

Research Briefing

14 June 2023

By Catherine Fairbairn,
Nerys Roberts

Charitable status and independent schools



Summary

- 1 Background
- 2 Public benefit: Law and guidance
- 3 Partnerships between independent schools and state schools
- 4 Department for Education 2016 consultation paper
- 5 Political consideration of charitable and tax status of independent schools
- 6 Background: History of public benefit guidance
- 7 Charitable schools in Scotland

Contributing Authors

Mark Sandford, Business rates, 1.6

Antony Seely, Tax, 1.5 & 1.7

Image Credits

Official Opening of St Paul's Catholic School in Leicester by Catholic Church England. Licensed under CC BY 2.0 / image cropped

Disclaimer

The Commons Library does not intend the information in our research publications and briefings to address the specific circumstances of any particular individual. We have published it to support the work of MPs. You should not rely upon it as legal or professional advice, or as a substitute for it. We do not accept any liability whatsoever for any errors, omissions or misstatements contained herein. You should consult a suitably qualified professional if you require specific advice or information. Read our briefing '[Legal help: where to go and how to pay](#)' for further information about sources of legal advice and help. This information is provided subject to the conditions of the Open Parliament Licence.

Sources and subscriptions for MPs and staff

We try to use sources in our research that everyone can access, but sometimes only information that exists behind a paywall or via a subscription is available. We provide access to many online subscriptions to MPs and parliamentary staff, please contact hoclibraryonline@parliament.uk or visit commonslibrary.parliament.uk/resources for more information.

Feedback

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

If you have any comments on our briefings please email papers@parliament.uk. Please note that authors are not always able to engage in discussions with members of the public who express opinions about the content of our research, although we will carefully consider and correct any factual errors.

You can read our feedback and complaints policy and our editorial policy at commonslibrary.parliament.uk. If you have general questions about the work of the House of Commons email hcenquiries@parliament.uk.

Contents

1	Background	9
1.1	Number of independent schools with charitable status	9
1.2	Charitable status	9
	Charitable status before the Charities Act 2006	9
	Statutory definition of charity	10
	Public benefit	10
1.3	The Charity Commission	10
1.4	The Tribunal	10
1.5	Tax reliefs for charities	11
1.6	Business rates	12
1.7	VAT on school fees	12
	How does VAT work?	12
	How does VAT apply to school fees?	13
2	Public benefit: Law and guidance	16
	The law relating to public benefit	16
2.1	Charity Commission guidance	17
	Legislative requirements	17
	Current Charity Commission guidance	17
	Making provision for “the poor” to benefit	18
2.2	Other Charity Commission publications	19
	Analysis of the law relating to public benefit	19
	Charging for services: illustrative examples of benefits for the poor	21
	Supplementary public benefit guidance	22
3	Partnerships between independent schools and state schools	24

3.1	How partnerships work	24
	Schools Together	25
3.2	Joint understanding between the Department for Education and ISC	25
4	Department for Education 2016 consultation paper	26
4.1	Conservative Party 2017 General Election Manifesto	27
4.2	Government response to the 2016 consultation	28
5	Political consideration of charitable and tax status of independent schools	29
5.1	Government policy	29
5.2	Labour Party policy	29
	Labour Party General Election Manifesto 2019	29
5.3	House of Commons debate January 2023	30
5.4	House of Lords debate on Schools Bill [HL]	31
6	Background: History of public benefit guidance	34
6.1	Charity Commission guidance 2008	34
6.2	Public benefit assessments	34
6.3	Legal challenges to the 2008 public benefit guidance	35
	Judicial review application	35
	The Attorney General's reference	35
	Tribunal decision	36
6.4	Charities (Protection and Social Investment) Bill	36
7	Charitable schools in Scotland	38
7.1	Charity law in Scotland	38
7.2	Review of non-domestic rates system	38
7.3	Non-Domestic Rates (Scotland) Act 2020	39

Summary

Charities, which must be for the “public benefit”, are eligible for some tax exemptions and reliefs. Independent schools can be charities although not all are set up in this way. Views differ on whether charitable independent schools which charge fees should be able to benefit from tax concessions.

This briefing deals with the law affecting the charity status of independent schools in England and Wales with a short section on the law in Scotland in section 7.

What is a charity?

The Charities Act 2011 [defines a charity as an institution which is established for charitable purposes only and is subject to the jurisdiction of the High Court](#). The Act lists [descriptions of a charitable purpose](#) and states it must be for the public benefit.

The advancement of education is one description of a charitable purpose and so independent schools are capable of being charities. Educational charities, like all other charities, must demonstrate they are for the public benefit. There is no statutory definition of what this means.

Number of independent schools with charitable status

In 2022 the Government said [around half of independent schools in England were registered as charities](#).

More recent responses to parliamentary questions have reconfirmed the percentage remains about the same. The [2023 Annual School Census by the Independent Schools Council](#) (ISC) found that 70% (978 out of 1,395) of their member schools across the UK had charitable status. However, not all independent schools are affiliated with the ISC.

Public benefit guidance

The Charity Commission is legally required to issue guidance to promote awareness and understanding of the public benefit requirement. Charity

trustees must consider the Charity Commission’s guidance when exercising any powers or duties to which the guidance is relevant. The Charity Commission’s [current public benefit guidance](#) (2013) replaced earlier guidance, published in 2008, which the [Independent Schools Council challenged](#) by judicial review (PDF).

Public benefit and benefiting “the poor”

[Charity Commission guidance](#) uses the term “the poor” and this terminology is used in case law. For that reason, the same term is used in this briefing.

The Charity Commission acknowledges there is no universal definition of “the poor”. It says the law relating to charities recognises it is [a relative term](#), which depends on the circumstances in individual cases. [The Commission guidance says it “does not just mean the very poorest in society and can include people of modest means”](#).

Charities (including charitable independent schools) may charge for the services or facilities they offer. However, [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 them](#).

A charity’s trustees must decide what provision (above what would be minimal or token provision) to make to enable the poor to benefit from the charity. The Charity Commission has provided [examples of how charitable educational establishments might enable the poor to benefit](#).

The Charity Commission’s [analysis of the law relating to public benefit](#) (PDF) sets out the main points emerging from a [decision of the Upper Tribunal](#) (PDF) in a case which considered the duties of charity trustees of charitable schools which charge fees.

Independent and state school partnerships

One way a charitable independent school which charges fees might fulfil the public benefit requirement is by collaborating with a state school. [The January 2023 ISC census](#) found 1,043 independent schools were involved in state school partnerships. This data is based on the ISC’s membership only.

Political consideration of charitable and tax status of independent schools

Government position

In February 2023, Nick Gibb, Minister of State for Education, said the [Government had no plans to change the tax status of independent schools](#).

Earlier, in 2016, Theresa May's Government [launched a consultation on school policy in England](#) (PDF). On independent schools, this proposed that, the “biggest and most successful” should face “exacting requirements”. Where able, schools should either sponsor state-funded academies, or should offer a certain proportion of fully funded places to those “insufficiently wealthy to pay fees”. The law didn't change following this consultation, but the Government did agree [a joint understanding with the ISC](#), on partnership working between state and independent schools.

Labour Party

The [Labour manifesto for the 2019 General Election](#) (PDF) pledged to “close the tax loopholes enjoyed by elite private schools and use that money to improve the lives of all children” adding that it would ask [the Social Justice Commission](#) “to advise on integrating private schools and creating a comprehensive education system.” “Private school” is another way of describing a school that charges fees.

On 11 January 2023, the House of Commons debated [a Labour motion calling for a new select committee to consider reforming the tax status of private schools](#), to raise funds to increase educational standards in the state school sector.

Shadow Secretary of State for Education, Bridget Phillipson, said Labour would require private schools to pay business rates and VAT. She said she did “not anticipate that the proposals would cover specialist provision [...]. There are ways in which they can be carefully drawn to ensure that exemptions apply where they should”. The motion was defeated by 303 votes to 197.

The position in Scotland

Charity law and regulation is devolved. The main legislation is the [Charities and Trustee Investment \(Scotland\) Act 2005](#). To qualify as a charity, an organisation must have exclusively charitable purposes and provide public benefit. Any conditions for being able to benefit (such as fees) must not be unduly restrictive.

Following a review of the non-domestic rates system (business rates), the Scottish Government has removed the business rates reduction from mainstream independent schools registered as charities.

Further reading

The Commons Library briefing on [Independent schools \(England\)](#) (CBP-7972) looks at other issues relating to fee-paying independent schools.

1 Background

1.1 Number of independent schools with charitable status

In 2016 the Government said around half of independent schools in England, around 1,300, were registered as charities.¹ More recent responses to parliamentary questions have reconfirmed the percentage remains about the same.² The [2023 Annual School Census by the Independent Schools Council](#) (ISC) found that 70% (978 out of 1,395) of their member schools across the UK had charitable status.³ However, not all independent schools are members of the ISC.

Independent schools vary greatly in terms of the number of pupils on roll, but the majority are small, with nearly three-quarters (73%) having 300 or fewer pupils.⁴

1.2 Charitable status

Charitable status before the Charities Act 2006

Before the Charities Act 2006, there was no general statutory definition of charity. The legal concept was developed by the courts over several centuries. To be charitable, an organisation had to have exclusively charitable purposes and be established for public benefit.

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.⁵

Independent schools could be charities for the advancement of education, although some were not set up in this way.

¹ Department for Education, [Schools that work for everyone](#), 12 September 2016, p13

² See for example, [PQ HI 279 \[on private education: charities\], 27 May 2022](#)

³ Independent Schools Council, [2023 Annual Census](#), published May 2023

⁴ Department for Education, [Schools, pupils and their characteristics: January 2023](#), supporting files, published June 2023

⁵ *Income Tax Special Purpose Commissioners v Pemsel* [1891] AC 531

Statutory definition of charity

The Charities Act 2006 (the 2006 Act) set out a statutory definition of charity for the first time. This is now included in the [Charities Act 2011](#) (the 2011 Act), a consolidation act which came into effect on 14 March 2012.⁶ The 2011 Act replaced much of the 2006 Act (among other things).

Definitions in the 2011 Act include:

- “Charity”: an institution which is established for charitable purposes only and is subject to the jurisdiction of the High Court.⁷
- “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.⁸ 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 that benefit must be to the public, or a section of the public.

There is no presumption that any type of charity is for the public benefit.⁹ Educational charities, like all other charities, must demonstrate that they meet this requirement.¹⁰

1.3

The Charity Commission

The Charity Commission registers and regulates charities in England and Wales. It is an independent, non-ministerial Government department accountable to Parliament.¹¹

1.4

The Tribunal

The 2006 Act created a new Charity Tribunal. Its jurisdiction has been transferred to the First-tier Tribunal General Regulatory Chamber (Charity) and the Upper Tribunal (Tax and Chancery Chamber) following reform of the

⁶ This Act brought together and replaced much of the earlier charities legislation

⁷ [Charities Act 2011 section 1](#)

⁸ [Charities Act 2011 section 2](#)

⁹ [Charities Act 2011 section 4\(2\)](#)

¹⁰ For an analysis of the relevant law see Charity Commission, [Analysis of the law relating to public benefit](#) (PDF), September 2013 (new format February 2017)

¹¹ [About us - The Charity Commission - GOV.UK \(www.gov.uk\)](#) (accessed 8 June 2023)

Tribunal system. Provisions relating to the Tribunal are now contained in [Part 17 of the 2011 Act](#).

A GOV.UK webpage provides more information: [Appeal against a Charity Commission decision about your charity - GOV.UK \(www.gov.uk\)](#).¹²

1.5

Tax reliefs for charities

Charities benefit from a series of reliefs for a variety of taxes – principally, reliefs on: income tax and inheritance tax on donations they receive; non-domestic rates on the property they use (see below); stamp duty land tax on property they buy; and, Value Added Tax (VAT) on a variety of goods and services they purchase.¹³

HM Revenue and Customs (HMRC) publish [detailed statistics](#) on these reliefs. In 2021/22 it is estimated that charities claimed:

- £1.34 billion on donations made through [Gift Aid](#)
- £2.38 billion in [relief on non-domestic rates](#).

In the same year, individuals making donations claimed £800 million in relief from inheritance tax, and £540m on higher rate relief for donations made through Gift Aid and covenants. Tax relief for charities and donors were worth £5.4 billion in 2021/22.¹⁴

These figures do not include what charities gain from a variety of VAT reliefs: on certain supplies they purchase, and certain supplies that they make.¹⁵ It is estimated that in 2021/22 VAT relief on supplies made to charities was worth £250 million.¹⁶

HMRC's data on charitable donations and associated tax reliefs is not broken down by sector. Ministers have stated in answer to PQs on the topic that, as a result, there is no estimate of the financial benefit received by those independent schools that are registered charities from these tax reliefs.¹⁷

¹² GOV.UK, [Appeal against a Charity Commission decision about your charity](#) (accessed 8 June 2023)

¹³ For a short overview see, HMRC, [Charities and tax](#), ret'd June 2023.

¹⁴ HMRC, [UK charity tax relief statistics commentary](#), 3 March 2023; HMRC, [UK charity tax relief statistics - Tables 1 and 2: Summary of UK tax reliefs for charities and donors](#), (PDF), March 2023

¹⁵ For a short overview see, HMRC, [VAT for charities](#), and, [VAT rates on different goods and services: health, education, welfare and charities](#), ret'd June 2023

¹⁶ HMRC, [Non-structural tax reliefs](#), May 2023 (for details see, HMRC, [Estimated cost of non-structural tax reliefs](#), January 2023).

¹⁷ For example, [PQ1234](#), 25 April 2017; [PQ1921](#), and [PQ1926](#), 6 July 2017

1.6 Business rates

Registered charities are eligible for an 80% discount on the business rates liability of a property, provided that that property is used wholly or mainly for charitable purposes. This discount is therefore available to independent schools with charitable status in England and Wales, and also to state-funded academies that have charitable status. In Scotland, the situation is different (see sections 7.2 and 7.3).

Separately, in England, Scotland and Wales, properties that are used for training or welfare services for disabled persons are exempt from business rates.¹⁸ This exemption covers most types of special school. No general business rates discount exists for state-funded schools that do not have charitable status.

The discrepancy between independent and state-funded schools, arising from how they are treated by the business rates system, has been challenged in the past. In an [answer to a Parliamentary Question on 30 March 2022](#), the Government stated:

The costs for local authority-maintained schools' and academies' business rates are currently covered by the department and there is no disadvantage to state-funded schools from paying full rates, or advantage from receiving rates relief.¹⁹

This implies that the Government has no plans to change this situation in regard to England (business rates are fully devolved to Scotland, Wales and Northern Ireland).

1.7 VAT on school fees

How does VAT work?

VAT is charged on the supply of all goods and services made in the course of a business by a taxable person, unless they are specifically exempt. All businesses must register for VAT if their annual turnover of taxable goods and/or services is above a given threshold. This threshold is [currently £85,000](#).

VAT is charged on the additional value of each transaction. It is collected at each stage of production and distribution. A business pays VAT on its purchases (known as input tax), and charges VAT on its sales (known as

¹⁸ Local Government Finance Act 1998, schedule 5, paragraph 16

¹⁹ [PQ HC 145043 2021-22](#), 30 Mar 2022

output tax). It will settle with HMRC for the difference between the two. In the end the cost of the tax is borne by the final consumer.²⁰

VAT is charged either at the standard rate – currently 20% – or the zero rate, though there is limited use of a reduced rate of 5%.

The exemption of goods and services from VAT should be distinguished from their being charged a zero rate.

Although a business will not charge a customer VAT on their supply of zero-rated goods or services, the supply will still count as part of a business' taxable turnover. VAT charged on inputs relating to zero-rated activities can be reclaimed, unlike the VAT incurred by a business in the course of an exempt activity. In the latter case, a business making exempt supplies has to absorb the VAT charged to it by its suppliers. This is often called 'irrecoverable' VAT.

From the perspective of the final consumer, both zero-rated supplies and exempt supplies will be VAT-free.

VAT law is consolidated in the [VAT Act \(VATA\) 1994, as amended](#).

[Schedule 9 to the Act](#) sets out those goods and services which are exempt from VAT. Categories of exempt supplies include land, insurance, finance, education, health and welfare.

[Schedule 8 to the Act](#) sets out those goods and services which are charged a zero rate. Categories of zero-rated supplies include food, construction of new dwellings, domestic and international passenger transport, drugs and medicines on prescription, and certain supplies to charities.

HMRC publishes detailed guidance on the rate of VAT that is charged on different goods and services.²¹

How does VAT apply to school fees?

Generally, school fees for attendance at an independent school will be VAT-free because the supply of education is exempt from VAT.

As noted, schedule 9 to VATA 1994 specifies supplies that are VAT-exempt. [Group 6 to schedule 9 deals with the supply of education](#). This establishes that the provision of education, research or vocational training by an “eligible body”, along with the provision of examination services, and goods or services “closely related” to the supply of education, research or vocational training, is exempt from VAT.²²

²⁰ HMRC's VAT Guide ([VAT Notice 700, March 2023](#)) provides an overview of the basic rules of VAT – see [section 4](#).

²¹ HMRC, [VAT rates on different goods and services](#), July 2022

²² specifically, item 1(a), item 3(a) and item 4 to [group 6 of schedule 8 to VATA 1994, as amended](#)

HMRC publish guidance on the scope of the exemption. As this explains, in this context, the term “eligible body” is one of the following:

- a school, sixth form college, tertiary college or further education college or other centrally funded further education institution (defined as such under the Education Acts)
- a centrally funded higher education institution in Wales, Scotland and Northern Ireland (defined as such under the Education Acts)
- the governing body of one of these institutions:
 - a local authority
 - a government department or executive agency
 - a non-profit making body that carries out duties of an essentially public nature similar to those carried out by a local authority or government department
 - a health authority
- a non-profit making organisation that meets certain conditions
- a commercial provider of tuition in EFL, in which case special rules will apply ...
- a university
- a higher education provider registered in the approved (fee cap) category of the register maintained by the Office for Students from the date of inclusion in the register.²³

HMRC’s guidance goes on to underline that “an organisation is likely to be an eligible body, where it’s a charity, professional body or company: that cannot and does not distribute any profit it makes; with any profit that might arise from its supplies of education, research or vocational training is used solely for the continuation or improvement of such supplies.”²⁴

In this context, ‘education’ means a course, class or lesson of instruction or study in any subject, regardless of when and where it takes place. It would include lectures; educational seminars; conferences and symposia; recreational and sporting courses; as well as distance teaching and associated materials.²⁵

²³ HMRC, [Education and vocational training: VAT Notice 701/30](#), February 2023 para 4.1. The term is defined by [note 1 to group 6 of schedule 8 of VATA 1994](#)

²⁴ [as above](#) para 4.3

²⁵ [as above](#) para 5.1

HMRC's guidance summarises the VAT consequences for an 'eligible body' if it is charging for its supply of education:

If school, higher or further education is being provided for a charge ... the VAT consequences are for an eligible body ...:

- the education provided is exempt
- any 'closely-related' goods or services provided are exempt
- the sales of other goods or services are taxed in the normal way.²⁶

HMRC publishes further guidance in its [VAT Education Manual](#).

In answer to a PQ in February 2023, Nick Gibb, Minister of State for Education, argued that “the introduction of additional tax on school fees, or otherwise changing their tax status, may make independent education less affordable and create place pressures on state-funded schools which have limited capacity”, and consequently “the Government has no plans to change the tax status of independent schools and has not made an assessment of the impact of such a change on both the independent school sector, and the state education system.”²⁷

²⁶ HMRC, [Education and vocational training: VAT Notice 701/30](#), February 2023 para 4.1. The term is defined by [note 1 to group 6 of schedule 8 of VATA 1994](#), para 2.1

²⁷ [PQ135345, 7 February 2023](#)

2

Public benefit: Law and guidance

The law relating to public benefit

As noted in section 1.2 above, the term “public benefit” does not have a statutory definition and continues to be interpreted in accordance with existing common law (case law).

The Charity Commission acknowledges the law on public benefit can be complex and continues to evolve as social conditions change.²⁸ It is considered on a case-by case basis. In 2012, the Upper Tribunal (Tax and Chancery Chamber) noted a consequence of the law developing in this way:

the authorities do not provide a comprehensive statement of the public benefit requirement but provide rather a series of examples of when the public benefit requirement is or is not satisfied. There is no application of some overarching, coherent, principle by which the Courts have been guided.²⁹

The Commission says trustees are free to exercise discretion within 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.³⁰

²⁸ [Public benefit: an overview - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/public-benefit-an-overview), 16 September 2013 (accessed 18 May 2023)

²⁹ Attorney General v Charity Commission (The Poverty Reference) [2012] WTLR 977 at [34], quoted at Charity Commission, [Analysis of the law relating to public benefit](#) (PDF), para 32

³⁰ [Public benefit: an overview - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/public-benefit-an-overview), 16 September 2013 (accessed 18 May 2023)

2.1

Charity Commission guidance

Legislative requirements

The 2011 Act requires the Charity Commission, following consultation, to issue guidance to advance its statutory public benefit objective, which is to “promote awareness and understanding of [...] the public benefit requirement”.³¹

Charity trustees must consider the Charity Commission’s guidance when exercising any powers or duties to which the guidance is relevant.³² They must confirm in their annual report that they have done so and how they have carried out their charity’s purposes for the public benefit.³³

Current Charity Commission guidance

The Charity Commission’s current public benefit guidance (2013) replaced guidance published in 2008, which the Independent Schools Council challenged through judicial review (see section 6 of this briefing).

There are three public benefit guides:

- [Public Benefit: the public benefit requirement](#) (PB1)³⁴
- [Public Benefit: running a charity](#) (PB2)³⁵
- [Public Benefit: reporting](#) (PB3).³⁶

In addition, [Public benefit: an overview \(www.gov.uk\)](#) gives an overview of the Commission’s guidance on public benefit.³⁷

The Charity Commission’s guidance is general guidance, rather than the law, “written for charity trustees to explain what the law says on public benefit and how the commission interprets and applies that law”.³⁸

The Charity Commission makes public benefit decisions, not based on its guidance which, it says, cannot cover all the complexities of the law, but on how the law applies to the circumstances of individual cases.³⁹

³¹ Charities Act 2011 sections 17 and 14

³² [Charities Act 2011 section 17\(5\)](#)

³³ [The Charities \(Accounts and Reports\) Regulations 2008](#) SI 2008/629 See also, [Public benefit: reporting - GOV.UK \(www.gov.uk\)](#), 16 September 2023 (accessed 8 June 2023)

³⁴ [Public benefit: the public benefit requirement - GOV.UK \(www.gov.uk\)](#), 16 September 2013 (accessed 8 June 2023)

³⁵ [Public benefit: running a charity - GOV.UK \(www.gov.uk\)](#), 16 September 2023 (accessed 8 June 2023)

³⁶ [Public benefit: reporting - GOV.UK \(www.gov.uk\)](#), 16 September 2023 (accessed 8 June 2023)

³⁷ [Public benefit: an overview - GOV.UK \(www.gov.uk\)](#), 16 September 2013 (accessed 8 June 2023)

³⁸ As above

³⁹ As above

Making provision for “the poor” to benefit

The Charity Commission uses the term “the poor” in [its guidance](#) and this terminology is used in case law and, where relevant, in this briefing.

Charities (including charitable independent schools) may charge for the services or facilities they offer. However, the Charity Commission says that if the fees charged are “[more than the poor can afford](#),” there is a legal requirement for the trustees to run the charity in a way that does not exclude those who are poor.⁴⁰

Annex C to the guidance, [Public Benefit: running a charity](#), provides further information and includes as an example of charities that often charge for their services, educational organisations such as schools and universities. The Charity Commission notes there is no universal definition of “the poor” in this context, and there is no universal definition of the charges that the poor cannot afford, adding:

Charity law recognises that ‘the poor’ is a relative term, which depends on the circumstances in individual cases. However, ‘the poor’ does not just mean the very poorest in society and it can include people of modest means.⁴¹

The guidance sets out three legal requirements related to making provision for “the poor” to benefit:

- the level of provision that trustees make for the poor must be more than minimal or token.
- it is for a charity’s trustees to decide, taking into account all the circumstances of their charity, what provision (in addition to what would be more than minimal or token provision) to make to enable the poor to benefit.
- trustees must make decisions that are within the range of decisions that trustees could properly make in those particular circumstances.⁴²

It adds that this might be demonstrated, for example, “by making decisions in accordance with the framework for [trustee decision making](#)” (which is not part of the Commission’s public benefit guidance).

The Charity Commission sets out some examples of what trustees might decide to do, including reducing charges for people who cannot afford the full cost, or providing benefit in other ways, such as by supporting the delivery of similar services by a state-run organisation.⁴³

⁴⁰ [Public benefit: running a charity - GOV.UK \(www.gov.uk\)](#), 16 September 2013 (accessed 8 June 2023)

⁴¹ As above

⁴² As above

⁴³ As above

It says trustees can consider the availability of other funding sources which might help people access the benefits of the charity, such as scholarship funds provided by other charities.

The guidance notes the Upper Tribunal set out factors which may be relevant to whether a charitable fee-charging school is making appropriate provision for the poor to benefit, including:

- the level of fees charged
- the charity's financial situation and business plans (including the level of salaries for professional staff and their required level of qualification)
- how the charity operates on the ground
- whether the charity provides a 'luxury' service and what facilities it offers
- whether the charity has any endowment funds (the funds which the trustees are legally required to invest or keep and use for the charity's purposes. Endowment may be expendable or permanent)
- the charity's geographical location and other relevant local factors (such as whether it is in an area of social deprivation)⁴⁴

Annex C also says trustees of charitable fee-charging independent schools might find it helpful to look at the [answers to hypothetical questions](#) about making provision for the poor put to the Upper Tribunal by the Attorney General, which are not part of the public benefit guidance. The Charity Commission adds that, to understand these questions and answers in context, some trustees may wish to view the full judgment of the Upper Tribunal.⁴⁵

2.2

Other Charity Commission publications

The Charity Commission has also published [associated documents](#),⁴⁶ including:

Analysis of the law relating to public benefit

The Charity Commission's [Analysis of the law relating to public benefit](#) (PDF) gives an overview of the law on which the Commission's statutory public benefit guidance is based.⁴⁷

⁴⁴ [Public benefit: running a charity - GOV.UK \(www.gov.uk\)](#), 16 September 2013 (accessed 8 June 2023)

⁴⁵ As above. The decision of the Upper Tribunal is [The Independent Schools Council v Charity Commission of England and Wales \[2011\] UKUT 421 \(TCC\)](#) (PDF)

⁴⁶ [Charitable purposes and public benefit - GOV.UK \(www.gov.uk\)](#) (accessed 8 June 2023)

⁴⁷ [Legal analysis: public benefit - GOV.UK \(www.gov.uk\)](#), September 2013, new format February 2017

It sets out the main points from the decision of the Upper Tribunal in the case which considered the duties of the charity trustees of charitable schools which charge fees:⁴⁸

- a. A pupil whose family is able to pay fees is no less a potential beneficiary of such a charity than a pupil with no-one to pay his fees. Both have a need for the education which it is the purpose of the charity to provide.
- b. When deciding whether a charitable fee-charging school is carrying out its purposes for the public benefit, it is legitimate to take into account the extent to which the school needs to charge fees to cover its expenditure. If, as is usual, the school needs an income from fees to be viable, it is legitimate for its admissions to be weighted in favour of potential beneficiaries able to pay fees.
- c. Where the charges made by a charitable fee-charging school are more than the poor can afford, its trustees must provide a benefit for such of the charity's potential beneficiaries as are poor which is more than minimal or tokenistic. Beyond that, the question of what provision to make for such of the potential beneficiaries as are poor is to be decided by the charity trustees in their discretion.
- d. When deciding whether a potential beneficiary is poor, it may be appropriate to look beyond the circumstances of the beneficiary viewed in isolation: the circumstances of his family may prevent him being treated as 'poor'; his eligibility for a grant from another charitable source may not.
- e. In the case of a charity whose charges are more than the poor can afford, there will be potential beneficiaries who are not poor but who cannot afford the full charge. The Tribunal did not prescribe any minimum level of provision for such potential beneficiaries, treating the matter as one to be decided by the trustees in their discretion.
- f. When deciding whether a charitable fee-charging school is carrying out its purposes for the public benefit:
 - the primary focus must be on the direct benefits it provides
 - all the benefits which it provides in furtherance of its charitable purposes can be taken into account
 - benefits which it provides which are unrelated to its charitable purposes cannot be taken into account.
- g. If the school provides luxurious facilities, the onus of demonstrating that it is carrying out its purposes for the public benefit is increased.⁴⁹

Central to the debate about the charitable status of fee-paying schools are the tax advantages that flow from this. However, the Charity Commission says

⁴⁸ [The Independent Schools Council v Charity Commission of England and Wales \[2011\] UKUT 421 \(TCC\)](#) (PDF)

⁴⁹ Charity Commission, [Legal analysis: public benefit](#) (PDF), September 2013, new format February 2017, para 99, footnotes omitted. Further information about this case is provided in section 6 of this briefing

the availability of fiscal privileges to charities is irrelevant to its assessment of charitable purposes, as this is a matter for tax law:

The courts have noted that charities enjoy fiscal privileges, and it has been suggested that the availability of fiscal privileges should be regarded as relevant to whether a purpose should be accepted as charitable. The Commission's approach to the recognition of new charitable purposes is to examine them in the context of decisions of the courts and its own previous decisions. Fiscal privilege that flows from charitable status is a matter for legislation by Parliament and enforcement by HM Revenue and Customs.⁵⁰

Charging for services: illustrative examples of benefits for the poor

Charity Commission guidance, [Charging for services: illustrative examples of benefits for the poor](#), sets out examples of how charities, which charge for their services or facilities at rates more than the poor can afford, might provide benefits for the poor.⁵¹

This guidance provides 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

⁵⁰ Charity Commission, [Analysis of the law relating to public benefit](#) (PDF), September 2013, new format February 2017, para 33 (footnotes omitted)

⁵¹ [Charging for services: illustrative examples of benefits for the poor - GOV.UK \(www.gov.uk\)](#), 16 September 2013. A Charity Commission press release, [Charity Commission updates guidance for fee-charging educational charities](#), 22 October 2015 (accessed 8 June 2023) indicates that this document was updated in October 2015. However, the document still carries its original publication date (16 September 2013)

- formalising ways of sharing knowledge, skills, expertise and experience with other educational providers, for example, state schools, colleges or academies as a form of non-financial sponsorship
- formally seconding teaching staff to other state schools or colleges, for example in specialist subjects such as individual sciences or modern languages
- working with schools overseas that provide education to children from families that cannot afford to pay for the child's education
- supporting state schools to help them prepare A-level students for entry to universities
- hosting joint schools events with other local state and independent schools, such as sports days, maths, spelling, music, dance and drama competitions or productions
- working together with a state school on a project to improve the quality of teaching and learning for pupils
- collaborating with a state school to share respective skills and experience
- working in partnership with a non fee-charging school overseas to share knowledge, skills and expertise and arrange cultural exchange visits for pupils at both schools
- engaging in sports, drama, music or arts partnership activities with local state schools.

The Commission says, although this is not mandatory, it is good practice for schools to comment on, or outline, in their trustee annual report their approaches to public benefit in sports, drama, music and the arts.⁵²

Supplementary public benefit guidance

The Charity Commission has also published [supplementary public benefit guidance](#) which, it says, should be read together with the core public benefit guidance for charities,⁵³ including:

- [The advancement of education for the public benefit](#) (PDF), 2008. Some of the text of this document has been withdrawn and it carries the following notice:

This guidance is currently under review

⁵² The Charity Commission has published an [illustrative example](#) of how a school might report on its public benefit provision, [Example trustees' annual reports and accounts for charities - GOV.UK \(www.gov.uk\)](#), 23 May 2013 (accessed 8 June 2023)

⁵³ [Charities: supplementary public benefit guidance - GOV.UK \(www.gov.uk\)](#) (accessed 8 June 2023)

It no longer forms part of our public benefit guidance and should now be read together with our set of 3 public benefit guides. It will remain available to read until we publish replacement guidance.⁵⁴

- [Analysis of the law underpinning The Advancement of Education for the Public Benefit](#) (PDF), December 2008, which is designed to be read in conjunction with the above document.

⁵⁴ Charity Commission, [The Advancement of Education for the Public Benefit](#) (PDF), 2008

3

Partnerships between independent schools and state schools

There are no comprehensive independent estimates of the extent or intensity of partnerships between independent and state-funded schools. However, the Independent Schools Council's (ISC) annual census of its member schools across the UK does collect some data on these partnerships.

The [January 2023 ISC census](#) found:

- 1,043 ISC independent schools were involved in state-funded school partnerships
- There were around 8,800 partnerships; individual independent schools can have a partnership with more than one state-funded school.⁵⁵

3.1

How partnerships work

The ISC identifies several ways its members work with state-funded schools, including:

- Through academic partnerships. Examples include jointly-attended subject workshops, targeted summer camps, and masterclasses
- On careers guidance, further and higher education initiatives. Examples include joint careers conferences, and specialist events on medical school applications
- Creating regional or sub-regional partnership groups, with several independent and state-funded schools in an area
- Participating in joint music and arts schemes
- Sports development, including tournaments, holiday and after-school clubs, festivals of sport, and access to specialist coaching
- Sharing facilities, such as grounds, sports pitches, and swimming pools, and organising joint teachers' continuing professional development

⁵⁵ Independent Schools Council, [ISC Annual Census 2023](#), May 2023, p5

- Setting up formal bodies such as trusts, that span both independent schools and their partner state-funded schools.⁵⁶

Schools Together

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.⁵⁷

[Schools Together](#) is owned and managed by the ISC.⁵⁸

3.2

Joint understanding between the Department for Education and ISC

In May 2018, the [Government published guidance on the joint understanding between the Department for Education \(DfE\) and the ISC](#) in relation to independent and state school partnership working [...] in England.

The Government encouraged cross-sector partnerships:

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

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.⁵⁹

The DfE has subsequently published [updated guidance for independent and state-funded schools, and universities, on collaboration](#). This encourages institutions to enter into formal agreements about their partnerships.⁶⁰

⁵⁶ Independent Schools Council, [Celebrating Partnerships 2022](#), November 2022

⁵⁷ Schools Together, [About Schools Together](#) [accessed 13 June 2023]

⁵⁸ Schools Together, [Statutory information](#) [accessed 13 June 2023]

⁵⁹ Department for Education, [Joint understanding between DfE and Independent Schools Council \(ISC\)](#), 11 May 2018

⁶⁰ Department for Education, [Guide to setting up partnerships](#), October 2022

4

Department for Education 2016 consultation paper

In September 2016, the Government published a consultation paper, [Schools that work for everyone](#) (PDF).⁶¹ This included proposals relating to independent schools.⁶²

The Government considered that independent schools could do more to ensure 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:

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.⁶³

The Government’s 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”:

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.⁶⁴

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

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

⁶¹ Department for Education, [Schools that work for everyone](#) (PDF), 12 September 2016

⁶² As above, p12-16

⁶³ As above, p12, para 4

⁶⁴ As above, p14, para 11

- 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 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.⁶⁵

In the consultation, the Government said it would consider legislation to remove the benefits of charitable status from schools that did not meet new benchmarks:

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.⁶⁶

The consultation closed in December 2016.

4.1

Conservative Party 2017 General Election Manifesto

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

⁶⁵ Department for Education, [Schools that work for everyone](#), (PDF), 12 September 2016, p15, para 13

⁶⁶ As above, p16, para 14

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.⁶⁷

4.2 Government response to the 2016 consultation

The Government published its [consultation response](#) in May 2018.⁶⁸ This did not include any proposals for legislation relating to charitable status. The Government said it had agreed a joint understanding with the ISC about support by independent schools for the state sector, including activities independent schools were expected to carry out:

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 pupils, including looked-after children, such as through targeting of bursaries.

[...]

The ISC now collects information on partnership activities through its annual school census. 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.⁶⁹

⁶⁷ [Forward, Together, Our Plan for a Stronger Britain and a Prosperous Future, The Conservative and Unionist Party Manifesto 2017](#), p50

⁶⁸ Department for Education, [Schools that work for everyone: Government response](#), May 2018

⁶⁹ [Schools that work for everyone: Government consultation response \(publishing.service.gov.uk\)](#), (PDF), May 2018, p9

5 Political consideration of charitable and tax status of independent schools

Views differ on whether independent schools which charge fees should be able to benefit from the tax concessions available to charitable organisations.

5.1 Government policy

As noted in section 1.7, above, [in a written answer in February 2023](#), Nick Gibb, Minister of State for Education, said the Government did not intend to change the tax status of independent schools which could make them less affordable and put pressure on places in the state-funded sector. He also argued:

Independent schools are an important part of the school system in England. The diversity of the sector gives parents valuable choice in how to educate their children. The independent school sector also provides specialised education supporting vulnerable children with complex needs, or children with skills in areas such as art or music. It is a source of international investment in the UK.⁷⁰

5.2 Labour Party policy

Labour Party General Election Manifesto 2019

The [Labour Manifesto for the 2019 General Election](#) (PDF) included a commitment relating to tax and private schools (another name for independent schools):

We will close the tax loopholes enjoyed by elite private schools and use that money to improve the lives of all children, and we will ask the Social Justice Commission to advise on integrating private schools and creating a comprehensive education system.⁷¹

⁷⁰ [PQ 135345 \[on Private Education: Taxation\], 7 February 2023](#)

⁷¹ [It's time for real change, The Labour Party Manifesto 2019](#) (PDF), p40

5.3

House of Commons debate January 2023

On 11 January 2023, the House of Commons debated a Labour motion calling for a new select committee “[to consider reforming the tax status of private schools in order to raise funding for measures to increase educational standards across the state school sector](#)”.⁷²

Shadow Secretary of State for Education, Bridget Phillipson said Labour would require private schools to pay business rates and VAT, adding:

At this time of economic uncertainty, asking the public to subsidise a tax break for private schools is inexcusable. We are not talking about small sums. Putting VAT on independent school fees would raise “about £1.7 billion”—those are the Chancellor’s words, not mine.⁷³

Bridget Phillipson said she did not anticipate that the proposals would cover specialist provision.⁷⁴

The Shadow Secretary asked what had happened to Conservative manifesto commitments made in 2017 to review private schools’ tax status if partnerships with state-funded school did not increase:

Conservatives will turn to bursaries, but the Independent Schools Council’s own figures shows that a mere 8% of children get means-tested fee support. The partnerships with state schools that they use to justify this special status have gone down again this year.

Protecting private schools is not about aspiration for all our children; it is about ensuring exclusive opportunities remain in the hands of a privileged few. Government Members know that. Back in 2017, they committed to review private schools’ tax status if partnerships did not grow, because they recognised that it is unfair and unreasonable to ask the public to pay for opportunities that most can only imagine. What has changed in that time?⁷⁵

Gillian Keegan, Secretary of State for Education, said the Opposition’s proposed tax policy would create challenges across the diverse independent school sector, with an uncertain outcome:

The more affordable schools, many of which are former grammar schools, are likely to be at greater risk from an increased tax burden, and the closure of such schools would increase inequality and reduce choice for families. Many schools, when faced with a sudden hike in costs, are likely to seek to avoid passing on the full cost to hard-pressed families. Indeed, many might choose to reduce the bursaries and scholarships that broaden access to such places instead.⁷⁶

⁷² [HC Deb 11 January 2023 cc566-617](#)

⁷³ [HC Deb 11 January 2023 c568](#). For the Chancellor’s original comments, see [HC Deb 17 November 2022 c849](#)

⁷⁴ [HC Deb 11 January 2023 c570](#)

⁷⁵ [HC Deb 11 January 2023 c573](#)

⁷⁶ [HC Deb 11 January 2023 c577](#)

Gillian Keegan argued that the closure of independent schools or reduced bursaries would put financial pressure on state-funded schools:

At the current average cost per pupil of £6,970, the projected cost of educating in the state-funded sector all the pupils we are aware of who receive some form of scholarship or bursary would be more than £1.1 billion. That does not factor in any additional capital or workforce costs to create places for those pupils.⁷⁷

She continued:

I would like to clarify that the figures that I used—160,000 pupils times £6,970—are our figures, so £1.1 billion is our calculation.... it would cost £1.1 billion at the current average cost per pupil £6,970. I do believe that that is why previous Labour Governments did not implement the policy, because it would greatly undermine the benefit of any additional funding to the state sector, and it could result in Labour’s proposed financial benefit in fact being a net cost to the Exchequer.⁷⁸

Stephen Morgan, Shadow Minister for Schools questioned whether private schools would have to close under Labour’s proposals:

Those on the Conservative Benches, and even the Chancellor, have recently quoted figures from the Independent Schools Council saying that Labour’s policy will cause private schools to shut, and that thousands of pupils will leave the private sector. However, the Institute for Fiscal Studies found that those claims do not stack up. Although fees have risen significantly in the past 20 years, the proportion of pupils in private education has hardly changed.⁷⁹

Education Minister Nick Gibb said the Government believed “the state education sector can and does benefit from collaboration with the private sector”.⁸⁰

The motion was defeated by 303 votes to 197.

In a subsequent written answer given on 13 January 2023, Nick Gibb reiterated: “The current Government has not proposed the introduction of VAT on school fees and no exploratory work has been undertaken in relation to this issue”.⁸¹

5.4 House of Lords debate on Schools Bill [HL]

At Lords committee stage of the [Schools Bill \[HL\] 2022-23](#), (which the Government has since confirmed will not progress in its original form),⁸² Baroness Chapman of Darlington, who was then Shadow Education

⁷⁷ [HC Deb 11 January 2023, c577](#)

⁷⁸ [HC Deb 11 January 2023, c578](#)

⁷⁹ [HC Deb 11 January 2023 c609](#)

⁸⁰ [HC Deb 11 January 2023 c612](#)

⁸¹ [PQ 114572 \[on Private Education: VAT\], 13 January 2023](#)

⁸² House of Commons Education Committee, [Accountability hearings](#), 7 December 2022, HC 58, Q237

Spokesperson, spoke to an amendment meaning independent, fee-paying schools, excluding independent special schools, would not qualify for the tax exemptions that come with charitable status. She said:

Some private schools offer bursaries and I have heard every argument and thread in this row over the years. We obviously know that they offer bursaries and many of them go to some considerable effort to contribute to the public good. That is recognised, appreciated, valued and respected. But that is no different to the way many businesses operate. ... The fact that many private schools work in their communities and offer some opportunities is very much on their terms and is quite limited. We do not consider that that makes them charities.⁸³

The Baroness questioned the effect of help with school fees:

Around 500,000 pupils attend independent schools in the UK. It is true that around one-third of these receive some help with their school fees, but most of these children win scholarships or benefit from something like a staff discount. Among those who get some help, only a very small minority pay no fees at all. It is not usually means-tested. The average amount of financial support received is around one-third of the fee. Given that I have seen estimates of an average fee at between £13,00 and £15,500, that is still a lot of money for a child attending—even with support from the school—to have to find: around £8,000 to £10,000 per year. Only 1.5% of means-tested bursaries and scholarships include any help at all with additional costs like uniform, so we really query the “widening opportunities, social mobility” arguments that you hear in defending charitable status.⁸⁴

Baroness Chapman asked whether providing tax concessions for charitable independent schools was the best use of public money:

Charitable status gives private schools around 80% relief on their business rates [⁸⁵] and saves a school like Eton more than £500,000 a year. We think we can save around £1.7 billion by removing tax breaks for private schools. Even if you are relaxed about the impact on society, equal opportunities and all of those issues, it is very difficult to argue that this is the best use of £1.7 billion. Removing a tax break from private schools should not be viewed as a matter just of ideology, though I am quite relaxed about saying that there is some ideology in this. It is also good management of public finances.

I ask noble Lords to consider whether this really is the best use of public money given the cost of living crisis and the pressures on the vast majority of families. This is about asking noble Lords to engage with the reality we face in 2022. Independent schools are just not charities in any modern sense. It is a status they have inherited for good historical reasons, but one that we think is no longer justifiable.

Baroness Barran, Parliamentary Under-Secretary for Education, disagreed with the amendment saying that charitable independent schools must show

⁸³ [HL Deb 22 June 2022 c312](#)

⁸⁴ As above

⁸⁵ See section 1.6 of this briefing paper above

public benefit and that the same principles should apply to these charities as to others:

...we are concerned that we should avoid piecemeal reform of charity law, aimed at only one group of charities. The amendment risks creating pressure to extend the removal of charitable status to other sectors. All charities must exist for public benefit, but they are not required to serve the whole public. It is not clear why this principle should change for one group, namely independent schools, and not for other charities.⁸⁶

The amendment was not moved to a vote.

⁸⁶ [HL Deb 22 June 2022 c317](#)

6 Background: History of public benefit guidance

6.1 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 a 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*, which 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 said this was not a requirement. The Commission said it could not suggest a percentage of bursaries that all independent schools should offer. This guidance has now been withdrawn.⁸⁷

6.2 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 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 materially for those who could not afford the fees.

In a speech to the Headmasters and Headmistresses Conference in October 2009, Dame Suzi Leather, then Chair of the Charity Commission, confirmed the 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

⁸⁷ Section 2 of this briefing provides information about current Charity Commission guidance

independently in its approach to public benefit, and that the Commission was obsessed with bursaries.⁸⁸

On 8 July 2010, the Charity Commission published an [update on its public benefit work](#).⁸⁹ It concluded 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.⁹⁰

6.3 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 to quash 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.⁹¹

In September 2010, the Attorney General asked the Tribunal to consider how the public benefit requirement should operate in relation to a hypothetical independent school.⁹² 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 Charities Act 2006.

The Attorney General made the reference because he thought there was uncertainty about how charity law operated in the context of fee-charging independent schools.

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

⁸⁸ Charity Commission, The Headmasters' and Headmistresses' Conference, 7 October 2009. See also Andrew Holt, "[Charitable schools have years to meet public benefit](#)", Charity Times, 8 October 2009 (accessed 8 June 2023)

⁸⁹ 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 8 June 2023)

⁹⁰ As above

⁹¹ 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

⁹² [HC Deb 11 October 2010 c247W](#). The questions referred are set out in [Annex A to The Independent Schools Council v Charity Commission of England and Wales \[2011\] UKUT 421 \(TCC\)](#) (PDF)

Tribunal decision

Following a hearing in May 2011, the [Upper Tribunal's decision](#) (PDF), was published on 14 October 2011.⁹³

In a lengthy decision, the Tribunal concluded that, in all cases, there must be more than minimal or token benefit for the poor, but trustees of a charitable independent school should decide what is appropriate in their particular circumstances. Benefits could be provided in a variety of ways.⁹⁴

In dealing with the Attorney General's reference questions, the Tribunal declined to give any sort of definitive ruling and said each case would depend on its own circumstances.⁹⁵

The Tribunal decided that some parts of the Charity Commission's guidance were erroneous.⁹⁶ The Charity Commission summarised:

The Tribunal's interpretation of the Commission's guidance was that the Commission was suggesting an objective test of 'reasonableness' in relation to the adequacy of provision that a fee-charging charity makes for the poor. The Tribunal indicated that the guidance confuses the public benefit requirement for being a charity and the trustees' duty to operate their charity for the public benefit once established as a charity. In these respects the Tribunal decided that parts of the Commission's guidance on public benefit were 'obscure' or 'wrong'.⁹⁷

The Tribunal subsequently made an order which allowed the Commission to withdraw those aspects of its guidance that required rewriting to ensure they were consistent with the Upper Tribunal's decision.⁹⁸

6.4

Charities (Protection and Social Investment) Bill

The issue of what independent schools should do to fulfil the public benefit requirement was considered in debates in both Houses on a bill which

⁹³ [The Independent Schools Council v Charity Commission of England and Wales \[2011\] UKUT 421 \(TCC\)](#) (PDF). A summary of the decision was also published, [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 \(PDF\)](#), 14 October 2011

⁹⁴ As above

⁹⁵ [The Independent Schools Council v Charity Commission of England and Wales \[2011\] UKUT 421 \(TCC\)](#) (PDF), paragraph 242

⁹⁶ [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 \(PDF\)](#), 14 October 2011, paragraph 24

⁹⁷ Charity Commission Parliamentary Briefing, [Update on public benefit guidance](#) (PDF), January 2012

⁹⁸ As above

became the Charities (Protection and Social Investment) Act 2016.⁹⁹ No amendments were made to the Bill to reflect the issues raised. However, in October 2015, the Charity Commission updated its guidance for fee-charging educational charities, including charitable independent schools, responding to concerns which had been expressed around independent arts and sports facilities:

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.¹⁰⁰

The Charity Commission said 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](#)¹⁰¹

⁹⁹ For example, [HL Deb 6 July 2015 cc18-21GC](#), [HL Deb 20 July 2015 c965](#) and [PBC Deb 7 January 2016 c131-146](#). The four main objectives of this Act were to provide new and strengthened powers for the Charity Commission; to extend the criteria for automatic disqualification from charity trusteeship and apply disqualification to senior management positions; to strengthen the transparency and accountability of charity fundraising; and give charity trustees an explicit legal power to make social investments, [Charities Act 2016 Post-Implementation Review - GOV.UK \(www.gov.uk\)](#) (accessed 18 May 2023)

¹⁰⁰ Gov.UK, Charity Commission press release, [Charity Commission updates guidance for fee-charging educational charities](#), 22 October 2015 (accessed 2 March 2023)

¹⁰¹ These documents still carry their original publication date

7 Charitable schools in Scotland

7.1 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](#). The 2005 Act set out the charity test to be met in Scotland in sections 7 and 8. The OSCR explained this:

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.¹⁰²

7.2 Review of non-domestic rates system

In 2016, the Scottish Government set up a review of the non-domestic rates system (business rates), chaired by former RBS chair, Kenneth Barclay. The [review reported in August 2017](#).¹⁰³ One of its recommendations was that fee-paying schools should lose their entitlement to a rates reduction:

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.¹⁰⁴

¹⁰² OSCR, [Charity regulator publishes schools report](#), 8 December 2014 (accessed 8 June 2023). See also [OSCR | Meeting the Charity Test: Guidance](#), 20 August 2015 (accessed 8 June 2023)

¹⁰³ [Non-domestic tax rates review: Barclay report - gov.scot \(www.gov.scot\)](#) (accessed 8 June 2023)

¹⁰⁴ [https://www.gov.scot/publications/report-barclay-review-non-domestic-rates/pages/5/Non-domestic-tax-rates-review-Barclay-report-gov.scot\(www.gov.scot\)](https://www.gov.scot/publications/report-barclay-review-non-domestic-rates/pages/5/Non-domestic-tax-rates-review-Barclay-report-gov.scot(www.gov.scot)) (accessed 8 June 2023), [para 4.120](#)

7.3

Non-Domestic Rates (Scotland) Act 2020

[Section 17 of the Non-Domestic Rates \(Scotland\) Act 2020](#) removed the mandatory 80% charitable relief from mainstream independent schools registered as charities. These schools still maintain their charitable status and are still eligible for disability rates relief where they qualify for this. Independent special schools and specialist independent music schools retain the mandatory 80% relief.

Section 17 came into force on 1 April 2022.

The House of Commons Library is a research and information service based in the UK Parliament. Our impartial analysis, statistical research and resources help MPs and their staff scrutinise legislation, develop policy, and support constituents.

Our published material is available to everyone on commonslibrary.parliament.uk.

Get our latest research delivered straight to your inbox. Subscribe at commonslibrary.parliament.uk/subscribe or scan the code below:



 commonslibrary.parliament.uk

 [@commonslibrary](https://twitter.com/commonslibrary)