"Still Standing?": Charitable Service-Users and Cy-Près in the First-tier Tribunal (Charity)

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A steady stream of charitable service-users have brought appeals against cy-près modification decisions made by the First-tier Tribunal (Charity).[1] The basis of their standing—the legal circumstances in which they are permitted to bring a case—has not yet been adequately developed. In search of a test for standing, this article takes a ground-up approach to the question. It recognises that as a matter of empirical fact, it is service-users who wish to bring appeals against schemes. It proposes a flexible prima facie rule recognising service-user standing in most cases.

Cy-près modification is a well-trodden statutory process, making possible the variation of charitable trust objects.[2] It is a procedure unique to charities established as trusts; incorporated charities have their own mechanisms.[3] It can be used as a method to update outdated trusts in the light of social change,[4] and because all charities were historically established as trusts,[5] cy-près is of vital importance for charitable modernisation. In more recent times, in part because of broad and flexible statutory provisions allowing cy-près modification, and in part because of an equally broad and flexible policy of the Charity Commission for England and Wales,[6] which carries through the great bulk of cy-près alterations, it has become relatively easy for trustees to achieve modification.

Trustees are under a legal duty to seek a scheme—a modification of the constitution—where it is necessary to secure the effective use of funds.[7] Sometimes this change or modernisation will be controversial, particularly with service-users.[8]

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[1] See T. Anderson, *The Charities Acts Handbook: A Practical Guide* (Bristol: LexisNexis, 2016), 296–301. The First-tier Tribunal (Charity) started life as the Charity Tribunal but took on a new name subject to the Tribunals, Courts and Enforcement Act 2007.

[2] Contained in Charities Act 2011 ss.63(1), 67(3).

[3] Charities Act 2011 ss.197–200, 224–227.

[4] See, e.g. R. Mulheron, *The Modern Cy-près Doctrine: Applications and Implications* (London: UCL, 2006), 130–132.

[5] But see J. Picton, "Reforming the Prerogative Cy-près Doctrine" (2014) 6 Conv. 473.

[6] Charity Commission for England and Wales, "OG2 Application of Property Cy-près" (2012) at *http://webarchive.nationalarchives.gov.uk/20140505103125/http://ogs.charitycommission.gov.uk/g002a001.aspx* [Accessed 30 August 2018].

[7] Charities Act 2011 s.61.

[8] See, e.g. *Ground v Charity Commission & The Guildford Diocesan Board of Finance* CA/2011/0004 6 December 2011 (Ft-T (Charity)); *Baddeley v Sparrow* [2015] UKUT 420 (TCC); *Aliss & Hesketh v Charity Commission*

The First-tier Tribunal (Charity) has provided a new forum to appeal the Commission's scheme.[9] As that decision is very likely to have been made in consultation with the charity's trustees,[10] such cases will often represent an internal disagreement in the charity, a source of tension between the service-users and the trustees. Service-users can be understood as those people who benefit from a charity's provision of goods and services. They are the "recipients" of charity and so they have a unique stake it in it, but it is also well established law, that they have no legally enforceable rights.[11] They use the charitable service, but they do not normally have a right to ensure its continuance.

While service users do not have legal rights in the charity, that ought not to mean that they cannot challenge the decisions of the Commission. There is a very broad definition of third party standing in the statute. It permits appeals for: "any other person who is or may be affected by the decision".[12] On an intuitive reading, most service-users would fall easily within this test. Yet the Upper Tribunal has recently developed an approach—the "affected legal rights" test—which in fact restricts third party standing to those circumstances where the prospective appellant enjoys a *legal right* which is impacted upon by the Commission's decisions.[13] If applied beyond the context in which it was developed, this new test could exclude service-users from bringing cy-près appeal cases.

Rejecting the affected legal rights test for the cy-près context, this article works towards the development of an appropriate basis for third party standing in cy-près cases. This is located in an assessment of the policy grounds for permitting appeals in the First-tier Tribunal (Charity), as well as a ground-up acknowledgement that the main source "demand" for First-tier Tribunal (Charity) oversight lies with service-users and not trustees. While service-user based standing cannot be an automatic or absolute rule, it is an important starting point in any decision as to whether an individual is a "person who is affected" for the purposes of an appeal.

Policy grounds for permitting cy-près appeals in the tribunal

The Cabinet Office's Strategy Unit produced a report in 2002, "Private Action, Public Benefit".[14] It reviewed the charity sector and suggested reforms for the Government to consider.[15] Among its successful recommendations was the creation of a new Charity Tribunal in 2008.[16] The system, as it has emerged, comprises the Upper Tribunal (Tax and Chancery) (the Upper Tribunal) and the First-tier Tribunal

CA/2011/0007 31 August 2012 (Ft-T (Charity)); *Bartley v Charity Commission* CA/2013/0016 21 July 2014 (Ft-T (Charity)).

[9] Charities Act 2011 ss.315(2)(a), 319(1), Sch.6 col.1. See generally D. Morris, "The First-tier Tribunal (Charity): Enhanced Access to Justice for Charities or a case of David versus Goliath?" 29(4) C.J.Q. 491.

[10] Charity Commission for England and Wales, "OG2 Application of Property Cy-près" (2012).

[11] *Thomas v Att-Gen* [1937] Ch. 72; [1936] 2 All E.R. 1325 (Ch) at 1328; *Morice v Bishop of Durham* 32 E.R. 656 at 658; (1804) 9 Ves. Jr. 399 at 405. See W. Barr and R, Stevens, *Pearce & Stevens' Trusts and Equitable Obligations* (Oxford: Oxford University Press, 2015), 367–368.

[12] Charities Act 2011 Sch.6 col.2(c).

[13] *Nicholson v Charity Commission for England and Wales* [2016] UKUT 198 (TCC).

[14] Cabinet Office Strategy Unit, "Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector" (2002).

[15] Also Public Administration Select Committee, "The Role of the Charity Commission and 'Public Benefit': Post-legislative Scrutiny of the Charities Act 2006—Volume I: Report, Together with Formal Minutes, Oral and Written Evidence" (HC 2013–14, 76, incorporating HC 2012–13, 574-i-vi); Lord Hodgson, *Trusted and Independent: Giving Charity Back to Charities—Review of the Charities Act 2006* (The Stationery Office 2012).

[16] Charities Act 2006 (Commencement No.3, Transitional Provisions and Savings) Order 2008 (SI 2008/751) art.2 and Sch.1.

(Charity), within the General Regulatory Chamber.[17] As an element of its powers,[18] it can hear appeals against schemes made by the Commission.[19] In appeals,[20] it must decide afresh and may consider new evidence.[21]

The Commission—which finds its decisions challenged in the tribunal system—regulates the charity sector. Prior to the establishment of the First-tier Tribunal (Charity), appeals against cy-près decisions of the Commission were made in the High Court, and relatively rare.[22] They were also expensive. While the Commission does have an internal review process, there was for a long time a view that the mechanism did not provide sufficient accountability.[23] The establishment of the Tribunal has created a new legal dynamic in which the decision of the Commission to permit a scheme is more readily challengeable than in the past.[24] The Tribunal has power to: quash the scheme and send it back to the Commission; substitute a scheme; or add to it.[25]

The tribunal system a relatively cheap alternative to the ordinary courts. Litigation costs in the High Court can be prohibitive. There are fees to pay to the High Court, which can vary depending on the length of the hearing, the financial value of the dispute, and the remedy sought.[26] Legal representation, which is normal in the High Court, can also be expensive.[27] A "suitor's fund" has, on occasion, been proposed to cover or minimise costs in important cases, but Parliament has rejected the idea.[28] Instead, it created a right of appeal into the tribunal system so as to provide a forum for low-cost litigation.[29] It is true that legal representation is allowed in the tribunal system but as it is optional, applicants can go without in order to avoid legal costs.[30] Some litigants-in-person have been successful,[31] but other applicants have chosen to appear with counsel.[32] Future plans to introduce tribunal fees may limit the attractiveness of the tribunal system,[33] but it is likely to remain a cheaper forum than the ordinary court system.

The policy justification for the existence of an appeals process against Commission decisions feeding into the First-tier Tribunal (Charity) is two-fold.

[17] Charities Act 2011 s.315(1); First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 (SI 2010/2655) arts 3(b), 13.

[18] It also has further functions. A power of review: Charities Act 2011 s.321. A forum for references from the Commission: Charities Act 2011 s.325. A forum for references from the Att-Gen: Charities Act 2011 s.326.

[19] Charities Act 2011 ss.315(2)(a), 319(1), Sch.6 col.1.

[20] Compare reviews: Charities Act 2011 ss.322, 323.

[21] Charities Act 2011 s.319(4).

[22] For analysis of the cases see R. Mulheron, *The Modern Cy-près Doctrine: Applications and Implications* (London: UCL, 2006), 98–118.

[23] Cabinet Office Strategy Unit, "Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector" (2002) 83–4.

[24] A. McKenna, "The Charity Tribunal—Where to and From" (2014) 4 P.C.B. 213, 214.

[25] Charities Act 2011 s.319(5), Sch.6 col.3.

[26] HMCTS, "EX50A" 25 July 2016 at *http://formfinder.hmctsformfinder.justice.gov.uk/ex50a-eng.doc* [Accessed 13 August 2018].

[27] Public Administration Select Committee, "The Role of the Charity Commission and 'Public Benefit': Post-legislative Scrutiny of the Charities Act 2006—Volume I: Report, Together with Formal Minutes, Oral and Written Evidence" (HC 2013–14, 76, incorporating HC 2012–13, 574-i-vi), 33, para.99 citing Q 516 (William Shawcross).

[28] e.g. NCVO, "For the Public Benefit? A Consultation Document on Charity Law Reform" (January 2001) para.4.5.2; HL Deb 28 June 2005, Vol.673 col.214 (Lord Bassam of Brighton).

[29] Lord Hodgson, *Trusted and Independent: Giving Charity Back to Charities—Review of the Charities Act 2006* (The Stationery Office 2012), 80, para.7.14.

[30] Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976) rl.11(1).

[31] *Roger Thomas v Charity Commission* CA/2012/0001 19 October 2012 (Ft-T (Charity)).

[32] Lord Hodgson, *Trusted and Independent: Giving Charity Back to Charities—Review of the Charities Act 2006* (The Stationery Office 2012), 82, para.7.20.

[33] Justice Committee, "Courts and Tribunals Fees (Second Report)" (HC 2016–17, 167) 12.

First, the right of appeal is intended to encourage litigation and prevent legal ossification.[34] Secondly, like any other tribunal, it is intended to provide redress. It "puts right" bad decision-making.[35] 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.

The first goal: developing the law

Charity law is made up of a large body of cases, many of which are very old. In recent times, the flow of cases into the ordinary court system has dwindled. This has created a situation where charitable organisations, many of which are at the front line of social change, find themselves regulated by an antiquated body of precedent.

Unfortunately, because of the law's great vintage, the textbook understanding of the doctrine often remains rooted in historic case law.[36] The old precedents treat cy-près as a highly restrictive rule prohibiting modification of objects outside of the exceptional circumstance of the complete failure of the trust. This historic approach also places the original intention of an often long-dead donor as the paramount concern in any modification decision, so that it operates as a conservative force, holding back change. So Sir John Romilly in *Philpott v Saint George's Hospital*, graphically stated that:

> "[The testator's] directions are not contrary to the law, this Court is bound to carry that intention into effect … Accordingly, instances of charities of the most useless description have come before the Court, but which it has considered itself bound to carry into effect."[37]

Similarly, in *Re Weir Hospital*, Farwell LJ said:

> "it is contrary to principle that a testator's wishes should be set aside, and his bounty administered not according to his wishes but according to the view of the Commissioners."[38]

These old cases do not reflect the contemporary statutory regime which—as it will later be seen—sets out a flexible and discretionary machinery, enabling the Commission in consultation with trustees to make far-reaching changes to existing charitable trusts. The cases, decided in the High Court, which do interpret the modern statute are few and far between. They also turn on fact-specific points, without a great deal of value in terms of wider principle.[39] Notably, no case clearly states that it is possible to "update" a charity with a constitution containing out-of-date value judgments or attitudes to the class of beneficiaries. This legal

[34] Cabinet Office Strategy Unit, "Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector" (2002) 5; A. McKenna, "Should the Charity Commission be Reformed?" (2011–12) 14 C.L.P.R. 1, 3.

[35] See T. Ison, "Administrative Justice: Is it such a Good Idea?" in M. Harris and M. Partington (eds), *Administrative Justice in the 21st Century* (Oxford: Hart, 1999), 23; H. Genn, "Tribunals and Informal Justice" 56 (1993) M.L.R. 393, 393.

[36] See, e.g. L. Sheridan, *Keeton and Sheridan's The Modern Law of Charities* (Chichester: Barry Rose, 1992), 212–274; H. Picarda, *The Law and Practice Relating to Charities* (London: Butterworths 1977), 219.

[37] *Philpott v St George's Hospital* 54 E.R. 42; (1859) 27 Beav. 107 at 112.

[38] *Re Weir Hospital* [1910] 2 Ch. 124 CA 136 at 138.

[39] See, e.g. *Peggs v Lambe* [1994] Ch. 172; [1994] 2 W.L.R. 1; *Re Lepton's Charity* [1972] 1 Ch. 262 which clarify the application of the statute but do not significantly address the broad social circumstances in which modification is possible.

silence is also potentially problematic where charities wish to undergo a social modernisation.

The extent of the problem should not be overstated. It will be seen that the statute is flexible even if the case-law is not. Trustees may also have access to legal advice, and the Commission's own reports reveal that they have been prepared, over time, to take a flexible approach to modification of objects. Yet a lack of appropriate and up-to-date case law in the area cannot be understood as a positive feature of the contemporary law. Solicitors will still engage with old fashioned case-law in order to interpret the statute. The availability of a new forum in which to bring cases has the potential, over time, to improve the situation simply by generating up-to-date decisions in interpretation of the statute.

The second goal: providing a forum for redress

The second policy justification behind cy-près appeals lies in a right of redress against mistakes in executive administrative decision-making. It can already be seen from the pattern of the decided cases that there are two key grounds upon which an appeal is likely to be brought—an error of the Commission relating to its jurisdiction and an error relating to the Commission's interpretation and application of the law.[40]

Appeals relating to an error of jurisdiction occur where the Commission oversteps the limits of its statutory powers.[41] Notably, the Commission cannot determine title, nor exercise its powers where there is in play an issue of a contentious character or a special question of law or fact.[42] As such complex questions necessarily involve a case-by-case assessment, it is inevitable that jurisdictional questions will often turn on the specific facts of a particular dispute. They are also likely to be of considerable technicality. So for example in *Baddeley v Sparrow*,[43] certain residents of Bath opposed a scheme of the Commission permitting Bath Rugby to use a section of charitable park land for stadium seating. Bath Rugby, a large professional organisation, was already occupying the land subject to a lease. Apparently unbeknown to the trustee council, that lease had been made in breach of trust. In such complex legal circumstances, a key ground for opposing the seating scheme was that it apparently regularised the original breach of trust, so effectively determining the club's title to the land. On the basis that the Commission is jurisdictionally unable to determine title, it was argued in the case—albeit unsuccessfully—that the scheme was unlawful. In such a case, it must be suspected that the "real" motivation for appeal lies outside the technical jurisdiction frame in which the argument is presented, so that in *Baddeley* the residents were presumably motivated by animosity to the existence of a large rugby club near their properties. But such community level animosity is, of course, not itself a basis for appeal.

[40] Jurisdiction: *Baddeley v Sparrow* [2015] UKUT 420 (TCC); *Bartley v Charity Commission* CA/2013/0016 21 July 2014 (Ft-T (Charity)); *Densham v Charity Commission* CA/2017/0002 6 December 2011 (Ft-T (Charity)). Application: *Aliss & Hesketh v Charity Commission* CA/2011/0007 31 August 2012 (Ft-T (Charity)); *Ground v Charity Commission & The Guildford Diocesan Board of Finance* CA/2011/0004 6 December 2011 (Ft-T (Charity)); *Maidment & Ryan v Charity Commission* [2009] UKFTT 377 (GRC).

[41] The Charity Commission has a concurrent jurisdiction with the High Court: Charities Act 2011 s.70.

[42] Charities Act 2011 s.70(8)(a).

[43] *Baddeley v Sparrow* [2015] UKUT 420 (TCC).

The second ground of appeal that can be discerned from the existing decisions rests straightforwardly on mistakes of law. The appeal will call into question the Commission's application of the statute and precedents. So for example in *Aliss v Charity Commission*,[44] parents opposed a school merger. Inter alia they called into question the Commission's interpretation of the statute, which directs the Commission to have regard to the spirit in which the gift was made. One of their key arguments was that a school had a special independent "ethos" which would be damaged by a merger. The parents were unsuccessful in their interpretation of the spirit of the gift, but it can be seen from the nature of the argument in *Aliss* that any claim that the Commission has got the law "wrong" is unlikely to be a clear cut issue. Instead, the true core of the argument is that the Commission has misdirected its discretion, so calling on the First-tier Tribunal (Charity) to provide oversight. In common with appeals against errors of jurisdiction, it must also be suspected that the "real" motivation for the case does not always lie within the legal frame permitted by statute, so in *Aliss* the parents were likely motivated by a community-level desire to prevent or protest alteration to their children's school.

The "real" community motivations behind these cases are relevant in policy terms. They imply that in the cy-près context, the decision of the First-tier Tribunal (Charity) will often have a wide community impact, affecting a broad class of service-users. This will not always be the case: some appeals will be brought by individual service-users trying to maintain a charitable benefit which they enjoy alone. So in *Densham v Charity Commission*,[45] an allotment holder sought inter alia to oppose a decision to provide a power of sale to trustees. This type of appeal is of a familiar character, common in other areas of law, motivated largely by the self-interest of the litigant. Although the report is not detailed on the point, it can only be assumed that the true motivation of the litigant was precisely to secure access to her allotment.

Many cy-près appeals have a far less individualistic flavour. On more than one occasion,[46] cases have been drawn from a groundswell of local community opinion. So in *Maidment v Charity Commission*,[47] local residents in Dartford had opposed the sale of charitable park land. The land was sold so as to construct a town centre Tesco and some housing. A case was brought to oppose a scheme regularising the sale, and feelings clearly ran high. Witness evidence reported in the case shows that when the charitable status of the land was revealed to a local meeting, the group broke out in applause—an indication of the collective mood behind the litigation.

There are strong policy grounds behind the right of appeal to the First-tier Tribunal (Charity) in cy-près cases. It is an area of law in need of continuing development and interpretation. It is also an area of law where redress might be of a special community value. These policy reasons weigh directly on the nature of the test for third party standing: the question of who is a person affected by the decision. As both rely upon a healthy flow of cases into the First-tier Tribunal

[44] *Aliss & Hesketh v Charity Commission* CA/2011/0007 31 August 2012 (Ft-T (Charity)).
[45] *Densham v Charity Commission* CA/2017/0002 6 December 2011 (Ft-T (Charity)).
[46] *Densham v Charity Commission* CA/2017/0002 6 December 2011 (Ft-T (Charity)); *Maidment & Ryan v Charity Commission* [2009] UKFTT 377 (GRC); *Ground v Charity Commission & The Guildford Diocesan Board of Finance* CA/2011/0004 6 December 2011 (Ft-T (Charity)).
[47] *Maidment & Ryan v Charity Commission* [2009] UKFTT 377 (GRC).

(Charity), they are best met by a broad and inclusive prima facie rule that service-users can bring cases.

The "affected legal rights" test

Both policy goals behind cy-près appeals—encouraging litigation and providing a forum for redress—weigh towards a broad right of standing including service-users. It is intuitive that the more cases which are permitted to filter through the system, the better the goals will be met. In a recent decision, *Nicholson v Charity Commission*,[48] the Upper Tribunal developed a restrictive test for third party standing—the "affected legal rights" test. This section explains the decision, as well as the policy behind it. Later it is argued that *Nicholson* should not be applied in the context of cy-près.

Writing in the *Charity Law and Practice Review*,[49] Alison McKenna who is currently Principal Judge of the First-tier Tribunal (Charity) noted that the natural language of the statute, "any other person who is or may be affected by the decision",[50] is of a very broad ambit and suggested that this might be an, "unintended consequence",[51] of wide parliamentary drafting. She also suggested that the policy rationale and its practical limitations might be considered by Parliament for clarification. In fact, a partial clarification has come from the Upper Tribunal without the attention of Parliament. That clarification, contained in *Nicholson*, marks a narrowing of the test, giving a very limited reading to the broad definition of third party standing of a person affected by the decision in the statute.

The restrictive interpretation, which on its face excludes service-users, should be understood in its own unique policy context. The case concerned a decision not to remove a charity from the register (a "non-deregistration decision")[52]; a type of appeal which has the potential to be extremely disruptive for the organisation at the centre of the case, particularly in circumstances where a charity has for a long time been validly registered and is financially dependent on the security of its status.[53] This is a very different context from cy-près appeals, which although they are likely to be troublesome for trustees, will not normally be seriously disruptive. The onus of change is different in the two types of case. In an appeal against a non-deregistration decision, a charity is threatened with a destabilising change to its status which might very well prevent it from continuing as a functioning organisation. By contrast, in a cy-près case, a functional organisation stands at the door of change. In an appeal against a non-deregistration decision, the case might cause disruption. In an appeal against a cy-près decision, the action is essentially conservative. Any attempt to prevent cy-près modification is an effort to keep things as they were.

Despite being decided in the special context of appeals against non-deregistration decisions, *Nicholson* is of considerable importance to the developing jurisprudence

[48] *Nicholson v Charity Commission for England and Wales* [2016] UKUT 198 (TCC).

[49] A. McKenna, "Applications to the First-tier Tribunal (Charity) by 'Persons Affected' by the Charity Commission's Decision" (2013–14) 16 C.L.P.R. 147.

[50] Charities Act 2011 Sch.6 col.2(c).

[51] A. McKenna, "Applications to the First-tier Tribunal (Charity) by 'Persons Affected' by the Charity Commission's Decision" (2013–14) 16 C.L.P.R. 147.

[52] Taken subject to the various provisions in Charities Act 2011 s.36.

[53] The charity is treated as suspended until the Commission is satisfied that it is validly charitable subject to Charities Act 2011 s.36(4)(b).

of the tribunal system as a whole. It is the first time that the issue of standing has reached the Upper Tribunal and so it is also the first time that a decision on the point has had the weight of precedential force.[54] In the case, a Mr Nicholson, a barrister and politically motivated campaigner who had been in consultation with the Commission, attempted to appeal a positive decision of that body to maintain the Jewish National Fund and two associated charities on the register of charities. The Upper Tribunal found that Mr Nicholson did not have standing to bring the appeal. Mr Nicholson's connection with the charity was remote, and crucially, he did not have any legal right in play. That is, he had no legal connection with the charity. Defining the statutory language in a very limited way and so rejecting Mr Nicholson's standing, the judge held:

> "[T]he 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 …"[55]

This—the affected legal rights test—is a narrow interpretation of the statute. Only very few individuals motivated to appeal a registration decision will have a legal right in play that has been impinged or affected by the decision of the Commission. It will be a rare circumstance. The judge did not specify the types of affected legal right which might permit standing, but counsel for the Commission made illustrative suggestions in argument. So for example, apparently drawing from the context of testamentary gifts, it was suggested inter alia that an individual who might benefit from a resulting trust upon removal from the register might be able to bring a case. Counsel also put forward the view that HMRC, which might have a direct interest in the tax status of an organisation, would have a legal right in play.[56] These examples illustrate the potentially very narrow ambit of the test. Their main practical impact is to prevent ordinary members of the public from bringing appeals.

In coming to her decision in *Nicholson*, Asplin J relied on concerns directly relevant to the context of non-deregistration decisions. The judge took into account the fact that these appeals, which are aimed at removing the charitable status of an organisation, might cause serious financial damage to the charity under question, impinging upon, "private and financial interests".[57] She also acknowledged that a charity subject to an appeal against a non-deregistration decision is treated as being off the register for the duration of appeal—a legal outcome which might be extraordinarily disruptive for the organisation involved.[58]

If applied as a uniform test for standing in all cases, the decision in *Nicholson* would undoubtedly limit the number of charity appeals which are brought before the Tribunal. The test would exclude a great many potential third party appellants, including service-users in cy-près cases, from the system. But while this is possible, it is unlikely. The restrictive approach in *Nicholson* should be understood as located in the context appeals against decisions not to deregister. Such appeals, particularly

[54] Previous cases did consider standing in detail, but do not have precedential force: *Lasper v Charity Commission* CA/2010/0006 20 November 2010 (Ft-T (Charity)); *Colman v Charity Commission* CA/2014/0001 & 0002 17 April 2014 (Ft-T (Charity)); *Nicholson v Charity Commission for England and Wales* [2016] UKUT 198 (TCC).

[55] *Nicholson v Charity Commission for England and Wales* [2016] UKUT 198 (TCC) at [47].

[56] *Nicholson v Charity Commission for England and Wales* [2016] UKUT 198 (TCC) at [37].

[57] *Nicholson v Charity Commission for England and Wales* [2016] UKUT 198 (TCC) at [43].

[58] Charities Act 2011 s.36(4)(b).

where the organisation is well-established, are uniquely disruptive to charities, and so a restrictive rule of standing operates to protect them from uncertainty.

While the affected legal rights test is undoubtedly conceptually broad enough to be applied in other types of cases, including *cy-près* appeals, it should also be noted that Asplin J stated directly in *Nicholson* that: "the category of persons in question in each case is not prone to a definitive definition". She then went on to state of the test, "[i]t is fact sensitive and must be considered in each case in the light of all the relevant circumstances".[59] Such comments unambiguously leave the door wide open for future judges to take alternative approaches both within the non-deregistration context and beyond.

This means that it is unlikely that the affected legal rights test was intended to provide a broad template applicable in other types of appeal, such as appeals against cy-près decisions. It is in essence an attempt to limit disruption to the register, but it is the sole case with precedential force which is directly on point. It is necessary to account for it, if only to set it aside, in the development of an appropriate test for cy-près appeals.

Meeting the policy goals through a flexible service-user based test for standing

The twin policy goals behind cy-près appeals in the First-tier Tribunal (Charity)—encouraging development of the law and providing a forum for redress—are both best satisfied where a steady stream of cases is able to flow into the system. This links with a broad right of standing, permitting an equally broad range of appeals to be brought. The core aim of this section is to develop an appropriate service-user based test for standing in cy-près cases, so recognising the real ground-up demand for appeals of Commission decisions.

It is important to keep in mind that the statutory language for third party standing: "any other person who is or may be affected by the decision",[60] is extremely broad—certainly wide enough to encompass service-users. With that centre of gravity in place, the most important conceptual questions then turn upon the circumstances in which it might be acceptable, in policy terms, to exclude service-users, as well as the circumstances in which a broader test might be necessary. So prior to developing a flexible service-user based test, it is first explained why the affected legal rights test as developed in *Nicholson* would be inappropriate for cy-près cases and then, why the right of appeal cannot be left in the hands of trustees alone.

Why the affected legal rights test is inappropriate to the cy-près context

It has already been seen that the affected legal rights test, as developed in *Nicholson*, was probably not intended to be applied outside the context of appeals against non-deregistration decisions, but as it is the sole case directly on point with precedential force it is of considerable importance for the evolving jurisprudence of the tribunal system. If applied in the cy-près context, it would have an

[59] *Nicholson v Charity Commission for England and Wales* [2016] UKUT 198 (TCC) at [42].
[60] Charities Act 2011 Sch.6 col.2(c).

inappropriate effect. The large majority of cases brought to the First-tier Tribunal (Charity) have been progressed by service-users. If they were filtered on the basis of whether or not they had a legal right affected by the decision of the Commission, this would have an arbitrary effect. It would exclude people from bringing cases who fall within the natural language reading of the statute, while continuing to permit some classes of service-users to bring cases.

In the normal course, service-users will have no legal relationship with the charity subject to the scheme, and in consequence, no legal rights affected by the decision of the Commission. So for example, if a recreation ground lawfully sells its fields and re-establishes itself with different objects in another part of a city, local residents have no legal right to stop the process. Or if one religious organisation lawfully decides to merge with another, members of the congregation have no legal right to keep it independent. The service-users benefit from the charity, and may feel closely associated with it, but they have no direct legal rights in it.

If applied in the cy-près context, the affected legal rights test as developed in *Nicholson* would exclude groups of service-users from bringing appeals. Perhaps the paradigm, and most desirable, instance of service-user standing arises in circumstances where a community pulls together to oppose a modification cy-près.[61] Such service-users will have no formal connection with the charity at all, but it is not right to say that the residents are not persons affected by the decision of the Commission. It is likely be an instance where local feelings run very high and where there is a potentially very important community interest in play.

A similar community dynamic might also emerge in relation to modifications of religious constitutions. *Bartley v Charity Commission* illustrates this, as well as the impact that the affected legal rights test would have on the appeal rights of faith-group members.[62] In the case, the Commission re-organised the trusts of the Westminster Chapel on Buckingham Gate in London so that they were unified under a sole corporate trustee. A Mr Bartley, who was a member of the congregation, objected to the changes and appealed in the First-tier Tribunal (Charity). His dispute should be understood within the context of a wider doctrinal disagreement with the trustees over their objection to the practice of infant baptism. Mr Bartley was not successful, the scheme was found not to touch on doctrinal matters, and the original decision of the Commission was left in place.

While it is not at all clear that Mr Bartley was acting constructively in this particular case, it is easy to see that providing faith group members with a right to appeal decisions of the Commission provides an important safeguard in sensitive religious contexts. Standing was treated as uncontroversial in the case, so the First-tier Tribunal (Charity) did not attempt to filter out his appeal. By contrast, under the affected legal rights test the case could not have been brought. Although Mr Bartley probably would not have termed himself so,[63] he was in essence a charitable service-user connected to the Westminster Chapel only through his religious affiliation. Regardless of how closely he might have felt himself associated with the charity, he had no legal rights in play.

[61] *Maidment & Ryan v Charity Commission* [2009] UKFTT 377 (GRC); D. Morris, "The First-tier Tribunal (Charity): Enhanced Access to Justice for Charities or a case of David versus Goliath?" 29(4) C.J.Q. 491, 510.

[62] *Bartley v Charity Commission* CA/2013/0016 21 July 2014 (Ft-T (Charity)).

[63] Mr Bartley apparently self-described as a trustee.

The affected legal rights test would exclude community and faith based service-users from bringing cy-près appeal cases. Such an approach would be wrong. Both are examples of circumstances where service-users might, as a matter of fact be very deeply impacted by the decision of the Commission. They also represent the types of case where there is real demand to use the First-tier Tribunal (Charity), being driven by a newly entitled class of individuals which in previous decades did not have an easily accessible forum in which to appeal.

The affected legal rights test also has another problem making it inappropriate to the cy-près context. It would select arbitrarily between types of service-users. The focus upon affected legal rights, if taken to its logical end, would favour one group of service-users above the others without any clear policy reason for the selection. The favoured group would be those who pay for charitable services and so find themselves in a contractual relationship with fee-charging charities, such as a charitable hospitals and charitable schools.[64] In such a case, a scheme, insofar as it impacts upon the nature of the service delivered, would likely also impact upon contractual rights. Following the reasoning of the affected legal rights test, they would enjoy standing as a uniquely privileged class of service-user.

Aliss v Charity Commission—where, as already shown, the Commission had decided to approve the merger of two fee-charging schools—is indicative of the problem.[65] Applying the logic of Nicholson, as fee-paying service-users, the parents would have stood in a contractual relationship with the merging school. In accordance with the affected legal rights test, they would enjoy standing if the contract were affected or impinged. Regardless of the merits or demerits of their cases, permitting standing for contract-holders but not permitting it for other types of service-users is arbitrary in effect. It is not necessarily the case that fee-paying service-users will be more deeply affected, in the ordinary sense of the word, than other classes of potential appellants.

The affected legal rights test was not developed with cy-près appeals in mind. Nor is it appropriate to them. If it were to be applied in the context, it would prevent service-users who wish to use the First-tier Tribunal (Charity) from doing so. It would also operate in an arbitrary manner. The test would prevent certain classes of service-user from reaching the First-tier Tribunal (Charity) but allow others to proceed.

Cy-près appeals should not be left to trustees alone

Trustees have an unambiguous right of standing to appeal cy-près decisions in the First-tier Tribunal (Charity), but the task cannot be left in their hands alone. They will normally work consensually with the Commission in order to vary the objects of their charity cy-près. In line with their legal duty to spend funds effectively,[66] they will approach the Commission and consult upon a change of purpose. This means that they have little incentive to appeal. In consequence, if trustees were

[64] See generally S. Moody, "Policing the Voluntary Sector: Legal Issues and Volunteer Vetting" in A. Dunn (ed), *The Voluntary Sector, the State and the Law* (Oxford: Hart, 2000), 49–51. Independent Schools will normally provide a contract between the school and parents. See Veale Wasbrough Lawyers, "Independent Schools and Special Educational Needs" in Gabbitas (ed), *Schools for Special Needs: The Complete Guide to Special Needs Education in the United Kingdom* (London: Kogan Page, 2011), 91.

[65] *Aliss & Hesketh v Charity Commission* CA/2011/0007 31 August 2012 (Ft-T (Charity)).

[66] Charities Act 2011 s.61.

the sole—or even the main—source of cy-près appeals, then the policy goals of developing the law and encouraging redress would not be met.

It is possible that trustees might object vehemently to a scheme. The Commission does have a statutory power to force a modification upon a charity where it takes the view that the trustees have unreasonably refused or neglected to apply for one,[67] but this power is only exceptionally used. The vast bulk of cy-près schemes occur because the trustees have co-operatively approached the Commission, which will normally take a flexible and generous approach in accommodating them. Outside of the most complex cases, it has become a largely routine and bureaucratic process.[68] This is not widely acknowledged. There is a traditional perspective that the Commission is conservative in its approach to changes of purpose.[69] It is possible that for a period the Commission, perhaps influenced by the pre-statute common law, took a relatively restrictive approach to trustee requests for variation. Notably, in 1961, just a year after the cy-près reform process had been put on a statutory footing, the Commission stated in its annual report, that the law of charity, "[is] concerned to secure that the intentions of the donors at the time of the gift are carried out as nearly as may be in altered conditions".[70] This attitude would have made it difficult for trustees to secure modification. If it had remained the policy position of the Commission, then frustrated trustees might reasonably be expected to bring cases into the First-tier Tribunal (Charity) to appeal limited and conservative schemes.

Yet in contemporary times, a generous attitude to alteration cy-près permitting far-reaching schemes can be evidenced from the online operational guidance used by staff in the decision-making process.[71] In routine cases at least, trustees requesting schemes are unlikely to be dissatisfied with the process. Commission guidance reveals that the decision is a systematised and almost "check-box" procedure. The guidance contains a number of principles, illustrating the Commission's willingness to be flexible and creative in deciding upon the new purposes for a charity. For example, the staff member deciding upon the scheme is directed that no part of a charity's objects are unalterable, and that in some circumstances it might be acceptable to exclude some of the charities existing purposes.[72] The Commission also uses model letters and orders, suggesting that decisions are sometimes off-the-shelf, taken without extensive deliberation and tailoring.

It is apparent from the Commission's own published reports that it takes a relaxed interpretation of the statutory rules governing modification cy-près.[73] Those rules are, despite undeniable complexity, in substance also flexible and permissive. The law directs the Commission, when deciding upon the nature of the alteration, to work through a two-stage deliberative process. While the statutory language is

[67] Charities Act 2011 s.70(5)(b). This applies for charities over 40 years old.

[68] Charity Commission for England and Wales, "OG2 Application of Property Cy-près" (2012).

[69] See, e.g. R. Mulheron, *The Modern Cy-près Doctrine: Applications and Implications* (London: UCL, 2006), 130–132; Law Commission, "Technical issues in Charity Law" Law Com No.375, 2017, [6.32].

[70] *Report of the Charity Commission for England and Wales* (1961) 8. See also: *Report of the Charity Commission for England and Wales* (1984) 12.

[71] Charity Commission for England and Wales, "OG2 Application of Property Cy-près" (2012).

[72] Casework Guidance 3.2.

[73] See, e.g. "St Dunstans", *Report of the Charity Commissioners for England and Wales* (1999–2000) 7; "Royal Holloway and Bedford College", *Report of the Charity Commissioners for England and Wales* (1992) 12; For criticism see L. Sheridan, "Cy-près Application of Three Holloway Pictures" (1993/4) 2 C.L.P.R. 181.

very far from accessible to ordinary trustees, the core concept behind the law is straightforward. The statute requires the decision-maker at the Commission to weigh the broadly conceived wishes of the donor against the need to ensure that trusts do not become outdated or ineffective over time.

In the first stage of the weighing process, the Commission must decide whether or not a modification of the charity's objects is legally permissible at all. The statute contains a list of occasions which "trigger" modification cy-près.[74] In most cases, this is a relatively easy hurdle for trustees to pass.[75] It is true that some triggers will occur only rarely, such as circumstances where a charity has succeeded in its goals and has no continuing reason to exist,[76] or where the class of people that the charity was intended to serve has dwindled away.[77] But there also exists a single broad "catch-all" trigger, permitting modification cy-près if the original purposes have ceased to provide a suitable and effective use of the property.[78] That trigger, the last in the statutory list, is of an extremely wide ambit. It will also be read in context, so that in deciding whether or not the original purposes have ceased to be suitable and effective, the decision-maker will weigh the spirit of the donor's gift and contemporary social and economic circumstances.[79] Unless the gift can be shown to have had a narrow and limited spirit, this process of contextual reading further increases the likelihood that cy-près will be triggered.

In the second stage of the weighing process,[80] the Commission decision-maker will set out the new purposes for the charity. Again, outside of complex cases, the decision-maker is likely to accommodate trustee requests. This stage involves a further balancing exercise, taking into account the spirit of the original donor,[81] the "desirability" of choosing new purposes close to the original,[82] and most crucially, the need for the charity to have new purposes which are suitable and effective in the light of current social and economic circumstances.[83] The Commission's operational guidance for staff is explicit that radical change to the charity is permissible, stating that it is open to finding new ways of delivering charitable benefits. By way of an example, the guidance explains that a charity providing a school building, could instead use resources to provide internet based education—a substantial change of purpose.[84]

In most cases, this process can be characterised as one of flexible co-operation with trustees. Although the Commission might, in a difficult case, refer back to the intention of a donor and place a break on some plans which jar directly with the charity as it was originally founded, the broad discretionary nature of the balancing exercise contained in the statute, combined with the Commission's flexible policy and its bureaucratic approach, will normally leave trustees feeling accommodated. This does not mean that, as the Tribunal jurisprudence develops,

[74] Charities Act 2011 s.62(1).
[75] For a practitioner perspective: T. Anderson, *The Charities Acts Handbook: A Practical Guide* (Bristol: LexisNexis, 2016), 296.
[76] Charities Act 2011 s.62(1)(a)(i).
[77] Charities Act 2011 s.2(1)(d)(ii).
[78] Charities Act 2011 s.62(1)(e)(iii).
[79] Charities Act 2011 s.62(2).
[80] Charities Act 2011 s.67(3).
[81] Charities Act 2011 s.67(3)(a).
[82] Charities Act 2011 s.67(3)(b).
[83] Charities Act 2011 s.67(3)(c).
[84] Charity Commission for England and Wales, "OG2 Application of Property Cy-près" (2012). Casework Guidance 4.1.

trustees will never appeal decisions, but it does suggest that such cases will be a rare event. In the large majority of cases, it is service-users and not trustees which have sought to use the First-tier Tribunal (Charity). While around 70 disputes with the Commission have been brought into the tribunal system, only a limited number schemes.[85] Although there is a persistent flow, a more generous rule on standing for service-users in cy-près disputes may help to increase the number.

A flexible prima facie test—and its limits

The First-tier Tribunal (Charity) has never explicitly set out the test for standing in cy-près cases. The sole decision with precedential force is *Nicholson*, which would be inappropriate. It is suggested that the cases themselves contain their own guide. Most appeal decisions have so far involved service-users seeking an appeal, and so the First-tier Tribunal (Charity) should take a ground-up approach and directly acknowledge the importance of service-user status. Here, a flexible test based upon service-user standing is developed, as well as exploring its limits. This test would match the policy goals behind the establishment of the First-tier Tribunal (Charity): encouraging the development of the law through a wide test, while also encouraging redress.

A test focused upon whether or not a potential appellant is a service-user carries with it the advantage of meeting a plain reading of the statutory language: "any other person who is or may be affected by the decision".[86] It also has the air of common sense. For example, if there has been a groundswell of community based service-users opposing a scheme in a context of town hall meetings, then it is self-evident that the Commission's decision has been of a far-reaching impact.

The true demand for use of the First-tier Tribunal (Charity) in cy-près cases is found in frustrated service-users who are dissatisfied with a modification of the charity. Demand does not lie with trustees, who will likely have been involved in a consensual and negotiated process with the Commission in bringing about the change. This means that cases, brought by service-users, often flow from internal disagreements within charities. On the one side, trustees and the Commission will have negotiated a change of objects. On the other, service-users will attempt to resist the change through an appeal.

The First-tier Tribunal (Charity) should accept this source of demand and explicitly recognise that that service-users have a prima facie right of standing as affected persons. The approach would be in alignment with the policy goals underpinning the right of appeal in the first place. By encouraging the flow of cases through a wide right of standing, the law of cy-près is more likely to develop and keep up-to-date with changing social circumstances. It has already been seen that, despite a flexible statutory regime, the case law in this area is of considerable vintage and in need of updating. In the context of internal disputes within charities, allowing service-users to bring cases also provides a valuable forum for redress. It has the potential to smooth out grievances and correct mistakes in circumstances where there is a clear demand for that legal function.

[85] HMCTS, Database of First-tier Tribunal (Charity) Decisions at *http://charity.decisions.tribunals.gov.uk* [Accessed 13 August 2018].
[86] Charities Act 2011 Sch.6 col.2(c).

Status as a service-user could not be a sufficient and complete test for third party standing by itself. It is an important starting point, but not an end point. In some circumstances it would be too narrow, and in others too wide. It would be too narrow where there are people who have been very closely impacted by a decision, but do not—as a matter of fact—use the services of a particular charity. So in *Ground v Charity Commission*,[87] trustees had operated a non fee-charging Church of England infants' school in the village of Dunsfold. The school, which had originally been established by way of a charitable gift, closed in 2004 in the face of local opposition. The trustees sought inter alia to sell the property and spend the funds outside of Dunsfold. The Commission had agreed to this scheme, but in an apparent attempt to keep the school site operational, local residents appealed that decision. The appellants had a mix of personal connections with the charity, a certain number of them were linked with the parish council, one appellant had school-age children in the village, but it appears from the report that none could call themselves a service-user.[88]

A test for standing which only permitted service-users to appeal would exclude potential appellants, like those in *Ground*, who are persons affected in the ordinary language meaning of the phrase, but do not use the services of the charity as a matter of fact. A charity, particularly if it has a local character, might benefit a wide community simply by the fact of its presence in an area. A prima facie rule in favour of service-user standing would mark a useful acknowledgement of the real-world demand for the Tribunal, reflecting that it is service-users who are likely to be motivated to use it. But it cannot be the final word on the question. It is inevitable that the test should remain discretionary: the First-tier Tribunal (Charity) should stay open to hearing cases, like in *Ground*, where people who are affected by a decision are not service-users themselves.

There are also circumstances where a test focussing exclusively on service-users might be too wide. The appeals which have so far come before the First-tier Tribunal (Charity) have all involved small and local organisations. In that context, the concept of service-user standing is a coherent and workable one. It represents an intuitively recognisable class of people in an obvious relationship with the charity. By contrast, where there is a very large class of people who use the services of the charity, the concept might be much less meaningful. A national museum, for example, may serve an extensive urban area and so benefit a very wide public who in some sense might be called "service users".[89] The same might be true for an organisation, such as a charitable fundraising platform, which is not only large in size, but might also interact with its users in only a transactional or superficial manner.[90] Again, with reference to the ordinary language meaning of the statute: it is no longer so obvious in every case that this type of service-user will be in truth a person affected by the decision of the Commission.[91]

There are some practical pre-conditions before a broad rule for charitable service-users to challenge cy-près decisions can be established. The Commission

[87] *Ground v Charity Commission & The Guildford Diocesan Board of Finance* CA/2011/0004 6 December 2011 (Ft-T (Charity)).
[88] *Ground v Charity Commission & The Guildford Diocesan Board of Finance* CA/2011/0004 6 December 2011 (Ft-T (Charity)) at [1.2].
[89] See generally J. Courtney, *The Legal Guide for Museum Professionals* (London: Rowman & Littlefield, 2015).
[90] See, e.g. *Charity Commission for England and Wales v Framjee* [2014] EWHC 2507 (Ch); [2015] 1 W.L.R. 16.
[91] Charities Act 2011 Sch.6 col.2(c).

must make a cy-près scheme and a service-user—whose legal rights are not clearly affected by the decision—must challenge it. The First-tier Tribunal (Charity) would have to decide (if it did not transfer the question directly to the Upper Tribunal[92]) whether *Nicholson* applies in cy-près cases. Unless the case was transferred, one of the parties would have to appeal to the Upper Tribunal,[93] whose decision would set binding precedent.[94] Without legislative intervention, a prima facie standing rule rests on a litigant's willingness to challenge the Commission and to see the case through to the Upper Tribunal.

Even if such a rule were to be established, ultimately the First-tier Tribunal (Charity) will have to maintain a discretion. Status as a service-user, while an important starting point and the sound basis of a prima facie rule, cannot provide an unquestioned and automatic entrance to the Tribunal. It is too narrow in some circumstances, but too wide in others. But that is not to say that the service-user status should not be taken seriously in every case. A service-user based test for standing would mesh with the policy goals behind establishing the First-tier Tribunal (Charity) in the first place. It would be a broad and open test, maintaining the flow of cases into the legal system.

An extra discretionary factor—engagement with the Commission

A prima facie rule in favour of service-user standing has the potential to encourage litigation and so help satisfy the policy goals behind the existence of the First-tier Tribunal (Charity). The focus on service-users is a useful, but not a complete, test for standing. At its edges, the First-tier Tribunal (Charity) will inevitably maintain a case-by-case discretion. So there is space for another discretionary factor to be considered: whether or not a potential appellant has made representations to the Commission. The body will sometimes consult with members of the public prior to making a decision.[95] Where this has occurred in cy-près cases, it is reasonable to treat representors—interested members of the public—as "persons affected" for the purposes of standing. They will have been actively solicited and so become stakeholders.

The link between representations and standing has a chequered past in the First-tier Tribunal (Charity). While First-tier decisions, without precedential force, initially treated engagement with the Commission as opening the door to standing,[96] those decisions were directly set aside in *Nicholson*. In that case, the Upper Tribunal found that Mr Nicholson should be excluded despite his correspondence on the subject of deregistration with the Commission.

Asplin J severed the link between representations to the Commission and standing on a practical basis that inter alia: "if engagement were a relevant factor, it might dissuade the Commission from accepting from members of the public information useful in its deliberations".[97] And so in the judge's view, an automatic right of standing for representors would carry with it a risk defensive case-handling

[92] Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976) rl.5(3)(k)(ii).
[93] Tribunals, Courts and Enforcement Act 2007 s.11(1).
[94] Tribunals, Courts and Enforcement Act 2007 s.3(5).
[95] See, e.g. *Lasper v Charity Commission* CA/2010/0006 20 November 2010 (Ft-T (Charity)); Charities Act 2011 s.88(2)(a).
[96] *Lasper v Charity Commission* CA/2010/0006 20 November 2010 (Ft-T (Charity)).
[97] *Nicholson v Charity Commission for England and Wales* [2016] UKUT 198 (TCC) at [54].

within the executive body. Alongside this concern, there is also a further issue in play. Although the Upper Tribunal did not expressly state the point, it is likely that the restriction on representor standing connects to the general policy approach running through *Nicholson*, which guards against and limits highly disruptive appeals against non-deregistration decisions brought about by members of the public.

The issue of representor standing marks another circumstance where the logic of *Nicholson* should not be transferred across to the cy-près context. The key distinction between the two legal circumstances is that, in appeals against non-deregistration decisions, the Commission might receive petitions from self-motivated individuals. By contrast, in cy-près cases, the Commission might proactively engage the general public. This process of a solicitation is built into the statute, so that the Commission is under a discretionary obligation to publish proposed schemes and invite public representations,[98] although it does not have to do so where public engagement is thought unnecessary.[99] There is no clear statutory guidance on the point, but it is very likely that where it does not give notice, and in turn does not receive representations in relation to a proposed scheme, it is because the decision-maker at the Commission perceives the scheme to be uncontroversial.

In contrast to appeals against non-deregistration decisions, cy-près cases involve an explicit statutory opportunity for public engagement. That is a key distinction. Where a member of the public has been proactively brought into a cy-près consultation, it is reasonable to treat them as an affected person. They have become, through solicitation, involved in the process. There is another key reason for providing cy-près representors with standing: it strengthens their voice at the statutory consultation stage. The possibility that solicited members of the public might appeal a decision that they do not agree with, makes it more likely that their views will be given a more serious weight in the decision-making process itself. Permitting representors, whether they are service-users or not, to have a voice backed by the possibility of an appeal in the Tribunal is likely to improve the consensual quality of the eventual scheme.

This extra element—whether or not a potential appellant has engaged with the Commission—is a helpful extra factor in the discretionary mix. It brings the test to a fresh focus, beyond the question of whether a potential appellant is a service-user. By strengthening representor voices, it also has the potential to improve the quality of decisions made. For this reason, the approach in *Nicholson* should once more be set aside as inappropriate for the context of cy-près appeals.

Conclusion

The sole decision with precedential force in relation to standing is *Nicholson*, containing the affected legal rights test. Applied to the cy-près context, the approach would operate arbitrarily, preventing many community and faith-based service-users from bringing appeals, while leaving the door open for those service-users in a contractual relationship with the charity. This is unlikely to be the direction in

[98] Charities Act 2011 s.88(2)(a).
[99] Charities Act 2011 s.88(4).

which the cy-près law develops. Even within *Nicholson*, Asplin J was clear that the affected legal rights test should not be applied automatically and without a sensitive and discretionary overview of all the facts of the case. It also self-evident that *Nicholson* was not decided with cy-près in mind. The restrictive approach of the Upper Tribunal in the decision is best understood as flowing from the specific policy circumstances surrounding appeals against non-deregistration decisions, where the potential instability for charities at risk of losing their status is very great. There is far less risk of disruption in a cy-près case. The onus of change is different. In an appeal against a non-deregistration decision, the purpose of the appeal will very likely be a disruption of the charity's operations. By contrast in a cy-près appeal, the point of litigation is conservative. It will most likely be directed towards preventing a change from happening.

The policy justification for cy-près appeals in the First-tier Tribunal (Charity) is twofold: to develop the law and to provide a forum for redress. This is best achieved where a steady flow of cases find their way into the Tribunal. In a case-based system, the law cannot expand without a sufficient number of litigants bringing cases. At the same time, if the tribunal system is underused, then it is a matter of logic that it is not providing an optimal forum for redress. As a practical matter, limitations on standing are in tension with the policy goals behind the establishment of the tribunal system and so they should only be accepted in circumstances where they can be clearly and readily justified. It has also been seen that cy-près appeals might be of special community-orientated value. They might represent a groundswell of local feeling against a decision of the Commission. This is a unique and important type of redress.

In the cy-près context, as a matter of empirical fact, it is service-users that wish to use the forum. Embracing this source of demand, it has been argued that the tribunal system should directly recognise the ground-up reality and so develop a test for standing which includes a flexible prima facie right of standing for service-users. It has been seen that this cannot be an automatic and absolute right in every case, but it is certainly an important starting point. There are other factors to consider. So it might be the case that community-level individuals are greatly affected by a decision, but are not in fact service-users. Or it might be that certain individuals are service-users in some distant and technical sense but have no real relationship with charity. The question of whether or not an individual has made representations to the Commission is also relevant to the question of standing but does not key in directly with whether or not they are a service-user.

Despite these inevitable refinements and limitations, this is a circumstance where wide principle is of more value than detail. The tribunal system is best served by a broad and accepting rule, applied in each case on a discretionary and flexible basis. As a prima facie position, acknowledgement that service-users have a right of standing has much to recommend it. The law would be clarified after the development of the affected legal rights test in *Nicholson*, and at the same time, the actual practice of the Commission in permitting a wide range of cy-près appeals would be explained. Crucially, a broad and generous approach to standing would ensure that appeal cases continue to come before the First-tier Tribunal (Charity), providing a mechanism for the development of the law alongside a forum for redress.