



BRIEFING PAPER

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Charitable status and independent schools

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Summary

This note deals with the law in England and Wales except where specifically stated.

Definition of charity

The *Charities Act 2011* (a consolidation act) defines a charity as an institution which is established for a charitable purpose and provides benefit to the public. The advancement of education is a charitable purpose and so independent schools are capable of being charities. There is no longer a presumption that any type of charity is for the public benefit. Educational charities, like all other charities, must demonstrate that they are for the public benefit. There is no statutory definition of what this means.

Tax concessions

Charities are able to take advantage of various tax concessions. The Government has stated that no estimate has been made of the savings which might accrue from changing the tax status of charitable independent schools

Public benefit guidance

The Charity Commission is required by statute to issue guidance to promote awareness and understanding of the operation of the public benefit requirement. In 2008, it published guidance, including guidance on public benefit and fee charging, in which the Commission set out issues to be considered by charities charging high fees that many people could not afford. The guidance stated that offering free or subsidised access was an obvious and, in many cases, the simplest way in which charities could provide opportunities to benefit for people who could not afford the fees; it also stated that this was not a requirement.

Legal challenges to public benefit guidance

The Independent Schools Council was granted permission by the High Court to bring a judicial review of the Charity Commission's public benefit guidance. This was heard by the Upper Tribunal at the same time as a reference by the Attorney General asking the Tribunal to consider how the public benefit requirement should operate in relation to fee-charging charitable schools. The Upper Tribunal's decision, published in October 2011, concluded that, in all cases, there must be more than minimal or token benefit for the poor, but that trustees of a charitable independent school should decide what was appropriate in their particular circumstances. Benefits could be provided in a variety of ways.

Revised guidance

The Charity Commission published revised public benefit guidance in September 2013. The Charity Commission has also provided some specific examples of ways in which charitable educational establishments, such as charitable independent schools, might make provision for the poor to benefit.

Some other Charity Commission publications have been revised to take into account concerns raised in debate in both Houses of Parliament on the Bill which is now the *Charities (Protection and Social Investment) Act 2016*.

Government consultation

In September 2016, the Government launched a consultation paper, *Schools that work for everyone*. Among other things, this included proposals relating to independent schools.

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The Government considered that independent schools could do more to benefit children from a wider variety of backgrounds as a condition of enjoying the benefits of charitable status. It proposed that independent schools with capacity and capability would be expected to sponsor academies, set up a new free school, or offer more fully funded bursaries. There would be different expectations for smaller independent schools which lacked the capacity and capability to take on full sponsorship.

The consultation paper stated that the Government would consider legislation to remove the benefits of charitable status from schools which did not meet new benchmarks.

The consultation closed in December 2016. The Government has not yet published its response. However, in June 2017, Justine Greening, Secretary of State for Education, indicated that the Government intends to continue to work with the ISC to agree how to take forward the proposals for more independent schools to support state schools.

New System Partnership Unit

In September 2017, Sir David Carter, National Schools Commissioner, spoke about the Department for Education's newly formed System Partnership Unit that is working to support the independent schools sector to broker partnerships and relationships with the state sector.

Angela Rayner, Labour's Education spokesperson, and Layla Moran for the Liberal Democrats, were reported to have criticised the seemingly voluntary basis of the new arrangements.

The position in Scotland

Charity law and regulation is devolved. An Office of the Scottish Charity Regulator (OSCR) briefing paper expresses the view that fundamental differences between the law in England and Wales, and that in Scotland, mean that the main principles underlying the Upper Tribunal decision have little application in Scotland.

In December 2014, OSCR published a report on its review of the charitable status of 52 fee-charging schools following a two-year assessment of individual schools.

In October 2014, a petition called on the Scottish Parliament to urge the Scottish Government to remove charitable status, and thus taxpayer support, from private, fee-paying schools. The petition was closed in September 2015. This was on the basis that that the Committee had taken the petition as far as it could, and that the Scottish Government had made it clear that it had no plans substantially to review the 2005 Act.

Following a review of the non-domestic rates system, the Scottish Government stated that it would give further consideration to the recommendation that fee-paying schools should lose their entitlement to a rates reduction, before deciding how to proceed.

1. Charitable status

1.1 Charitable status before the enactment of the *Charities Act 2006*

Before the enactment of the *Charities Act 2006* there was no general statutory definition of charity and the legal concept was developed by the courts over several centuries. The law at that time was based on the preamble to the *Charitable Uses Act 1601*. This Act did not contain a definition of charity but instead a list of the purposes considered charitable at that time.

No statutory definition of charity before the Charities Act 2006

In 1891, Lord McNaghten grouped charitable purposes into four divisions: the relief of poverty; the advancement of religion; the advancement of education; and other purposes beneficial to the public.¹

To be charitable, an organisation had to have exclusively charitable purposes and be established for public benefit. The public benefit requirement involved two elements: the purpose had to be beneficial and not detrimental to the public, and the size of the group intended to benefit had to be sufficient.

Charities for the advancement of education, in common with charities for the relief of poverty and for the advancement of religion, were generally presumed to be beneficial to the public, and did not have to demonstrate this unless some positive reason for doubt was presented.² Purposes within the fourth head (other purposes beneficial to the public) had to be proved to be beneficial.

Independent schools were capable of being charities (although not all of them were set up in this way) and it was generally presumed that, as charities for the advancement of education, they were for the public benefit.³

1.2 *Charities Act 2011*: charitable status

The [Charities Act 2011](#) (the 2011 Act) is a consolidation act which came into effect on 14 March 2012. It has replaced much (but not all) of the earlier charities legislation, including much of the *Charities Act 2006*.

¹ *Income Tax Special Purpose Commissioners v Pemsel* [1891] AC 531

² Joint Committee on the Draft Charities Bill, [The Draft Charities Bill](#), 30 September 2004, HL 167, HC 660, 2003-04, paragraph 63

³ In 2011, the Upper Tribunal decided that, on the issue of whether those able to afford to send their children to charitable independent schools were a sufficient section of the public, "there had never in fact been a presumption in relation to this aspect of public benefit" [Summary of Decision by Upper Tribunal \(Tax and Chancery Chamber\) in \(a\) judicial review proceedings brought by the Independent Schools Council and \(b\) an Attorney General's Reference regarding the public benefit test for charitable independent schools following the Charities Act 2006](#), 14 October 2011, paragraph 21

Definitions

Charity

Section 1 of the *Charities Act 2011* sets out a general statutory definition of a 'charity' as an institution which is established for charitable purposes only and is subject to the jurisdiction of the High Court.

"Charity" is now defined in statute

Charitable purpose

Section 2 sets out a statutory meaning of 'charitable purpose' as a purpose which meets two criteria: it falls within any of the descriptions of purposes listed in section 3, and is for the public benefit. The advancement of education is one of the listed descriptions.

Public benefit

The term 'public benefit' does not have a statutory definition and continues to be interpreted in accordance with existing common law (case law). The two key principles of public benefit continue to be that there must be an identifiable benefit or benefits, and benefit must be to the public, or a section of the public.

No statutory definition of "public benefit"

No presumption of public benefit

There is now no presumption that any type of charity is for the public benefit.⁴ Educational charities, like all other charities, must demonstrate that they are for the public benefit.

Requirement for the Charity Commission to publish guidance

Section 17 of the 2011 Act requires the Charity Commission, following consultation, to issue guidance to promote awareness and understanding of the operation of the public benefit requirement.

The Tribunal

The 2006 Act created a new Charity Tribunal.⁵ In 2009, the Charity Tribunal was transferred to the First-tier Tribunal (Charity) following reform of the Tribunal system. Provisions relating to the Tribunal are now contained in [Part 17 of the 2011 Act](#). The Tribunal is defined to mean:

- the Upper Tribunal in any case where it is determined by or under Tribunal Procedure Rules that the Upper Tribunal is to hear the appeal, application or reference, or
- the First-tier Tribunal, in any other case.

The Tribunal has jurisdiction to:

- hear appeals against certain decisions of the Charity Commission;
- hear applications for review of certain decisions of the Charity Commission;

⁴ [Charities Act 2011 section 4\(2\)](#)

⁵ Section 8

- consider references from the Attorney General or the Charity Commission on points of law.

1.3 Number of independent schools with charitable status

The Government has stated that there are about 1,300 independent schools which are registered as charities and that there is a great variation in size of school across the sector:

6. There are approximately 2,300 independent schools in England, ranging in size from the very small (single digit numbers of pupils) to the very large (nearly 4,000 pupils). Many of them are very small: almost 50% are smaller than 150 pupils, with a median size of 154. The fees range from £20k per year in a prestigious day school (and approaching double that in a boarding school) to far smaller amounts in small religious schools.⁶ Similarly, quality varies from world-leading education to some small, poorly-resourced schools which may have difficulty meeting the Independent Schools Standards.

7. About half of the schools in the sector (c.1,300) are registered as charities.⁷

The 2017 Annual School Census by the Independent Schools Council found that 77% of their member schools had charitable status: a total of 998 schools.⁸

1.4 Tax concessions

Charities are able to take advantage of various tax concessions. Information about the taxation of charities in the UK and the reliefs claimed by both charities and individuals following a charitable donation is given in HM Revenue & Customs, [UK charity tax relief statistics commentary](#), 2017.

In June 2017, in a written answer, the Government provided some general information about the tax exemptions and reliefs available to schools with charitable status:

Schools with charitable status that apply to HM Revenue and Customs may be eligible for a number of tax exemptions and reliefs. These include the ability to reclaim Gift Aid on any qualifying donations that they receive and exemptions on charitable trading profits, rental income, investment income and business rates, as well as certain reliefs from VAT.⁹

The Government also stated that no estimate had been made of the savings which might accrue from changing the tax status of charitable independent schools:

No estimates of the sum likely to accrue to the public purse from changing the charitable tax status of independent schools have been made. Also, no estimate of ending the charitable status of

⁶ Footnote to text: Source: DfE School Census 2015

⁷ Department for Education, [Schools that work for everyone](#), 12 September 2016, p13

⁸ [ISC Census And Annual Report 2017](#), p29

⁹ [PQ 1921 \[on Private Education\], 6 July 2017](#)

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independent schools have been made. Data held on charitable tax relief costs cannot be broken down into specific sectors.¹⁰

¹⁰ [PQ 1926 \[on Taxation: Private Education\], 6 July 2017](#)

2. Charity Commission current guidance on public benefit

Summary

The Charity Commission's current public benefit guidance was published in September 2013. It replaced earlier guidance, published in 2008, on which there were legal challenges.

Trustees must make provision for the poor that is more than minimal or token, but it is for the charity's trustees to decide how to do this, taking into account all the circumstances of their charity, and they must act reasonably.

The Charity Commission has provided some specific examples of ways in which charitable educational establishments, such as charitable independent schools, might make provision for the poor to benefit.

2.1 Public benefit requirement

To be a charity in England or Wales, an organisation must be set up with purposes which are exclusively charitable and for the public benefit.¹¹

2.2 Charity Commission duty to issue guidance

One of the Charity Commission's statutory objectives is "to promote awareness and understanding of the operation of the public benefit requirement".¹² In pursuance of this objective, the Commission has a specific statutory duty to issue guidance, following such consultation as it considers appropriate. The Commission also has power to revise its guidance.¹³

2.3 Charity trustees' duty to have regard to guidance

Trustees of a charity must have regard to the Charity Commission's guidance when exercising any powers or duties to which the guidance is relevant.¹⁴

2.4 Purpose of guidance

The Charity Commission has stated that the guidance "is not the law on public benefit" but that it is "high level general guidance that reflects the law on public benefit". The Charity Commission adds that: "It is written for charity trustees to explain what the law says on public benefit and how the commission interprets and applies that law".¹⁵

¹¹ [Charities Act 2011 Part 1](#)

¹² [Charities Act 2011 section 14](#)

¹³ [Charities Act 2011 section 17](#)

¹⁴ [Charities Act 2011 section 17\(5\)](#)

¹⁵ Gov.UK, Charity Commission, [Public benefit: an overview](#), 16 September 2013

The guidance is not the basis on which the Commission make decisions about public benefit; it makes these decisions on a case by case basis:

The commission does not make decisions based on its high level public benefit guidance because it cannot cover all the complexities of the law relating to public benefit

The commission makes decisions about public benefit in individual cases based on the law as it applies to the facts of the particular case.¹⁶

The Charity Commission has highlighted that trustees are free to exercise their discretion within the legal boundaries:

In relation to carrying out a charity's purposes for the public benefit, the law on public benefit:

- does not specify what decisions on public benefit trustees must make

There are legal boundaries within which trustees must operate but, within those boundaries, trustees are free to exercise their discretion when making decisions

In many situations there is no one 'right' decision to be made; rather that there are a range of decisions that a trustee could properly make in those particular circumstances

Provided that the trustees make a decision within that range, then they will have made a 'right' decision.¹⁷

2.5 Current guidance

The Charity Commission's public benefit guidance was published on 16 September 2013. It replaced earlier guidance, published in 2008, on which there were legal challenges (see section 5 of this note).

The guidance is split into three guides:

[Public Benefit: the public benefit requirement](#)

Part 5, "Benefiting the public or a sufficient section of the public", includes a section about deciding what is a 'sufficient' section of the public. The guidance specifies that this is decided on a case by case basis and that decisions are informed by what the courts have or have not accepted in other cases. The guidance goes on to list a number of ways in which charities must not define their beneficiaries, as these will not benefit a sufficient section of the public. This includes a purpose which excludes the poor from benefiting:

Charity law recognises that 'the poor' is a relative term which depends upon the circumstances. However, 'the poor' does not just mean the very poorest in society and can include people of modest means

[Public Benefit: running a charity](#)

Part 5, "Deciding who benefits", specifies that, when making decisions that affect who can benefit, trustees may choose to focus on certain

¹⁶ *Ibid*

¹⁷ *Ibid*

beneficiaries, provided that (among other things) this does not exclude the poor from benefit.

The guidance also states that charities can charge for the services or facilities they offer but that, where a charity's charges are more than the poor can afford, its trustees must run the charity in a way that does not exclude those who are poor.

[Annex C](#) sets out further information. The level of provision that trustees make for the poor must be more than minimal or token, but it is for the charity's trustees to decide how to do this, taking into account all the circumstances of their charity, and they must act reasonably.

Annex C also includes specific advice for trustees of charitable fee-charging independent schools:

Trustees of charitable fee-charging independent schools may also find it helpful to look at how the Upper Tribunal answered some [hypothetical questions](#) put to them by the Attorney General about making provision for the poor. (These questions and answers are not part of our public benefit guidance) To understand these questions and answers in context, some trustees may wish to view the [full judgment of the Upper Tribunal](#).¹⁸

[Public Benefit: reporting](#)

This guidance provides information about why and how charity trustees must report on how they have carried out their charity's purposes for the public benefit. It includes:

- what to put in the trustees' annual report
- how reporting on public benefit can help your charity's impact
- examples showing how to report on public benefit

All charity trustees must have regard to this guidance.¹⁹

2.6 Other Charity Commission publications

The Charity Commission has also published some associated documents. These are available on the Gov.UK website: [Charitable purposes and public benefit](#). The documents include:

- [Analysis of the law relating to public benefit](#) (September 2013).²⁰

This document does not form part of the Charity Commission's guidance:

This analysis of the law may be of interest to charity trustees who wish to know more about the legal basis of the commission's guidance. However, it does not form part of its set of public benefit guides, and so is not, as such, guidance to which charity trustees must have regard.²¹

¹⁸ The judgment is discussed in section 5.4 of this briefing paper

¹⁹ Gov.UK, Charity Commission, [Public benefit: reporting \(PB3\)](#), Part 5, 16 September 2013

²⁰ New format February 2017

²¹ Gov.UK, Charity Commission, [Public benefit: an overview](#), 16 September 2013

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The Analysis refers to the decision of the Upper Tribunal regarding the duties of the charity trustees of charitable schools which charge fees.²² It includes this commentary on the main points:

The following main points emerge from that decision:

- a. A pupil whose family is able to pay fees is no less a potential beneficiary of such a charity than a pupil with no-one to pay his fees. Both have a need for the education which it is the purpose of the charity to provide.
- b. When deciding whether a charitable fee-charging school is carrying out its purposes for the public benefit, it is legitimate to take into account the extent to which the school needs to charge fees to cover its expenditure. If, as is usual, the school needs an income from fees to be viable, it is legitimate for its admissions to be weighted in favour of potential beneficiaries able to pay fees.
- c. Where the charges made by a charitable fee-charging school are more than the poor can afford, its trustees must provide a benefit for such of the charity's potential beneficiaries as are poor which is more than minimal or tokenistic. Beyond that, the question of what provision to make for such of the potential beneficiaries as are poor is to be decided by the charity trustees in their discretion.
- d. When deciding whether a potential beneficiary is poor, it may be appropriate to look beyond the circumstances of the beneficiary viewed in isolation: the circumstances of his family may prevent him being treated as 'poor'; his eligibility for a grant from another charitable source may not.
- e. In the case of a charity whose charges are more than the poor can afford, there will be potential beneficiaries who are not poor but who cannot afford the full charge. The Tribunal did not prescribe any minimum level of provision for such potential beneficiaries, treating the matter as one to be decided by the trustees in their discretion.
- f. When deciding whether a charitable fee-charging school is carrying out its purposes for the public benefit:
 - the primary focus must be on the direct benefits it provides
 - all the benefits which it provides in furtherance of its charitable purposes can be taken into account
 - benefits which it provides which are unrelated to its charitable purposes cannot be taken into account.
- g. If the school provides luxurious facilities, the onus of demonstrating that it is carrying out its purposes for the public benefit is increased.²³

The Charity Commission has set out the main points to emerge from the decision of the Upper Tribunal regarding the duties of trustees of charitable schools which charge fees

²² [The Independent Schools Council v Charity Commission of England and Wales \[2011\] UKUT 421 \(TCC\)](#)

²³ Footnotes (references to paragraphs in the decision) omitted. Further information about this case is provided in section 5 of this note.

- [*Charging for services: illustrative examples of benefits for the poor*](#) (September 2013). This document was revised in October 2015.²⁴

This provides some specific examples of ways in which charitable educational establishments, such as charitable independent schools, might make provision for the poor to benefit:

In every case it will depend on the actual provision and the circumstances of the particular fee-charging charity whether the provision of benefits to the poor is more than minimal or tokenistic:

- offering bursaries or other types of assisted places
- collaborating with state schools, including working with or sponsoring academies
- having a funding arrangement between an independent school and a separate, and possibly linked, grant-making body
- allowing pupils from local state schools to use its educational facilities (including sports facilities, such as swimming pool, sports hall, astro and playing fields, tennis courts etc or drama, music and arts facilities, such as concert halls)
- allowing pupils from local state schools to attend certain lessons or other educational events at independent schools
- formalising ways of sharing knowledge, skills, expertise and experience with other educational providers, for example, state schools, colleges or academies as a form of non-financial sponsorship
- formally seconding teaching staff to other state schools or colleges, for example in specialist subjects such as individual sciences or modern languages
- working with schools overseas that provide education to children from families that cannot afford to pay for the child's education
- supporting state schools to help them prepare A-level students for entry to universities
- hosting joint schools events with other local state and independent schools, such as sports days, maths, spelling, music, dance and drama competitions or productions
- working together with a state school on a project to improve the quality of teaching and learning for pupils
- collaborating with a state school to share respective skills and experience
- working in partnership with a non fee-charging school overseas to share knowledge, skills and expertise and arrange cultural exchange visits for pupils at both schools
- engaging in sports, drama, music or arts partnership activities with local state schools

Examples of ways charitable independent schools might make provision for the poor to benefit

²⁴ Charity Commission press release, [*Charity Commission updates guidance for fee-charging educational charities*](#), 22 October 2015 [accessed 18 September 2017]. However, the document still carries its original publication date (16 September 2013)

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The document goes on to say that, whilst not mandatory, it is viewed as good practice for schools to provide a comment on, or outline, in their trustee annual report, their individual approaches to public benefit in sports, drama, music and the arts.

- [*Charitable trust \(school\): example trustees' annual report*](#)

This provides an example of how a school might report on its public benefit provision.²⁵

²⁵ Gov.UK, Charity Commission, [*Example trustees' annual reports and accounts for charities*](#), 23 May 2013 [accessed 18 September 2017] The example annual report was revised in October 2015 but the webpage still carries its original publication date

3. Schools Together

Schools Together is supported and maintained by the Independent Schools Council in collaboration with the Department for Education and the Independent/State Schools Partnership.

It has three stated aims:

- to highlight the projects and partnerships which currently exist between independent schools and maintained schools or community groups
- to provide a selection of case studies and best practice guides which add more detail about specific types of existing projects and partnerships so that others interested in setting up similar activities have the support they need
- to encourage and enable more collaboration between schools and within local communities by putting people in touch.²⁶

²⁶ Schools Together, [About](#) [accessed 18 September 2017]

4. Recent developments

4.1 Department for Education consultation paper

The consultation

In September 2016, the Government launched a consultation paper, [Schools that work for everyone](#).²⁷ Among other things, this included proposals relating to independent schools.²⁸

The Government considered that independent schools could do more to ensure that children from a wider variety of backgrounds could benefit from “the excellent education they can deliver”, as a condition of enjoying the benefits of charitable status:

4. Many of these schools enjoy charitable status, and the associated advantages including relief from business rates. We believe independent schools could and should do more as a condition of these benefits and their privileged position. We want to see them doing more to increase the number of good and outstanding school places in the state system and to give more ordinary students access to the education they deliver.

The Government’s stated objective was to “harness the capacity of independent schools to offer greater benefit to ordinary families”. It proposed to set an expectation “that the best independent schools sponsor state schools and offer funded places”:

11. We propose that independent schools with the capacity and capability should meet one of two expectations in recognition of the benefits of their charitable status:

- To sponsor academies or set up a new free school in the state sector. The capital and revenue costs of this would be met by the government, but the independent school would have responsibility for ensuring its success. We would expect this school to be good or outstanding within a certain number of years, or;
- To offer a certain proportion of places as fully funded bursaries to those who are insufficiently wealthy to pay fees. We expect this figure to be considerably higher than that offered currently at most independent schools.

There would be different expectations for smaller independent schools which lacked the capacity and capability to take on full sponsorship:

13. We will ask these schools to fulfil one or more of the following:

- Provide direct school-to-school support with state schools. This could include providing staff to assist state schools with teacher development and personal support between heads of department in independent and state schools to share best practice. Joining Teaching School Alliances is the

Independent schools with capacity and capability would be expected to sponsor academies, set up a new free school, or offer more fully funded bursaries

There would be different expectations for smaller independent schools

²⁷ Department for Education, [Schools that work for everyone](#), 12 September 2016

²⁸ At pp12-16

best way to make those contributions to teacher development or school improvement really count;

- Support teaching in minority subjects which state schools struggle to make viable, such as further maths, coding, languages such as Mandarin and Russian, and classics;
- Ensure their senior leaders become directors of multi-academy trusts, to give strategic steer and leadership and provide experienced staff to be governors;
- Provide greater expertise and access to facilities, for example access to science labs and music, drama and sporting facilities; and
- Provide sixth-form scholarships to a proportion of pupils in each year 11 at a local school; assisting with their teaching; or helping them with university applications.

The consultation paper stated that the Government would consider legislation to remove the benefits of charitable status from schools which did not meet new benchmarks:

14. We propose to set new benchmarks that independent schools are expected to meet, in line with their size and capacity. We think it is essential that independent schools deliver these new benchmarks. If they do not, we will consider legislation to ensure that those independent schools that do not observe these new benchmarks cannot enjoy the benefits associated with charitable status, and to result in the Charity Commission revising its formal guidance to independent schools on how to meet the public benefit test, putting the new benchmarks on to a statutory footing.

New legislation might be considered to remove the benefits of charitable status from schools not meeting expectations

The consultation closed in December 2016.

Parliamentary question on consultation

The Government has not yet published its response to the consultation. However, in June 2017, Justine Greening, Secretary of State for Education, gave this written answer in response to a question from William Wragg asking whether the consultation proposals relating to independent schools would be taken forward:

As part of the Government's commitment to create more good school places, last September we published the consultation document: Schools that work for everyone. This asked how we could harness the resources and expertise of those in our independent schools to work in partnership to lift attainment across the wider school system.

The Government has welcomed the way that our independent schools have actively considered and proposed what more they could do to raise attainment in state schools, in recognition of their responsibility to their own local communities. Over this Parliament, we intend to build on the positive and constructive conversations we have had with the sector to agree how they could do more to improve attainment for children from all backgrounds, and increase the number of good school places.

The Government intends to continue to work with the ISC to agree how to take forward the proposals for more independent schools to support state schools

Officials will continue to work with the Independent Schools Council to agree how best to take forward the proposals for more independent schools to support state schools.²⁹

4.2 General Election Manifestos 2017

Conservative party

The [Conservative Manifesto for the 2017 General Election](#) also stated that the leading independent schools would be required to sponsor academies or found free schools:

We will work with the Independent Schools Council to ensure that at least 100 leading independent schools become involved in academy sponsorship or the founding of free schools in the state system, keeping open the option of changing the tax status of independent schools if progress is not made.³⁰

Labour party

The [Labour Manifesto for the 2017 General Election](#) included plans to introduce free school meals for all primary school children, paid for by removing the VAT exemption on private school fees.³¹

4.3 ISC Celebrating Partnerships event

On 13 September 2017, Justine Greening spoke at the [Celebrating Partnerships](#) event hosted by the Independent Schools Council (ISC).³²

A Department for Education (DfE) news release set out how the Government was collaborating with the ISC:

The Department for Education is working in collaboration with the Independent Schools Council to support more joint working between the independent and state school sectors. Support will include drawing on the experience and the expertise of independent schools in leadership, teacher training, curriculum support, school improvement and sponsorship, or setting up a free school.

Ms Greening reiterated the importance of sharing knowledge and spreading expertise so that every child, regardless of their background or circumstances, could go on to fulfil their potential.

Justine Greening was quoted as saying that many independent schools were already undertaking partnership activities with state schools, “helping raise attainment across the wider school system”. She said that the Government wanted this to continue:

We want to continue to harness the resources and expertise of leading independent schools through more partnership activities, sponsorship or setting up new free schools, so more young people have the opportunity to gain the knowledge and skills to fulfil their potential.

²⁹ [PQ 713 \[on Independent Schools: Standards\], 27 June 2017](#)

³⁰ [Forward, Together. Our Plan for a Stronger Britain and a Prosperous Future. The Conservative and Unionist Party Manifesto 2017](#), p50

³¹ [For The Many Not The Few. The Labour Party Manifesto 2017](#), p38

³² Gov.UK News from the Department for Education, [Partnership is key to creating more good school places](#), 13 September 2017 [accessed 18 September 2017]

ISC chairman, Barnaby Lenon, launched the organisation's [Celebrating Partnerships](#) booklet, an annual report of cross-sector partnership work between independent and state schools.

The ISC highlighted thousands of existing partnerships including academic, sporting or musical support, which were estimated to benefit around 10,000 state schools and 175,000 pupils.³³

Barnaby Lenon said that partnerships between independent and state schools had historically been under-reported. He also said that independent schools wanted to do more:

Alongside the ongoing development of partnership work with state sector colleagues, independent schools are widening access through transformational bursary schemes. Most bursaries are means-tested and most money is spent on those from the lowest income families. Manchester Grammar School, for example, has 220 boys on a bursary and the average bursary there is 93% of the fee.³⁴

Mr Lenon was quoted as saying that "Partnerships work less well when the only motivation has got something to do with charitable status or acting under a perceived pressure from the government."³⁵

Speaking to the press after the Education Secretary's speech, Mr Lenon was further reported to have said: "I wouldn't say anyone is feeling like now we are off the hook," adding, "The atmosphere now is of firm encouragement and it comes from both sides."³⁶

New System Partnership Unit

At the same event, Sir David Carter, National Schools Commissioner, spoke about the DfE's newly formed System Partnership Unit that is working to support the independent schools sector to broker partnerships and relationships with the state sector. The DfE also launched a leaflet to offer further guidance in setting up or expanding existing partnerships.³⁷

The Systems Partnerships Unit has produced some [slides on what they do](#).³⁸

The Schools Together website advises schools wanting help in finding a partner, or wanting to offer support or partnership, to contact the DfE System Partnerships Unit at contact details provided.³⁹

³³ Ibid

³⁴ ISC news release, [Celebrating Partnerships: Secretary of State shows support for cross-sector working](#), 13 September 2017 [accessed 18 September 2017]

³⁵ Eleanor Busby, "[DfE to monitor partnerships between state schools and independents](#)", TES, 13th September 2017 [accessed 18 September 2017]

³⁶ Ibid

³⁷ Gov.UK News from the Department for Education, [Partnership is key to creating more good school places](#), 13 September 2017 [accessed 18 September 2017]

³⁸ Available from Schools Together, [Get involved](#) [accessed 18 September 2017]

³⁹ Schools Together, [Get involved](#) [accessed 18 September 2017]

Reaction from other parties

Angela Rayner, Labour's Education Spokesperson, and Layla Moran for the Liberal Democrats, were reported to have criticised the seemingly voluntary basis of the new arrangements.⁴⁰

⁴⁰ See, for example, Rob Merrick, "[Theresa May quietly drops manifesto promise to strip tax breaks from private schools](#)", *Independent*, 13 September 2017 [accessed 18 September 2017]

5. Background: history of public benefit guidance

Summary

The charitable status of independent schools has been subject to a considerable amount of controversy and debate, particularly in the context of how schools fulfil the public benefit requirement. The Charity Commission's original public benefit guidance was revised following legal challenges. Further Charity Commission documents were revised following debate in both Houses of Parliament.

5.1 2008 guidance

In January 2008, the Charity Commission published general guidance on the public benefit requirement, *Charities and Public Benefit*. In December 2008, the Charity Commission published more specific guidance, *The Advancement of Education for the Public Benefit*. Both sets of guidance were subsequently amended following the decision of the Upper Tribunal about the Commission's guidance on public benefit and fee-charging in relation to educational charities (see below).

In December 2008, the Charity Commission also published further guidance, *Public Benefit and Fee-Charging* in which it stated: "Offering free or subsidised access is an obvious and, in many cases, the simplest way in which charities can provide opportunities to benefit for people who cannot afford the fees"; it also stated that this was not a requirement. The Commission said that it could not suggest a percentage of bursaries that all independent schools should offer. This guidance has now been withdrawn.

5.2 Public benefit assessments

The Charity Commission carried out public benefit assessments as one way of fulfilling its statutory objective to promote awareness and understanding of the operation of the public benefit requirement. The Charity Commission's first programme of public benefit assessments included twelve charities, of which five were fee-charging independent schools. It indicated why it had chosen such charities:

We deliberately included charities of a type which were presumed to be for the public benefit, before the changes made by the Charities Act 2006, and, because of the high level of public interest in how the public benefit requirement might affect them, we also included fee-charging charities.⁴¹

The five schools were: The Manchester Grammar School Foundation; Highfield Priory School Limited; Pangbourne College Limited; Manor House School Trust Ltd; and S. Anselm's School Trust Limited. Two of these schools, Highfield Priory and S. Anselm's, were considered not to be meeting all aspects of the public benefit requirement. The schools

⁴¹ Charity Commission, [Public Benefit Assessments - Emerging findings for Charity Trustees 2008-09](#), July 2009, p4 (now archived)

were given a year to agree a plan with the Charity Commission to show how they would ensure a sufficient opportunity to benefit in a material way for those who could not afford the fees, including people in poverty.

Simon Northcott, the head teacher of S. Anselm's was quoted as saying:

As a stand-alone prep school, we just don't have the pot that other schools have. We failed only because we're not producing enough bursaries. But nowhere in the course of this process has the commission given us a clear idea of what we need to achieve. It's like being told you've failed a maths exam but without being told what the passmark is.⁴²

In a speech to the Headmasters and Headmistresses Conference in October 2009, Dame Suzi Leather, then Chair of the Charity Commission, confirmed that the Charity Commission would continue to apply its guidance unless and until its interpretation of the law was challenged successfully in the Tribunal or the courts. She refuted claims that the Commission had not been acting independently in its approach to public benefit, and that the Commission was obsessed with bursaries.⁴³

5.3 Charity Commission update on public benefit work

On 8 July 2010, the Charity Commission published an [update](#) on its public benefit work.⁴⁴

All four charities, including the two schools, which had been assessed as not fulfilling the public benefit test, had developed and submitted plans intended to address the concerns which had been raised. The Charity Commission concluded that the two schools had addressed the findings of the Commission's public benefit assessments, published in July 2009, and that the trustees were now carrying out their duty to administer their charity for public benefit. It said that all the charities had been given sufficient time to implement those plans, with up to five years where necessary, and set out the following information about the two schools:

The plans for the two schools used a mix of new or additional bursary assistance financed by fundraising, together with the educational benefits they provide in the local community.

Neither school plans to increase its fees as part of these changes. The Commission took into account the totality of benefits provided, including work with local communities and state schools as well as bursaries. It concluded that these charities had addressed the findings of the Commission's public benefit assessments published in July 2009 and that the trustees are

⁴² "Parents face fees increase as schools fail the charitable status test", *Times*, 14 July 2009

⁴³ Charity Commission, *The Headmasters' & Headmistresses' Conference*, 7 October 2009. See Andrew Holt, "[Charitable schools have years to meet public benefit](#)", *Charity Times*, 8 October 2009 [accessed 18 September 2017]

⁴⁴ Charity Commission press release PR46/10, [Charity Commission publishes update on Public Benefit work Arts assessments published, work completed on schools](#), (archived) 8 July 2010 [accessed 18 September 2017]

carrying out their duty to administer the two charities for public benefit.

Dame Suzi Leather, Chair of the Charity Commission said;

"... The plans that the schools ... have put in place underline very clearly that we take into account all the ways in which charities can fulfil their aims for the public benefit. We have every reason to be confident in their commitment to putting these plans into place."⁴⁵

5.4 Legal challenges to the 2008 public benefit guidance

Judicial review application

In February 2010, the Independent Schools Council (ISC) applied for permission to bring a judicial review of the Charity Commission's public benefit guidance, seeking an order quashing parts of the Charity Commission's guidance, *Charities and Public Benefit* issued in January 2008, and *Public Benefit and Fee-Charging* and *The Advancement of Education for the Public Benefit*, both issued in December 2008.

In October 2010, the High Court granted permission. The ISC said that the judicial review would be heard together with the Attorney General's reference (see below), and that they expected that the joined proceedings would be heard by the Upper Tribunal.⁴⁶

Judicial review allows individuals, businesses, and other groups to challenge the lawfulness of decisions made by Ministers, Government Departments, local authorities and other public bodies. The main grounds of review are that the decision maker has acted outside the scope of its statutory powers, that the decision was made using an unfair procedure, or that the decision was an unreasonable one.

The Upper Tribunal is a court of record established by Parliament under the *Tribunals, Courts and Enforcement Act 2007*. It has power to decide certain cases that do not go through the First Tier Tribunal, and to exercise powers of judicial review in certain circumstances.

The Attorney General's reference

The Attorney General may refer to the Tribunal any question which involves either the operation of charity law in any respect, or the application of charity law to a particular state of affairs.⁴⁷ In September 2010, the Attorney General made such a reference, asking the Tribunal to consider how the public benefit requirement should operate in relation to fee-charging charitable schools.⁴⁸ The

⁴⁵ *Ibid*

⁴⁶ ISC press release, *Permission granted for ISC's challenge to the Charity Commission's public benefit guidance*, 7 October 2010

⁴⁷ The reference was made under Paragraph 2(1)(a) of Schedule 1(D) *Charities Act 1993* (as amended by the *Charities Act 2006*), now section 326(1) of the *Charities Act 2011*

⁴⁸ [HC Deb 11 October 2010 c247W](#). The questions referred are set out in [Annex A](#) to the decision, [The Independent Schools Council v Charity Commission of England and Wales \[2011\] UKUT 421 \(TCC\)](#)

Charity Commission and the ISC were joined as interested parties to the reference. This was the first reference made under the powers introduced by the 2006 Act.

The Attorney General made the reference because he considered there to be uncertainty as to the operation of charity law in the context of fee charging independent schools.

Tribunal decision

Following a hearing in May 2011, the [Upper Tribunal's decision](#),⁴⁹ together with a [summary](#),⁵⁰ was published on 14 October 2011.

The issues considered by the Tribunal related primarily to principles 2b and 2c of the two stated principles of public benefit in the Charity Commission's guidance:

Principle 2: Benefit must be to the public or a section of the public

2a The beneficiaries must be appropriate to the aims

2b Where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted

- by geographical or other restrictions; or
- by ability to pay any fees charged

2c People in poverty must not be excluded from the opportunity to benefit

In a lengthy decision, the Tribunal concluded that, in all cases, there must be more than minimal or token benefit for the poor, but that trustees of a charitable independent school should decide what is appropriate in their particular circumstances. Benefits could be provided in a variety of ways:

23. The Tribunal concluded (at paragraph 214) that a charitable independent school would be failing to act for the public benefit if it failed to provide some benefits for its potential beneficiaries other than its fee-paying students (unless this was a merely temporary state of affairs). However, it also decided that each case depends upon its own facts and (provided the de minimis threshold is crossed) it is a matter for the trustees of a charitable independent school (rather than the Charity Commission or the Tribunal) to decide how trustees' obligations might best be fulfilled in the light of their circumstances. Benefits for potential beneficiaries who are not or will not become fee-paying students may be provided in a variety of ways (see paragraph 196), including, for example, the remission of all or partial fees to "poor" students and the sharing of educational facilities with the maintained sector.⁵¹

There must be more than a token benefit for the poor but trustees decide how to meet public benefit requirement

⁴⁹ [The Independent Schools Council v Charity Commission of England and Wales \[2011\] UKUT 421 \(TCC\)](#)

⁵⁰ [Summary of Decision by Upper Tribunal \(Tax and Chancery Chamber\) in \(a\) judicial review proceedings brought by the Independent Schools Council and \(b\) an Attorney General's Reference regarding the public benefit test for charitable independent schools following the Charities Act 2006](#), 14 October 2011

⁵¹ [Summary of Decision by Upper Tribunal \(Tax and Chancery Chamber\) in \(a\) judicial review proceedings brought by the Independent Schools Council and \(b\) an Attorney General's Reference regarding the public benefit test for charitable independent schools following the Charities Act 2006](#), 14 October 2011

In dealing with the Attorney General's reference questions, the Tribunal expressly declined to give any sort of ruling intended to be definitive and said that each case would depend on its own particular circumstances:

242. B2 to B10 appear to be designed to draw from us conclusions about where the lines can be drawn between what is, and what is not, a sufficient element of public benefit to determine whether a charitable school is acting properly. Although we will make some remarks about each of the hypothetical scenarios, we decline to give any sort of ruling which is intended to be definitive. Each real case will depend on its own factual circumstances. A tribunal addressing an actual school would need to have all sorts of detailed information: for example, it would need to see detailed accounts, to know the school's business plan, to know what its staff are paid and their level of qualification, to see how the school operates on the ground (is there any goldplating for instance?), to know what its class-sizes are; and to know what facilities it has (such as playing fields, sports halls, art rooms, music rooms, laboratories, computer rooms, to name but a few). These are only examples.⁵²

The Tribunal decided that some parts of the Charity Commission's guidance were erroneous. Whilst sympathising with the Commission in its difficult task, the Tribunal invited the parties to agree the wording of a formal Order granting appropriate relief to the ISC on the judicial review application.⁵³

Tribunal order for relief

The parties were unable to agree the terms of a formal Order and so, on 2 December 2011, the Upper Tribunal published a further decision regarding the terms of relief to be given. The Tribunal said that it proposed making a direction quashing the whole of *Public Benefit and Fee-Charging*, and parts of *Charities and Public Benefit* and *The Advancement of Education for the Public Benefit*, but would first give the Charity Commission the opportunity to withdraw these parts of their guidance.

5.5 Charity Commission guidance amended

The Commission subsequently published a statement confirming that it had withdrawn aspects of its public benefit guidance and specifying exactly which parts of the guidance were affected. It said that the withdrawn sections were clearly marked and no longer formed part of the Commission's statutory guidance on public benefit to which charities must have regard when carrying out any powers or duties to which the guidance is relevant.⁵⁴

⁵² [The Independent Schools Council v Charity Commission of England and Wales \[2011\] UKUT 421 \(TCC\)](#), paragraph 242,

⁵³ [Summary of Decision by Upper Tribunal \(Tax and Chancery Chamber\) in \(a\) judicial review proceedings brought by the Independent Schools Council and \(b\) an Attorney General's Reference regarding the public benefit test for charitable independent schools following the Charities Act 2006](#), 14 October 2011, paragraph 24,

⁵⁴ Charity Commission, [Update for trustees on public benefit guidance](#), (archived), 21 December 2011 [accessed 18 September 2017]

The Charity Commission also published a Parliamentary Briefing, [Update on public benefit](#) (January 2012) setting out what had happened.

5.6 Other consideration of the public benefit requirement

Evidence to the Public Administration Select Committee

The then House of Commons Public Administration Select Committee⁵⁵ took evidence relating to charitable status, independent schools and public benefit on a number of occasions including:

- in the 2005-2010 Parliament, it took evidence on the impact of the *Charities Act 2006* on independent schools (and others);⁵⁶
- on 10 December 2009, Dame Suzi Leather (then Chair), and Andrew Hind (then Chief Executive), of the Charity Commission, gave evidence on a range of issues relating to the Charity Commission's work in 2008 to 2009. They were questioned specifically about the Charity Commission's approach to the public benefit requirement in relation to independent schools;⁵⁷
- on 3 July 2012, Dame Suzi Leather gave further evidence in her valedictory appearance before the Committee.⁵⁸ She said that the issue of the charitable status of independent schools was "one that is heavily ideologically laden in public debate".

Review of the *Charities Act 2006* and Government response

The Review

Section 73 of the *Charities Act 2006* required the Minister for the Cabinet Office to institute a review of the operation of the Act within five years after Royal Assent. The report of the review, led by Lord Hodgson of Astley Abbots, was published on 16 July 2012: [Trusted and Independent: Giving charity back to charities Review of the Charities Act 2006](#).

The review covered wide-ranging issues, including public benefit. Lord Hodgson considered the arguments for and against introducing a statutory definition of "public benefit". He recommended that, "in order to retain the flexibility attached to the common law definition", no such statutory definition should be introduced. He also recommended that the attention of the Tribunal should be drawn to "the important role it has to play in ensuring case law precedents reflect emerging social mores".⁵⁹

⁵⁵ Now the Public Administration and Constitutional Affairs Committee

⁵⁶ Oral evidence taken before the Public Administration Select Committee on 12 June 2008, 2 July 2008, 8 July 2008 and 9 October 2008, [HC 2007-8 663-i-v](#)

⁵⁷ Public Administration Select Committee, [Minutes of Evidence Work of the Charity Commission in 2008-09](#), 10 December 2009, Q74

⁵⁸ Public Administration Select Committee, Corrected transcript of oral evidence, [Chair of the Charity Commission Valedictory Hearing](#), 3 July 2012

⁵⁹ p41

Government response

In September 2013, the Coalition Government published its [response](#) to both Lord Hodgson's statutory review and the Public Administration Select Committee report (see below).⁶⁰

The Government agreed that a statutory definition of public benefit "should not be pursued at this time" but said that "the possibility of change should not be completely ruled out, particularly in light of any developments in the case law".⁶¹

Public Administration Select Committee report

The report

On 6 June 2013, the then House of Commons Public Administration Select Committee (PASC), published its report, [The role of the Charity Commission and "public benefit": Post legislative scrutiny of the Charities Act 2006](#).⁶²

The Committee said that the legal disputes relating to the Charity Commission's interpretation of "public benefit" and the *Charities Act 2006* were complex and "touch upon controversial and political questions concerning charitable status".⁶³

PASC considered that Parliament should resolve the issues of the criteria for charitable status and public benefit:

85. Parliament should be under no illusion about the scale of the task it presented to the Charity Commission when it passed the Charities Act 2006, which required the Commission to produce public benefit guidance without specifically defining "public benefit". This has had the effect of inviting the Commission to become involved in matters such as the charitable status of independent schools which has long been a matter of party political controversy.

86. In our view, it is for Parliament to resolve the issues of the criteria for charitable status and public benefit, not the Charity Commission, which is a branch of the executive. In this respect the Charities Act 2006 has been an administrative and financial disaster for the Charity Commission and for the charities involved, absorbing vast amounts of energy and commitment, as well as money.

The Committee also considered the 2006 Act to be "critically flawed" on the question of public benefit, and that the removal of the presumption of public benefit should be repealed, along with the Charity Commission's statutory public benefit objective:

91. The Charity Commission's evidence argued that there was a "lack of certainty as to the law relating to the public benefit

⁶⁰ [Government Responses to: 1\) The Public Administration Select Committee's Third Report of 2013-14: The role of the Charity Commission and "public benefit": Post-legislative scrutiny of the Charities Act 2006 2\) Lord Hodgson's statutory review of the Charities Act 2006: Trusted and Independent, Giving charity back to charities](#), September 2013, Cm 8700

⁶¹ *Ibid* p21

⁶² House of Commons Public Administration Select Committee, [The role of the Charity Commission and "public benefit": Post legislative scrutiny of the Charities Act 2006](#), 6 June 2013, HC 76 [incorporating HC 574-i-vi, Session 2012-13]

⁶³ *Ibid* paragraph 59

requirement for the advancement of religion" since the passing of the Charities Act 2006. This lack of certainty, and the Commission's interpretation of the Act, have led to the questioning of the charitable status of independent schools and the Plymouth Brethren Christian Church (or Exclusive Brethren) and concerns over the wider impact on faith charities.

92. In its approach to the question of public benefit, the Charity Commission chose not to rely on previous jurisprudence, as it could be argued Parliament intended, in the light of the vacuum of definition left by the Act. Ultimately the Charities Act 2006 is critically flawed on the question of public benefit and should be revisited by Parliament.

93. We recommend that the removal of the presumption of public benefit in the 2006 Charities Act be repealed, along with the Charity Commission's statutory public benefit objective. This would ensure that no transient Government could introduce what amounts to substantive changes in charity law without Parliament's explicit consent. If the Government wishes there to be new conditions for what constitutes a charity and qualifies for tax relief, it should bring forward legislation, not leave it to the discretion of the Charity Commission and the courts.

Government response

The Coalition Government agreed that Parliament, and not the Charity Commission or the Government of the day, should define the criteria for charitable status, including what is meant by "public benefit". The Charity Commission and not Parliament or the Government should determine whether organisations meet those criteria in individual cases:

Following almost two years' debate, Parliament provided a new statutory definition of charity in the Charities Act 2006, with a statutory list of headings of charitable purposes, and chose to continue to rely on the case law definition of public benefit. The Charities Act also gave the Charity Commission the difficult task of providing guidance on public benefit. It was almost inevitable that the Charity Commission's interpretation of the case law would be challenged through the tribunal or courts at some point, and more likely than not that such challenges would arise in relation to education, religion, or poverty relief, which were widely considered to benefit from a presumption of public benefit prior to the Charities Act 2006.⁶⁴

Part of the purpose of creating the Charity Tribunal, it said, was to facilitate the development of charity case law.

The then Government did not consider that there should be a statutory definition of public benefit saying it would be difficult to achieve and inflexible:

On the surface, a statutory definition of public benefit might appear attractive, but no-one has yet been able to adequately describe what a statutory definition would be. The diversity of

⁶⁴ [*Government Responses to: 1\) The Public Administration Select Committee's Third Report of 2013-14: The role of the Charity Commission and "public benefit": Post-legislative scrutiny of the Charities Act 2006 2\) Lord Hodgson's statutory review of the Charities Act 2006: Trusted and Independent, Giving charity back to charities*](#), September 2013, Cm 8700, pp11-12

charitable purposes and activities mean that, in our view, the case law is too complex to encapsulate in a simple statutory definition. This is evident from the difficulty that the Charity Commission had in trying to distil the concept of public benefit into many pages of guidance. Any attempt to legislate a definition would face the same challenges. We consider that a statutory definition of public benefit would be just as likely to result in legal challenges and would have the potential for serious unintended consequences. A statutory definition would be also inflexible and would risk ossifying the law, unlike the existing case law definition which can evolve flexibly over time and respond to social and economic change.⁶⁵

The Government commented on the presumption of public benefit:

The Upper Tribunal made it clear in its judgment on the Independent Schools Council case that there had not been a legal presumption of public benefit in the case law before the Charities Act 2006. Therefore it would not be possible to “restore” a presumption of public benefit that may never have existed. We also believe that restoring or creating a presumption of public benefit for a particular class or classes of charity would not be supported by most charities.⁶⁶

5.7 *Charities (Protection and Social Investment) Bill*

The issue of what independent schools should do to fulfil the public benefit requirement was considered in debates on the Bill which is now the *Charities (Protection and Social Investment) Act 2016*. No amendments were made to the Bill to reflect the issues raised, but the Charity Commission has revised some of its publications to take into account the concerns expressed.

House of Lords debate on proposed amendments Grand Committee

In Grand Committee, Lord Moynihan (Conservative) moved an amendment to require charitable independent schools to engage fully with local communities and state schools with a view to sharing sports facilities and coaching expertise. The amendment would have also required the Charity Commission to publish guidance setting out the minimum that charitable independent schools must do to comply with this duty. Lord Wallace of Saltaire (Liberal Democrat) had tabled an amendment in similar terms relating to sharing facilities for music, drama and arts.⁶⁷ The proposed amendments provoked a lengthy debate.

Lord Moynihan acknowledged the existing good practice of many independent schools but spoke of the lack of consistency across the sector.

The then Cabinet Office Minister, Lord Bridges of Headley, sympathised with the aim of the amendments but said that it was for the trustees of each charity to decide how to satisfy the public benefit requirement in

⁶⁵ *Ibid* p13

⁶⁶ *Ibid* p14

⁶⁷ [HL Deb 6 July 2015 cc18-21GC](#)

the best interests of their charity, taking into account their individual circumstances. He did not want their discretion to be fettered with prescriptive requirements that would not always be appropriate.⁶⁸

Lord Moynihan withdrew his amendment and Lord Wallace did not move his.

Report stage

Lord Wallace returned with an amendment at Report stage which he called a “simplified version” of both previous amendments.⁶⁹ Both Lord Wallace and Lord Moynihan spoke of developments between Grand Committee and Report stages and of what the Charity Commission and the Independent Schools Council were now proposing. Lord Moynihan was satisfied that these initiatives were “very significant steps forward” which were tailor-made for the differences between schools and would achieve more than “a one-size-fits-all amendment”.⁷⁰ He hoped that the amendment would not be pressed to a vote.

Other peers were less confident that the non-statutory proposals would be sufficient.

Lord Bridges reiterated that he remained strongly in sympathy with the aims of the amendment but disagreed with its approach. He did not agree that it was appropriate to single out charitable schools in legislation when all charities had to fulfil obligations and abide by the law. He said that the amendment would single out only one way in which schools could demonstrate public benefit when no other type of charity was treated this way in legislation. He also considered that it was not for the Government or the regulator to interfere with the exercise of discretion by trustees, and that setting particular duties or minimum standards around one particular form of public benefit, by one particular type of charity, would create a dangerous precedent.

Lord Bridges also provided more detailed information about the package of measures agreed by the Commission and the ISC, comprising guidance, research and a web resource:

The package contains three sorts of measures, of which the first is guidance. The Charity Commission will relaunch its existing guidance entitled Public Benefit: Running a Charity, publicising for schools examples of how to provide benefit for people who cannot afford their fees. This includes examples of sharing sporting facilities. It will also give new examples relating to the sharing of sports, arts and music facilities in its wider Public Benefit: Reporting guidance and in its example of a good trustees’ annual report for schools. The Charity Commission will commit to ensuring that the guidance links to more examples of what constitutes good practice for independent schools to satisfy the public benefit test, which will include encouraging schools to pursue and develop partnerships. I am pleased that the ISC will publicise the relaunched guidance among all its members. In keeping with what I have said, any additions made to the

The Government did not want to set particular standards for one type of charity only

Charity Commission guidance to be relaunched

⁶⁸ [HL Deb 6 July 2015 cc28-30GC](#)

⁶⁹ [HL Deb 20 July 2015 c961](#)

⁷⁰ [HL Deb 20 July 2015 c965](#)

guidance will be examples of good practice and will not introduce any new mandatory requirements.

The second part of the package is research. There are many claims about the extent of the sharing of facilities between schools, and we should base further debate more solidly on a better understanding of what is actually the case. As has been said, the Charity Commission will therefore commission a research report 12 months from the introduction of the revised guidance that I have spoken of. This is likely to be built upon data from the annual reports from charitable schools, as well as aggregated data that the ISC collects through its census. The terms will be worked up by the commission and the ISC together ...

Finally, the ISC is in the early stages of developing a web resource which enables local schools to request involvement in partnership activities. The ISC will request that member schools, on a voluntary basis, provide contact details of the co-ordinators of partnership work at their schools.⁷¹

New research to assess the impact of initiatives to increase partnerships between charitable schools and the state sector

New web resource to facilitate partnerships

Lord Wallace asked for leave to withdraw his amendment but, as some Lords objected to the request, permission was not granted and there was a division on the amendment. The amendment was defeated by 156 votes to 105.

A [letter to the Independent Schools Council \(ISC\) from the Charity Commission](#) (21 July 2015), on the Gov.UK website, sets out further information about how the Charity Commission intended to proceed at that time (as outlined by Lord Bridges).

House of Commons debate on proposed amendments

Similar issues were considered in the House of Commons.

In Public Bill Committee, the then Shadow Civil Society Minister, Anna Turley, moved a new clause intended to require charitable independent schools to engage with local communities and state schools with a view to sharing resources and facilities. The new clause would have also required the Charity Commission to publish guidance setting out the minimum that charitable independent schools would have to do to comply with this duty. Anna Turley also spoke to other new clauses (not moved) which were in similar terms but referred respectively to sports facilities and coaching expertise; facilities for music, drama and arts; and careers advice, work experience and further education admissions advice.

Similar issues debated in House of Commons

The Shadow Minister agreed that many independent schools were doing good work but did not consider that enough was being done. She said that “charitable status is now an outdated and inappropriate financial privilege that is impossible to justify without substantial action from independent schools, which is what the new clauses seek to achieve”.

Anna Turley questioned whether it was right that trustees should determine how the school benefitted not only those who paid fees. She did not consider that the non-legislative measures mentioned in the

⁷¹ [HL Deb 20 July 2015 c971-4](#)

House of Lords were sufficient to address the issue and spoke of a need to clarify the law:

If they want to keep facilities solely for their own pupils, schools must give up their charitable status. If they want to retain that status and the financial benefit that the parents of non-pupils pay for, they must allow non-pupils greater access. It is time to clarify the law. In the wise words of the Upper Tribunal, adjudicating between the Independent Schools Council and the Charity Commission,

“these are issues which require political resolution”.

That is the purpose of the new clauses.

Rob Wilson, then Minister for Civil Society, agreed that more should be done to promote stronger partnerships between independent and state schools but differed from the Opposition Members on how this should be achieved. He considered that there were both principled and practical reasons against legislating to force charitable independent schools to do more.

Rob Wilson said that there was a wide range of ways in which charitable independent schools could provide benefits and that it was for the trustees to determine the way in which their charity provided a public benefit. The Minister also spoke of the danger of legislating for only one type of charity:

It would be wrong to single out one type of charity in legislation and stipulate one particular type and the extent of public benefit that it must provide. No other type of charity is treated in that way, and it would set a very dangerous precedent. What would be next? Religious charities, overseas aid charities or campaigning charities? Once the precedent has been set, the risk is that the temptation to interfere would be too great for some to resist, and specific legislative requirements could creep in over the years for different types of charities. If unchecked, there is a real danger that over time charities would be opened up to significantly increased state interference—whether or not politically motivated—which could seriously undermine the charity sector’s independence. In this Committee, all parties have sought to protect the independence of charities and trustees.⁷²

Anna Turley challenged this point saying that the situation in education was unique:

On the point about setting a precedent, the difference is that independent schools provide a service over and above state provision. There is statutory universal provision, but people choose to go in over and above that and send their children to independent schools. We should question the right of those schools to receive taxpayers’ money. It is a unique situation in education, so we cannot simply say that it would set a precedent.⁷³

Rob Wilson also thought, on a practical level, that forcing schools into particular types of partnership might undermine existing good work. He spoke of the different levels of resources of independent schools and

⁷² [PBC Deb 7 January 2016 c141](#)

⁷³ [PBC Deb 7 January 2016 c142](#)

gave examples of successful partnerships. He also detailed non-legislative activity in this area.

Anna Turley said that she was not convinced that there had been sufficient progress or that anything other than a statutory power would “do anything to compel independent schools to justify the money they get back from the British taxpayer”. The amendment was withdrawn.⁷⁴

Documents revised

In October 2015, the Charity Commission announced that it had updated its guidance for fee-charging educational charities:

The guidance has always made it clear that sharing facilities with local state schools is one way in which trustees of charitable independent schools can fulfil their public benefit duty by making provision for the poor to benefit. The updated guidance now encourages trustees of charitable schools, as a matter of good practice, to comment on their individual approaches to public benefit in sports, drama, music and other arts in their trustee annual report.

The commission has updated its example trustee annual report for a charitable school to reflect the recommendation in the updated guidance.

The move follows concerns raised in Parliament during debates on the Charities (Protection and Social Investment) Bill that too few sports and arts facilities owned by charitable independent schools are accessible to students in state education.⁷⁵

The Charity Commission said that the Independent Schools Council supported this development and had committed to disseminating the revised guidance among its members.

Two documents were revised:

- [*Charging for services: illustrative examples of benefits for the poor;*](#)
- [*Charitable trust \(school\): example trustees' annual report.*](#)⁷⁶

⁷⁴ [PBC Deb 7 January 2016 cc131-146](#)

⁷⁵ Gov.UK, Charity Commission press release, [Charity Commission updates guidance for fee-charging educational charities](#), 22 October 2015

⁷⁶ Although the documents have been revised they still carry their original publication date

6. Position in Scotland

Summary

Charity law and regulation is devolved. An Office of the Scottish Charity Regulator (OSCR) briefing paper expresses the view that fundamental differences between the law in England and Wales, and that in Scotland, mean that the main principles underlying the Upper Tribunal decision have little application in Scotland. In December 2014, OSCR published a report on its review of the charitable status of 52 fee-charging schools following a two-year assessment of individual schools.

In October 2014, a petition called on the Scottish Parliament to urge the Scottish Government to remove charitable status, and thus taxpayer support, from private, fee-paying schools. The petition was closed in September 2015. This was on the basis that that the Committee had taken the petition as far as it could, and that the Scottish Government had made it clear that it had no plans to substantially review the 2005 Act.

Following a review of the non-domestic rates system, the Scottish Government stated that it would give further consideration to the recommendation that fee-paying schools should lose their entitlement to a rates reduction, before deciding how to proceed.

6.1 Charity law in Scotland

Charity law and regulation is devolved. In Scotland, charities are regulated by the Office of the Scottish Charity Regulator (OSCR). The main legislation is the [Charities and Trustee Investment \(Scotland\) Act 2005](#). OSCR has set out further information:

Sections 7 and 8 of the Charities and Trustee Investment (Scotland) Act 2005 set out the charity test that must be met in Scotland. In particular (and in contrast to the position in England and Wales) the 2005 Act sets out specific factors which the Regulator must look at in assessing whether organisations meet the test. In summary, a charity must have exclusively charitable purposes and provide public benefit; and, in doing so, where conditions exist on gaining access to the benefit (such as fees), these must not be unduly restrictive. In addition, the Regulator must have regard to issues such as private benefit and any disbenefit to the public.⁷⁷

An OSCR Briefing paper, [England and Wales Upper Tribunal decision on fee-charging schools](#) (November 2011),⁷⁸ expresses the view that fundamental differences between the law in England and Wales and that in Scotland mean that the main principles underlying the judgement have little application in Scotland, or impact on OSCR regarding fee-charging schools on their Register:

A. Essentially, the English legislation (the 2006 Act) does not include any explicit definition or indication of how 'public benefit' is to be viewed – instead public benefit means what the law of England and Wales (that is, the case law) says it means. The Tribunal's decision is that CCEW has come to a mistaken

⁷⁷ OSCR, [Charity regulator publishes schools report](#), 8 December 2014 [accessed 19 September 2017]

⁷⁸ Redacted

interpretation of that case law. By contrast, in Scotland section 8 of the 2005 Act provides that in assessing whether a body provides public benefit OSCR must have regard to 'whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.' This wording is set out in statute, and is not a matter of interpretation of case law. That the test in Scotland is one of undue restriction is therefore not in doubt, but the English position seems now to be clearly diverging from this.

B. The judgement seems to call into question CCEW's in respect of public benefit. They have power to issue guidance to charity trustees, to which trustees should have regard. But the judgment comments that this duty to issue guidance "should not usurp trustee discretion". In contrast, both the public benefit requirement and OSCR's role in assessing compliance with it and taking action about it are quite explicit in our legislation.

4. Our view, therefore, is that, while there are points of interest for us in the judgement (and much in common with our views in the detail of what schools might actually do to provide public benefit), the underlying situation in Scotland differs significantly. That being the case, there is no reason to depart from our current position, resting on the 2005 Act and the principles set out in our Meeting the Charity Test guidance.

6.2 OSCR review of charitable status of fee-charging schools

In December 2014, OSCR published its summary report on its review of the charitable status of 52 fee-charging schools, [Fee-charging schools, public benefit and charitable status](#). This followed the conclusion of the Regulator's two-year assessment of individual schools. An OSCR press release provides further information:

The review considered whether they met the charity test set out in the Charities and Trustee Investment (Scotland) Act 2005. Of the 52 schools assessed in total, 40 met the charity test. OSCR took enforcement action in 10 cases, directing schools to widen access to the public benefit they provide. Two reviews have been suspended due to their particular circumstances.

The report sets out the Regulator's perspective from the conclusion of its group review, the principles that guided its decision making, what action it took where it found non-compliance, and how it will monitor such charities in future while maintaining their compliance with charity law.⁷⁹

OSCR's Head of Registration, Martin Tyson, spoke of fee-charging schools having a high degree of interest from the public:

'From the commencement of the charity legislation in 2006, we identified fee-charging schools as a priority group that continues to have a high degree of interest from the public. Where we have found problems we have taken action to ensure that charities are all now doing what the charity test requires,' he said. 'More recently, we embarked on a full-scale review of this group and today's report sets out our findings and key issues. Our work is aimed ultimately at reinforcing public confidence and our report

⁷⁹ *Ibid*

illustrates both the issues we consider and the enforcement action we take where required.'

6.3 Scottish Parliament petition

On 1 October 2014, a petition was lodged calling on the Scottish Parliament to urge the Scottish Government to remove charitable status, and thus taxpayer support, from private, fee-paying schools.⁸⁰

Supporting documents and information about the petition history are available on the [Scottish Parliament website](#). This includes [a briefing for the Public Petitions Committee by the Scottish Parliament Information Centre \(SPICe\)](#) which provides further information about the position in Scotland, including about the charity test; benefits of charitable status; and Scottish Government and Scottish Parliament action.

On 22 September 2015, the Committee agreed to close the petition. This was on the basis that that the Committee had taken the petition as far as it could and that the Scottish Government had made it clear that it had no plans substantially to review the 2005 Act.

6.4 Review of non-domestic rates system

Because of their charitable status, fee-paying schools can also qualify for relief from non-domestic rates. If they meet the qualifying criteria, they are entitled to mandatory relief of 80% of the bill, with the potential of additional relief - up to 100% - at the local authority's discretion.

In 2016, the Scottish Government set up a review of the non-domestic rates system, chaired by Kenneth Barclay (former chair of Royal Bank of Scotland in Scotland). The [review reported in August 2017](#). One of its recommendations was that fee-paying schools should lose their entitlement to a rates reduction. The report stated (paragraph 4.120):

"Independent (private) schools that are charities also benefit from reduced or zero rates bills, whereas council (state) schools do not qualify and generally will pay rates. This is unfair and that inequality should end by removing eligibility for charity relief from all independent schools. They will of course still retain charitable status and other benefits will continue to flow to them from that status. And Independent special schools will be eligible for disability rates relief where they qualify for this."

The Scottish Government set out its [response to the Barclay Review](#) in the Scottish Parliament on 12 September 2017. While broadly supporting the Review's recommendations, the Scottish Government noted that several of the recommendations deserved further consideration. Derek Mackay MSP, the Cabinet Secretary for Finance and the Constitution stated (col 52):

After engaging with stakeholders, I believe that a small number of recommendations merit further thought and engagement. That is entirely in keeping with Barclay's recommendation 8 that, wherever possible, the Scottish Government should consult on

⁸⁰ [PE01531: Remove Charitable Status from Private Schools](#)

changes to the rates system in advance of their implementation. The recommendations that require further consideration and engagement are those on removing charity relief for certain recipients, including arm's-length external organisations, independent schools and university accommodation; on reforming relief for sports clubs, empty properties and properties in active occupation; and on the levying of rates on parks.

On each of those areas, I will continue engagement to fully understand the impact and any wider implications and possible unintended consequences, before outlining my position in the implementation plan that I propose to publish later this year. The issues will be considered individually and the most appropriate route forward will be taken for each. "⁸¹

⁸¹ Information provided by Scottish Parliament Information Centre (SPICe) on 19 September 2017

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