Charitable status and independent schools

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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. The *Charities Act 2006* specified that 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 public benefit.

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, the Charity Commission 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.

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 on 14 October 2011, concluded that in all cases there must be more than *de minimis* 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. The ruling was welcomed by both the ISC and the Charity Commission. The Charity Commission has recently published revised public benefit guidance.

Academies are publicly-funded schools that are independent of the local authority. No admission fees are paid by parents. Academies are now exempt charities.

This note deals with the law in England and Wales.

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1 Independent schools with charitable status

The 2013 Annual School Census by the Independent Schools Council (which represents the majority of independent schools) found that 82% of their member schools had charitable status: a total of 1,007 schools.[1] Charities are able to take advantage of various tax concessions.

In oral evidence to the Public Administration Select Committee in July 2008, Dame Judith Mayhew Jonas, then Chair of the Independent Schools Council, stated that, if charitable status were removed from independent schools, the cost to them at that time would be £100 million. She also gave evidence about other potential financial implications:

> Q117 Kelvin Hopkins: By how much would fees have to go up?
>
> Dame Judith Mayhew Jonas: It is not a huge amount; it is about £200 per pupil. If you abolished them you would have to find another £2.5 billion to educate the children from the independent sector in the state sector which might cause a crisis…
>
> To pay for all that education might have an effect on the public finances. We estimate that £2.5 billion is saved by the independent sector in exchange for £100 million in tax breaks.[2]

2 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. 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.[3]

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.[4] 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.[5]

Purposes within the fourth head (other purposes beneficial to the public) had to be proved to be beneficial.

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1 *Independent Schools Council Census 2013*

2 Public Administration Committee, *Minutes of Evidence,* 2 July 2008, HC 663-i-v

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

4 Joint Committee on the Draft Charities Bill, *The Draft Charities Bill*, 30 September 2004, HL 167, HC 660, 2003-04, paragraph 63

5 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". See section 5 of this note below

3 The *Charities Act 2011*

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

3.1 Definitions

Charity

Section 1 of the *Charities Act 2011* (the 2011 Act) sets out a general statutory definition of 'charity' as an institution which is established for charitable purposes only and is subject to the jurisdiction of the High Court (this provision was previously section 1 of the *Charities Act 2006* (the 2006 Act).

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.

3.2 No presumption of public benefit

The 2006 Act specified that there is no presumption that any type of charity is for the public benefit.[6] This provision is now section 4(2) of the 2011 Act. Educational charities, like all other charities, must demonstrate that they are for the public benefit.

3.3 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.[7]

3.4 The Tribunal

Section 8 of the 2006 Act created a new Charity Tribunal. 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;

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6 Section 3(2)

7 Previously section 4 of the 2006 Act

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

4 Charity Commission guidance on public benefit

4.1 2008: guidance published (amended in 2011)

In January 2008, following consultation, the Charity Commission published general guidance on the public benefit requirement, *Charities and Public Benefit*. In December 2008, again following consultation, the Charity Commission published more specific guidance, *The Advancement of Education for the Public Benefit.* Both sets of guidance were amended in December 2011, following the decision of the Upper Tribunal about the Commission's guidance on public benefit and fee-charging in relation to educational charities.[8] Parts of the guidance were withdrawn.

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.[9]

4.2 2013: revised guidance published

On 16 September 2013, following further consultation, the Charity Commission published revised public benefit guidance, split into three guides:

- *Public Benefit: the public benefit requirement*

  Part 5 of this guidance, *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 state that charities must not define their beneficiaries in a number of specified ways, 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 of this guide, *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.[10] 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

[8] Discussed in section 5 of this note, below
[9] Discussed in section 5 of this note, below
[10] *Public Benefit: running a charity, Part 5: Deciding who benefits*

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.

- *Public Benefit: reporting.*

Trustees must have regard to this guidance when administering their charity.[11]

The Charity Commission has stated that it is now reviewing its supplementary public benefit guidance, including *The advancement of education for the public benefit*, "in light of the revised general guidance, and to take account of relevant decisions of the Charity Tribunal made since the guidance was issued in December 2008". The supplementary guidance no longer forms part of the Charity Commission's public benefit guidance, but is to remain available to read until replacement guidance is published.[12]

4.3 Public benefit assessments

The Charity Commission carries 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 and 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.[13]

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 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.

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11 Charity Commission, *Charitable purposes & public benefit* [accessed 23 October 2013]

12 Charity Commission news release, *Charity Commission publishes revised public benefit guidance,* 16 September 2013 [accessed 23 October 2013]

13 Charity Commission, *Public Benefit Assessments - Emerging findings for Charity Trustees 2008-09*, July 2009, p4

> It's like being told you've failed a maths exam but without being told what the passmark is.[14]

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.[15]

4.4 Charity Commission update on public benefit work

On 8 July 2010, the Charity Commission published an update on its public benefit work.[16]

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 carrying out their duty to administer the two charities for public benefit.
>
> Dame Suzi Leather, Chair of the Charity Commission said;
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> "... 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."[17]

5 Legal challenges to the 2008 public benefit guidance

5.1 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.

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

15 Charity Commission, *The Headmasters' & Headmistresses' Conference*, 7 October 2009

16 Charity Commission press release PR46/10, *Charity Commission publishes update on Public Benefit work Arts assessments published, work completed on schools,* 8 July 2010 [accessed 23 October 2013]

17 *Ibid*

In October 2010, the High Court granted permission and the ISC said that the judicial review would be heard together with the Attorney General's reference,[18] and that they expected that the joined proceedings would be heard by the Upper Tribunal.[19]

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* and 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.

5.2 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.[20] 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.[21] 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.

5.3 Tribunal decision

The Upper Tribunal's decision,[22] together with a summary,[23] was published on 14 October 2011, following a hearing in May 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

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18 See the next section of this note below

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

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

21 HC Deb 11 October 2010 c247W. The questions referred are set out in Annex A to the judgment, *The Independent Schools Council v Charity Commission of England and Wales and National Council for Voluntary Organisations* [2011] UKUT 421 (TCC)

22 *The Independent Schools Council v Charity Commission of England and Wales and National Council for Voluntary Organisations* [2011] UKUT 421 (TCC)

23 *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

The Tribunal considered the development of the legal concept of charity and the meaning of public benefit:

> 14. The legal concept of charity has developed over several centuries and is not static. The decided cases applied differing public benefit requirements as between different types of charitable purposes, so that the Tribunal's decision in this case was applicable to educational charities only.
>
> 15. The case law has developed two identifiable strands to what is meant by public benefit. The first is that any charitable purpose must be of benefit to the community. The advancement of education has long been recognised as beneficial by the Courts. There was no dispute in this case that education in the sense of the delivery of a standard curriculum to school-age children was for the benefit of the community.
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> 16. The second strand of "public benefit" which is discernible from the case law is that those who benefit from the carrying out of the charitable purpose must be sufficiently numerous and identified in such a manner as to constitute a "section of the public."
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> 17. The Tribunal concluded (at paragraph 53) that the concept of "public benefit" which applied immediately before the enactment of the 2006 Act incorporated both strands of public benefit and that an educational charitable purpose therefore had to satisfy both aspects both before and after the 2006 Act.[24]

The Tribunal then considered what presumptions (if any) were made under pre-existing law about purposes being for the public benefit:

> 19. In relation to the first sense of public benefit, the Tribunal concluded that the courts had in the cases before them formed their own view on the basis of the evidence and made a decision on it. This involved the consideration of evidence in some of the cases but not in others where this issue was not in dispute. This process did not involve the application of a presumption as that term is usually understood (paragraphs 67 - 68). In any case where detriment to society was alleged and this allegation was supported by evidence, the Tribunal would have to balance the alleged benefits against the alleged detriment in order to decide whether public benefit in the first sense was made out. The Educational Review Group ("the ERG") an intervener in this case, had argued that the independent schools sector produced dis-benefits to society, in particular through impairing diversity and social mobility. The Tribunal concluded that the material presented to it by the ERG was not sufficient to establish its case in this regard (paragraph 108). It noted that the ERG had raised "issues which should be of concern to all members of society [but which] require political resolution".
>
> 20. The courts had not, prior to the 2006 Act, applied a presumption in relation to the second sense of public benefit – the "sufficient section" test (paragraph 71) and that this was a matter for the decision of the Court or Tribunal in each case. In considering the decided cases in relation to the second sense of public benefit (including those concerned with charities which charge for their services) the Tribunal concluded (at paragraph 178) that a charity which (either constitutionally or as a matter of practice) excluded the "poor" from benefiting from its charitable activities would not satisfy the public benefit requirement in its second sense as it would not be providing for a sufficient section of the community. The meaning of "rich" and "poor" in this context is not straightforward (see paragraphs 40 and 179 to 185).[25]

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[24] *Ibid*
[25] *Ibid*

The Tribunal considered the extent to which the pre-existing law had been changed by the 2006 Act (other than by stating that it is not presumed that any purpose was for the public benefit). On the issue of whether those able to afford to send their children to charitable independent schools are a sufficient section of the public, the Tribunal concluded that the 2006 Act had not changed the pre-existing law "because there had never in fact been a presumption in relation to this aspect of public benefit".[26]

The Tribunal ruled that the status of an existing registered charity and the duties of the trustees had not been changed by the 2006 Act, and that a school's status as a charity depended on what it was established to do, not on what it did:

> As to status, either it was entitled to be registered before the 2006 Act or it was not. If it was, its purposes must have been for the public benefit as that term was then understood and, since we are dealing with schools where there is no presumption made under the pre-2006 Act law for the reasons we have given, it thus fulfils the public benefit test under the 2006 Act. Accordingly, whether such a school is a charity within the meaning of the 2006 Act does not now turn on the way in which it operates any more than it did before. Its status as a charity depends on what it was established to do not on what it does.[27]

The Tribunal concluded that in all cases there must be more than *de minimis* 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:

> 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.[28]

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

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[26] *Ibid* paragraph 21, see further paragraph 83 *The Independent Schools Council v Charity Commission of England and Wales and National Council for Voluntary Organisations* [2011] UKUT 421 (TCC)

[27] Paragraph 191, *The Independent Schools Council v Charity Commission of England and Wales and National Council for Voluntary Organisations* [2011] UKUT 421 (TCC)

[28] *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

> 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.[29]

The Tribunal decided that some parts of the Charity Commission's guidance were erroneous and, whilst sympathising with the Commission in its difficult task, invited the parties to agree the wording of a formal Order granting appropriate relief to the ISC on the judicial review application.[30]

5.4 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:

> ... we think that the Commission should be given the opportunity of withdrawing those parts of the Guidance which we would otherwise quash. We would have thought that the Commission's power to revise the Guidance would enable them to withdraw the offending parts, but even if that is wrong, new guidance could quickly be issued with the offending parts removed pending a full review. We therefore direct that the Commission may give an undertaking to withdraw the relevant parts of the Guidance, such undertaking to be received by the Tribunal within 7 days from the date of the release of this Decision. The undertaking should be to effect such withdrawal within 21 days from the date of the release of this Decision. Failing the giving of such undertaking or actual withdrawal of the relevant parts of the guidance in accordance with it, we will make a quashing order.[31]

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.[32]

5.6 Reaction to Tribunal decision

Both the Charity Commission and the Independent Schools Council welcomed the decision:

- Independent Schools Council press release, *Tribunal overturns Charity Commission guidance on public benefit,* 14 October 2011
- *Charity Commission statement on the Upper Tribunal's decision*, 14 October 2011

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[29] Paragraph 242, *The Independent Schools Council v Charity Commission of England and Wales and National Council for Voluntary Organisations* [2011] UKUT 421 (TCC)

[30] Paragraph 24, *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

[31] *The Independent Schools Council v Charity Commission of England and Wales and National Council for Voluntary Organisations* TCC-JR/03/2010

[32] Charity Commission, *Update for trustees on public benefit guidance*, 21 December 2011

There was considerable media coverage of the Upper Tribunal decision including:

- Kaye Wiggins, "Analysis: the Upper Tribunal decision on fee-charging schools and public benefit", *Third Sector*, 25 October 2011
- "Disappointment as tribunal fails to clarify charity law", *Solicitors Journal,* 24 October 2011
- Jessica Shepherd, "Private schools win case over showing benefit to society", *guardian.co.uk*, 14 October 2011
- "Sector pleased with Upper Tribunal's decision on private schools", *Charity Times*, 14 October 2011

6 Other consideration of the public benefit requirement

6.1 Evidence to the Public Administration Select Committee

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

- in the 2005-2010 Parliament, the Public Administration Select Committee took evidence on the impact of the *Charities Act 2006* on independent schools (and others);[33]
- on 10 December 2009, Dame Suzi Leather, then Chair, and Andrew Hind, then Chief Executive, of the Charity Commission, gave evidence to the Public Administration Select Committee 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;[34]
- on 3 July 2012, Dame Suzi Leather gave further evidence in her valedictory appearance before the Public Administration Select Committee.[35] She said that the issue of the charitable status of independent schools "is one that is heavily ideologically laden in public debate".

6.2 Review of 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. On 8 November 2011, Nick Hurd announced that Lord Hodgson of Astley Abbotts would lead a full review of the law relating to charities in England and Wales, and would report to Parliament by summer 2012.[36]

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33 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

34 Public Administration Select Committee, *Minutes of Evidence Work of the Charity Commission in 2008-09,* 10 December 2009,Q74

35 Public Administration Select Committee, Corrected transcript of oral evidence, *Chair of the Charity Commission Valedictory Hearing*, 3 July 2012

36 Cabinet Office news release, *Review of charity law,* 8 November 2011

The review was published on 16 July 2012: *Trusted and Independent: Giving charity back to charities Review of the Charities Act 2006,* together with research, *Public perceptions of charity*,[37] commissioned from Ipsos Mori, that underpinned the Review.

The review covered wide-ranging issues, including public benefit. Lord Hodgson considered the arguments for and against introducing a statutory definition of "public benefit":

> The flexibility of the case law basis of the existing definition has undoubtedly had its benefits over the years, allowing the definition of what is charitable to change and develop along with society. This has permitted the evolution of the sector in a way that a statutory definition would most likely have been unable to. The contrary view is that the uncertainty of a case law approach is unhelpful. It can be difficult for both new and existing charities to understand the complexities of the law as it has developed and what it means for their organisation today. The clarity of a statutory definition would help charities to focus their energies and give trustees more confidence in discharging their responsibilities.[38]

Lord Hodgson 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". [39]

Government response

In September 2013, the Government published its response to both Lord Hodgson's statutory review and the Public Administration Select Committee report (which is considered in the next section of this note).[40]

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". The Government had written to the President of the Lower Tier Tribunal (General Regulatory Chamber) to draw this recommendation to the Tribunal's attention.[41]

6.3 Public Administration Select Committee report

The report

On 6 June 2013, the 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*.[42]

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".[43]

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37 15 May 2012
38 p29
39 p41
40 *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
41 *Ibid* p21
42 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]

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.
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> 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 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.
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> 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.
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> 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 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,

[43] *Ibid* paragraph 59

> or poverty relief, which were widely considered to benefit from a presumption of public benefit prior to the Charities Act 2006.[44]

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

The Government went on to consider whether there should be a statutory definition of public benefit:

> 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 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.[45]

The Government then commented on the Independent Schools Council case:

> 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.[46]

7 Academies[47]

Academies are publicly-funded schools that are independent of the local authority and operate in accordance with the funding agreement between the individual academy trust and the Secretary of State for Education. No admission fees are paid by parents.

The first academies opened in 2002, and the programme was a major part of the Labour Government's strategy to improve educational standards in secondary schools in disadvantaged communities and areas of poor educational performance. The Labour Government's *Children, Schools and Families Bill*, as originally introduced, included a provision to make academies exempt charities (clause 42). However, the clause was subsequently removed after discussion with the Charity Commission about how the objective could be achieved by simplifying the registration process. At the time, the Conservative

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44 *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

45 *Ibid* p13

46 *Ibid* p14

47 Contributed by Christine Gillie, Library Social Policy Section

opposition spokesmen were in favour of retaining the clause to make academies exempt charities.[48]

On 26 May 2010, Michael Gove, Secretary of State for Education, wrote to schools saying that he wanted to open up the academies programme to all schools - including, for the first time, primaries and special schools, and he invited schools to register their interest in becoming an academy. He pledged to make the process of becoming an academy quicker and less bureaucratic. Subsequently the *Academies Act 2010* was introduced to enable all maintained schools to seek academy status.[49] Since then there has been a rapid expansion of the programme.

Under section 12 of the *Academies Act 2010* a 'qualifying academy proprietor' will be an exempt charity, and will therefore not need to register with, or be regulated by, the Charity Commission. In effect all academies are now exempt charities. Academies must still comply with charities law but the Secretary of State for Education is the principal regulator. The Young Person's Learning Agency (YPLA) had supported the Secretary of State's regulatory role. In April 2012, the YPLA was wound-up and the new Education Funding Agency took over the YPLA's work in this area.

During the passage of the *Academies Bill* through Parliament several Peers, particularly Lord Phillips, expressed concern about ensuring the accountability of academies. However, speaking for the Government, Lord Hill explained that deeming academies to have automatic charitable status would make the process of establishing an academy easier by removing the need for each one to apply for charitable status. He believed that the change was necessary as hundreds of schools were anticipated to convert to academy status, and the Government wanted to put beyond doubt that academies are charities.[50]

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48 For background, see House of Commons Library Research Paper 10/12, Committee Stage Report on the *Children, Schools and Families Bill* p21

49 The *Academies Act 2010* allows the governing body of each maintained school in England to apply to convert the school to an academy provided it has passed a resolution to do so. The Secretary of State is empowered to make an academy order to convert a school to an academy in two circumstances: where a school has made an application, or where a school is 'eligible for intervention'. A school is eligible for intervention if it is subject to a warning notice, requires significant improvement or requires special measures.

50 House of Commons Library Research Paper 10/48, written for the Commons' second reading debate summarised the debates in the Lords on this issue – see pages 45 and 46.