her family had been deprived of land in Israel by parties connected to the JNF Charities. Applying the *Nicholson (No.1)* test, the Tribunal held that none of the appellants had standing. See in particular §§16-17:

“16. The Charity Commission’s decision not to remove the Charities from the register does not ‘relate to’ Ms Al Ajarma at all: it relates to the Charities. The fact that the decision was made in response to an application made to the Commission by Ms Al Ajarma does not mean that it necessarily relates to her. Nor (as the Upper Tribunal has made clear) does the fact that Ms Al Ajarma was one of the addressees of the decision mean that she is necessarily affected by it.

17. I am not persuaded that Ms Al Ajarma’s legal rights have been impinged or affected by the decision she now seeks to challenge or that there is any identifiable impact on her legal rights which is likely to occur. It is unnecessary for the Tribunal to determine whether Ms Al Ajarma or her family has rights in respect of property overseas (and it would be inappropriate for the Tribunal to express any opinion in that regard). However, even if it is accepted that Ms Al Ajarma does have such rights, it is not apparent that the Charity Commission’s refusal to de-register the Charities would have any effect, or any likely effect, upon them. Any such rights as may exist are unaffected by the Commission’s refusal to de-register the Charities. Indeed, no evidence was presented to demonstrate how the de-registration of the Charities might result in, or even facilitate, the restitution of land which Ms Al Ajarma desires.”

17. It is clear from *Nicholson (No.1)* that the fact that Mermaids disagrees with LGB Alliance’s views on various issues relating to transgender people, and accordingly disagrees with the Commission’s decision to register LGB Alliance as a charity, is insufficient. As Asplin J made clear at §47, the fact that an appellant “*disagrees with the decision emotionally, politically or intellectually and as a result is affected emotionally and/or socially*” is insufficient, “*however sincere [the appellant’s] concerns*” may be.
18. In light of the approach set out in *Nicholson (No.1)*, the relevant questions are as follows: (1) whether the Commission’s Decision to register LGB Alliance as a charity relates to Mermaids in some way; and (2) whether Mermaids’ legal rights have been impinged or affected by the Decision itself and/or whether the Decision itself is likely to have an identifiable impact on Mermaids’ legal rights. The Commission invites the Tribunal to consider carefully whether Mermaids satisfies either of these requirements.
19. In its Grounds of Appeal, Mermaids advances the following arguments in an attempt to bring itself within the standing requirement as explained in *Nicholson (No.1)*:

- 19.1. First, Mermaids argues (Grounds §14.1) that if LGB Alliance remains registered as a charity, *“it is likely to impede Mermaids’ efforts (and the efforts of its charity trustees) to pursue its own charitable objects”*, on the premise that *“[o]ne of LGB Alliance’s core purposes is seeking to undermine Mermaids’ charitable activities”*. It is further asserted that the Commission’s Decision *“facilitates”* LGB Alliance’s *“interference with Mermaids’ activities”* by giving it access to tax relief, allowing it to access charitable grants and donations and allowing it to *“portray registration as an endorsement of LGBA’s Beliefs, thereby raising the profile and credibility of its opposition to Mermaids”*.
- 19.2. Secondly, Mermaids argues (Grounds §14.2) that if LGB Alliance remains registered then Mermaids is likely to *“suffer financial loss”* in that it may have to compete with LGB Alliance for donations and grants, and may *“face attempts by LGB Alliance to undermine its funding, including its ability to fundraise”*.
20. In this regard, the Commission notes the following points:
 - 20.1. The factual premise of Mermaids’ first argument is that one of LGB Alliance’s *“core purposes”* is to undermine Mermaids’ own charitable activities. This raises an issue of fact, which LGB Alliance evidently disputes, about whether LGB Alliance’s *“true”* purposes are different from those set out in its Articles of Association. In this respect, the question of standing to an extent overlaps with the substantive issues in the appeal regarding charitable status (addressed below).²
 - 20.2. In addressing this allegation, the Tribunal will need to consider whether and to what extent such *“undermining”* of Mermaids’ activities, if established, is merely part and parcel of LGB Alliance taking a different position from that of Mermaids on the issues of public debate in they are all active participants.
 - 20.3. In any event, Mermaids does not appear to allege that its legal rights have been or are likely to be breached by the actions of LGB Alliance, less still that its rights have been or are likely to be breached by the Commission’s Decision to register LGB Alliance as a charity. Mermaids does not refer at all to its legal rights, but rather to alleged impeding or undermining of or interference with its activities.
 - 20.4. Insofar as Mermaids may be concerned that LGB Alliance may in the future commit legal wrongs in respect of Mermaids, then Mermaids is likely to have legal remedies available to it at that stage. To take a simple example, if Mermaids in future considers that LGB Alliance has made defamatory statements about Mermaids, it would be open to Mermaids to bring a claim for defamation³. The

² It was this degree of overlap that led the Commission to support the listing of a single hearing to address both standing and the substantive issues in the appeal, rather than addressing standing at a preliminary hearing.

³ See Gatley on Libel and Slander (13th ed., 2022) at §9-019, noting that a charity can sue for defamation since *“defamatory statements may discourage subscribers or otherwise impair its ability to carry on its charitable objects”*, and citing *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 at 547.

Commission of course does not encourage the use of charitable resources for litigation of this type, but the availability of legal remedies shows that there is no need for an expansive approach to standing in order to protect Mermaids' rights. Put another way, the possibility of disputes arising between two charities does not of itself mean that one of them has standing to challenge a decision to register the other with a view to denying it charitable status in the first place.

- 20.5. Insofar as Mermaids relies on the fact that it will have to compete with LGB Alliance for donations and grants if they are both registered charities, the Commission submits that this is plainly insufficient to satisfy the requirements for standing to appeal against the Decision to register LGB Alliance. Increased competition for funds falls well short of the type of impact on an appellant's legal rights that is needed for standing. If Mermaids' argument were accepted, logically it would confer standing to challenge a registration decision on every other existing charity in the country, which cannot have been what Parliament intended.
21. In its Skeleton Argument, Mermaids maintains the same points whilst also attempting to water down the *Nicholson (No.1)* test. Indeed, Mermaids comes close to contending that the Tribunal should not apply that test in the present case. As to this:
 - 21.1. Mermaids contends that the approach to standing to appeal against a section 30 decision to register a charity should be different from the approach in relation to a section 34 decision not to deregister a charity (Skeleton §§89-92). However, it would be surprising if Parliament had intended a materially different test for standing to be applied in these closely analogous contexts, not least in circumstances where Parliament included a single entry in Schedule 6 to the 2011 Act to address both section 30 and section 34 decisions. The Commission does not accept that a different test is justified by the assertion that a different degree of 'disruptiveness' is caused by challenging a refusal to deregister an existing charity, compared with challenging a decision to register a new charity.
 - 21.2. Mermaids also invites the Tribunal to take a more generous approach to standing on the basis that, whilst Asplin J in *Nicholson (No.1)* relied on the fact that the Attorney General has a right of appeal under section 319(2)(a), in Mermaids' view there is no "*realistic possibility*" of her deciding to exercise that right of appeal in relation to a registration decision (Skeleton §93). However, as Asplin J noted at §43, the willingness of the Attorney General at a given point in time to exercise her right of appeal cannot affect the proper interpretation of the 2011 Act.
22. The Commission accordingly invites the Tribunal to apply the *Nicholson (No.1)* test, which is binding upon it as a matter of precedent, to the facts of this case.

V. CHARITABLE STATUS

23. As noted above, the substantive issue in this appeal is whether LGB Alliance is a charity. As explained below, to a certain extent this depends now on issues of fact which are disputed as between Mermaids on the one hand and LGB Alliance on the other.

(A) LGB ALLIANCE'S PURPOSES AND WHETHER THEY FALL WITHIN THE DESCRIPTION OF CHARITABLE PURPOSES IN SECTION 3(1) OF THE 2011 ACT

The approach taken in the Commission's Decision

24. The objects of LGB Alliance, as set out in Article 2 of its Articles of Association, are reproduced in the Annex to this Skeleton Argument. In summary, the first and second objects state that LGB Alliance seeks to promote equality and diversity in connection with lesbian, gay and bisexual people and to promote human rights in respect of those who face discrimination on the grounds of sexual orientation. The third object is to promote any other purpose that is charitable under the law of England and Wales.

25. As the Commission's Decision notes at §6:

"The terms used in the objects as expressed are clear and certain, they are not indefinite or ambiguous in nature. The stated means of furthering each of the objects are wide ranging and are all capable of furthering the respective purposes of the promotion of equality and diversity and the promotion of human rights."

26. The objects set out in the Articles of Association fall within the descriptions of charitable purposes in section 3(1) of the 2011 Act, in particular at section 3(1)(h):

"the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity"

27. The position was further explained in the Commission's Decision as follows:

"8. The Commission accepts as charitable the promotion of human rights (as set out in the Universal Declaration of Human Rights and subsequent United Nations conventions and declarations) throughout the world and recognises that human rights may be advanced in many different ways. To be charitable, purposes which fall within the advancement of human rights must be for the public benefit, meaning that they must benefit the public or a sufficient section of the public.

9. There are limitations on the advancement of human rights consistent with the principles of charity law. In particular, in order to be charitable a purpose cannot be political and any political activities must be ancillary to charitable purposes.

10. In assessing charitable status, the Commission has taken into account the principles underpinning the advancement of human rights in charity law set out by the First-tier Tribunal in *The Human Dignity Trust v Charity Commission*.

11. The Commission recognised the promotion of equality and diversity for the benefit of the public as charitable in 2003, by analogy with the following purposes, which had been separately recognised either by the courts or by the Commission itself:

- the promotion of equality of women with men;
- the promotion of racial harmony;
- the moral or spiritual welfare and improvement of the community;
- the promotion of religious harmony;
- the promotion of human rights.

12. The information in support of the application confirmed that LGB Alliance would undertake a range of activities to further its objects including: education; research; public guidance; advice and guidance to government and other policy makers; promoting the development of policy and practice; and advice and support to lesbian, gay and bisexual people."

28. The Commission's Decision referred to two Commission publications which confirm that promoting human rights and equality and diversity were considered to be charitable purposes even before this was expressly recognised in the 2011 Act:

28.1. "The Promotion of Human Rights" (RR12, January 2005), which explained that the promotion of human rights is recognised as a charitable purpose, and considered the various ways (including political campaigning) in which a charity may promote human rights.

28.2. "Promotion of Equality and Diversity for the Benefit of the Public" (July 2003), which recorded the Commission's conclusion that the promotion of equality and diversity for the benefit of the public is a charitable purpose.

Mermaids' contentions about LGB Alliance's "true" purposes

29. Mermaids does not dispute that the objects set out in LGB Alliance's Articles of Association fall within the descriptions of charitable purposes in section 3(1) of the 2011 Act. Instead, Mermaids contends that these are not LGB Alliance's "true" purposes.

30. This gives rise to a number of issues. Many of these are issues of fact. For example: whether the motives of those who established LGB Alliance were different from or inconsistent with the objects set out in the Articles of Association; what if anything the activities (pre- or post-registration) of LGB Alliance or persons associated with it show about its true purposes or beliefs; and in particular whether those activities reveal that LGB Alliance is "anti-trans" or is intent on impeding the work of "pro-trans" charities.

31. There is also an important issue of law, concerning the correct legal test for the Tribunal to apply when addressing Mermaids' contention about LGB Alliance's "true" purposes.

32. The Commission's Decision addressed similar contentions to those now advanced by

Mermaids and identified the relevant legal issue as follows:

“(ii) Complaints that LGB Alliance’s purposes include some which are not charitable

40. As described earlier in this decision, the Commission has concluded that the purposes of LGB Alliance, as set out in its governing document, are exclusively charitable.

41. There is some suggestion in the objections to registration that the objects declared in clause 2 of LGB Alliance’s Articles of Association are not its “true” objects. This is, in legal terms, an allegation that clause 2 is a “sham”. In *Snook v London and West Riding Investments*, the Court held that such a situation arose where there had been a common intention amongst the signatories to a document not to establish the legal rights and obligations which it gave the appearance of creating. It is tantamount to an allegation of dishonesty. The First-tier Tribunal in *Hipkiss v Charity Commission for England and Wales* impliedly rejected a submission that one could suggest that the objects declared in a governing instrument did not declare its true objects in the absence of alleging a sham.

42. The Commission found no evidence to support allegations of dishonesty or a sham.”

33. Tudor on Charities⁴ sets out the position as follows at §7-035, again citing *Snook v London and West Riding Investments* [1967] 2 QB 786:

“[T]he court also may look at activities where there is a need to determine whether a governing document is a sham, setting out charitable purposes but hiding the real objects of the organisation. The test for whether an act or document is a sham is, broadly speaking, whether it is intended by the parties to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual rights and obligations (if any) which the parties intend to create. The court must be satisfied that the document is no more than a piece of paper which the parties have signed with no intention of its having any effect, save that of deceiving a third party and/or the court into believing that it is genuine.”

34. Mermaids does not allege that LGB Alliance’s objects as set out in its Articles of Association are a “sham” in the above sense. Instead, Mermaids argues that “[i]t is not necessary to surmount the threshold of a “sham” ... before the Tribunal has regard to the factual matrix” (Reply §7; Skeleton §§30-31). Mermaids’ position is as follows (Reply §§5-6):

“5.1. It was formerly thought that extrinsic evidence could only be used to construe a written instrument when the instrument was “ambiguous”. That is no longer the case. According to the modern approach, (a) construction is a unitary process and there is no need to meet a threshold of “ambiguity” before background material is admitted; and (b) a company’s articles, in particular, fall to be construed in light of the publicly available information available to a reasonable reader.

5.2. Alternatively, if a threshold of “ambiguity” for admitting extrinsic evidence still exists in the charities context, it is met (and has been met in previous cases) by overly-broad objects clauses which purport to be charitable, but do not give accurate particulars of what the organisation has actually been set up to do.

6. Whether any given objects are charitable is not exclusively a matter of construction (as is clear from the Commission’s quotation from *Tudor on Charities* (10th ed.) at paragraph

⁴ 10th edition, published in 2015, with supplement published in 2018.

21 (“at least primarily a question of ... construction”). The question must be resolved on the evidence, including evidence of the institution’s actual activities.”

35. In essence, Mermaids is inviting the Tribunal to look beyond the plain wording of the objects in LGB Alliance’s Articles of Association and to take into account evidence about the motives and activities of LGB Alliance (pre- and post-registration) with a view to reaching a finding on what its “true” purposes are.

36. As to this, the general position remains as set out in Tudor on Charities at §7-005:

“A charity is an institution established for charitable purposes only. Whether an institution with a written constitution is so established is at least primarily a question of the construction of its constitution and not a matter of the evaluation of its activities. It is well established that in this respect the court is not concerned with the subjective motives or ultimate aims of the charity’s founders or participants, but only with the meaning and effect of the language employed.”

37. The position was considered and explained by the Upper Tribunal in *R (Independent Schools Council) v Charity Commission* [2011] UKUT 421 (TCC), [2012] Ch 214:

“187. We now turn to consider a school which, as a matter of its constitution, can admit students whatever their ability to pay, but as a matter of fact (whether because of a policy of accepting only fee-paying students or because of some financial imperative) does not do so. The first question which then arises is whether such a school is established for charitable purposes only. It was clear, we think, under the law prior to the 2006 Act, that whether a trust or institution which had a written constitution was a charity was to be ascertained by reference to that constitution. It was not permissible to look at the subsequent activities of the institution to ascertain its status. ...

188. We do not consider that the position under the 2006 Act is any different: the question whether an institution is “established” for charitable purposes only is to be answered by deciding, as a matter of construction, whether its purposes (a) fall within one of the description of purposes listed in section 2(2) and (b) satisfy the public benefit test. The ordinary meaning, and we would suggest generally the most natural meaning, of the word “established” is directed to what it is that the institution was set up to do, not to how it would achieve its objects or whether its subsequent activities are in accordance with what it was set up to do. Further, section 2(2) itself more naturally reflects that ordinary meaning than an interpretation which looks at activities. It lists descriptions of purposes, not categories of activity. Moreover, the public benefit as it was understood prior to the 2006 Act was also directed to what the relevant trust or institution was set up to do, not on how it operated. The incorporation of the previously understood meaning of “public benefit” into the 2006 Act is another indicator that “established” is to be interpreted as we have stated.”

38. The primary focus must therefore be on the objects set out in LGB Alliance’s Articles of Association, construed according to ordinary principles of construction. Tudor on Charities at §7-001 cites the summary of those principles by the Supreme Court in *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129 at §19 per Lord Neuberger:

“When interpreting a contract, the court is concerned to find the intention of the party or

parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions."

39. *The Human Dignity Trust v Charity Commission* (CA/2013/0013, 9 July 2014) is an example of the Tribunal declining to take into account extrinsic evidence in order to determine an institution's purposes. The Commission had declined to register HDT as a charity on grounds that its objects were too vague and uncertain to be certain that it was established for charitable purposes only and further that it had a political purpose, namely that of seeking to change the law of foreign states, which precludes charitable status (§3). The Tribunal allowed HDT's appeal and directed rectification of the register. At §18, the Tribunal recorded the Commission as making the following submission:

"The Charity Commission submitted that, when making a decision whether to register an institution, the Tribunal should consider whether the purposes of the institution are clear and unambiguous and whether they have a "particular meaning" under charity law. If the purposes are not clear and unambiguous then the Tribunal should look to extrinsic evidence to help construe them. The Charity Commission submitted that, in the case of an institution established to promote human rights, it would generally be necessary to consider extrinsic evidence (including evidence about the nature of its activities or proposed activities) because, firstly, there is as yet no "particular meaning" in charity law of the term "human rights" and secondly, the promotion of human rights is a broad concept which could include non-charitable activities."

40. However, the Tribunal was "*not persuaded that HDT's purposes are unclear or ambiguous, as submitted by the Charity Commission, and in those circumstances we have not found it relevant to have regard to extrinsic evidence in order to determine HDT's purposes*" (§29). The Tribunal made clear that in these circumstances "*we need say nothing about the type(s) of extrinsic evidence which might have been relevant and admissible for the task had we found it necessary to consider them*" (ibid.). Further, the Tribunal was satisfied that "*the scope of the human rights to be protected and promoted is clear and sufficiently well particularised*" (§30).
41. Similarly, in *Vernor-Miles v Charity Commission* (CA/2014/0022, 15 June 2015), the Tribunal rejected the Commission's submission that the purposes of the Independent Press Regulation Trust were "*unclear or ambiguous*": "*We have concluded, having construed the governing document of IPRT on its plain meaning as a whole document, that the Objects are clearly described at clause 3.1 only*" (§34). The Tribunal therefore declined to have regard to extrinsic evidence: "*In the circumstances, we have not found it necessary to have regard to extrinsic evidence in order to determine IPRT's purposes. We identify the particular purpose of IPRT as that set out in clause 3.1 of the Declaration of Trust*" (§35).
42. As to allegations regarding post-registration activities, a further relevant point illustrated by *Hipkiss v Charity Commission* (CA/2017/0014, 23 August 2018) is that alleged *ultra vires* activities by a registered charity should be considered in the context

of possible regulatory action by the Commission, rather than as undermining whether it should be registered as a charity in the first place. See §111: *“If the evidence shows that HOPRT’s activities since entry on the Register are outside the confines of charitable objects, then we follow Scott J [in A-G v Ross [1986] 1 WLR 252] in considering that that evidence should be considered by the Commission as requiring regulatory intervention rather than undermining HOPRT’s charitable status. It is an important principle of charity law that charitable trusts endure in perpetuity, even if the trustees who administer the trusts misdirect themselves.”*

43. There are two qualifications to the need to focus primarily on an institution’s written objects when assessing whether it is established for charitable purposes only.
44. First, as Mermaids notes, the process of construction of the institution’s constitution and written objects can to some extent include having regard to certain background material as an aid to interpretation. This is explained further in Tudor on Charities at §7-016:

“In light of the modern tendency to take the same approach to the construction of different kinds of document, it is reasonable to take the view that, given the relatively liberal approach taken in construing contracts, the strictness with which certain kinds of extrinsic evidence has been excluded at common law from the interpretation of wills and deeds has been relaxed. Whether or not there has been a relaxation or simply a more modern restatement of old principles is moot, but it is now clear that it is no longer necessary to find an ambiguity before resort can be had to relevant background.

Rather, it is permissible in all cases to adduce extrinsic evidence to establish what was known to or assumed by the parties (or testator as the case may be) at the time they executed the document as an aid to interpretation. But direct evidence of the subjective intention of the parties or party in question has always generally been excluded at common law. Thus where the relevant document purporting to establish the charity was a conveyance to a municipal corporation, the court refused to consider statements made by the corporation’s officers as to the corporation’s purposes in acquiring the property but did consider the statutory powers available to the corporation at the date of the conveyance.

It is well established that extrinsic evidence cannot be used to contradict, vary, or add to the plain terms of a formal document. So evidence could not be given to prove that a gift of a lump sum was intended to be a gift only of the income of it. But it has for a long time been settled that extrinsic evidence (other than of subjective intention) is admissible to explain what would otherwise be a meaningless provision of a will. It seems likely that relevant, extrinsic evidence will also be admissible for the purpose of correcting by interpretation mistakes in a will, as in other documents; for such a correction to occur, it must be clear that something has gone wrong and what a reasonable person would have understood to have been meant.”

45. Secondly, in construing an institution’s objects, evidence about its activities can be admitted if there is doubt or ambiguity about whether those objects are charitable in the sense that they would achieve a charitable end result. See *Helena Partnerships Ltd v Revenue and Customs Commissioners* [2011] STC 1307 at §20 (affirmed by the Court of Appeal without comment on this point at [2012] EWCA Civ 569, [2012] PTSR 1409):

“In accordance with well established principle, the motives and intentions of the founders of HHL are irrelevant to the exercise of construction. Further, it is not generally relevant to consider evidence about the activities of a company in construing its memorandum and articles of association, any more than it is permissible in the case of a contract to see how the parties have in fact acted under it. However, where there is a doubt or ambiguity about whether the objects of an institution are charitable, the court may examine the activities of the institution. This is done, not for the purpose of construing its constitution, but for the purpose of assisting in assessing whether the implementation of the objects would achieve a charitable end result: see *Incorporated Society of Law Reporting for England and Wales v A-G* [1972] Ch 73 at p 99E. After pointing out that motives and intentions of the founders are irrelevant, Buckley LJ said this:

“But in order to determine whether an object, the scope of which has been ascertained by due processes of construction, is a charitable purpose it may be necessary to have regard to evidence to discover the consequences of pursuing that object. It would be immediately evident that a body established to promote the Christian religion was established for a charitable purpose, whereas in the case of a body established to propagate a particular doctrine it might well be necessary to consider evidence about the nature of the doctrine to decide whether its propagation would be a charitable activity.”

46. In terms of how these principles fall to be applied in the present case, the Commission notes the following points in relation to the first qualification above:

46.1. As a matter of principle, there is an important distinction between (i) having regard to background material as an aid to interpretation of an institution’s written objects, and (ii) having regard to the institution’s formation and activities with a view to showing that its “true” purposes are different from and inconsistent with those written objects. The Tribunal will need to determine whether it is the former or the latter exercise that Mermaids is asking it to undertake. If it is the latter, the relevant legal issue is whether it can be shown that the objects recorded in LGB Alliance’s Articles of Association are a sham in the *Snook* sense.

46.2. Mermaids may say that it is not alleging that LGB Alliance’s “true” purposes are different from and inconsistent with the objects recorded in its Articles of Association, but rather that the “true” purposes are effectively a sub-set of or a particular application or interpretation of what Mermaids characterises as “*overly-broad object clauses which purport to be charitable, but do not give accurate particulars of what the organisation has actually been set up to do*” (Reply §5.2; Skeleton §§38-39).

46.3. The Commission invites the Tribunal to consider carefully whether in substance the argument remains that LGB Alliance’s “true” purposes are different from and inconsistent with the objects in its Articles of Association. The Tribunal should be wary of any attempt by Mermaids to repackage its argument in the hope that it may avoid the application of the *Snook* legal test for a sham.

46.4. There is a clear danger here of the Tribunal being invited to go beyond a process of interpretation on orthodox principles, and instead to engage in a process of in

effect rewriting the written objects of an institution by reference to highly contentious characterisations of what the institution's "true purposes" are. The Commission would be concerned about the Tribunal adopting an approach that would result in the Commission (and the Tribunal on appeal) effectively being required to investigate subjective intentions in registration cases, and to have regard to a potentially vast array of evidence in order to form a view on this.

- 46.5. In this regard, the Commission notes the Tribunal's approach in *Human Dignity Trust* and *Vernor-Miles* of rejecting reliance on extrinsic evidence where it was not persuaded that the written objects of the institution were "*unclear or ambiguous*". The Tribunal also specifically observed in *Human Dignity Trust* at §32: "*we find nothing objectionable in principle about an institution which declares wide purposes but, in practice, confines itself to a smaller area of operation than that permitted*".
- 46.6. In *Yeats v Charity Commission* (CA/2017/0007, 19 March 2018), relied on by Mermaids, the Tribunal was prepared to consider extrinsic evidence because of "*the cumulative effect*" of a number of factors, including "[t]he ambiguous and unclear phrasing of the proposed objects" in the institution's draft constitution (§28). The Tribunal did not purport to widen the admissibility of extrinsic evidence beyond the scope of previous decisions such as *Human Dignity Trust* and *Vernor-Miles*.
47. Mermaids does not rely on the second qualification (see §45 above). This is not a case where there is said to be doubt or ambiguity about whether the objects recorded in LGB Alliance's Articles of Association are charitable, such as could lead to evidence being admitted to assist in assessing whether the implementation of the objects would achieve a charitable end result. Instead, the issue raised by Mermaids is whether the objects recorded in the Articles of Association are LGB Alliance's "true" purposes.
48. Finally, if and to the extent that the Tribunal finds that LGB Alliance's "true" purposes are not the same as those in the Articles of Association, it will need to rule on whether the "true" purposes fall within the descriptions of charitable purposes in section 3(1) of the 2011 Act and are for public benefit. It would not automatically follow that an institution is not a charity because its written objects do not record its "true" purposes.

(B) WHETHER LGB ALLIANCE'S PURPOSES ARE FOR THE PUBLIC BENEFIT

49. In order to constitute a "charitable purpose", a purpose must not only fall within the descriptions at section 3, but must also be "for the public benefit": see section 2(1)(b) of the 2011 Act. Section 4(2) provides that in applying this requirement it is not to be presumed that a purpose of a particular description is for the public benefit. Section 4(3) provides that in Chapter 1 of the 2011 Act any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law of England and Wales. Section 4(4) makes clear that section 4(3) is subject to section 4(2).

50. Thus, subject to the point about there being no presumption of public benefit⁵, the 2011 Act retains the previous approach to the issue of public benefit as developed in case law.
51. It is well established that there are two aspects of public benefit, each of which must be satisfied in order for an institution to be a charity. See *R (Independent Schools Council) v Charity Commission* [2011] UKUT 421 (TCC), [2012] Ch 214 at §44:

“The courts have adopted an incremental and somewhat ad hoc approach in relation to what benefits the community or a section of the community. There has never been an attempt comprehensively to define what is, or is not, of public benefit. It is possible, however, to discern from the cases two related aspects of public benefit. The first aspect is that the nature of the purpose itself must be such as to be a benefit to the community: this is public benefit in the first sense. In that sense, the advancement of education, referred to in the Preamble under the guise of “schools of learning, free schools and scholars in universities”, has the necessary element of benefit to the community (although that needs to be qualified as we will see). The second aspect is that those who may benefit from the carrying out of the purpose must be sufficiently numerous, and identified in such manner as, to constitute what is described in the authorities as “a section of the public”: this is public benefit in the second sense. The decision in *Oppenheim’s* case illustrates these two aspects, which we will refer to as public benefit in “the first sense” and “the second sense”. The advancement of education, as such, was of a nature which was beneficial to the community (and so of public benefit in the first sense); but the practical restriction of the benefits to children of employees of certain employers was in effect to render the trust a private trust, because it was not for the benefit of a sufficient section of the public. It was therefore not charitable.”

52. The Upper Tribunal further distinguished between the types of benefit which, in general terms, may result from the advancement of a particular purpose:

“37. Given the very wide range of potential charitable purposes, it is obvious that some charities have purposes which have the primary effect of conferring direct benefits on certain individuals, while other charities have purposes which confer benefits on the public, whether individually or collectively, much more indirectly. An educational charity such as a school is a clear example of the first class of charity, while a charity for the advancement of animal welfare is a clear example of the second class. A trust for maintaining a bridge is somewhere in between: it is of direct benefit to those who use it but of indirect benefit to the relevant community. Mr Pearce has put forward a terminology which we have found helpful in illuminating the subject and we adopt it in this judgment. It distinguishes the following three types of benefit. (1) Direct benefits: benefits to persons whose needs it is a purpose of the charity to relieve which are received by such persons as recipients of the main service which the charity provides. (2) Indirect benefits: benefits to persons whose needs it is a purpose of the charity to relieve which are received by such persons otherwise than as recipients of the main service which the charity provides. (3) Wider benefits: benefits other than direct and indirect benefits which are received by the community at large from the activities of the charity.

⁵ In the *Independent Schools Council* case, the Upper Tribunal took the view that there had never been any presumption of public benefit with the result that section 4(2) of the 2011 Act (and the equivalent provision in the Charities Act 2006) did not change the law or the approach to public benefit. See §§54-71.

38. We recognise the cases do not use a consistent terminology to distinguish public benefit of different degrees. For instance, the term “indirect benefit” is sometimes used to include both (2) and (3) in Mr Pearce’s classification.”

53. The Commission’s “Analysis of the law relating to public benefit”, which was published alongside its guidance on public benefit, addresses how benefit is established. As it notes at §§46-50, for a purpose to be accepted as being beneficial to the public, the benefit must be identifiable and, in principle, be capable of being proved by evidence. However, in practice the court will regard some benefits as being too obvious to require formal proof, and the court will also take account of statute law as indicating what Parliament regards as being for the public benefit, and will take judicial notice of obvious facts.

THE ‘BENEFIT ASPECT’ OF PUBLIC BENEFIT

The approach taken in the Commission’s Decision

54. The Commission focused on whether the objects set out in LGB Alliance’s Articles of Association are for the public benefit. As to the ‘benefit aspect’ of public benefit, the Commission’s Decision stated as follows:

“(1) Purpose beneficial to the community

15. The Commission recognised the benefit to the public of the advancement of human rights in its Guidance The Promotion of Human Rights RR12, at paras 10-12.

“There is an obvious public benefit in promoting human rights. For individuals whose human rights are thereby secured, the benefit is immediate and tangible. There is also a less tangible, but nonetheless significant, benefit to the whole community that arises from our perception that the fundamental rights of all members of the community are being protected. That provides sufficient benefit to the community to justify treating the promotion of human rights as a charitable purpose in its own right.”

16. The Commission, in recognising the promotion of equality and diversity as charitable, noted evidence of public benefit to include the prohibition of discrimination and promotion of equality enshrined within legislation [footnote reference to the Equality Act 2010]. The Commission’s publication Promotion of equality and diversity for the benefit of the public at para 6 recognises

“...that the overwhelming intangible benefit is a fairer and more just society in which people are valued for themselves.”

17. LGB Alliance states that it benefits the public by:

- advancing education and raising awareness of the public on matters relating to equality and diversity;
- providing advice to lesbian, gay and bisexual persons and the wider public about the legal and other support available to them; and
- providing advice to the government on human rights matters, particularly on issues affecting lesbian, gay and bisexual persons, and seeking to ensuring that the law appropriately addresses the needs of lesbian, gay and bisexual persons.

...

21. The Commission was satisfied based on the evidence before it that the purposes of LGB Alliance met the public benefit requirement."

55. In response to the concern raised by some of those who objected to the registration of LGB Alliance that its purposes are not for public benefit, the Decision stated:

"49. Evidence of public benefit was presented by LGB Alliance in support of its application and include raising awareness and educating the public about equality and diversity issues and providing support to lesbian, gay and bisexual people."

Mermaids' contentions about the 'benefit aspect' of public benefit

56. Mermaids does not dispute that the objects set out in LGB Alliance's Articles of Association satisfy the 'benefit aspect' of public benefit. Instead, Mermaids contends that these are not LGB Alliance's "true" purposes, and advances three arguments as to why its "true" purposes do not satisfy the 'benefit aspect'. The Commission repeats what is said above about the correct legal test for the Tribunal to apply when addressing Mermaids' contention about LGB Alliance's "true" purposes.

57. Mermaids' three arguments are set out at Grounds of Appeal §11, as follows:

57.1. That LGB Alliance's "true" purposes are political purposes that are not ancillary to recognised charitable purposes (see also Skeleton §§43-49 and 71).

57.2. That there is no common understanding of enlightened opinion that attaining LGB Alliance's "true" purposes would benefit the public (see Skeleton §§51 and 72).

57.3. Alternatively, that LGB Alliance's "true" purposes offer no positive benefit to the public, on the basis that their pursuit by LGB Alliance (and the manner of that pursuit) gives rise to significant disbenefits and are contrary to public policy recognised in equalities legislation (see Skeleton §§56-57 and 73).

58. As set out below, the Commission's Decision addressed similar contentions to those advanced by Mermaids. The Commission comments further below.

Mermaids' first argument: "political purposes"

59. On political purposes and activities generally, see the Commission's guidance "Campaigning and political activity guidance for charities (CC9)" (March 2008).

60. The Commission addressed the "political purposes" argument in its Decision at §§43-47, citing *McGovern v Attorney General* [1982] 1 Ch 321:

"(iii) Concerns that LGB Alliance is established for a political purpose

43. A charity cannot be established with a political purpose, although political activity can be undertaken by a charity where this is in support of the delivery of charitable purposes and is not the sole and continuing activity. The approach of the Court in *McGovern v Attorney General* as follows:

“the mere fact that trustees may be at liberty to employ political means in furthering the non-political purposes of a trust does not necessarily render it non-charitable ... in any case where it is asserted that a trust is non-charitable on the grounds that it introduces non-charitable as well as charitable purposes, a distinction of critical importance has to be drawn between (a) the designated purposes of the trust, (b) the designated means of carrying out these purposes and the consequences of carrying them out... similarly, trust purposes of an otherwise charitable nature do not lose it merely because the trustees, by way of furtherance of such powers, have incidental powers to carry on activities which are not themselves charitable”.

“the distinction is thus one between (a) those non-charitable activities authorised by the trust instrument which are merely subsidiary or incidental to a charitable purpose, and (b) those non-charitable activities so authorised which in themselves form part of the trust purpose.”

44. Charities with purposes for the promotion of human rights may engage in political activities when enforcing rights against states and challenging decisions of government and public bodies. A difficulty arises in distinguishing between political purposes and political activities, and whether particular political activities may be ancillary to charitable purposes.

45. Some of the campaigning activities undertaken by LGB Alliance are political in nature where they are directed towards advocating for or against the reform of law. A charity can campaign for changes in law provided that the campaigning is carried out in support of the charity's purposes, and otherwise in accordance with the legal framework applicable to charities.

46. On the basis of the evidence the Commission was satisfied that LGB Alliance's campaigning activities are undertaken in furtherance of its stated charitable purposes and are ancillary to those purposes. There is evidence that political activity is not its sole continuing activity but one aspect of its work.

47. There is a suitable power in LGB Alliance's Articles of Association to undertake political activities in accordance with the requirements of charity law. The trustees of LGB Alliance confirmed to the Commission that they understand that their campaigning activities must be undertaken only in the context of supporting the delivery of LGB Alliance's charitable purposes and they will have regard to the Commission's guidance on campaigning and political activity.”

61. Thus, on the basis of the evidence available to it at the time of its Decision, the Commission was satisfied that LGB Alliance's campaigning activities are undertaken in furtherance of its stated charitable purposes and are ancillary to those purposes. The objects set out in LGB Alliance's Articles of Association do not express a political purpose and clause 3, which sets out its powers, expressly limits any attempt to influence the reform, development or implementation of law or policy to that which may properly be undertaken by a charity (see clause 3.1.8).

62. Mermaids' argument that LGB Alliance is pursuing “political purposes” appears to focus on the alleged “true” purpose of LGB Alliance stated at Grounds of Appeal §8.2:

“Seeking or opposing changes in the law and/or lobbying government bodies in the United Kingdom, in order to restrict the rights and protections afforded to transgender people.” Mermaids’ Skeleton at §71.1 puts it more broadly: *“LGB Alliance was essentially set up to influence legislation and government policy on trans issues. ... Such activities are plainly not ancillary to some other overarching objective: they are LGB Alliance’s main purpose”*.

63. The Tribunal will have to determine whether this is indeed LGB Alliance’s “true” purpose (or one of them) and, if so, whether LGB Alliance crosses the line between (i) political activity in furtherance of charitable purposes, and (ii) political purpose.
64. In this regard, the Commission’s guidance notes that charities can carry out political activity for a change in the law if it supports their own charitable purpose; however, campaigning for a change in the law is not itself a charitable purpose (§3.7). Further, a charity can seek to influence government or other public bodies, provided it is in support of its charitable purposes; but trustees must take care to avoid an approach which is purely focused on political activity as this could call into question their charitable status (§3.9).
65. The *Human Dignity Trust* case is a recent example of the Tribunal concluding that an institution was not pursuing a political purpose when it sought to promote and establish its own views as to the specific requirements of human rights. See the summary at §101:

“In conclusion, for the reasons above we are satisfied that the promotion and protection of human rights (a) by means which include the support or conduct of litigation which is (b) aimed at securing the interpretation and/or enforcement of superior constitutional rights (c) in a foreign country which has given effect to the relevant treaty obligation so as to enable that process — is not a political purpose, and neither is it in our view a political activity. We accept that there is no prior authority for that view because the promotion of human rights through the conduct of such litigation has not previously been considered by the courts or by this Tribunal. In reaching our conclusion we have in mind the “living instrument” approach to human rights described by Professor Van Bueren and her evidence that the ambit of human rights has evolved in recent years, particularly in relation to the human rights of the LGBTI community. It seems to us that a human rights instrument may only evolve in this way if it is tested from time to time and that, in including “the advancement of human rights” in its list of descriptions of charitable purposes in the Act, Parliament must be taken to have understood that those rights would evolve by being interpreted, clarified and enforced in ways which include the constitutional mechanisms with which HDT is involved.”

66. This supports the proposition that an institution which seeks to promote and establish its own views as to the specific requirements of human rights does not fall foul of the “political purposes” rule. As set out below, the Commission submits that in order to determine whether such an institution has charitable status, the issue is (a) whether its purposes are themselves unlawful or contrary to public policy (including under the Equality Act 2010), and/or (b) whether unlawful action (including unlawful discrimination) would be a necessary consequence of pursuing its purposes.

Mermaids' second argument: "enlightened public opinion"

67. Mermaids argues that there is “no common understanding of enlightened opinion” that the attainment of what it contends are LGB Alliance’s “true” purposes would benefit the public, and that “[t]he Commission and the Tribunal have no means of judging whether it would do so, nor would that exercise be constitutionally appropriate” (Grounds §11.2).
68. The phrase “common understanding of enlightened opinion” derives from case law which has established that whilst the benefit to the public should generally be a tangible and objective one, an intangible benefit may suffice if there is “approval by the common understanding of enlightened opinion for the time being” that there is benefit to the public: *National Anti-Vivisection Society v IRC* [1948] AC 31 at 49, per Lord Wright.
69. The Commission agrees that it is not the role of the Commission or the Tribunal to adjudicate on the issues of public debate in which Mermaids and LGB Alliance are active participants. However, it does not follow that LGB Alliance does not meet the public benefit requirement and hence does not have charitable status.
70. As set out in the Commission’s Decision and as is common ground between the parties, the promotion of human rights and equality and diversity is for the public benefit. This is not an area (like suppression of vivisection) where the issue of public benefit is unclear and intangible and would need to cross the threshold identified by Lord Wright.
71. Where there is evidently a strong difference of opinion between Mermaids and LGB Alliance is as to the specific requirements of human rights and equality and diversity in the context of transgender people, and what specific entitlements arise, and how to resolve potential conflicts between competing rights and interests. The issues include how best to support a young person who identifies as the opposite gender from their biological sex (e.g. in respect of potential medical treatment) and whether and in what circumstances a person who identifies in this way is entitled to have access to facilities or services provided to members of that opposite gender (e.g. public toilets or prisons).⁶
72. The law does not require all institutions who seek charitable status on the basis of promoting human rights and equality and diversity to adopt identical views on issues of this nature. In a pluralist society there will be a spectrum of views held and there will be individuals or groups who find the views which others hold or express to be questionable or unpalatable. However, this cannot without more result in the denial of

⁶ As one of Mermaids’ witnesses notes: “Service providers can exclude trans women (whether or not they have a GRC [Gender Recognition Certificate]) if they have good reasons for doing so” (WS John Nicolson MP, §13(b)). Under the Equality Act 2010, Schedule 3 paragraph 28, it is not unlawful gender reassignment discrimination to exclude a trans person from a service provided to persons of the opposite sex from their biological sex, if this is a proportionate means of achieving a legitimate aim. The relevant EHRC guidance gives a number of examples, such as: “A leisure centre introduces some female only fitness classes. It decides to exclude trans women because of the degree of physical contact involved in such classes”. See EHRC, “Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment exceptions” (April 2022) at page 8.

charitable status. It is possible that two institutions with divergent views regarding the specific requirements of human rights and equality and diversity may both be charities. Neither of them will need to show that its views represent the “*common understanding of enlightened opinion*” in order to establish that its purposes are for the public benefit.

73. Instead, the correct approach is to examine (a) whether an institution’s purposes are themselves unlawful or contrary to public policy, including under the Equality Act 2010, and/or (b) whether unlawful discrimination would be a necessary consequence of pursuing its purposes. The Commission’s Decision identified the issue as follows at §27:

“The issue is whether the pursuit of ostensibly charitable objects (promoting the human rights of those who face discrimination on the grounds of sexual orientation and educating the public about equality and diversity of those persons) would necessarily infringe the Equality Act and discriminate against people who share a particular protected characteristic (those who consider that their gender identity might not correlate to the gender they were assigned at birth).”

74. Applying that test, the Commission concluded that unlawful discrimination would not be a necessary consequence of LGB Alliance pursuing its purposes:

74.1. The Commission noted that “[a] purpose of promoting the equality and human rights of lesbian, gay and bisexual people is not inherently discriminatory and does not necessarily have the effect of inhibiting the rights of transgender people” (§28).

74.2. Further, “assessing the public benefit of purposes falling within the promotion of equality and diversity and the promotion of human rights may involve complex considerations”, since “[t]here may be competing rights of different groups such that activities to promote the equality and rights of one group may have, or be seen as having, the effect of inhibiting the rights of another” (§29).

74.3. LGB Alliance had stated in its application for registration that in educating the public about human rights and equality issues relating to the LGB community, its position will be that “*there are only two sexes and gender is a social construct, and that this perspective should form part of the discussion about these issues*” (§30).

74.4. The Commission “looked at whether LGB Alliance’s purpose inevitably involves the denigration of the rights of transgender people and considered that it did not”, noting: “LGB Alliance asserts that it engages constructively and respectfully with representatives of the transgender community, has a number of supporters within the transgender community, invited transgender supporters to attend and speak at the meetings it has held and has spoken publicly about its commitment to equality and respect for transgender people” (§35). Further: “LGB Alliance explains its position on the basis that it seeks to protect women and young people in particular. It argues, for example, that some spaces should be limited to biological women where they are potentially at risk. LGB Alliance is also concerned about the support and after care that is provided for young people who are

uncertain about their gender identity and when applying for a GRC” (§36).

74.5. Finally, in response to concerns raised by the Commission, LGB Alliance had reviewed and revised its social media policy, with a focus on the language and tone of social media posts and a requirement that staff must never: unlawfully discriminate; make offensive, abusive or threatening comments or harass or bully other people in any way or breach any laws or ethical standards (§38).

74.6. The Commission concluded that “[i]f LGB Alliance presents its view in such a way that respects the dignity of transgender persons and does not create an intimidating, hostile, degrading, humiliating or offensive environment, then this is capable furthering charitable purposes” (§39).

75. The Commission invites the Tribunal to apply the above test to the evidence before it, rather than requiring LGB Alliance to show that its views on relevant issues regarding transgender rights represent the “*common understanding of enlightened opinion*”.

Mermaids’ third argument: “detriments outweigh benefits”

76. Mermaids argues that LGB Alliance’s “true” purposes offer no positive benefit to the public and that their pursuit (and the manner of that pursuit) gives rise to significant disbenefits, “*including encouraging discrimination against transgender people; engaging in offensive public-facing communications; and hampering the efforts of registered LGBT rights charities to further their own charitable objects*”, and “*they are contrary to the public policy recognised in equalities legislation*” (Grounds of Appeal §11.3).

77. As in relation to Mermaids’ other arguments, this is premised on the allegation that Mermaids’ “true” purposes are not the same as the objects in its Articles of Association.

78. The Commission addressed this argument in its Decision at §§50-55, as follows:

“(v) Arguments that the harm resulting from LGB Alliance’s purposes outweighs the public benefit

50. Detriment and harm is an aspect of the assessment of the public benefit requirement. Even though there may be clear benefit arising from the purposes of LGB Alliance, if this is outweighed by detriment or harm to the public by pursuing its purposes, then the public benefit requirement will not be met. The principal legal authority on this issue is the case of *National Anti-Vivisection Society v IRC* where the moral benefits to the community arising from campaigning to prevent live animal experimentation were weighed against the material benefit to humankind arising from medical research. The House of Lords found in favour of the latter and the Society was not found to be charitable.

51. The Upper Tribunal in *Independent Schools Council v Charity Commission* (paragraphs 105 and 106) looked at the impact of evidence of detriment and harm and said:

“... we think that a clear case will have to be made out to show that an object which would ordinarily be charitable is not charitable because of the consequences which it has for society.

The court, we conclude, has to balance the benefit and disadvantage in all cases where detriment is alleged and is supported by evidence. But great weight is to be given to a purpose which would, ordinarily, be charitable; before the alleged disadvantages can be given much weight, they need to be clearly demonstrated. There is, we think, a considerable burden on those seeking to change the status quo.”

52. The Commission noted that there is evidence of some disagreement with the views of the LGB Alliance and allegations of discrimination against transgender persons.

53. The Commission’s public benefit guidance makes it clear that the existence of detriment and harm does not necessarily mean that an organisation cannot be charitable. It is a question of balancing the benefits of the purposes against any detriment and harm of the purposes.

54. The Commission carefully considered the allegations of detriment and the evidence put to it and concluded that the purposes of LGB Alliance, as properly construed in accordance with the legal framework, are charitable and beneficial to the public. The Commission concluded that the consequences of furthering those purposes would not necessarily be detrimental to the public.

55. LGB Alliance has taken action to ensure its social media activity is undertaken in furtherance of its charitable purposes and consistent with its publicly expressed value of respect.”

79. In the *Independent Schools Council* case cited in this passage, the Upper Tribunal concluded that mainstream education of school age children was for the public benefit (§94) and then addressed the argument that this was outweighed by disbenefits arising from the charging of fees, which had been attacked as having “*socially divisive effects and detrimental consequences for social mobility*” (§96). The Tribunal noted (*ibid.*):

“It cannot, we think, be for the Charity Commission or for us or the higher courts to carry out what is an essentially political exercise to determine whether and if so what, if any, disbenefits there are of the private schools sector generally and then to balance the benefits and to form a view about public benefit. If the tribunal had to carry out that exercise to determine whether a particular institution whose charitable status was challenged was in fact a charity, it would not be involved in a hearing over a few days. Instead it would have to be engaged in something more akin to a public inquiry...”

80. The Tribunal continued at §107:

“Even where a clear disadvantage can be demonstrated, it may not be easy, or indeed, possible, for the court (and now the tribunal) to balance the benefits and disadvantages. Still more will that be the case where the suggested disadvantages (and indeed the benefits) depend on value judgments influenced by social and political agendas. That cannot, we think, have been the sort of case within the contemplation of the House of Lords in the *National Anti-Vivisection Society* case [1948] AC 31 and, if it had been, we think that the majority might have expressed themselves rather differently.”

81. The Tribunal considered that the material filed on behalf of those opposing private education (known as the ‘Education Review Group’ or ERG) did not clearly establish the “disbenefits” which it identified, regarding impairing diversity and social mobility (§108). Whilst the ERG’s skeleton argument was “*a powerful submission*”, the Tribunal

noted that “it is a manifesto as much as anything” and that the issues it raised “are issues which require political resolution. It cannot be right, we think, that the tribunal should have to grapple with issues of that kind, which are not really capable of judicial, rather than political, resolution” (§109). Ultimately, the Tribunal concluded that the relevant schools do have purposes which are for the public benefit in the first sense (§113).

82. The Commission invites the Tribunal to apply the same test that was applied in the Decision to the evidence before it, in particular having regard to the *Independent Schools Council* case. In this regard, the Commission notes the following points:

82.1. The focus must be on alleged detriment arising from LGB Alliance acting in accordance with its objects, properly construed. As per the *Hipkiss* case referred to above, alleged *ultra vires* activities by a registered charity should be considered in the context of possible regulatory action by the Commission, rather than as undermining whether it should be registered as a charity in the first place.

82.2. As to Mermaids’ contention that LGB Alliance’s “true” purposes include “encouraging discrimination against transgender people” and that those purposes “are contrary to the public policy recognised in equalities legislation”, this raises the same point addressed above as to whether it is a necessary consequence of furthering LGB Alliance’s purposes that it will breach the Equality Act 2010.

82.3. If the Tribunal concludes that this is not a necessary consequence, and that LGB Alliance is seeking in good faith to promote and secure its own understanding of the specific requirements of human rights and equality and diversity in the context of transgender people, then it will be open to the Tribunal to conclude that this is for the public benefit in the first sense without having to adjudicate on whether LGB Alliance’s views are to be preferred to those of Mermaids.

82.4. Like the *Independent Schools Council* case, this can be viewed as a case where the alleged benefits and detriments “depend on value judgments influenced by social and political agendas”, for example on issues such as those identified at §71 above. As in that case, it is not appropriate for the Tribunal to have to “grapple with issues of that kind, which are not really capable of judicial, rather than political, resolution”. However, it does not follow that the Tribunal must conclude that LGB Alliance fails to satisfy the public benefit requirement.

82.5. As to the allegation about LGB Alliance “hampering the efforts of registered LGBT rights charities to further their own charitable objects”, the Tribunal will need to consider whether and to what extent such “hampering”, if established, is merely part and parcel of LGB Alliance taking a different position from that of Mermaids and certain other charities on the issues of public debate in they are all active participants.

THE 'PUBLIC' ASPECT OF PUBLIC BENEFIT

The approach taken in the Commission's Decision

83. As to the 'public aspect' of public benefit, the Commission again focused on the objects set out in LGB Alliance's Articles of Association. The Decision stated as follows:

"18. The Commission's guidance recognises the benefit to the community as a whole in promoting human rights and equality and diversity. Where benefit is not to the public generally, it can be to a particular section of the public, provided that this is sufficient section for the purposes of the test. The Commission considers that the beneficiary class for purposes within the promotion of equality and diversity and the promotion of human rights is in many cases the public in general and that public benefit can be delivered by the protection of the rights of a smaller class, in this case lesbian, gay and bisexual people.

19. The information received in support of the application evidenced that LGB Alliance provides benefit to lesbian, gay and bisexual people and the wider public.

20. LGB Alliance can serve the public at large though the publication of material on its website and through its education and awareness-raising activities. To the extent that the purposes and activities are directed towards lesbian, gay and bisexual people these people are a sufficient section of the public to satisfy the public benefit requirement.

21. The Commission was satisfied based on the evidence before it that the purposes of LGB Alliance met the public benefit requirement."

84. In other words, pursuit of the objects set out in LGB Alliance's Articles of Association stands to benefit both the particular section of the public who can be direct or indirect beneficiaries of the relevant activities – i.e. lesbian, gay and bisexual people – and also the public at large, since the promotion of equality and human rights and the protection of the rights of the specific class of beneficiaries benefits the public as a whole.

85. Thus, the 'public aspect' of public benefit is satisfied whether the matter is analysed by reference to "direct/indirect benefits" or "wider benefits", applying the classification in the *Independent Schools Council* case (see §52 above).

86. As to the "wider benefits", the Commission's guidance "The Promotion of Human Rights" (RR12, January 2005) explained the position as follows at §12:

"There is an obvious public benefit in promoting human rights. For individuals whose human rights are thereby secured, the benefit is immediate and tangible. There is also a less tangible, but nonetheless significant, benefit to the whole community that arises from our perception that the fundamental rights of all members of the community are being protected. That provides sufficient benefit to the community to justify treating the promotion of human rights as a charitable purpose in its own right."

87. Tudor on Charities addresses the limitation of direct/indirect beneficiaries to a particular class as follows:

"1-144 What is a sufficient section of the public to support a valid charity under one head

will not necessarily be sufficient to support a charity under another head. Even within a particular head there may be differences as to what amounts to a sufficient section of the public. What is a sufficient section of the public varies with the nature of the trust. The class of potential beneficiaries and the particular nature of the trust are interdependent.

1-145 A wholly capricious restriction on the class of potential beneficiaries unrelated to the objects of the charity might cause the class not to be a sufficient section of the public even if the restricted class was numerically very large; as might a restriction imposed by a settlor for understandable personal reasons but wholly unrelated to the objects of the charity...”

88. See further the *Independent Schools Council* case at §9 of the ruling on 2 December 2011 on consequential matters (reported together with the main judgment at [2012] Ch 214):

“It is to be recalled that it is ultimately a matter for the tribunal and the court to decide whether the class of potential beneficiaries identified in an institution’s objects is a sufficient section of the public. This requires an overall assessment and is not, on the authorities, a test of reasonableness, although reasonableness may come into the picture. For instance, a wholly capricious restriction—nothing to do with an ability to pay—unrelated to the objects of the charity might not be valid even if the restricted class was numerically very large. A wholly capricious restriction may be unreasonable on any view, but that is not to say that the restriction is invalid because it is unreasonable: rather, it is invalid because it is capricious. To give another example, a restriction imposed by a settlor for understandable personal reasons but wholly unrelated to the objects of the charity may be invalid. In the public benefit context, it can be said, therefore, to be not “reasonable”, which is a convenient way of encapsulating the ideas that what is a sufficient section of the public varies with the nature of the trust and that the class of potential beneficiaries and the particular nature of the trust are interdependent. Thus Mr Giffin in his original skeleton argument accepted that “any restriction on who can benefit must be reasonable, having regard to the objects of the charity”, citing *Inland Revenue Comrs v Baddeley* [1955] AC 572. But that is very different from a restriction relating to an ability to pay in cases where fees are inevitable if the school is to function at all and is not, we think, the sort of reasonableness to which principle 2b, in relation to fee-charging, is referring.”

89. See also *IRC v Baddeley* [1955] AC 572 at 615 per Lord Somervell:

“I cannot accept the principle submitted by the respondents that a section of the public sufficient to support a valid trust in one category must as a matter of law be sufficient to support a trust in any other category. I think that difficulties are apt to arise if one seeks to consider the class apart from the particular nature of the charitable purpose. They are, in my opinion, interdependent. There might well be a valid trust for the promotion of religion benefiting a very small class. It would not at all follow that a recreation ground for the exclusive use of the same class would be a valid charity...”

90. Equally in the present context, for an institution whose purpose is to promote and protect the rights of lesbian, gay and bisexual people, those same people will constitute a sufficient section of the public to satisfy the ‘public aspect’ of public benefit.

Mermaids' contentions about the 'public aspect' of public benefit

91. Mermaids does not dispute that the objects set out in LGB Alliance's Articles of Association satisfy the 'public aspect' of public benefit. Instead, Mermaids again contends that these are not LGB Alliance's "true" purposes, and argues that its true purposes do not satisfy the 'public aspect', as follows (Grounds of Appeal §12):

"In reality LGB Alliance seeks only to operate for the benefit of lesbian and gay people who are not transgender and who share LGBA's Beliefs. Since the class of beneficiaries is restricted capriciously and in a manner which does not accord with public policy as set out above, it does not represent a sufficient section of the public."

92. See also Mermaids' Skeleton at §§58-61 and 74-76, which specifically accepts that "*all LGB people*" would constitute a sufficient section of the public.

93. The Commission notes the following points in this regard:

93.1. There is a factual issue about LGB Alliance's "true" purposes and the class of people it seeks to benefit. LGB Alliance does not accept that it seeks only to operate for the benefit of the sub-set of lesbian and gay people who are not transgender and who share what Mermaids characterises as LGB Alliance's beliefs.

93.2. The reference to public policy refers back to Mermaids' contention that LGB Alliance's "true" purposes are "*contrary to public policy recognised in equalities legislation*" (Grounds of Appeal §11.3). Mermaids' argument on the 'public aspect' thus depends on the same argument which it advances in relation to the 'benefit aspect', addressed above, that it is a necessary consequence of furthering LGB Alliance's purposes that it will breach the Equality Act 2010.

VI. CONCLUSION

94. The Commission invites the Tribunal to rule on the issues in this appeal in accordance with the applicable law on standing and charitable status as set out above.

IAIN STEELE

29 July 2022

Blackstone Chambers

ANNEX TO COMMISSION'S SKELETON ARGUMENT

LGB ALLIANCE'S OBJECTS

"2. Objects

The objects of the Company are:

- 2.1. To promote equality and diversity for the public benefit, in particular by:
 - 2.1.1. the elimination of discrimination on the grounds of sexual orientation;
 - 2.1.2. advancing education and raising awareness in equality and diversity in respect of lesbian, gay and bisexual people;
 - 2.1.3. conducting or commissioning research on equality and diversity issues and publishing the useful results to the public; and
 - 2.1.4. cultivating a sentiment in favour of equality and diversity for lesbian, gay and bisexual people.
- 2.2. To promote human rights (as set out in the Universal Declaration of Human Rights and subsequent United Nations conventions and declarations) and particularly the rights and freedoms of those who face discrimination on the grounds of sexual orientation, including by:
 - 2.2.1. monitoring abuses of human rights;
 - 2.2.2. obtaining redress for the victims of human rights abuses;
 - 2.2.3. relieving need among the victims of human rights abuses;
 - 2.2.4. research into human rights issues;
 - 2.2.5. educating the public about human rights;
 - 2.2.6. providing technical advice to government and others on human rights matters;
 - 2.2.7. contributing to the sound administration of the law;
 - 2.2.8. commenting on proposed human rights legislation;
 - 2.2.9. raising awareness of human rights issues;
 - 2.2.10. promoting public support for human rights;
 - 2.2.11. promoting respect for human rights among individuals and corporations; and
 - 2.2.12. eliminating infringements of human rights.
- 2.3. To promote any other purpose that is charitable under the law of England and Wales."

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(CHARITY)

MERMAIDS

Appellant

And

(1) THE CHARITY COMMISSION FOR ENGLAND AND WALES

First Respondent

(2) LGB ALLIANCE

Second Respondent

SECOND RESPONDENT'S (LGB ALLIANCE)

SKELETON ARGUMENT

[x/x] = reference to documents [Vol 1 or 2/ page]

[A/x/x] = reference to Authorities Bundle [Authorities/tab/page]

[ws/x/x/§x] = reference to witness statements/ name/page/paragraph.

The witnesses are (i) Paul David Roberts (PDR) (ii) Belinda Mary Riddall Bell (BMRB) (iii) John Nicholson MP (JN) (iv) Beverley Jackson (BJ) (v) Kate Harris (KH) and (vi) Eileen Gallagher (EG).

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A. Introduction and Summary

1. This is an appeal against the decision of the Charity Commission for England and Wales (CC) (the First Respondent) dated 20 April 2001 to register the Second Respondent, LGB Alliance, as a charity [1/31].
2. LGB Alliance is a company limited by guarantee (no.12338881), incorporated by Memorandum and Articles of Association dated 28 November 2019 [2/21-56], and is a registered charity (no. 1194148 (England and Wales)).¹ Since LGB Alliance is an incorporated body and the subject of the decision in issue, the appropriate respondent is LGB Alliance and not its trustees.² LGB Alliance seeks an order substituting LGB Alliance as Second Respondent for those presently identified.
3. The Appellant, Mermaids, is a charitable organisation with registered charity status (charity no: 1160575 and company no. CE002708).³
4. The first question, and logically prior question, for this Tribunal is whether the Appellant has standing for the purposes of bringing this Appeal. A direction has been given that that question be determined at this hearing ([x/15], §1).
5. The Grounds of Appeal, on which this appeal is to be decided, are not easy to discern, and no grounds of appeal at all are referred to in the Appellant's Skeleton Argument. Pursuant to the Tribunal's direction⁴, and to assist the Tribunal, LGB Alliance will agree a list of issues for the hearing of this appeal. It will make no admission as to the significance of those issues for the determination of this appeal. This is because, as LGB Alliance wish to highlight at the outset, there is a considerable lack of clarity in the Appellant's Ground of Appeal: in essence and in reality, the Appellant's appeal is simply predicated on

¹<https://register-of-charities.charitycommission.gov.uk/charity-search/-/charity-details/5154625/charity-overview>.

² Made a party to this appeal by an order dated 23 September 2021: [1/8], §1.

³<https://register-of-charities.charitycommission.gov.uk/charity-search/-/charity-details/5054976/charity-overview>

⁴ [1/11], §14.

ideological disagreement with the values and beliefs that underpin LGB Alliance's work.

6. LGB Alliance, in summary, submits as follows:
 - a. The Appellant lacks standing to bring this appeal. It has not identified any legal right enjoyed by it that has been, or may be, impinged upon or affected by the decision to register LGB Alliance.
 - b. LGB Alliance's purposes are charitable as falling within s.3(1)(h) of the Charities Act 2011 and being for the public benefit. Those purposes are unambiguously set out in its Articles of Association, and they are lawful on their face. There is no legitimate basis for undertaking any further inquiry beyond those Articles in determining whether LGB Alliance's purposes are charitable.
 - c. The beliefs and values that underpin LGB Alliance's work are lawful, protected, consistent with public policy and valuable. LGB Alliance relies on the Equality Act 2010 to contextualise its lawful underlying beliefs and approach.
 - d. LGB Alliance's purposes are not political and its engagement in political activity is subsidiary or incidental to its charitable purposes.
 - e. LGB Alliance's purposes meet the requirements of the first (benefit) and second (public) aspects of the public benefit test as being concerned with equality and diversity and human rights. The activities undertaken pursuant to its purposes benefit both individuals who secure benefits as a result and society more widely.
 - f. There is no detrimental effect to the Appellant (or anyone) arising from LGB Alliance's work. Even if there was (and there is not), it would be outweighed by the benefit aspect.

7. In its Skeleton Argument, the Appellant remarks upon the number of documents that LGB Alliance have included in the hearing bundle. Regrettably, this has proved necessary given the volume of “anecdote”⁵ found in the Appellant’s Grounds of Appeal,⁶ and in its witness statements, providing further emphasis, if emphasis were needed, of quite the problems that arise where appeals against registration are predicated simply on profound disagreement with an organisation’s “worldview”.⁷

B. Legal Background

(i) The Charities Act 2011: Standing

8. By s.319(2)(b), Charities Act 2011 (CA 2011) an appeal lies against the decision of the CC that LGB Alliance is a charity and, as such, should be entered on the register of charities (Sch. 6, column 1). However, an appeal may only be brought by the trustees (or those claiming to be trustees) of, or, in the case of an incorporated charitable organisation, the organisation, or by “any ...person who is or may be affected by the decision” (Sch. 6, column 2). The question arises in this appeal whether the Appellant is a “person who is or may be affected by the decision” on registration.
9. All parties accept that *Nicholson v Charity Commission for England and Wales* [2016] UKUT 0198 (TCC) [A/x/x] is the leading authority on this issue.⁸ According to Asplin J in *Nicholson*, the starting point is construing the words of the CA 2011 “in order to determine the statutory framework intended to apply” (§42). This requires consideration of the decision to which the appeal relates (§§43, 44): in this case, registration. This is a decision “which whilst having a public aspect also impinge[s] upon private and financial interests” and “has serious

⁵ Charity Commission Grounds of Defence, §26 [1/55].

⁶ [1/38ff].

⁷ Appellant’s Skeleton Argument, §61.

⁸ Appellant’s Skeleton Argument, §78; CC’s Grounds of Defence, §8 [1/48]; Appellant’s Skeleton Argument, §78. In *Nicholson*, permission to appeal in respect of the First Tier Preliminary Issue Decision was granted by Principal Judge McKenna specifically on the issue of “affected by”, noting that there was at that point no binding authority directly on the point; §2 of the Upper Tribunal decision

consequences for the charity itself, many of which will be fiscal” (§43). Unsurprisingly, then, the enumerated classes of persons with standing are those *directly and immediately* affected (Sch. 6, column 2) (see *Nicholson*, §§43, 49). To the extent that any broader public interest is engaged, this is a matter for the Attorney General exercising her right of appeal (s.319(2), CA 2011; §49).

10. Bearing in mind these matters, the question whether a person has standing, being a person who is or may be affected by the decision, is a “narrow one” (§45), namely:

“[I]n order to be affected by the decision, first the decision itself must relate to the person in some way. Secondly, the person’s legal rights must have been impinged or affected by the decision and to be a person who “may” be affected, there must be an identifiable impact on the person’s legal rights which is likely to occur”. (*Nicholson*, §44, emphasis added).

11. This means, to emphasise, that:

[I]n order to be *affected* a person’s rights need to have been altered or impinged by the decision itself in some way and in order to be someone who “may” be affected there must be an identifiable impact upon that person’s legal rights which is likely to occur. It is insufficient that he disagrees with the decision emotionally, politically or intellectually and as a result is affected emotionally and/or socially, however sincere his concerns (*Nicholson*, §47, emphasis added).

12. The concern is, then, to provide those persons to whom the decision relates in some way and whose *legal rights* are or may be *directly* affected by the decision in issue with the opportunity to appeal that decision. As will be submitted below,

even on the most generous interpretation, the decision in the instant appeal does not relate to the Appellant and nor does it impact upon *any* legal right of the Appellant and no such right is, or could be, identified.

13. It is important to note, given the context in this appeal, that the backdrop to the appeal in *Nicholson* raised “some profoundly important and highly complex issues” (Israel/Palestine) about which the Appellants and indeed others held “very strong feelings” (§14, citing the first instance decision). However, “there is no public interest test” encompassed by the legal test of standing (§55). Further, and to the extent that it might be suggested otherwise, the fact that a person may have engaged in correspondence with the CC, even where that correspondence had received substantive consideration, does not by itself confer standing upon them (see, *Nicholson*, §§23, 39, 46).
14. While acknowledging that *Nicholson* is the leading authority on the issue of standing so far as it applies here (“*is or may be affected*”) (Appellant’s Skeleton Argument, §78), the Appellant seeks, it appears, to distinguish it, or at least to marginalise its significance, albeit with an evident degree of reticence (Appellant’s Skeleton Argument, §§89). This is on the grounds that (i) it concerned a decision to deregister, and an upsetting of the “status quo”, and that concerns about deregistration may not “carry over” to other types of challenge (Appellant’s Skeleton Argument, §§89-90) and (ii) regard must be had to the need to ensure that there is an effective system of accountability and redress that might be undermined by a strict reading of *Nicholson* (Appellant’s Skeleton Argument, §§89-94).
15. As to (i), *Nicholson* is binding on the issues of principle; namely the *test* for determining whether a person is, or may be, affected by the decision in issue. The impact, including the fiscal impact, of a decision to register is as severe as one to deregister. There is no basis for distinguishing the two types of decision whether as a matter of statutory construction or principle (having regard to the decision in *Nicholson*). And in any event, LGB Alliance *is* presently entered on

the register⁹ and thus the impact of allowing this appeal will be as severe as in any case on deregistration.

16. As to (ii), the system for effective accountability was considered, indeed centrally, by Asplin J in *Nicholson*. Parliament plainly intended that only those directly affected – as in the case of trustees of, and incorporated, charities and those to whom the decision relates in some way and whose legal rights are, or may be, altered or impinged – should have standing, with the public interest being served by the Attorney General. The fact that the Attorney General has never appealed (if that be so: see Appellant’s Skeleton Argument, §93.1) was a matter specifically addressed by Asplin J in *Nicholson*: the right of the Attorney General to appeal “is relevant to the exercise of statutory construction whether or not the Attorney General makes use of his standing in practice” (§43).
17. For completeness, the Crumely and Picton article (“‘Still Standing?’: Charitable Service-Users and Cy-Près in the First Tier Tribunal (Charity)”) referred to by the Appellant (Appellant’s Skeleton Argument, §89) is not even of scholarly interest (let alone influential) having regard to the issues in this appeal, for a number of reasons. These include that (i) the article covers a very discrete subject of no relevance here (cy-près and service users) and (ii) the authors themselves distinguish *Nicholson* on the basis that it applies to a different subject matter (263ff).
18. As further submitted below, the Appellants do not, therefore, have standing in this appeal and whatever view this Tribunal takes in relation to the issues raised, respectfully, these are not matters it can or should properly determine.

⁹<https://register-of-charities.charitycommission.gov.uk/charity-search/-/charity-details/5154625/accounts-and-annual-returns>

(ii) The Charities Act 2011: Registration and Charitable Purposes

19. The CC must keep a register of charities and that register must contain, *inter alia*, the name of every charity registered in accordance with section 30 (s.29, Charities Act 2011 (CA 2011) [A/x/x]).
20. To qualify for registration, an organisation must be a charity within the meaning of s.1, CA 2011, namely “an institution which...is established for charitable purposes only...”.¹⁰ A charitable purpose is a purpose which (a) falls within s.3(1), and (b) is for the public benefit (s.2, CA 2011) [A/x/x]. The charitable purposes in s.3(1) include “the advancement^[11] of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity” (s.3(1)(h), CA 2011 [A/x/x]). As to whether the public benefit requirement is met, “it is not to be presumed that a purpose of a particular description is for the public benefit.” (s.4(2), CA 2011).
21. This statutory test is addressed at §§36–44 below. The relevant principles of construction and the proper evidential requirements are addressed first, since the Tribunal must be careful to approach the application of the test correctly.
22. Whether the organisation is “established for charitable purposes” (s.1(1)(a), CA 2011 [A/x/x]), is a matter of construction. Thus, it is “well established” that what the CC or the Tribunal is concerned with is the “meaning and effect of the language employed” in the organisation’s written objects (Tudor on Charities, 10th edition, 7–005). Thus:

“the question whether an institution is established for charitable purposes only is to be answered by deciding, as a matter of construction whether its purposes (a) fall within one of the description of purposes listed in section 2(2) and (b) satisfy the public benefit test. The ordinary meaning,

¹⁰ No issue arises as to the jurisdiction of the High Court: s.1(1)(b), CA 2011.

¹¹ This includes the “promotion of human rights” (*Human Dignity Trust v Charity Commission of England and Wales* [2014] CA/2013/0013 [A/x/x])

and we would suggest generally the most natural meaning, of the word established is directed to what it is that the institution was set up to do, not to how it would achieve its objects or whether its subsequent activities are in accordance with what it was set up to do. Further, section 2(2) itself more naturally reflects that ordinary meaning than an interpretation which looks at activities. It lists descriptions of purposes, not categories of activity.” (*R (Independent Schools Council) v Charity Commission* [2012] Ch 214 (UT) at §188 [A/x/x])

23. The authorities show that the Tribunal should take a two-stage approach.
24. Firstly, the Tribunal should examine the wording of the governing document, interpreting it “so as to facilitate, rather than so as to hinder” the pursuit of the charitable objectives (*Trustees of the Celestial Church of Christ v Lawson* [2017] EWHC 97 at §20 [A/x/x]).
25. In doing so it is entitled to have regard to limited contextual evidence as to “the objective circumstances to which the language relates” (*River Wear Comrs v Adamson* (1877) 2 App Cas 743 per Lord Blackburn at 763, cited in *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956 (HL) at §5 [A/x/x]).
26. This may include evidence about the “facts known or assumed by the parties at the time that the document was executed”, but it may not include subjective evidence which goes to the intentions of any party (*Marley v Rawlings* [2015] AC 129 per Lord Neuberger at §19 [A/x/x]; see also *Trustees of the Celestial Church of Christ v Lawson* [2017] EWHC 97 at §20 [A/x/x]).
27. This contextual evidence is occasionally described in the authorities as “extrinsic evidence” (see, for example, in *Trustees of the Celestial Church of Christ v Lawson* [2017] EWHC 97 at §20 [A/x/x]). However, it is of a quite different nature to the

extrinsic evidence which may be taken into account at the second stage, discussed below.

28. If this exercise shows unambiguously that the organisation is established for charitable purposes, that is the end of the matter:

“the first essential is to consider and construe the scope of the objects and powers of the [organisation] under its constitution. If the objects of an organisation and the means by which those objects may be achieved are exclusively charitable, that, without more ado, answers the question whether the organisation was formed for a charitable purpose” (*Attorney General v Ross* [1986] 1 WLR 252, 264C-D [A/x/x]).

29. The second stage arises only if the governing document is ambiguous on its face, or if the written objects contain a mixture of charitable and non-charitable objects or there are no written objects.
30. At this stage the Tribunal may consider a broad range of extrinsic evidence which would not have been admissible at the first stage. This may include subjective evidence which goes to the intentions of any party (*Marley v Rawlings* [2015] AC 129, §19 [A/x/x]), “extrinsic evidence of which only a limited number of people would have known” at the time that the document was executed (*Cosmetic Warriors Ltd v Gerrie* [2015] EWHC 3718 (Ch) at §27) [A/x/x]; or evidence as to *intra vires* activities carried out by the organisation before or after its formation (*Attorney General v Ross* [1986] 1 WLR 252, 263E [A/x/x]).
31. This broader type of extrinsic evidence is admissible to resolve ambiguity because it is probative of the question whether the organisation was indeed “established for charitable purposes” if – but only if – on a proper construction of the governing documents there remains doubt on the matter.

32. It was cases of this sort that Scott J had in mind when he said in *Attorney General v Ross* [1986] 1 WLR 252 [A/x/x] that:

“The skill of Chancery draftsmen is well able to produce a constitution of charitable flavour intended to allow the pursuit of aims of a non-charitable or dubiously charitable flavour. In a case where the real purpose for which an organisation was formed is in doubt, it may be legitimate to take into account the nature of the activities which the organisation has since its formation carried on” ((263), emphasis added)

33. That Scott J was not making a sweeping statement about the admissibility of broadly defined extrinsic evidence in construing unambiguous governing documents (as suggested in the Appellant’s Skeleton Argument at §31) is abundantly clear from the rest of his analysis, which includes the statement at §28 above as well as the following:

“if the constitution, while expressing some charitable objects, also permits noncharitable activities to be carried on, then, in my opinion, it is necessary to ask whether the main purpose of the organisation is charitable and whether the non-charitable powers can be regarded as merely ancillary or supplemental. This, as Brightman J. said in the *London Hospital* case [1976] 1 W.L.R. 613, 623, is a matter of degree. And extrinsic evidence as to the real or main purpose for which the organisation was formed would, in my view, be admissible. The extent to which the organisation has carried on intra vires but non-charitable activities is capable, in my opinion, of being admissible extrinsic evidence” (at 264D-E [A/x/x])

34. The authorities, going back to the mid nineteenth century, are entirely consistent with this distinction. Those upon which the Appellant relies at §§37–38 of its Skeleton Argument are all cases in which there was doubt as to the governing documents:
- a. *Shore v Wilson* (1842) 8 ER 45 [A/x/x] concerned ambiguity as to the meaning of terms such as “godly preachers of Christ’s holy Gospel” and “godly persons” in the deeds, which had been made many years previously. The court held that it was not possible to know what those terms referred to without extrinsic evidence as to the intention of the founder: “No Judge can interpret the word ‘godly’, used in those deeds by Lady Hewley, until he knows who and what she was. It is a relative term; that which is godly in one sense, is ungodly in another; that which is godly to Unitarians may be ungodly to Trinitarians: it is a term that includes an unavoidable reference to the person who uses it; to his opinions and modes of thinking, as testified by his habits of acting; and it is, therefore, a term the construction of which, is impossible without knowledge of those habits ... in construing an instrument made many years ago, we are not to confine ourselves to the meaning of the terms contained in it as they are now used, but must consider their meaning and ordinary application at the time of the date of the instrument” (at 503–504 [A/x/x]).
 - b. In *McGovern v Attorney-General* [1978] 1 Ch 321 [A/x/x] the trust deed was “not very clear or satisfactory” (at 344B–C), “ambiguous” (at 348H) and was open to differing constructions. It was common ground that “in construing ... any ambiguous wording contained in the trust deed” the court could have regard to the statute of the unincorporated association, Amnesty International, which was “manifestly part of the factual matrix accompanying the execution of the trust deed” (at 348H–349A).
 - c. In *Attorney General v Ross* [1986] 1 WLR 252 [A/x/x] there was doubt as to whether all or only some of the written objects were charitable.

- d. In *Yeats v Charity Commission* (FtT, CA/2017/0007, 19 March 2018) [A/x/x] the “unclear and ambiguous” nature of the proposed objects (§§28(1), 29) was one factor which led the Tribunal to conclude that it should take into account evidence about how the Appellant intended to pursue its purposes and objects. The full extent of the ambiguity as to the charitable nature of the proposed objects may be appreciated from the Tribunal’s summary of the Appellant’s motivations: “The primary motivation of Mr Yeats in forming The Banbury Children’s Foundation and seeking to register it as a CIO is to address his concern about a nationwide child trafficking operation in which the government is complicit and which the police are prevented by law from investigating or stopping. Mr Yeats reported that he has seen around 1.2 million children in Banbury over a five month period who were being trafficked. The trafficking is achieved by the use of particular software in mobile telephony networks that emit messages or sounds in a particular language that can be heard by the public at large, but which is particularly appealing to teenagers and young adults. Mr Yeats had heard these messages and has done so even when he is not using a mobile phone hand set. The trafficking is also achieved through the removal by the government of children at birth from their mothers”.
 - e. In *Southwood v Attorney General* (unreported, 9 October 1998) [A/x/x] Carnwath J found that the deed was ambiguous and its wording was “obscure” (at 134e-f). The educational organisation purported to carry out its activities in the field of “militarism and disarmament”, which was not “well established and understood as a field of academic study”. Therefore it was necessary to look at the “background material” as to the manner in which the organisation carried out its activities.
35. Contrary to the implication in §39 of the Appellant’s Skeleton Argument, these authorities do not show that the courts and tribunals take a generally liberal approach to considering extrinsic evidence. Rather, they demonstrate that the broader category of extrinsic evidence may be relevant only where the written

documents do not provide sufficient clarity. The Appellant is correct that “in none of these cases could the institutions’ purposes be determined by their governing documents alone” (Appellant’s Skeleton Argument, §39). Had it been possible to determine the purposes from the governing documents alone, considered in their objective context, that is what would have been done.

36. Turning to the application of the statutory test in ss.1 and 3, CA 2011, as adverted to above, the charitable purposes under s. 3(1)(a) include “the advancement of human rights... [and] equality and diversity.” As to the “public benefit” requirement, the CC has produced guidance, as it is legally bound to do (s. 17, CA 2011), pursuant to its duty to promote awareness and understanding of the operation of the public benefit requirement (s.14, para 2).
37. It is clear from that guidance that the benefit requirement has two “aspects”; the “benefit aspect” and the “public aspect”. As to the benefit aspect, “a purpose must be beneficial – this must be in a way that is identifiable and capable of being proved by evidence where necessary and which is not based on personal views; any detriment or harm that results from the purpose (to people, property or the environment) must not outweigh the benefit – this is also based on evidence and not on personal views.” As to the “public aspect”, it must “benefit the public in general, or a sufficient section of the public – what is a ‘sufficient section of the public’ varies from purpose to purpose [and] must not give rise to more than incidental personal benefit – personal benefit is ‘incidental’ where (having regard both to its nature and to its amount) it is a necessary result or by-product of carrying out the purpose”. See too, *R (Independent Schools Council) v Charity Commission (UT)* [2012] Ch 214, §44, §108 [A/x/x].
38. “Political purposes” do not satisfy the public benefit test (*McGovern v Attorney General* [1982] 1 Ch 321 [A/x/x]). This means that charities for “political objects” can never be legal charities (at 334). As to what is meant by political objects, they include objects which involve changes in the existing laws of England (at 334). Thus, an organisation the “principal object” of which “is to alter the law of

this country cannot be regarded as charitable” (335). However, political activities which are “merely subsidiary or incidental to a charitable purpose” are not inconsistent with charitable status (341): “if all the main objects of the trust are exclusively charitable, the mere fact that the trustees may have incidental powers to employ political means for their furtherance will not deprive them of their charitable status” ((343) and *Guidance: Campaigning and Political Activity Guidance for Charities* (2008) CC¹²).

39. It should go without saying that purposes concerned with human rights and equality and diversity, satisfy both the benefit and the public aspects of the test (see *R (Independent Schools Council) v Charity Commission (UT)* [2012] Ch 214, §44 [A/x/x]). As Slade J observed in *McGovern v Attorney General* [1982] 1 Ch 321 [A/x/x]: “No doubt in some cases a purpose may be so manifestly beneficial to the public that it would be absurd to call evidence” (333-4). The promotion of human rights and equality and diversity is so manifestly beneficial to the public that it would be absurd to call evidence to demonstrate it.
40. Thus, in the case of human rights,

“There is an obvious public benefit in promoting human rights. For individuals whose human rights are thereby secured, the benefit is immediate and tangible. There is also a less tangible, but nonetheless significant, benefit to the whole community that arises from our perception that the fundamental rights of all members of the community are being protected. That provides sufficient benefit to the community to justify treating the promotion of human rights as a charitable purpose in its own right.” (*The Promotion of Human Rights* (2005) Charity Commission

¹²<https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9/speaking-out-guidance-on-campaigning-and-political-activity-by-charities>

RR12;¹³ see reference to the same in *Human Dignity Trust v Charity Commission of England and Wales* [2014] CA/2013/0013 [A/x/x])

41. And in the case of equality and diversity,

“The Commissioners noted the considerable public harm caused by discrimination and the clear benefits arising from promoting diversity in society and considered that it was unnecessary to consider evidential proof on this point. They recognised that the overwhelming intangible benefit is a fairer and more just society in which people are valued for themselves.” (*Promotion of Equality and Diversity for the Benefit of the Public*, §6¹⁴).

42. It must be shown that any detriment or harm resulting from the purpose to any person is such as to outweigh the “benefit aspect” (*R (Independent Schools Council) v Charity Commission (UT)* [2012] Ch 214, §96 [A/x/x]). However, a “clear case” would “have to be made out to show that an object which would ordinarily be charitable is not charitable because of the consequences which it has for society” *R (Independent Schools Council) v Charity Commission (UT)* [2012] Ch 214, §105 [A/x/x]).

43. Further, care must be taken in undertaking any assessment of respective benefits and disadvantages: “Even where a clear disadvantage can be demonstrated, it may not be easy, or indeed, possible, for the court (and now the tribunal) to balance the benefits and disadvantages. Still more will that be the case where the suggested disadvantages (and indeed the benefits) depend on value judgments influenced by social and political agendas” (*R (Independent Schools Council) v Charity Commission (UT)* [2012] Ch 214, §107 [A/x/x]). This is especially

¹³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/813730/rr12text.pdf, §12.

¹⁴https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/359361/ped.pdf

important in this case where there is such profound disagreement as to sex and gender which underpins much of the tension between the Appellant and LGB Alliance.

44. The Appellant says that while a human rights and anti-discrimination institution is likely to meet the second aspect of the public benefit test if it is established to meet the specific unmet needs of a minority group, it does not meet it if it confines itself to a minority group or a subset of a minority group just because they agree with its worldview. This is asserted on the basis that the restriction bears no rational relationship to the benefits conferred (Appellant's Skeleton Argument, §61). That is not relevant here since LGB Alliance does not restrict its benefits to those who share its "worldview" (*ibid.*). In any event, as a statement of principle this is unlikely to be correct (an organisation restricting benefits to gay Christians is capable of being charitable).

(iii) The Equality Act 2010

45. The Equality Act 2010 (EA 2010) is an important context for this appeal. An understanding of it bears on the lawfulness of the activities of LGB Alliance and whether it meets the criteria for entry on the register (CC Reply, §62). The Appellant refers extensively to the EA 2010 in its documents and evidence¹⁵ and raises the question in its Skeleton Argument whether LGB Alliance's activities depend upon a misreading of the EA 2010 and / or are contrary to public policy (§§17-19). LGB Alliance must, therefore, explain the meaning and effect of the EA 2010.
46. Part 2, EA 2010 identifies and defines the "protected characteristics" under the EA 2010. They include gender reassignment, philosophical belief, sex and sexual orientation (s.4, EA 2010 [A/x/x]).
47. As to "gender reassignment": "A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has

¹⁵ Grounds of Appeal [1/39]; Reply [1/87, 90]; [ws/PDR/104/106/107/110/119]; [ws/JN/153/155].

undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex" (s.7, EA 2010). A person who has the protected characteristic of gender reassignment is referred to as a "transsexual person" (s.7, EA 2010 [A/x/x]).

48. As to "belief": "Belief means any ... philosophical belief and a reference to belief includes a reference to a lack of belief" (s.10, EA 2010 [A/x/x]).
49. Protected beliefs under s.10, EA 2010 include the belief that biological sex is real, important, immutable and not to be conflated with gender identity, and the belief that conflating biological sex with gender poses a risk to women's sex based rights (sometimes described as "gender critical" beliefs : *Grainger v plc v Nicholson* [2010] ICR 360, §4, §24 [A/x/x]; *Forstater v CGD Europe Others* [2022] ICR 1 [A/x/x]¹⁶; *Miller v The College of Policing* [2021] EWCA Civ 1926 [A/x/x] ([w/s / xx]). The expression of those beliefs is protected by Article 10 (*Miller v The College of Policing* [2021] EWCA Civ 1926, §§68-69 [A/x/x]).
50. These beliefs do not, as suggested by the Appellant, attract "a degree of qualified" protection under the EA 2010 (Appellant's Skeleton Argument §19). Beliefs are either protected or they are not – and gender critical beliefs are so protected.
51. The Appellant states that in determining whether gender critical beliefs are protected the EAT in *Forstater* [A/x/x], one of the key cases on gender critical beliefs, applied a "very undemanding test, namely whether the relevant beliefs were 'akin to Nazism or totalitarianism'" (Appellant's Skeleton Argument, §19). That is the test that the EAT was bound to apply in all cases given the criteria applicable (*Grainger v plc v Nicholson* [2010] ICR 360, §24 [A/x/x]; *Forstater v CGD Europe Others* [2022] ICR 1 [A/x/x]).

¹⁶ The CC's decision in this case was made before the EAT decision in *Forstater* and thus refers to the ET decision: [2/8], §31.

52. The Appellant's beliefs are such that "gender identity" is of more significance than sex (what the Appellant's describe as a "cisgender/binary framework": (ws/BMRB/124/§6]). Their beliefs stand in opposition to "gender critical beliefs" which Mermaids stigmatise as "anti-trans" (see, Appellant's Skeleton Argument, §5, PDR w/s §30, MRB w/s, §13). Gender critical beliefs are not anti-trans (*Forstater*, §103, §118) and when one looks at the meaning of "sex" and "sexual orientation" under the EA 2010, it is readily apparent that gender critical beliefs are both orthodox and mainstream.
53. While the courts or tribunals have not yet had to determine (so far as LGB Alliance is aware) whether the beliefs that underpin the Appellant's activities are protected under s.10, EA 2010, given the legal approach to "belief", it can safely be assumed that they are. They would not attract, however, any greater protection or weight than gender critical beliefs and nor is it for a court or tribunal come to a view about the merits of those respective beliefs (*Forstater*, §2).
54. As to "sex": "Sex" is "a reference to a man or to a woman" (s.11, EA 2010) and man and woman means "male" and "female" respectively (s.212, EA 2010). As the courts have repeatedly said, "sex" is binary, biological and immutable.¹⁷ Gender means something altogether different:

"Although at one time the terms "sex" and "gender" were used interchangeably, (and confusingly still are on occasions), due to an increased understanding of the importance of psychological factors, (albeit these may be due to differences in the brain's anatomy), sex is now more properly understood to refer to an individual's physical characteristics, including chromosomal, gonadal and

¹⁷ (*Elan-Cane v Secretary of State for the Home Dept* [2018] EWHC 1530 (Admin) [A/x/x] (undisturbed by the CA and then the SC (*Elan-Cane v Secretary of State for the Home Dept* [2018] 1 WLR 5119 [A/x/x]; *Elan-Cane v Secretary of State for the Home Dept* [2022] 2 WLR 133 SC [A/x/x]. The SC noted too "that questions whether other gendered categories should be recognised beyond male and female ...and, if so, on what basis such recognition should be given, raise complex questions with wide implications" (§54); *R (C) v Secretary of State for Work and Pensions* [2017] 1 WLR 4127 §24 [A/x/x]; *Chief Constable of the West Yorkshire Police v A (No 2)* [2004] 1 AC 51, §30 [A/x/x]; *Corbett v Corbett* [1971] P83 [A/x/x].

genital features, whereas gender is used to refer to the individual's self-perception" *R (Elan-Cane) v SSHD* [2018] EWHC 1530 (Admin) §96, per Baker J [A/x/x].¹⁸

55. This means that "transsexuals living as women" (or transwomen) do not fall within the definition of "woman" under the EA 2010 since they are not biologically female (*For Women Scotland Limited v (1) The Lord Advocate and (2) The Scottish Ministers* [2022] CSIH 4, §§36, 39, 40). It also means that in some circumstances transwomen, for example, can be excluded from female only services (Sch. 3, paras 26-8, EA 2010). This emphasises the significance of biological sex for equality law.
56. The authorities demonstrate, then, that the Appellant's views, while no doubt protected by law, are unorthodox.
57. As to "sexual orientation": "Sexual orientation" means a "sexual orientation towards—(a) persons of the same [biological] sex, (b) persons of the opposite [biological] sex, or (c) persons of either [biological] sex" (s.12, EA 2010). The words bracketed reflect the meaning of sex under s.11, EA 2010.
58. These provisions define the protected characteristics and do not make any particular conduct unlawful. Part 2, Ch. 2, EA 2011 defines discrimination and Part 3 makes discrimination connected to the protected characteristics unlawful in some circumstances.
59. Charities are entitled by law to limit their aims to advancing the rights of particular groups of people at the exclusion of other groups. Section 193, EA 2010, in particular, creates exceptions to the prohibitions on discrimination in the case of charities established to promote the interests of those who share a particular protected characteristic:

¹⁸ This analysis was not disturbed by the Court of Appeal [2020] 3 WLR 38 [A/x/x] or the Supreme Court [2022] 2 WLR 133 [A/x/x].

“(1) A person does not contravene this Act only by restricting the provision of benefits to persons who share a protected characteristic if –

- (a) the person acts in pursuance of a charitable instrument, and
- (b) the provision of the benefits is within subsection (2).

(2) The provision of benefits is within this subsection if it is –

- (a) a proportionate means of achieving a legitimate aim, or
- (b) for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic).”

60. The effect is that a charity may lawfully restrict benefits to persons possessing a particular protected characteristic without having to extend those benefits on the basis of different, or additional, characteristics; for example, a LGB charity need not extend its benefits to disabled people or indeed trans people. The Appellant has established itself an exclusively trans-focussed charity and it is lawfully entitled to do so. LGB Alliance is entitled to restrict its focus, as it does, to lesbian, gay and bisexual people, as defined by the EA 2010.¹⁹

C. Submissions

(i) Standing

61. The legal background is set out above.

62. The decision on registration in issue in this appeal does not relate to the Appellant. Further, the Appellant has not identified, less so proved, a *single* legal

¹⁹ In each case, if benefits are restricted, where one or other limb of s.193(2) is satisfied, though it is difficult to see how one, other, or both would not be satisfied here.

right affected, or which might be affected, by the decision to register LGB Alliance (the critical question). The factual matters the Appellant relies upon in support of its claim to have standing are set out at §§95ff of its Skeleton Argument. One looks in vain for the identification of a legal right impinged upon, affected or altered by the decision to register LGB Alliance.

63. For the avoidance of doubt, while the Appellant refers most specifically (“in concrete terms”, Skeleton Argument, §99) to funding, it does not assert that it has any legal right to funding that is impinged by the decision to register LGB Alliance.
64. Much of what the Appellant says by way of factual submission on (what is presumed to relate to) standing is untrue, implausible and/or the inferences drawn unsupportable (for example, Skeleton Argument references, §95ff). Submissions will be made on this after close of the evidence if it proves necessary. However, more particularly, the *relevance* of much of what the Appellant says by way of factual submission on standing is simply unfathomable. To a large degree much of the evidence reads like a “manifesto” and thus amounts to “issues which require political resolution. It cannot be right... that the tribunal should have to grapple with issues of that kind, which are not really capable of judicial, rather than political, resolution” (see, *R (Independent Schools Council) v Charity Commission (UT)* [2012] Ch 214, §109 [A/x/x]).

(ii) Substantive case – introduction

65. It is important to identify two themes at the outset: firstly, that the central concern of the Appellant is ideological and arises from its profound disagreement with LGB Alliance’s approach to the promotion and protection of LGB rights; and second that the appeal rests entirely on an analysis which requires the Tribunal to go behind LGB Alliance’s written objects.

66. The Appellant makes no complaint that the objects are, on their face, not charitable. Nor does it contend that the objects are ambiguous. Rather, it argues that the Tribunal must discover a hidden meaning which lies behind the objects and which reveals LGB Alliance's noncharitable nature. It asks the Tribunal to construe the written objects by reference to evidence which purports to show that LGB Alliance uses language which "serves to obscure its fundamentally anti-trans focus" (Appellant's Skeleton Argument, §5) and that LGB Alliance engages in activities which are "essentially 'antitrans', and not 'pro-LGB'" (Appellant's Skeleton Argument, §64.4).
67. LGB Alliance's case is that its objects, and purposes (Articles of Association, cl.2 [2/2]), are transparent and unambiguous. This is not a case where the particular purposes (equality, diversity, human rights) might not in a particular context be charitable. There is no call for the Tribunal to take into account broad-ranging extrinsic evidence in order to answer the question whether LGB Alliance's particular purposes are for the public benefit (Appellant's Skeleton Argument, §40ff). Indeed, it would be an error of law to do so.
68. Moreover, the findings sought by the Appellant would require the Tribunal to take an ideological position about the rights of transgender people and the merits of "gender critical" beliefs, contrary to the reassurance in §2.1 of the Appellant's Skeleton Argument that it will not be called upon to do so (and as to which, see the EA 2010, referred to above) and contrary to law (see EA 2010 above). This exercise would reveal nothing of relevance to the question before the Tribunal, which is whether the organisation's objects are charitable.
69. Nor can it be said that there is any detriment or harm resulting from LGB Alliance's purposes to any person, at all and in any event such as to outweigh the "benefit aspect" (*R (Independent Schools Council) v Charity Commission (UT)* [2012] Ch 214, §96 [A/x/x]).
70. Religious and human rights charities, in particular, will often have conflicting and competing beliefs and objects, and charities and the individuals and groups

running them will often have diverse and opposing views and opinions on an infinite number of matters (see illustrations in LGB Alliance's response to the Notice of Appeal [1/83-4]). However, this is not the place to ventilate those disagreements. The emotional, political and intellectual disagreement between those who hold the views shared by the Appellant and those who do not has resulted in these proceedings and in voluminous amounts of evidence having to be adduced as (if the Appellant has its way) one side or the other seeks to prove itself right.

71. It has also, regrettably, seen the Appellant descend into hyperbole and absurdity. It is not possible to address every assertion and allegation in the Appellant's dense Skeleton Argument without making this Skeleton Argument unwieldy. The main points will be addressed and if necessary elaborated upon in submissions at conclusion of the hearing.

(iii) Construction and evidential requirements

72. The Tribunal must embark upon the process of considering whether LGB Alliance's objects are charitable by analysing the governing document itself. The Appellant has suggested no proper basis for the Tribunal to take into account extrinsic evidence when conducting this task, beyond that which might illustrate the objective contextual background to the formation of LGB Alliance (of the sort described at §§25-27 above).
73. The matters referred to in §64(1) of the Appellant's Skeleton Argument amount to no more than purely subjective evidence of the intentions of LGB Alliance's founders. The trustees' alleged "intense disagreement" with and "desire to undermine" existing LGBT organisations are not objective circumstances or facts which would have been known or assumed by the parties at the time that the objects were executed. Even if the Tribunal accepts the characterisation proposed by the Appellant, it amounts to no more than "extrinsic evidence of which only a limited number of people would have known" at the time that the document was executed (*Cosmetic Warriors Ltd v Gerrie* [2015] EWHC 3718 (Ch) at §27). It

would be quite improper to take this into account in construing the terms of the governing document.

74. As to §64.2 of the Appellant's Skeleton Argument, there is no warrant for consideration of LGB Alliance's pre- or post-foundation activities (and see also §62 of the Appellant's Skeleton Argument). The Appellant suggests that the Tribunal make a finding of fact that "[t]he centre of gravity of LGB Alliance's activities has always been essentially 'anti-trans', and not 'pro-LGB'". This is not so (see, [ws/EG]).
75. In any event, subject to standing, the Appellant is at liberty to invoke the jurisdiction of the courts to challenge any activities undertaken by LGB Alliance's trustees which are *ultra vires* LGB Alliance's objects. The present case is not brought on that basis; it is merely a challenge as to whether the objects are charitable.
76. The suggestion at §64.3 of the Appellant's Skeleton Argument that LGB Alliance uses a secret language to signal its malign intentions (or, presumably, dog-whistling) is, again, a quite improper subject of enquiry for the Tribunal. There can be no question of any ambiguity as to the meaning of the words "lesbian, gay and bisexual" or "sexual orientation" in the objects. The term "sex-based rights" does not appear in the objects [2/4] and in any event has a clear and lawful meaning (see EA 2010 above).
77. The characterisation of LGB Alliance's "core beliefs" at §64.4 of the Appellant's Skeleton Argument is wildly inaccurate. Moreover, it is irrelevant to the matters to be determined by the Tribunal. Again, the Tribunal is asked by the Appellant to wade into the debate on the validity of gender identity ideology and of gender critical beliefs. The fact that the Appellant asks the Tribunal to determine these issues exposes its true motivations in this misconceived appeal: it is an ideological attack on the manner in which LGB Alliance chooses to pursue its objects. In essence, the Appellant argues that LGB Alliance activities are *ultra vires* its charitable objects. As indicated above, if the Appellant takes issue with

LGB Alliance's activities, it should direct its challenge at the activities and not its objects.

(iv) Charitable Purposes

78. LGB Alliance's purposes fall within the meaning of s.2 read with s.3(1)(h), CA 2011 ("the advancement of human rights...[and] the promotion of equality and diversity"), as is apparent on the face of their Articles of Association [2/26]. The statement of those objectives in the Articles of Association is, on the facts here, conclusive as to LGB Alliance's true purposes since the Appellant does not appear to contend that these stated purposes are a "sham"²⁰ or ambiguous (see §§22–35 above) (see reference to the same in Appellant's Skeleton Argument, §30). The Appellant does suggest that since "gender-critical", "biological sex" and "same-sex attraction" are not mentioned this indicates that "one needs to look beyond the four corners of this document" (Appellant's Skeleton Argument, §67). This is obfuscation. The Articles do indeed refer to sexual orientation and lesbian, gay and bisexual people *who are the subject of its purposes*. And these classes are defined in law by reference to biology (see §§54–55 above).
79. Those purposes are not political. To the extent that any of LGB Alliance's activities are "political", they are ancillary to these charitable purposes. Thus, for example, BV explains at §114ff of her witness statement their work campaigning on the Gender Recognition Reform (Scotland) Bill (presently at committee stage in the Scottish Parliament) because of its likely impact on spaces reserved for those with a same-sex sexual orientation (within the meaning of the EA 2010).²¹ Its central activities are described in the witness statement of EG [ws/EG/234ff]. The activities identified in LGB Alliance Articles to the extent that they engage legal matters are consistent with its charitable purposes.

²⁰ *Snook v London and West Riding Investments* 1967] QB 786 [A/x/x].

²¹ J Nicholson MP for the Appellant misunderstands the probable impact of the Bill and its significance (ws/JN/150ff/p150ff) but in any event that is nothing to the point. JN supports the Bill, LGB Alliance does not because of the view they take as to its likely impact.

80. There is an obvious and uncontroversial benefit (the first aspect) in promoting equality and diversity and human rights (see §§39–41 above). Those benefits are both tangible, for those whose human rights and equality and diversity rights are secured. They are also intangible in that there is a benefit to the whole community that arises from a fairer and more just society in which people are valued for themselves and from a collective perception that the fundamental rights of all members of the community are being protected (see §40 above; see too, [ws/EG/234ff]). LGB Alliance’s activities pursue those purposes to the direct benefit of individual LGB people, a sufficiently large section of the public, and to society more widely (the second aspect) (Articles of Association ([2/26] cl.2 and [ws/EG/235ff]). They are not restricted to those who share its “worldview” (Appellant’s Skeleton Argument, §§61, 69, 74.1, 75) if that is what is suggested.
81. The Appellant states that “LGB Alliance cannot rely on [any in/tangible benefits] ...because the benefit or otherwise of gender-critical goals is highly controversial” (Appellant’s Skeleton Argument, §72). However, the purposes and activities of LGB Alliance are lawful and consistent with public policy (as expressed, *inter alia*, in the EA 2010 and the Human Rights Act 1998). Further, its purposes and/or activities do not impinge adversely upon the rights of trans people. The values and beliefs underpinning the work of LGB Alliance are not “anti-trans”. They simply differ from those that underpin the Appellant’s work. The fact that views or approaches and values may be controversial as between organisations and sometimes conflict does not by itself indicate that one, other, or both of those organisations are not charitable as a result. As the CC properly observed in its decision “promoting the equality and human rights of lesbian, gay and bisexual people may be pursued without denigrating the rights of transgender people” [2/9/§34]. The Appellant apparently believes otherwise. However, LGB Alliance’s purposes are not detrimental and / or do not outweigh the public benefit (see §42 above for the legal test) and there is no rational basis for concluding otherwise.

D. Conclusion

82. The Appellant lacks standing and that is a basis by itself for dismissing this appeal. As to the Appellant's other contentions, these are unarguable.
83. LGB Alliance was properly and lawfully registered as a charity. The fact that LGB Alliance has certain values and beliefs underpinning its work, and they differ from the Appellant's, does not undermine its charitable purposes. Further, those values and beliefs are lawful, protected, commonplace and valuable.
84. Accordingly, it is respectfully submitted that this appeal should be dismissed.



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29 JULY 2022