



## BRIEFING PAPER

Number 05222, 17 October 2019

# Charitable status and independent schools

By Catherine Fairbairn

### Contents:

1. Charitable status
2. Charity Commission current guidance on public benefit
3. Partnerships between independent schools and state schools
4. Consideration of charitable status for fee-charging independent schools
5. Background: history of public benefit guidance
6. Position in Scotland



# Contents

<b>Summary</b>	<b>3</b>
<b>1. Charitable status</b>	<b>5</b>
1.1 Charitable status pre-Charities Act 2006	5
1.2 Charities Act 2011: charitable status	5
1.3 The Tribunal	6
1.4 Number of independent schools with charitable status	7
1.5 Tax concessions	7
<b>2. Charity Commission current guidance on public benefit</b>	<b>8</b>
2.1 Purpose of public benefit guidance	8
2.2 Current guidance	9
2.3 Other Charity Commission publications	10
<b>3. Partnerships between independent schools and state schools</b>	<b>13</b>
3.1 Partnership working	13
3.2 Joint understanding between DfE and ISC	13
3.3 Schools Together	14
3.4 System Partnership Unit	14
<b>4. Consideration of charitable status for fee-charging independent schools</b>	<b>15</b>
4.1 Department for Education consultation paper	15
4.2 Conservative party General Election Manifesto 2017	16
4.3 Government response to the consultation	16
4.4 Joint understanding	17
4.5 Government policy on charitable and tax status	17
4.6 Labour party policy	18
<b>5. Background: history of public benefit guidance</b>	<b>19</b>
5.1 Charity Commission guidance 2008	19
5.2 Public benefit assessments	19
5.3 Legal challenges to the 2008 public benefit guidance	20
5.4 Other consideration of the public benefit requirement	22
5.5 Charities (Protection and Social Investment) Bill	24
<b>6. Position in Scotland</b>	<b>28</b>
6.1 Charity law in Scotland	28
6.2 OSCR review of charitable status of fee-charging schools	29
6.3 Scottish Parliament petition	30
6.4 Review of non-domestic rates system	30
6.5 Non-Domestic Rates (Scotland) Bill	31

## 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 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. In September 2019, the Government said that it had no plans to change the tax status of 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 (ISC) 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 became the Charities (Protection and Social Investment) Act 2016.

### **Partnerships between independent schools and state schools**

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

## 4 Charitable status and independent schools

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 Government's consultation response, published in May 2018, did not include any proposals for legislation relating to charitable status but it did refer to an agreed joint understanding between the Department for Education (DfE) and the ISC which was published alongside the response. The Joint Understanding set out principles of cross-sector partnership.

In September 2017, 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.

### **Labour party policy**

Delegates at the 2019 Labour conference voted in favour of a motion that the party should commit to "integrate all private schools into the state sector" in its next election manifesto. This would include the withdrawal of charitable status and all other public subsidies and tax privileges, including business rate exemption.

The motion added: "Endowments, investments and properties held by private schools to be redistributed democratically and fairly across the country's educational institutions."

Shadow Education Secretary, Angela Rayner, said "tax loopholes" that benefit private schools would be scrapped by a Labour government in its first Budget.

### **Further reading**

Another Library briefing paper provides an overview of the topics Members commonly encounter relating to fee-paying independent schools in England:

[Independent schools \(England\)](#) (CBP 7972).

### **The position in Scotland**

Charity law and regulation is devolved. The main legislation is the Charities and Trustee Investment (Scotland) Act 2005.

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 2011 Upper Tribunal decision have little application in Scotland.

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 on the basis that that the Public Petitions 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. A Bill has now been introduced in the Scottish Parliament which would remove the rates reduction from mainstream independent schools registered as charities.

# 1. Charitable status

## 1.1 Charitable status pre-Charities Act 2006

Before the Charities Act 2006 was enacted, there was no general statutory definition of charity. 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

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.

In an 1891 case, 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.<sup>1</sup>

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.<sup>2</sup> 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 some were not set up in this way) and it was generally presumed that, as charities for the advancement of education, they were for the public benefit.<sup>3</sup>

## 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.

The 2011 Act sets out various definitions, including:

- **Charity:** an institution which is established for charitable purposes only and is subject to the jurisdiction of the High Court.<sup>4</sup>

“Charity” is now defined in statute

<sup>1</sup> Income Tax Special Purpose Commissioners v Pemsel [1891] AC 531

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

<sup>3</sup> 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

<sup>4</sup> Charities Act 2011 section 1

- **Charitable purpose:** 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.<sup>5</sup>

### 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.<sup>6</sup> Educational charities, like all other charities, must demonstrate that they are for the public benefit.

### Requirement for Charity Commission to publish guidance

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 Commission may also revise its guidance.<sup>7</sup>

## 1.3 The Tribunal

The 2006 Act created a new Charity Tribunal.<sup>8</sup> The Charity Tribunal has now been transferred to the First-tier Tribunal General Regulatory Chamber (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;
- consider references from the Attorney General or the Charity Commission on points of law.

---

<sup>5</sup> Charities Act 2011 section 2

<sup>6</sup> Charities Act 2011 section 4(2)

<sup>7</sup> [Charities Act 2011 section 17](#)

<sup>8</sup> Section 8

## 1.4 Number of independent schools with charitable status

In 2016 the Government 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.<sup>9</sup> 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.<sup>10</sup>

The 2019 Annual School Census by the Independent Schools Council found that 74% of their member schools had charitable status (1,012 schools).<sup>11</sup>

## 1.5 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](#), 2019.

In July 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.<sup>12</sup>

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 independent schools have been made. Data held on charitable tax relief costs cannot be broken down into specific sectors.<sup>13</sup>

---

<sup>9</sup> Footnote to text: Source: DfE School Census 2015

<sup>10</sup> Department for Education, [Schools that work for everyone](#), 12 September 2016, p13

<sup>11</sup> [ISC Census and Annual Report 2019](#), p30. [The ISC](#) is a membership organisation of 1,364 independent schools

<sup>12</sup> [PQ 1921 \[on Private Education\], 6 July 2017](#)

<sup>13</sup> [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 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 Purpose of public benefit guidance

The Charity Commission has stated that its public benefit 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".<sup>14</sup>

The guidance is not the basis on which the Charity Commission makes decisions about public benefit "because it cannot cover all the complexities of the law relating to public benefit". The Commission makes these decisions "in individual cases based on the law as it applies to the facts of the particular case".<sup>15</sup>

The Charity Commission states 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.<sup>16</sup>

<sup>14</sup> Gov.UK, Charity Commission, [Public benefit: an overview](#), 16 September 2013

<sup>15</sup> Ibid

<sup>16</sup> Ibid



## 2.2 Current guidance

The Charity Commission's current public benefit guidance, published in 2013, replaced earlier guidance, published in 2008, on which there were legal challenges (see section 5 of this briefing paper).

Charity trustees must have regard to the Charity Commission's guidance when exercising any powers or duties to which the guidance is relevant.<sup>17</sup>

There are three public benefit guides:

- [Public Benefit: the public benefit requirement](#): Part 5, "Benefiting the public or a sufficient section of the public", includes information 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 lists various 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 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](#).<sup>18</sup>

---

<sup>17</sup> [Charities Act 2011 section 17\(5\)](#)

<sup>18</sup> The judgment is discussed in section 5.4 of this briefing paper

- [Public Benefit: reporting](#): This guidance provides information about why and how charity trustees must report on carrying out their charity's purposes for the public benefit.<sup>19</sup>

### 2.3 Other Charity Commission publications

The Charity Commission has also published some [associated documents](#),<sup>20</sup> including:

- [Analysis of the law relating to public benefit](#).<sup>21</sup>

This sets out the main points which emerged from the decision of the Upper Tribunal in the case which considered the duties of the charity trustees of charitable schools which charge fees:<sup>22</sup>

- 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 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

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

<sup>20</sup> These are available on the [Gov.UK website](#)

<sup>21</sup> September 2013, new format February 2017. This document does not form part of the Charity Commission's guidance and so is not, as such, guidance to which charity trustees must have regard.

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

- 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.<sup>23</sup>

- [Charging for services: illustrative examples of benefits for the poor.](#)<sup>24</sup>

This guidance 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

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

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

<sup>24</sup> Charity Commission press release, [Charity Commission updates guidance for fee-charging educational charities](#), 22 October 2015 [accessed 10 October 2019] indicates that this document was updated in October 2015. However, the document still carries its original publication date (16 September 2013).

## 12 Charitable status and independent schools

- 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.

The document states 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.

## 3. Partnerships between independent schools and state schools

The Independent Schools Council (ISC) states that independent schools are very keen to work with local schools and that that 84% of its schools are in “mutually beneficial partnerships with state schools, sharing expertise, best practice and facilities to the benefit of children in all the schools involved”<sup>25</sup>

### 3.1 Partnership working

The ISC has set out a number of ways in which its schools work with maintained schools, stating that they:

- provide qualified teachers in specialist subjects to state schools.
- share expertise to help state school students get into top universities.
- run joint extra- curricular programmes where the state school is an equal partner.
- provide GCSE or A-level revision classes.
- provide classes in subjects not on offer at some state schools, such as classics and Modern Foreign Languages.
- offer shared subject workshops and masterclasses.
- provide coaching with music, drama and sport.
- offer Saturday schools to local state schools, such as James Allen's Girls' school in Dulwich, which provides 500 local children with music, dance and drama teaching every week in term time.<sup>26</sup>

### 3.2 Joint understanding between DfE and ISC

In May 2018, the Government published [guidance](#) which set out the joint understanding between the Department for Education (DfE) and the ISC in relation to independent and state school partnership working (ISSP cross-sector working) in England.

The guidance highlighted that schools which are charities are subject to charity law and must operate for the public benefit. The Government encouraged cross-sector partnerships:

Independent schools operate according to education legislation and, where they are charities, they are subject to charity law. Approximately 80% of ISC schools are charities. A higher proportion engage with cross-sector partnership working because schools are aware of their civic duties in relation to local and national communities and value opportunities to support educational standards and social mobility across the country.

---

<sup>25</sup> ISC, [Schools' Partnerships and Charities](#) [accessed 14 October 2019]

<sup>26</sup> ISC, [Schools' Partnerships and Charities](#) [accessed 14 October 2019]

There are approximately 10,000 state schools involved in cross-sector partnerships (ISC census, 2017) and the number is growing.

Schools which are charities must be accountable for public benefit activity and demonstrate that they operate according to their individual charitable objects, established at the foundation of the charity. They do this through annual reporting to the Charity Commission. The commission's guidance (updated 2016) encourages full disclosure of partnership activities with the community and state schools when these activities support the school's charitable objects.

A judicial review in 2011 confirmed that the advancement of education is a charitable purpose and trustees of schools which are charities must be responsible for setting the scope of charitable activities according to their objects.

The Secretary of State for Education recognises that independent schools are an asset to the school system and encourages the independent sector to support the state sector as far as possible.<sup>27</sup>

### 3.3 Schools Together

[Schools Together](#) is owned and managed by the ISC.<sup>28</sup>

The Schools Together Group is a discussion group for individuals from both state and independent schools, in primary and secondary schools, who are responsible for running partnerships. The group organises termly events based on themes of interest to partnership coordinators, such as measuring outcomes and funding models.<sup>29</sup>

### 3.4 System Partnership Unit

In September 2017, Sir David Carter, then 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.<sup>30</sup>

The Schools Together website includes information about [how to get involved in a school partnership](#). This includes details of a [new fund](#) for cross-sector school partnerships.

---

<sup>27</sup> Department for Education, [Joint understanding between DfE and Independent Schools Council \(ISC\)](#), 11 May 2018

<sup>28</sup> Schools Together, [Statutory information](#) [accessed 14 October 2019]

<sup>29</sup> Schools Together, [About the Schools Together Group](#) [accessed 14 October 2019]

<sup>30</sup> Gov.UK News from the Department for Education, [Partnership is key to creating more good school places](#), 13 September 2017 [accessed 14 October 2019]

## 4. Consideration of charitable status for fee-charging independent schools

### 4.1 Department for Education consultation paper

In September 2016, the Government launched a consultation paper, [Schools that work for everyone](#).<sup>31</sup> Among other things, this included proposals relating to independent schools.<sup>32</sup>

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

---

<sup>31</sup> Department for Education, [Schools that work for everyone](#), 12 September 2016

<sup>32</sup> Ibid, 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.

The consultation closed in December 2016.

### 4.2 Conservative party General Election Manifesto 2017

The [Conservative Manifesto for the 2017 General Election](#) 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.<sup>33</sup>

### 4.3 Government response to the consultation

The Government published its [consultation response](#) in May 2018. This did not include any proposals for legislation relating to charitable status. However, it referred to an agreed [joint understanding](#) between the DfE and the ISC which was published alongside the response:

The independent schools sector has responded positively and is taking steps to increase the scope and ambition of its work with the state sector, as well as to increase access for disadvantaged

---

<sup>33</sup> [Forward, Together, Our Plan for a Stronger Britain and a Prosperous Future, The Conservative and Unionist Party Manifesto 2017](#), p50



pupils, including looked-after children, such as through targeting of bursaries. The Government and the Independent Schools Council (ISC) have agreed a joint understanding, setting out the activities we collectively expect to see these schools participate in to help support state schools. Through the joint understanding, the ISC will require independent schools that are members of its associations to submit information on partnership activities in their annual census return. This will set out how they have worked with state schools and pupils from disadvantaged backgrounds in that year; with reference to the impact this has had, such as attainment levels in the subjects supported or progression to higher education, or other appropriate measures. In addition, the ISC now publishes periodic reports setting out details of particular partnership activities by individual schools, to illustrate the kind of activity that can be delivered and share best practice.<sup>34</sup>

## 4.4 Joint understanding

The [Joint Understanding](#) between the DfE and the ISC was stated to demonstrate “a commitment on the part of ISC associations, on behalf of member schools, to support the raising of educational standards in state schools where independent schools have the capability and capacity to provide expertise and resource and a commitment on the part of government to creating circumstances under which this can operate most effectively”.<sup>35</sup>

The Joint Understanding set out principles of cross-sector partnership, including a statement that ISC schools would be encouraged to support social mobility:

ISC schools spent £385 million in 2017 on means-tested bursaries and scholarships for children from lower income households and from disadvantaged backgrounds. ISC schools will be encouraged to target bursary support at those on the lowest incomes as well as looked after children, to increase opportunities for these children and to support social mobility. The new Boarding Schools Partnerships Service will also see pupils from troubled homes going to ISC boarding schools next year.

The Government noted that “any expectation of partnership activity must be proportionate to the means and strengths of a school”.

## 4.5 Government policy on charitable and tax status

In September 2019, the Government stated it had no plans to change the tax status of independent schools.<sup>36</sup>

---

<sup>34</sup> [Department for Education, Schools that work for everyone Government consultation response, May 2018, p9](#)

<sup>35</sup> Department for Education, [Joint understanding between DfE and Independent Schools Council \(ISC\)](#), 11 May 2018

<sup>36</sup> [PO 282372 \[on Private Education: Taxation\], 3 September 2019](#)

## 4.6 Labour party policy

### Labour party General Election Manifesto 2017

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.<sup>37</sup>

### Labour party conference motion 2019

Delegates at the 2019 Labour conference voted in favour of a motion that the party should commit to "integrate all private schools into the state sector" in its next election manifesto. This would include the withdrawal of charitable status and all other public subsidies and tax privileges, including business rate exemption.

The motion added: "Endowments, investments and properties held by private schools to be redistributed democratically and fairly across the country's educational institutions."

Shadow Education Secretary Angela Rayner said "tax loopholes" that benefit private schools would be scrapped by a Labour government in its first Budget.<sup>38</sup>

Comment on this motion includes:

- Jeremy Hyam, "[Abolishing private schools and redistributing their assets: social justice at the expense of human rights?](#)", UK Human Rights Blog, 3 October 2019;
- "[John Tizard: Private schools' charitable status is neither in public interest nor that of other charities](#)", Civil Society, 14 Oct 2019.

---

<sup>37</sup> [For The Many Not The Few, The Labour Party Manifesto 2017](#), p38

<sup>38</sup> "[Labour members call to 'redistribute' private schools' assets](#)", BBC News, 23 September 2019 [accessed 17 October 2019]

## 5. Background: history of public benefit guidance

### Summary

The charitable status of independent schools has been the subject of 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 Charity Commission guidance 2008

In 2008, the Charity Commission published general guidance on the public benefit requirement, and also more specific guidance on 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 a 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 five fee-charging independent schools. Two of these schools were considered not to be meeting all aspects of the public benefit requirement. The schools 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.

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.<sup>39</sup>

On 8 July 2010, the Charity Commission published an [update](#) on its public benefit work.<sup>40</sup> 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.<sup>41</sup>

## 5.3 Legal challenges to the 2008 public benefit guidance

### Judicial review application

In October 2010, the High Court granted the Independent Schools Council (ISC) permission to bring a judicial review seeking an order quashing parts of the Charity Commission's public benefit guidance.

### 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.<sup>42</sup>

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.<sup>43</sup> The 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.

The judicial review was heard with the Attorney General's reference.

### Tribunal decision

Following a hearing in May 2011, the [Upper Tribunal's decision](#),<sup>44</sup> together with a [summary](#),<sup>45</sup> was published on 14 October 2011. In a

---

<sup>39</sup> 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 17 October 2019]

<sup>40</sup> 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 17 October 2019]

<sup>41</sup> *Ibid*

<sup>42</sup> 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

<sup>43</sup> [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 \(TCC\)](#)

<sup>44</sup> [The Independent Schools Council v Charity Commission of England and Wales \[2011\] UKUT 421 \(TCC\)](#)

<sup>45</sup> [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](#)

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.<sup>46</sup>

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.<sup>47</sup>

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.<sup>48</sup>

## 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.

---

[General's Reference regarding the public benefit test for charitable independent schools following the Charities Act 2006](#), 14 October 2011

<sup>46</sup> Ibid

<sup>47</sup> [The Independent Schools Council v Charity Commission of England and Wales \[2011\] UKUT 421 \(TCC\)](#), paragraph 242

<sup>48</sup> [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

## 5.4 Other consideration of the public benefit requirement

### Evidence to the Public Administration Select Committee

The then House of Commons Public Administration Select Committee<sup>49</sup> 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);<sup>50</sup>
- 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;<sup>51</sup>
- on 3 July 2012, Dame Suzi Leather gave further evidence in her valedictory appearance before the Committee.<sup>52</sup> 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

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".<sup>53</sup>

---

<sup>49</sup> Now the Public Administration and Constitutional Affairs Committee

<sup>50</sup> 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](#)

<sup>51</sup> Public Administration Select Committee, [Minutes of Evidence Work of the Charity Commission in 2008-09](#), 10 December 2009, Q74

<sup>52</sup> Public Administration Select Committee, Corrected transcript of oral evidence, [Chair of the Charity Commission Valedictory Hearing](#), 3 July 2012

<sup>53</sup> At p41

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).<sup>54</sup>

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".<sup>55</sup>

## 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](#).<sup>56</sup>

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".<sup>57</sup>

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.<sup>58</sup>

---

<sup>54</sup> [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

<sup>55</sup> *Ibid* p21

<sup>56</sup> 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]

<sup>57</sup> *Ibid* paragraph 59

<sup>58</sup> *Ibid*, paragraphs 91 to 93

### 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.<sup>59</sup>

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.<sup>60</sup>

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.<sup>61</sup>

## 5.5 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 became 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,

<sup>59</sup> [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](#)

<sup>60</sup> *Ibid* p13

<sup>61</sup> *Ibid* p14



drama and arts.<sup>62</sup> 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 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.<sup>63</sup>

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.<sup>64</sup> 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”.<sup>65</sup> 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.<sup>66</sup>

Lord Wallace asked for leave to withdraw his amendment but, as some Lords objected to the request, permission was not granted and there

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

<sup>62</sup> [HL Deb 6 July 2015 cc18-21GC](#)

<sup>63</sup> [HL Deb 6 July 2015 cc28-30GC](#)

<sup>64</sup> [HL Deb 20 July 2015 c961](#)

<sup>65</sup> [HL Deb 20 July 2015 c965](#)

<sup>66</sup> [HL Deb 20 July 2015 c971-4](#)

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.

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 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.

Similar issues  
debated in House  
of Commons

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.<sup>67</sup>

Anna Turley challenged this point saying that the situation in education was unique.<sup>68</sup>

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 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.<sup>69</sup>

## 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.<sup>70</sup>

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.](#)<sup>71</sup>

---

<sup>67</sup> [PBC Deb 7 January 2016 c141](#)

<sup>68</sup> [PBC Deb 7 January 2016 c142](#)

<sup>69</sup> [PBC Deb 7 January 2016 cc131-146](#)

<sup>70</sup> Gov.UK, Charity Commission press release, [Charity Commission updates guidance for fee-charging educational charities](#), 22 October 2015 [accessed 16 October 2019]

<sup>71</sup> These documents still carry their original publication date

## 6. Position in Scotland

### Summary

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.

An 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 Public Petitions 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. A Bill has now been introduced in the Scottish Parliament which would remove the rates reduction from mainstream independent schools registered as charities.

### 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.<sup>72</sup>

An OSCR Briefing paper, [England and Wales Upper Tribunal decision on fee-charging schools](#) (November 2011),<sup>73</sup> expresses the view that fundamental differences between the law in England and Wales and that in Scotland mean that the main principles underlying the

<sup>72</sup> OSCR, [Charity regulator publishes schools report](#), 8 December 2014 [accessed 16 October 2019]

<sup>73</sup> Redacted

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 [Charity Commission for England and Wales] has come to a mistaken 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.<sup>74</sup>

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

---

<sup>74</sup> Ibid

'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 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.<sup>75</sup>

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 Public Petitions 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 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.

On 12 September 2017, the Scottish Government set out its [response to the Barclay Review](#) in the Scottish Parliament. While broadly supporting the Review's recommendations, the Scottish Government noted that several of the recommendations deserved further consideration.

---

<sup>75</sup> [PE01531: Remove Charitable Status from Private Schools](#)

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 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.

## 6.5 Non-Domestic Rates (Scotland) Bill

The Non-Domestic Rates (Scotland) Bill was introduced by the Cabinet Secretary for Finance, Economy and Fair Work, Derek Mackay MSP, on 25 March 2019.

Clause 10 would make provision to remove the mandatory 80% charitable relief from mainstream independent schools registered as charities. These schools would still maintain their charitable status and would still be eligible for disability rates relief where they qualified for this. Independent special schools and specialist independent music schools would retain the mandatory 80% relief.

The removal of charity relief from mainstream independent schools is expected to raise £36.9 million in additional rates income over the period 2020-21 to 2024-25.<sup>76</sup>

Further information is provided on the [Scottish Parliament Bill page](#).

---

<sup>76</sup> [Non-Domestic Rates \(Scotland\) Bill, Financial Memorandum, paragraph 35](#)

### About the Library

The House of Commons Library research service provides MPs and their staff with the impartial briefing and evidence base they need to do their work in scrutinising Government, proposing legislation, and supporting constituents.

As well as providing MPs with a confidential service we publish open briefing papers, which are available on the Parliament website.

Every effort is made to ensure that the information contained in these publicly available research briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

If you have any comments on our briefings please email [papers@parliament.uk](mailto:papers@parliament.uk). Authors are available to discuss the content of this briefing only with Members and their staff.

If you have any general questions about the work of the House of Commons you can email [hcenquiries@parliament.uk](mailto:hcenquiries@parliament.uk).

### Disclaimer

This information is provided to Members of Parliament in support of their parliamentary duties. It is a general briefing only and should not be relied on as a substitute for specific advice. The House of Commons or the author(s) shall not be liable for any errors or omissions, or for any loss or damage of any kind arising from its use, and may remove, vary or amend any information at any time without prior notice.

The House of Commons accepts no responsibility for any references or links to, or the content of, information maintained by third parties. This information is provided subject to the [conditions of the Open Parliament Licence](#).