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Introduction

It has been an interesting decade for charity law.

A major piece of legislative reform was introduced in 2004 and then lambasted in 2013 as 'critically flawed' and 'an administrative and financial disaster' by the Public Administration Select Committee.[1] A newly formed Charity Commission (the Commission) came into existence in 2008 and was then castigated as 'not fit for purpose' in 2014 by the Chair of the Public Accounts Committee.[2] Guidance on the public benefit requirement was published by the Commission in 2008 and then completely replaced in 2013 after the Upper Tribunal (Tax and Chancery) (the Tribunal) subjected it to criticism and called it 'wrong' in places.[3] The Tribunal, for its part, had the opportunity to bring clarity and order to the disarray which had marked the early part of the new millennium, but instead delivered a judgment which has been widely criticised for its unfathomability and lack of a sound legal base.[4] And, although not normally a high profile subject, charity law aroused strong public opinion and found itself in the headlines: 'Private schools are victims of 'medieval' attack',[5] 'Private schools win £100m charity tax relief case'[6] and 'Churches battle "anti-Christian" charity chiefs',[7] to name but a few.

The reform in question was the new statutory definition of charity in the Charities Act 2006 (the 2006 Act), which required a charitable institution's purposes to be 'for the public benefit'.[8] Whilst not a new requirement in itself, its statutory

[1] *The role of the Charity Commission and 'public benefit': Post-legislative Scrutiny of the Charities Act 2006*, Third Report of Session 2013–14 (TSO, June 2013) paras 92 and 86 respectively.

[2] Margaret Hodge MP (Statement, 5 February 2014): www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/news/publication-of-report-tax-reliefs-on-charitable-donations.

[3] *R (Independent Schools Council) v Charity Commission* [2011] UKUT 421 (TCC), [2012] Ch 214 [235].

[4] eg, P Luxton, 'Opening Pandora's Box: The Upper Tribunal's Decision on Public Benefit and Independent Schools' (2012–13) 15 *Charity Law & Practice Review* 27; M Synge, '*Independent Schools Council v Charity Commission*' (2012) 75 *MLR* 624; and see ch 8.

[5] *The Telegraph*, 5 October 2009.

[6] *The Guardian*, 14 October 2011. For a review of the media coverage in respect of independent schools, see 'The Public Benefit Issue: A Media Analysis 2008–2012', Independent Schools Council bulletin (undated): www.isc.co.uk/Resources/Independent%20Schools%20Council/Research%20Archive/Bulletin%20Articles/2012/Bulletin29_Media_analysis.pdf.

[7] *The Sunday Times*, 29 July 2012.

[8] 2006 Act, s 2(1)(b).

enactment gave it a prominence which placed it centre stage and provoked widespread debate about its meaning.[9] Few concerned with charity law and the charity sector will be unfamiliar with the developments described in the chapters which follow, but for those who might have lacked sufficient time to question closely their legitimacy or justification in legal terms, it is hoped that this book will be both helpful and thought-provoking. The sympathy which must be felt for charity trustees, who have been bombarded with copious publications from the Commission and two lengthy Tribunal judgments, might also be extended to law lecturers and legal practitioners who must now find a way to articulate and advise upon the public benefit requirement in a way that makes sense. Particularly in the realms of fee-charging charities and religion, this requirement has proved to be something of a hot potato, politically divisive and far-reaching in its impact, yet strangely elusive in definition.

Perhaps we should not be surprised by either the criticisms or the confusion of recent years. The Joint Committee, which was appointed by the House of Lords and the House of Commons to report on the Charities Bill (which later became the 2006 Act), was clearly confused about the very reasons behind the Bill.[10] Reasonably clear was the intention that high-fee charging charities should qualify for charitable status only if they widened access to their services to people who were unable to afford the fees they charged, but rather less clear was, first, whether this represented any change in the law and, second, whether existing charities, most notably perhaps independent schools and private hospitals, were at risk of losing their charitable status. Conflicting messages were coming from the Home Office and the Commission as to what difference the legislation would make,[11] the Government having taken issue with the Commission's suggestion that it would probably not affect independent schools very much. Although the publication of a Concordat went some way towards reconciling these messages on a general level,[12] the lack of clarity which surrounded both the criteria for judging public benefit and the consequences of a charity losing its charitable status was never rectified and the scope for confusion persisted.[13] There was also serious concern over the capacity of the Commission to perform its intended role and about the prospect of incompatibility between the separate jurisdictions of the United Kingdom.[14]

[9] It is only in the sense of this statutory incarnation that the public benefit requirement should properly be considered 'new'.

[10] Joint Committee on the Draft Charities Bill, *The Draft Charities Bill* (2003–04, HL 167-I, HC 660-I) paras 14–22.

[11] Specifically, what difference the purported removal of an alleged presumption of public benefit would make (see text to nn 57–59 below), a dispute which the Joint Committee described as 'nothing short of farcical' (ibid, para 76).

[12] A joint letter from Fiona Mactaggart MP and Geraldine Peacock, Chair of the Charity Commissioners, an extract of which is reproduced in the Report (n 10) para 78.

[13] The non-exclusive criteria for judging public benefit which had been set out in the Concordat never found their way onto the face of the Bill and the Commission (as opposed to the Home Office) was charged with publishing guidance on public benefit, as discussed at various points in this book.

[14] Matters of charity law having been devolved in Scotland and Northern Ireland.

At the same time, questions of law became confused with questions of policy. In the public domain, it was easy to understand attention being diverted to whether independent schools *should* be charitable, rather than whether they *were* charitable as a matter of law, especially since the latter question depended on a technical definition of charity that had been developed by the courts over several centuries and because the automatic legal entitlement of charities to significant tax privileges meant that the impact on the public purse was significant.[15] One might well sympathise with a view that fee-charging schools should only qualify for charitable status, and therefore the tax privileges that go with it, if they offer people who cannot afford their fees adequate opportunities to benefit from the services and activities they provide. Such a view might be morally or politically legitimate, but it is also necessary to ask whether it has a sound basis in law or whether it is, in fact, contrary to law and in need of legislative reform to validate it: that is the question addressed here. It is important to emphasise that the issue is not whether or not one favours independent schools, or private hospitals or religious organisations, or even whether one believes that they should enjoy tax advantages or not: the issue is whether or not they are charitable as a matter of law.

Confusion about the interface between law and policy was not limited to the minds of the general public, however. Indeed, the following chapters will raise questions about law-making processes and the integrity of the law on a much deeper level. Lawyers are familiar with the separation of powers being a fundamental part of the Rule of Law, requiring clearly marked boundaries between the legislative, judicial and executive functions of government.[16] On the face of it, the Legislature legitimately passed an Act of Parliament which expressly preserved case law previously developed by the Judiciary, and the Executive (in the form of the Commission) was charged with applying that law in deciding whether or not to add an institution to the Register of Charities (the Register) or to remove one already registered. The Judiciary was also presented with an opportunity to 'check'[17] the Executive in the judicial review proceedings which challenged the Commission's interpretation of the law.[18] In the detail, however, it will be seen that the boundaries may have been blurred amid signs of a rather less conservative approach, as the Commission's role of explaining and applying the public benefit requirement arguably metamorphosed into one of also defining the term itself. At the same time, it seemed that the normal process of expounding the law by reference to legal precedent and legal principle was being replaced by a nod in the direction of concepts which had rather less rigour and formality: changing 'social and economic circumstances', for example, and the need for organisations to 'earn'

[15] Considered below.

[16] This is something of a simplification of a highly complex subject, but it is adequate for our purposes.

[17] The Rule of Law is safeguarded by a system of 'checks and balances' which operates between the three separate branches of State and is designed to ensure that no one branch exceeds its powers.

[18] *ISC* (n 3) (see ch 8).

charitable status and for the acquisition of that privileged status to be endorsed by public opinion.[19]

But first things first. It may be helpful to say a little about charitable status and then to set out a brief summary of the recent developments which have prompted the analysis in this book and to explain how these will be dealt with during the next nine chapters. Much of the book's content relates to the public benefit requirement and charity law in general terms, but there is a focus on fee-charging charities and independent schools in particular. The author makes no apology for this. Institutions with purposes for the advancement of religion can also be singled out as having been prejudiced by the Commission's interpretation of the law, but the issues are quite different and worthy of dedicated study on another occasion, although they will be touched upon in these pages where appropriate. The debate surrounding the status and fiscal treatment of fee-charging independent schools, however, raised important questions about social deprivation and advantage and about fiscal policy. Described as 'the only potentially partisan issue in the Bill',[20] this debate was particularly heated during the legislative journey of the 2006 Act and the impact of developments on fee-charging charities since its enactment is also particularly striking. Anyone would be forgiven for believing that the charitable status of independent schools (and other charities which charge fees) is partly dependent on their trustees widening access to those unable to afford their fees, although he or she might also be unsure whether this has always been the case or whether it was a new requirement brought in by the 2006 Act. It is hoped that this book will encourage the reader to question whether or not, as a matter of law, that belief is even well founded.

Charitable Status

Charitable status is highly prized but not easily explained. It does not depend on constitutional structure, nor is it the case that not-for-profit organisations or 'public-spirited' purposes are necessarily charitable. Charities have no distinct legal form but include trusts, companies, unincorporated associations and charitable incorporated organisations,[21] and charitable status is determined according to a legal, or 'technical', definition which is applied to the institution's purposes (as opposed to its activities). As a result, there is often a mismatch between what a layman might think of as charitable and what *is* charitable in law: one survey revealed that only seven per cent of respondents realised that Eton School was charitable, for example.[22] And although a lawyer recognises that religion and

[19] The idea of charitable status being 'a privilege, not a right' is questioned later in the text, along with the relevance of changing social and economic circumstances.

[20] HL Deb 20 January 2005, vol 668, col 906 (Lord Phillips).

[21] Charitable incorporated associations were introduced by the 2006 Act, although the first such entities were not registered until January 2013.

[22] And 73% thought that it was not: *Report of Findings of a Survey of Public Trust and Confidence in Charities* (Opinion Leader Research (for the Charity Commission) November 2005) 16, 17.

charity have long been closely associated, a layman might be surprised to learn that the law readily accepts religious organisations as charitable. Such mismatches between popular perceptions of charity and the legal position might arise from a belief that charity is necessarily associated with relieving poverty, for example, or that charities should be staffed by volunteers, or that they should not be in receipt of state funding. But whilst disparity between the legal and public understanding of charity might be marked, and whilst it might provide a legitimate impetus for legislative reform, it should not be allowed to displace proper legal analysis, precedent or legal doctrine.

The charity 'brand' brings with it public respect and confidence, the volunteering of time and money and also certain legal privileges. A trust which is expressed to endure indefinitely, or which is uncertain in its terms, for example, will be void if it is a private trust, but not if it is a charitable, or 'public', trust.[23] More significant, however, are the tax privileges which are automatically conferred on charities, subject to their being registered (if required to be registered) and the managers being 'fit and proper persons'.[24] Thus, at a basic level,[25] a charity is not subject to income or corporation tax,[26] for example, nor capital gains tax,[27] and the substantial relief from business rates of 80 per cent or more can be particularly valuable.[28] There are also reductions in inheritance tax where testators leave a qualifying legacy to charity[29] and a limited number of VAT reliefs,[30] although the inability of most charities to recover VAT remains a contested issue. The availability of tax advantages is not a factor which can legitimately be taken into account in determining charitable status, but it does mean that whether or not an institution is charitable is of substantially more than academic or linguistic interest.[31]

[23] It must be clear that certain property was intended to be given for charitable purposes, but any uncertainty in the exact nature of those purposes can be overcome by the court making an order for the direction of a scheme under its inherent jurisdiction. See, eg, P Pettit, *Equity and the Law of Trusts*, 12th edn (Oxford, Oxford University Press, 2012) 330 ff.

[24] Finance Act 2010, s 30, sch 6 (subject also to a jurisdiction condition). For comment on problems arising with these new provisions, see J Smith, 'Notes on the Finance Acts: Section 30 of and Schedule 6 to the Finance Act 2010: Charity Re-defined' [2010] *British Tax Review* 415.

[25] The summary here is necessarily simplistic. For a fuller discussion of the tax position, see H Picarda, *The Law and Practice Relating to Charities*, 4th edn (Haywards Heath, Bloomsbury Professional, 2010) and First Supplement (Haywards Heath, Bloomsbury Professional, 2014) chs 55–57.

[26] Save in respect of trading activities outside its primary purposes: Income Tax Act 2007, ss 521–36; Corporation Tax Act 2010, ss 466–93.

[27] Taxation of Chargeable Gains Act 1992, s 256.

[28] Local Government Finance Act 1988, ss 43, 47. In the case of independent schools, it was noted that over 70% of the tax benefits were attributable to business rates relief: HL Deb 28 June 2005, vol 673, col 154.

[29] Finance Act 2012, sch 33. Charitable legacies are not included in a valuation of the estate for inheritance tax purposes and lifetime donations to charity are also tax-efficient.

[30] See Value Added Tax Act 1994, as amended (eg, VAT cost-sharing exemption provisions in group 16, sch 9, introduced by s 197 Finance Act 2012).

[31] The impact of tax advantages has led many to question whether this is or should be a factor, but the legal authority for such a proposition is scarce (see text to nn 109–33, ch 2).

The automatic grant of fiscal privileges was noted to be 'clearly the most controversial' issue in the Joint Committee's deliberations on the draft legislation,[32] and it is this which, undoubtedly, has given rise to much of the opposition to the charitable status of fee-charging charities, at least in respect of independent schools. In the course of a debate in the House of Lords in 2005, the value of these privileges to the independent schools sector was noted to be £100m, although this was contrasted with more than £300m in fee reductions, grants and other charitable activities provided by the sector and £200m suffered in irrecoverable VAT. At the same time, the saving to the public purse, by reason of independent school pupils not taking up places in the state education system, was put at £2bn.[33]

It is more than a question of figures, however, and the legal and political debate surrounding the public benefit requirement has not been conducted in the fiscal arena, but in the name of charity regulation. Even if it had been put beyond doubt that the independent schools sector contributes more to the economy than it receives in fiscal benefits, it is likely that the debate as to whether independent schools should receive any or all of those benefits, and whether they should be entitled to call themselves charities, would still have taken place and recent developments have done little to silence the debate. Opposition to the sector is not new: political challenges in the past have included proposals for the outright abolition of independent schools or the imposition of VAT on their fees, as well as the removal of their charitable status.[34] To the extent that the developments described and analysed in the forthcoming chapters portray a sector under attack, however, it is suggested that this reveals a political desire to focus attention on, and to increase, the benefits which independent schools provide to society over and above the immediate benefit of providing an education to their fee-paying pupils, rather more than a drive to secure their abolition or even the blanket removal of their charitable status or fiscal privileges.[35]

It may seem rather obvious that entitlement to tax privileges could more helpfully be dealt with separately in fiscal legislation. This book owes its title to the words of Lord Campbell-Savours, who, during the passage of the Charities Bill, complained that attempts to address questions of tax, and the automatic conferral of tax privileges, in the name of charity law was making 'an absolute nonsense' of charity law and risked bringing the law into disrepute.[36] Not the first or the

[32] HL Deb 9 February 2005, vol 669, col GC69 (Lord Campbell-Savours). For our purposes, references to the automatic conferral of tax privileges on charities should be understood to be subject to the conditions noted above (n 24).

[33] HL Deb (n 28) col 155 (Lord Brooke).

[34] D Morris, *Schools: An Education in Charity Law* (Aldershot, Dartmouth Publishing, 1996) 24–29; I Williams, *The Alms Trade* (London, Unwin Hyman, 1989) 57–85. Both authors provide a historical account of various political challenges to independent schools.

[35] At least in the short term. It is possible that the abolition of independent schools, or the removal of their tax privileges, might have been part of the medium or long-term strategy.

[36] HL Deb (n 32) col GC69 (Lord Campbell-Savours) (see p xiii).

last to be acutely aware of the tensions created by failing to separate questions of charitable status from the automatic tax privileges which accompany it, however, his plea 'for once, let us sort it out' went unheeded.[37]

The Dawn of the Charities Act 2006

In 2001, the Labour Government initiated a review of the legal and regulatory framework for the charitable and wider not-for-profit sector. This was conducted by the Strategy Unit, a part of the Cabinet Office which was established in 2002 by former Prime Minister, Tony Blair, to provide advice and analysis on matters of strategy and government policy.[38] The Strategy Unit published its conclusions and recommendations for reform in a consultation paper (Strategy Unit Report) in September 2002.[39]

This was by no means the first initiative in reforming charity law, but it laid the foundation for the 2006 Act, not least in its recommendation of the enactment of a statutory definition of charity, something which had long been debated but never adopted.[40] It was proposed that the legislation should set out broad headings of charitable purpose in modern language and impose an obligation to provide public benefit, but also that 'public benefit' should not be defined in the statute. Such a definition was considered to be inadvisable on the grounds that it would be difficult to achieve, would lose the benefits of flexibility which case law offered and increase the risk of political interference.[41]

The intention was that the level of each charity's provision of public benefit should be assessed on a case-by-case basis and that, where it was considered insufficient, a charity should be encouraged to improve its provision, rather than lose its charitable status (although that was not ruled out).[42] It is evident from the Strategy Unit Report that its authors believed the law to stipulate that any fees charged by charities were required to be reasonable and that high-fee charging schools were obliged to 'make significant provision for those who cannot pay

[37] ibid; Lord Wedderburn was also direct (ibid, col GC68 (see p xiii)).

[38] Signalling that the third sector was significant for all arms of government and not just the Home Office: G Morgan, 'Public Benefit and Charitable Status: Assessing a 20-year Process of Reforming the Primary Legal Framework for Voluntary Activity in the UK' (2012) 3 *Voluntary Sector Review* 67, 68; the Strategy Unit Report also noting that many of the issues covered affected all UK jurisdictions and not just England and Wales (n 39 below) 10).

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

[40] See, eg, *Report of the Committee on the Law and Practice Relating to Charitable Trusts* (Cmd 8710, 1952) (Nathan Report); National Council of Social Service, *Charity Law and Voluntary Organisations* (1976) (Goodman Report); Home Office, *Charities: A Framework for the Future* (Cm 694, 1989); and *Report of the Commission on the Future of the Voluntary Sector: Meeting the Challenge of Change, Voluntary Action into the 21st Century* (1996) (Deakin Report).

[41] Strategy Unit Report (n 39) paras 4.18, 4.21.

[42] The preference was for the institution's provision of public benefit to be developed 'rather than immediately losing charitable status': ibid, para 4.30. Although removal of charitable status was countenanced, the consequences of removal were never addressed in the Report.

full fees'.[43] This appeared to have been based on a publication by the Commission in 2001,[44] which had set out the Commission's interpretation of the legal criteria for charitable status, but without any consideration of whether these criteria had been accurately represented.[45] Nonetheless, the Strategy Unit considered the law on charitable status to be 'outdated and unclear' and proposed that there should be a stronger emphasis on the delivery of public benefit, particularly in relation to charities which charge high fees.[46] This was to be backed up by putting a 'systematic programme' in place, in order to check that charities were complying with these obligations.[47]

The Government accepted the majority of the Strategy Unit's recommendations and a draft Charities Bill was published in May 2004. A significant part of the Bill's long progress[48] was taken up with debate on public benefit and the potential impact of the legislation on fee-charging charities, in particular independent schools and private hospitals.[49] Introducing the Bill, Baroness Scotland explained that the purpose was 'to create a modern legislative framework' for the charitable sector and not to 'single out independent schools in any way'.[50] In fact, the Bill was criticised both for failing to remove *and* failing to protect the schools' charitable status,[51] and ambiguity about its intention and its effect continued long after it had become law.

The resulting 2006 Act failed to reflect entirely the Strategy Unit's intentions and some of the more strenuously argued amendments to the Bill. Although public benefit can be described as central to its new definition of charity, the statute provided that a charity's *purposes* should *be* for the public benefit and not that a charity should *provide* public benefit. The difference may appear pedantic but, as will be seen in the chapters to follow, that is far from the case. The term 'public benefit' was neither defined nor given defining characteristics in a way which would have reflected the criteria that the Commission had been applying to date. Attempts had been made during the legislative process to amend the Bill so that the term should be defined or applied, at least in part, by reference to the impact of

[43] Strategy Unit Report (n 39) para 4.26.

[44] *The Public Character of Charity* (Commission, February 2001); Strategy Unit Report (n 39) para 4.7.

[45] It is suggested that they were not (see chs 3 and 5).

[46] Strategy Unit Report (n 39) 8 and paras 4.15–4.30.

[47] ibid, para 4.18.

[48] The Bill was examined by a Joint Committee, which heard witnesses and received written representations, and then introduced in the House of Lords (and reintroduced following the General Election in 2005), where it also completed its passage and received Royal Assent on 8 November 2006.

[49] Other major issues included the impact on religious organisations and the independence of the Commission.

[50] HL Deb (n 20) cols 883, 885 (Baroness Scotland).

[51] ibid.

any fees charged, but those attempts had failed.[52] Rather, the statute provided that the term should have the meaning given to it in centuries of case law.[53] By tying the definition of public benefit to a body of case law which had frequently been criticised for its complexity and 'illogicalities',[54] however, Parliament may have avoided the shortcomings of a rigid definition, but any intention to bring order and clarity to the law of charitable status, or indeed to reform it, was in danger of falling at the first hurdle.[55] Essentially, charitable status, with its full and automatic privileges, was to be determined by the Commission on the basis of a legal term which lacked any clear or easy definition. This was an unenviable, if not impossible, task for a poorly equipped public body.[56]

The 2006 Act also provided that it should not be presumed that any particular purpose was for the public benefit.[57] The rationale for this appears to have been to ensure a level playing field for all potentially charitable organisations, it having been a commonly held view (possibly still held by some) that certain purposes, including the advancement of education, had previously been presumed to be for the public benefit and that this provision, therefore, would remove that presumption and require educational institutions to demonstrate the benefit that they provided to the public.[58] The significance of this argument may be greatest in the realm of religious charities, where it was also employed by the Commission to cast doubt upon long established legal authority, but its impact on the advancement of education will also be considered. It will be suggested that the better view is that no such presumption ever existed and, therefore, that this provision effected no change in the law at all.[59]

Although the new statute appeared to preserve the old law, interpretations of the term 'public benefit' varied considerably, most particularly in relation to fee-charging charities. In the case of independent schools, for example, was it the case that they had always been subject to a legal duty to demonstrate that they were delivering public benefit, or was this a new obligation somehow introduced by the 2006 Act? And was this a duty which pertained to establishing the charitable status of the institution, or was it an operational duty to be performed

[52] An amendment which would make it necessary to 'consider the effect on public benefit of the charging policy of any charity', for example, was rejected by 139 votes to 60 (HL Deb 12 October 2005, vol 674, cols 310–20).

[53] 2006 Act, s 3(3).

[54] *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 306 (Lord Simonds).

[55] Which was evident to some: 'for this Bill to go through with [the public benefit guidance clause] unamended would lead at best to confusion and at worse to no change at all in the law regarding public benefit' (HL Deb (n 32) col GC112 (Lord Phillips)).

[56] Although there has been much criticism of the Commission's performance of this task (by the author and others), one should also take account of the financial and staffing resources available to the Commission (see text to nn 110–12 below and ch 10, n 33).

[57] 2006 Act, s 4(3).

[58] The purposes of relieving poverty and advancing religion are also considered by some to have been presumed to be for the public benefit.

[59] The no-presumption provision is considered in ch 2, part II.

by the trustees in carrying out the institution's purposes? In either case, was any such requirement satisfied by simply educating the school's pupils, or did it necessitate offering means-tested bursaries to pupils who could not afford the fees? Or could it be satisfied by widening access in other ways, perhaps by a school sharing its facilities or staff with state schools in its locality? These were important questions which were not given the attention they deserved. At the same time, the use of the term 'public benefit' to refer to a charity's provision for people beyond its immediate class of beneficiaries, in particular for those unable to afford any fees charged, became widespread. And yet analysis of the legal authorities will show that such an interpretation was entirely new and lacked any clear foundation in case law. The term 'social benefit' might have been more accurate and, where appropriate, will be used in the following chapters to refer to such facilitated (financial) access and other opportunities for those unable to afford a charity's fees.[60]

In fact, the debate was focused neither on the justification for fiscal privileges, nor the proper performance of trustees' duties, but on charitable status itself. Essentially, doubts had been cast over the correctness, or continued correctness, of independent schools being recognised as charities, doubts which necessitated a careful interpretation of the term 'public benefit' in case law and also the provisions of the 2006 Act, if they were to be resolved. Chapter two examines both and explains how charitable status was, and should be, determined as a matter of law. It also considers in what circumstances an organisation's charitable status might come to an end, principally because the risk of charitable status being lost assumed a new significance in the Commission's interpretation, even though it had featured rarely in case law.

The 2006 Act was subsequently consolidated in the Charities Act 2011 (the 2011 Act), which was passed in December 2011 and came into force on 14 March 2012.[61] Statutory references hereinafter appearing are to the 2011 Act, unless the context requires otherwise.[62]

The Charity Commission

The Commission is a non-ministerial government department and body corporate, which was established by the 2006 Act.[63] Its status and independence were

[60] See ch 4. 'Facilitated access' is a term commonly used to refer to means-tested bursaries (and often other financial assistance such as scholarships and discounts). 'Widened access' might appear preferable to 'social benefit', but its usage is commonly restricted to independent schools, whereas 'social benefit' has a wider relevance. (The term 'social benefit' is also used to describe the (repealed) right of trustees under the Law of Property Act 1925, s 28: C Jessel, 'Public Benefit Gifts by Trustees of Land' (1998) 72 *Conveyancer and Property Lawyer* 246.)

[61] Consolidating (principally) the Recreational Charities Act 1958, the Charities Act 1993 and much of the 2006 Act (but not Part 3 of that Act, dealing with public charitable collections).

[62] In which case the appropriate reference is given in addition.

[63] The Commission replaced the Charity Commissioners, individuals appointed by the Secretary of State to hold an office originally created by the Charitable Trusts Act 1853 (although the term 'Charity Commission' was in use prior to the 2006 Act, hence the publication of documents in the name of the Commission, such as *The Public Character of Charity* (n 44)).

much debated during the passage of the Bill[64] and continued to be of concern to some who questioned the Commission's adherence to the law and its statutory remit following the 2006 Act.[65] It is accountable to Parliament, through submission of an annual report and accounts,[66] and to the court which may overturn its decisions,[67] but it is required to be free from ministerial influence or control over the exercise of its functions.[68]

The Commission was assigned both regulatory and advisory functions and is required to observe and apply the law, but it was not given specific law-making powers.[69] In particular, it is charged with determining charitable status on applications for registration and with maintaining a public register of charities.[70] The 2006 Act also required the Commission to publish guidance on the public benefit requirement, in order to 'promote awareness and understanding' of its operation.[71] The Commission duly did so during 2008, issuing extensive general guidance[72] and supplemental guidance which related specifically to individual sectors, including charities for the advancement of education,[73] and to fee-charging charities.[74] None of these publications had force of law, but were intended to be 'a guide' to, and 'summary of', the law relating to public benefit and the Commission's interpretation and application of that law.[75] It also published its own legal analysis of the law underpinning the guidance.[76] Trustees of charities are obliged by statute to

[64] Lord Hodgson insisted that it was 'quite wrong', for example, that the Commission should be a non-ministerial government department (HL Deb 10 February 2005, vol 669, col GC127) and Lord Swinfen believed that the status made the Commission 'vulnerable to back-door interference' (HL Deb 7 June 2005, vol 672, col 813).

[65] See, eg, P Luxton, 'Making Law? Parliament v The Charity Commission' (Politeia, 2009), who suggested that the Commission was simply carrying out the Government's agenda. To what extent independence has been achieved may merit scrutiny, but it is beyond the scope of this work.

[66] It is also subject to the scrutiny of the National Audit Office (which reported on its regulatory effectiveness in December 2013: *The Regulatory Effectiveness of the Charity Commission* (HC 20013–14, 813) 21); see also the Reports noted at nn 1 and 103 (considered further in ch 9).

[67] Appeal against the Commission's decisions lies to the First-tier Tribunal (Charity), then to the Upper Tribunal (Tax and Chancery) and thereafter to the Court of Appeal.

[68] 2011 Act, s 13(4) (although the members of the Commission are appointed by the appropriate government minister, after a public appointments process).

[69] The dual regulatory and advisory role has often been criticised for creating conflicts of interest to the prejudice of charities.

[70] 2011 Act, s 15(1), (4).

[71] 2006 Act, s 4 (as part of its 'public benefit objective').

[72] *Charities and Public Benefit* (Commission, January 2008).

[73] *The Advancement of Education for the Public Benefit* (Commission, December 2008). The Commission also published guidance relating to the charitable or non-charitable nature of research conducted by universities and other higher education organisations (*Research by Higher Education Institutions*, June 2009), but the focus on fee-charging educational charities in this work is limited to independent schools. (Other publications addressed charities for the relief of poverty and the advancement of religion.)

[74] *Public Benefit and Fee-charging* (Commission, December 2008).

[75] *Charities and Public Benefit* (n 72) D2 and C4.

[76] The relevant analyses being *Analysis of the law underpinning Charities and Public Benefit* and *Analysis of the law underpinning Public Benefit and Fee Charging* (Commission, December 2008). The second publication, with the exception of one footnote, was an extract of the first (and used the same paragraph numbering). References to the 'Analysis', therefore, are to either publication.

'have regard to any such guidance when exercising any powers or duties to which the guidance is relevant'.[77]

During the consultation process prior to publication of its guidance in 2008, the Commission dismissed 'significant challenges' to the legal basis of its draft documents, remaining satisfied that both its guidance and legal understanding were correct.[78] And, notwithstanding the difficulties in extrapolating legal principles from centuries of case law, the Commission also rejected calls for the guidance to be written by a panel of experts on charity law.[79] In fact, the 2008 guidance was written by its own Policy Division, whose members are responsible for proposing and developing the Commission's policies and strategies.[80]

As mentioned above, the guidance published in 2008 was later subjected to legal challenge and replaced in 2013. Although the structure and content were altered in the revised publications, fundamental aspects of the original guidance remained and an appreciation of the original version is crucial to an understanding of how the public benefit requirement has developed, both as a matter of law and in practice. Chapter three examines the 'key principles' set out in the 2008 guidance, which the Commission maintained were 'distilled … from the relevant case-law',[81] and compares them to the principles expounded in the preceding chapter, concluding that the Commission's legal interpretation was flawed. It also comments on the quality and accuracy of the Commission's guidance and legal analysis, noting in particular the Commission's focus on a charity's activities, as opposed to its purposes, and its explanation of the consequences which it said would flow from a failure to meet the public benefit requirement. (Relevant changes made in the 2013 guidance are noted where appropriate, but addressed more directly in chapter nine.)

The Significance of Poverty and Fee-Charging

Two of the principles put forward by the Commission in 2008 proved to be particularly contentious. These were: (i) that a charity must ensure that people in poverty are not excluded from the opportunity to benefit; and (ii) in the case of fee-charging charities, that opportunities should not be unreasonably restricted by the fees charged. Although these principles were subjected to criticism by the

[77] 2011 Act, s 17(5).

[78] Including challenges from the Charity Law Association and the Independent Schools Council: *Public Benefit and Fee-charging: Summary of consultation responses* (Commission, undated) 3.

[79] Proposed by the Independent Schools Council, for example, in its response to the draft guidance, 6 June 2007. Lord Phillips had also suggested that the Attorney-General might obtain an independent legal opinion, as he warned that the Bill would not achieve the legal effect intended (HL Deb (n 28) col 171).

[80] The guidance (and *The Public Character of Charity* (n 44)) was 'written by staff in the Policy Division, with input/assistance from legal and signed off at board level'. (This information was obtained in a response to a request for information made by the author, 11 August 2010.)

[81] Foreword to *Charities and Public Benefit* (n 72).

Tribunal and given far less prominence in the 2013 guidance,[82] the essence of them remains: it is still the case that fee-charging charities are said to be required by law to provide opportunities to the poor, although whether this is a matter of trustees' duties or potentially a condition of charitable status, or both, is less clear. Whether consideration of poverty is an essential ingredient in charity *has* proved contentious at times, but the Commission's interpretation appears to be fundamentally flawed: case law, which properly informs the interpretation of public benefit,[83] contained no obligation for charity trustees to consider the financial means of intended beneficiaries, or to accommodate the needs of potential beneficiaries who are unable to afford any fees charged. Nor did that law make charitable status conditional upon the existence or performance of any such obligation.

Chapter four offers an analysis of the law regarding poverty and the charging of fees and this can be contrasted with chapter five, where the Commission's legal interpretation in the 2008 guidance is considered (the 2013 guidance, again, principally being noted in chapter nine).

The Schools

The long anticipated Charities Bill, and the lively debates which accompanied its journey through Parliament, meant that the issue of independent schools widening their access and offering financial and other assistance to non-pupils featured prominently in the sector and general press. It was also acknowledged, during the legislative process, that many independent schools already offered such forms of social benefit and that the level of provision had increased as charities had seen 'what was coming on the wind',[84] but the momentum for legislative action was undiminished. Concerns remained that such practice among independent schools was not sufficiently widespread, and/or that it was insufficient in some cases, and also that no sanctions had been imposed in cases where provision could be seen as 'inadequate'.

'Public benefit' became the new catchwords in school governors' annual reports and summaries[85] and there was a visible shift in emphasis in the type of financial assistance offered by independent schools, so that scholarships awarded on merit and regardless of means came to be replaced by bursaries or scholarships which were means-tested and/or capped. Thus, a benchmarking survey of independent schools recorded a 59 per cent increase in the level of concessions during the

[82] eg, there is no longer a separate publication in respect of fee-charging charities, but rather a short annex in one of the general publications (see ch 9).

[83] 2011 Act, s 4(3); so ignoring for the moment the Tribunal's judgment in 2011 (*ISC* (n 3)).

[84] HL Deb (n 32) col GC118 (Baroness Scotland).

[85] Summary Information Returns, previously part of the Annual Return for larger charities (but discontinued in early 2014).

six-year period to 2006.[86] It also noted a slight reduction in the number of pupils receiving assistance and suggested that this indicated a greater 'targeting' of financial aid to those most in need of it.[87]

Some schools, of course, are richly endowed with extensive funds which are restricted for the purpose of providing assistance with fees, but most are not.[88] In the absence of such dedicated funds, a school must raise funds by other means if it is going to offer bursaries, namely by seeking donations and legacies, trading and/or by increasing the fees charged to existing pupils.[89] Opportunities for widening access and participation also differ between schools across the sector: a small rural preparatory school, for example, is likely to have fewer opportunities to share its staff with neighbouring schools than a large city school. It was evident that the less wealthy schools were most likely to struggle with any test of charitable status which depended on providing social benefit.

Between October 2008 and July 2009, the Commission conducted its first round of public benefit assessments, examining 12 registered charities, including five independent schools. The process was intended to be part of a long-term review of existing charities, a project which it had already outlined in October 2001,[90] and which now had the added support of a recommendation from the Strategy Unit and acceptance of that recommendation by the Government.[91] Nonetheless, provision for such a 'systematic programme'[92] had not been incorporated in the 2006 Act and this omission left the legal basis for reviewing the status of existing charities unclear.[93] The project was later cut short, in August 2010, although this was attributed to a lack of resources rather than any doubt over its rationale or legality. No other schools had been assessed since the first round.

In respect of each school assessed as part of this programme, the Commission listed (at length) the benefits offered, together with details of the means-tested and non-means tested financial assistance given or made available. The Commission

[86] Horwath Clark Whitehill, *Benchmarking Financial Performance in Independent Schools* (2007) 8.

[87] ibid. (The survey also noted that fee concessions were also used to attract and retain pupils and not solely as a means of delivering social benefit.)

[88] Caritas Data, *Independent Schools Financial Yearbook* (2009/10) (Caritas Data, 2009) 2.26–2.35; of course, schools may also utilise unrestricted funds for widening access. By way of illustration, Eton College reported income of £4,900,000 available for scholarships and bursaries in the year 2012/2013, whilst Highfield Priory (one of the schools which initially 'failed' the Commission's public benefit assessment (see ch 6)) reported fundraising of almost £11,000 for the same period.

[89] More than 91% fee remissions were granted out of schools' own resources ('inevitably' meaning higher fees) during the 2007/08 academic year, increased from 84.7% a decade earlier, but down from 93.25% a year earlier, possibly suggesting that 'some sort of ceiling might have been reached': Horwath Clark Whitehill, *Benchmarking Financial Performance in Independent Schools* (2009) 12.

[90] *The Review of the Register of Charities* (Commission, October 2001).

[91] *Charities and Not-for-Profits: A Modern Legal Framework, The Government's Response to 'Private Action, Public Benefit'* (Home Office, July 2003) para 3.25.

[92] See text to n 47.

[93] See ch 3, part IV; its purpose and merits, in legal terms, are also questioned (see ch 2, part III, Rule 3).

had indicated that it would take into account the size and resources of each school, but its published reports failed to explain how this had been done and the Commission's refusal to indicate what level of financial assistance and other benefits it considered appropriate in each case meant that the actual significance of a school's size and resources was far from clear.

Two of the schools 'failed' the Commission's application of the public benefit requirement, attracting damaging publicity in the national press. In its published findings, the Commission suggested that the schools' governors were in breach of trust and also cast doubt upon the schools' charitable status. Unable to appeal against these findings because they did not constitute 'decisions' within the jurisdiction of the newly formed Charity Tribunal,[94] the two schools had little choice but to respond to the Commission's invitations to draw up plans which indicated an intention to increase the level of social benefit on offer. This they did and the schools' charitable status was affirmed as a result.

Chapter six considers this assessment process and the reports published in respect of the five schools. It draws attention to some of the inconsistencies in the Commission's approach, both as between individual assessments and more broadly, and considers what conclusions can be drawn from the programme.

Charity Law in Scotland

The supervision and regulation of charities had been devolved to the Scottish Parliament by the Scotland Act 1998 and so, while the Charities Bill was making its way through the parliamentary process in Westminster, a similar (but not identical) Bill was being debated north of the border. It was clearly the intention of the UK Government that the legislation in each jurisdiction should be 'fully compatible'[95] and the two regulators resolved to reach a 'common position' on matters of public benefit 'wherever possible'.[96]

Consistency in the law, however, was not achieved and so charities which operated both north and south of the border emerged with two regulators applying two distinct tests of charitable status. The Charities and Trustee Investment (Scotland) Act 2005 introduced a 'charity test', which expressly focuses on a charity's activities and the delivery of social benefit (although the term 'public benefit' is used). The Scottish regulator was given considerable discretion in its interpretation and application of 'public benefit', the definition of which is not tied to case law in the Scottish Act, and the legislation makes clear on the face of it that 'unduly restrictive' fees or charges might result in depriving an organisation of charitable status. Tax reliefs associated with charitable status were not devolved, however,

[94] 2006 Act, sch 4; 2011 Act, sch 6.

[95] HL Deb (n 20) col 884 (Baroness Scotland).

[96] *Memorandum of Understanding* (Office of the Scottish Charity Regulator/Commission, May 2007) Annex 3.2.

and constitute a reserved matter for the Parliament in Westminster, meaning that the definition of charity in England and Wales continues to be relevant to Scottish charities for tax purposes.

Chapter seven compares and contrasts the tests of charitable status north and south of the border and identifies some of the discrepancies between the two jurisdictions. It also examines the public benefit assessments of independent schools in Scotland, which the Scottish regulator has undertaken as part of its statutory obligation to review each entry on the Scottish Register from time to time, and makes a comparison with the Commission's approach described in chapter six.[97]

The Legal Challenge

Seven months after the reports on the two 'failed' schools were published, the Independent Schools Council (the ISC), an umbrella organisation for independent schools, sought judicial review and an order to quash parts of the Commission's guidance on public benefit.[98] The Attorney-General also submitted a Reference, seeking clarification as to whether the public benefit requirement was met in a series of hypothetical scenarios involving schools of various descriptions.[99] The Commission argued that the ISC's application should be rejected on the grounds of delay and/or because it had been rendered otiose by the Attorney-General's application, but the argument was dismissed and both applications were transferred to the Tribunal,[100] where they were heard during May 2011.[101]

If the public benefit requirement had failed to make much sense of charity law in the hands of the Commission, it fared little better in the hands of the Tribunal, which gave its judgment in October 2011. This appeared to confirm the view that the trustees of an independent school have a legal duty to provide opportunities to benefit for those unable to afford the fees charged, although the manner and extent of such provision was described as a matter for the trustees' discretion and not for the Commission. Although not without ambiguity, the Tribunal also appeared to reduce (but not remove) the risk of a school losing its charitable status. Following the parties' failure to agree a revised form of guidance, the Tribunal released a further decision, in December 2011, identifying those parts of the Commission's guidance which it said would be quashed if the Commission did not withdraw them first.[102] The Commission duly withdrew those affected parts of the guidance and neither party appealed either decision.

[97] A much briefer glance at Northern Ireland (in ch 9) will highlight the fragmented landscape of charitable status across the UK.

[98] *ISC* (n 3).

[99] In a Reference submitted pursuant to the Charities Act 1993, s 2A(4)(b), as amended (now 2011 Act, s 326).

[100] *R (Independent Schools Council) v Charity Commission* [2010] EWHC 2604 (admin), [2011] ACD 2. (This hearing took place on 7 October 2010.)

[101] *ISC* (n 3).

[102] *Independent Schools Council v Charity Commission* TCC-JR/03/2010, available at: www.bailii.org/uk/cases/UKUT/TCC/2011/B27.html.

Chapter eight offers an analysis of the judgment in this case and questions its legitimacy.

Later Developments

A review of the operation of the 2006 Act was commenced by Lord Hodgson in January 2012 and the resulting conclusions and recommendations were published six months later.[103] This review included consideration of the obligations which attach, or should attach, to charitable status (including an examination of the public benefit issue) and the nature and extent of regulation of the charitable sector. It recommended no legislative reform of either the definition of charity or the public benefit requirement. The 2006 Act was subjected to rather fiercer criticism by the Public Administration Select Committee in 2013, which disagreed with Lord Hodgson in a number of respects, most particularly by calling for legislative reform of the public benefit requirement (including the removal of the no-presumption provision).[104] The Government preferred Lord Hodgson's approach and the status quo, at least for the time being.[105] All the signs were that any charity law reform still to come would not include reform of the public benefit requirement, but a recent proposal by the Labour Party raises the possibility that the issues addressed in this book might not rest undisturbed for long.[106]

Although revised guidance was initially intended to be published in March 2012, it was another 18 months before it appeared. The Commission chose to replace the entire 2008 guidance and substitute new guidance in an altered format, but the key principles were barely altered.[107] One of the most striking differences was that guidance for fee-charging charities was no longer contained in a separate publication but tucked away in a brief annex which, together with the revised legal analysis, relied heavily on the Tribunal's decision in *ISC*[108] and did little to improve the assistance given to charity trustees and others.

The Commission has suffered harsh and repeated criticism and this book is inevitably critical. It seems only fair, therefore, to note both the extensive range of responsibilities assigned to it by the 2006 Act[109] and the continuing reductions in the Commission's resources which may have impacted on its performance. Initially established with a budget of £32.6m in 2007/2008,[110] repeated public spending

[103] *Trusted and Independent: Giving charity back to charities* (TSO, July 2012).

[104] *Post-legislative Scrutiny* (n 1); see nn 57, 59 above.

[105] *Government Responses* (Cm 8700, 2013).

[106] Tristram Hunt MP, Shadow Education Secretary, writing in *The Guardian*, 24 November 2014 (proposing the introduction of a School Partnership Standard which requires all private schools to form 'genuine and accountable partnerships with state schools' in order to retain business rates relief).

[107] The publications noted at nn 72, 74 and 76 above were replaced; the sector-specific guidance (n 73) remains available, but is noted to be awaiting replacement.

[108] *ISC* (n 3).

[109] Its 'objectives', 'functions' and 'duties' are now set out in the 2011 Act, ss 14–16; see also text to nn 44–47, ch 9.

[110] National Audit Office Report (n 66) 1.12.

cuts reduced this to £22.7m in 2013/2014[111] and this is due to fall to £20.2m in 2015/16.[112] With such depletion in its resources, the prospects of it carrying out any further public benefit assessments or of enforcing reported failures to meet the public benefit requirement are surely weak.

Chapter nine considers the impact of these developments coming after the Tribunal's decision in *ISC*,[113] and also takes a very brief glance at charity law reforms in other jurisdictions. Chapter ten concludes by taking an overview of the events described in preceding chapters and asks, in light of those developments, to what extent the public benefit requirement has helped to make sense of charity law.

The content of this book reflects the position as at 30 November 2014.

[111] ibid.

[112] Following the December 2013 Spending Review: www.thirdsector.co.uk/charity-commission-budget-cut-further-450000-two-years/finance/article/1224717; note, however, that a further £9m, over 3 years and specifically for improving its identification of abuse and mismanagement (rather than addressing questions of public benefit), was announced in October 2014: www.thirdsector.co.uk/david-cameron-announces-9m-new-funding-charity-commission-three-years/governance/article/1318316.

[113] *ISC* (n 3).