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**A critical analysis of the development of the public benefit requirement of charitable purposes under English and Welsh charity law, from *Re Compton* [1945] 1 Ch 123 to *R (Independent School Council) v Charity Commission* [2012] Ch 214**

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**Abstract**

The enactment of the Charities Act 2006 in November 2006 introduced the first statutory definition of charity into English and Welsh law. Under the provisions of the Act, charitable status requires that an institution must be established for charitable purposes only and that the charitable purposes must be of public benefit. Although, generally, well received the Charities Act 2006 has been criticised as 'flawed' on the public benefit requirement of charitable purposes.

The Charities Act 2006 was passed with the principle aim of modernising existing charity law, which was considered outdated and unclear. However, unlike charitable purposes, which are set down within the provisions of the Act, a definition of public benefit is not provided. Section 3(3) of the Charities Act 2006 merely provides that 'reference to public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales'.

This lack of a definition as to what constitutes public benefit and statutory reliance upon the charities' regulator, the Charity Commission, to interpret and provide guidance on the public benefit requirement for charitable purposes has led to criticism that the Charities Act 2006 has raised as many uncertainties as it sought to clarify.

In critically evaluating the impact of the Charities Act 2006, and its successor, the Charities Act 2011, upon English charity law, this assessment places the legal definition of charity within its complex and, at times, vague historical context. Thus, providing an ideal backdrop in which to explore the policy objectives behind the Charities Acts and assess the effectiveness of the Charities Acts in achieving those objectives.

**Keywords:** Charities Act 2006; Charities Act 2011; Charity Commission; charitable purposes; *R (Independent Schools Council) v Charity Commission* [2012] Ch 214; public benefit.

## Introduction

Charitable trusts have a long history within English society, the oldest being King's School, Canterbury, established in 597.<sup>1</sup>

Today, charities are considered to be at the heart of UK society,<sup>2</sup> with nearly £10 billion in donations being given in 2011/12<sup>3</sup> and approximately 25 charity status applications being made to the Charity Commission<sup>4</sup> every working day.<sup>5</sup> In the financial year 2013/14, the Charity Commission received 6,661 applications for new charities in England and Wales, a 16 percent rise on the previous year.<sup>6</sup>

Charitable trusts have a number of advantages over other forms of express trust, including exemption from formalities such as certainty of object<sup>7</sup> and the rule against perpetuity.<sup>8</sup> Unlike other forms of purpose trusts, which are generally void for lack of ascertainable beneficiaries,<sup>9</sup> the Attorney General can legally enforce charitable trusts.<sup>10</sup>

Charities also enjoy considerable tax advantages,<sup>11</sup> including exemption from income tax and capital gains tax,<sup>12</sup> and at least 80 percent relief on non-domestic rates.<sup>13</sup> In addition, donations to charities may fall within the Gift Aid scheme, which provides substantial income tax advantages when the donor is a British taxpayer, as the scheme allows charities to reclaim the basic rate of tax on the gross equivalent of the gift.<sup>14</sup>

Undoubtedly, these generous tax advantages are a significant motivation for seeking charitable status,<sup>15</sup> with the Inland Revenue bringing many of the cases challenging the charitable status of trusts.<sup>16</sup> Indeed, it is purported<sup>17</sup> that the public benefit requirement for charitable purposes developed as a means of determining whether charitable status was being sought to obtain the tax advantages afforded to charities, for what are, essentially, trusts for private classes of beneficiaries.<sup>18</sup>

### *Charity law reformed*

Historically, English charity law developed through the courts and the process of reasoning by analogy.<sup>19</sup> However, on 8 November 2006, following recommendations by the Cabinet Office's Strategy Unit,<sup>20</sup> Parliament passed the Charities Act 2006 (CA 2006), with the aim of reducing bureaucracy and modernising existing charity law by providing 'greater clarity and a stronger emphasis on the delivery of public benefit'.<sup>21</sup> The CA 2006 was consolidated into the Charities Act 2011 (CA 2011) on 14 March 2012.

Under the provisions of the CA 2011, a charitable trust must be created exclusively for charitable purposes.<sup>22</sup> The charitable purpose must be legally recognised<sup>23</sup> and must be of public benefit.<sup>24</sup> However, unlike charitable purposes, which are set down within the provisions of s 3(1)(a)–(m) CA 2011,<sup>25</sup> the 2011 Act does not provide a definition of public benefit. Section 4(3) CA 2011<sup>26</sup> merely provides that 'reference to public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales'.

The lack of a definition as to what constitutes public benefit and statutory reliance on the charities regulator, the Charity Commission, to interpret and provide guidance on

the public benefit requirements for charitable purposes<sup>27</sup> has led to major criticism of the Charities Acts.<sup>28</sup>

Assessment of just how successful the Charities Acts have been in modernising English charity law, by providing 'greater clarity and stronger emphasis on public benefit',<sup>29</sup> effectively requires the statutory definition of 'charity' or, more precisely, of 'charitable purposes', to be placed within its historical context.

### **Charitable purposes**

The legal definition of charitable purposes was originally set down in the preamble to the Statute of Charitable Uses (1601).<sup>30</sup> Despite being over 400 years old, the preamble has formed the basis for the development of English charity law.<sup>31</sup>

In *Inland Revenue Commissioners v Pemsel*,<sup>32</sup> Lord Macnaghten grouped the charitable purposes within the preamble to the 1601 statute under four headings:

Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for purposes beneficial to the community, not falling under any of the preceding heads.<sup>33</sup>

Macnaghten's classification of charitable purposes has been expanded under s 3(1) CA 2011<sup>34</sup> to include nine additional headings, thus codifying the development of charity law under Macnaghten's fourth heading, trusts for purposes beneficial to the community.

Noticeably, s 3(1)(m) CA 2011<sup>35</sup> preserves any other purpose recognised as charitable under existing law,<sup>36</sup> whilst protecting the development of charitable purposes by analogy.<sup>37</sup> Thus, allowing charity law to continue to develop in response to changes in society and public attitudes; thereby reflecting the spirit and intention behind the preamble to the *Statute of Charitable Uses* (1601) and Macnaghten's fourth heading, trusts for purposes beneficial to the community.

As Lord Wilberforce noted in *Scottish Burial Reform and Cremation Society v Glasgow City Corporation*,<sup>38</sup> 'the law of charity is a moving subject which evolves over time'.<sup>39</sup> Similarly, in *National Anti-Vivisection Society v Inland Revenue Commissioners*,<sup>40</sup> Lord Simonds observed that '[a] purpose regarded in one age as charitable may in another be regarded differently'.<sup>41</sup>

Where a trust is created for purposes other than those that are charitable, the trust will fail,<sup>42</sup> unless the non-charitable purpose is merely ancillary or incidental to the main charitable purpose.<sup>43</sup> This distinction was highlighted in *McGovern v Attorney General*.<sup>44</sup>

The distinction is between (a) those non-charitable activities authorised by the trust instrument which are merely incidental or subsidiary to a charitable purpose and (b) those non-charitable activities so authorised which themselves form part of the trust purpose. In the latter but not the former case, the reference to non-charitable activities will deprive the trust of its charitable status.<sup>45</sup>

Political purposes will cause a trust to fail, even where the purposes are stated as being for the public benefit,<sup>46</sup> as it is not within the court's competence to decide whether or not the legal changes being sought would be beneficial to the public.<sup>47</sup> The courts must assume the law to be correct.<sup>48</sup> However, political discussions<sup>49</sup> or political objects subsidiary to the main charitable purpose<sup>50</sup> do not fall foul of the prohibition on political purposes.

Since the enactment of the Equalities Act 2010 (EA 2010) in October 2010, it may be unlawful for trust purposes to discriminate on the grounds of protected characteristics.<sup>51</sup> Where the EA 2010 does not make it unlawful to establish a charity that discriminates on the grounds of protected characteristics, but the Charity Commission considers it unlikely that the purpose can be administered in accordance with the EA 2010 provisions, the trust purpose will be held not to be in the public benefit, and thus, not charitable.<sup>52</sup>

### **Public benefit**

The requirement that a trust purpose has to be of public benefit to be charitable is provided under s 2(1)(b) CA 2011.<sup>53</sup> The CA 2011, however, falls short of providing a statutory definition of public benefit. Instead, the public benefit requirement is determined on the operation of existing case law,<sup>54</sup> which has developed two identifiable aspects to the meaning of public benefit, both of which must be satisfied.<sup>55</sup>

#### *The 'benefit' aspect*

The benefit aspect requires that the charitable purpose must 'benefit' the public, or a section of the public.<sup>56</sup> The benefit must be identifiable and must relate to the charitable purpose.<sup>57</sup> Any detriment or harm that may result from the purpose must not outweigh the benefit.<sup>58</sup>

In *National Anti-Vivisection Society* Lord Simonds states:

Where on the evidence before it the court concludes that, however well intentioned the donor, the achievement of his object will be greatly to the public disadvantage, there can be no justification for saying that it is a charitable object.<sup>59</sup>

It has been argued that prior to the enactment of the CA 2006 there was a general presumption of the benefit aspect for charitable purposes falling within Macnaghten's first three headings,<sup>60</sup> which was removed under s 3(2) CA 2006,<sup>61</sup> following recommendations by the Joint Committee on the Draft Charities Bill.<sup>62</sup>

However, authority on this point is conflicting. For example, in *National Anti-Vivisection Society* Lord Wright states: 'The test of benefit to the community goes through the whole of Lord Macnaghten's classification, though as regards the first three heads, it may be *prima facie* assumed unless the contrary appears.'<sup>63</sup>

Conversely, in *Re Hummeltenberg*<sup>64</sup> Russell J states: '[N]o matter under which of the four [heads of charity] a gift may *prima facie* fall, it is still... necessary...to show...that the gift will or may be operative for the public benefit.'<sup>65</sup>

In the post-CA 2006 case, *R (Independent Schools Council) v Charity Commission*,<sup>66</sup> the Upper Tribunal (Tax and Chancery Chamber) held that the courts had not recognised purposes falling within Macnaghten's first three heads as charitable, by virtue of the operation of any presumption, prior to the CA 2006.<sup>67</sup>

Subsequently, in the Attorney General's second charity law reference, *Attorney General v Charity Commission* (The Poverty Reference),<sup>68</sup> the Upper Tribunal (Tax and Chancery Chamber) held that there was nothing in case law to cast doubt upon the necessity for the requirement of the benefit aspect of charitable purposes. Therefore, s 3(2) CA 2006 has had no impact upon whether a purpose is charitable, or not.<sup>69</sup>

This view was also supported in the Government's response<sup>70</sup> to the Public Administration Select Committee's third report of 2013–14,<sup>71</sup> which had called for Parliament to restore the presumption of public benefit:

The Upper Tribunal made it clear in its judgment on the Independent Schools Council case that there had not been a legal presumption of public benefit in the case law before the Charities Act 2006. Therefore it would not be possible to 'restore' a presumption of public benefit that may never have existed.<sup>72</sup>

Therefore, although, it is argued that s 3(2) CA 2006 introduced a fundamental change to the public benefit requirement of charitable purposes,<sup>73</sup> essentially, the statutory provision did not change the law on the public benefit requirement of charitable purposes. It merely sought to clarify the existing case law position with regard to the non-existence of any presumption of public benefit for charitable purposes falling within Macnaghten's first three headings.<sup>74</sup>

#### *The 'public' aspect*

The public aspect requires that the charitable purpose must be accessible to the public, or to a sufficient section of the public.<sup>75</sup> A purpose can be for the benefit of the public even if a limited number of people are capable of availing themselves of its benefits, or are likely to do so.<sup>76</sup> A trust purpose that confers benefits to private individuals or to a fluctuating group of private individuals cannot, generally, be charitable,<sup>77</sup> unless the benefit is no more than incidental to the charitable purpose.<sup>78</sup>

The distinction between a sufficient section of the public and a fluctuating group of private individuals was defined in *Re Compton*:<sup>79</sup>

[A] gift under which the beneficiaries are defined by reference to a purely personal relationship to a named propositus cannot on principle be a valid charitable gift. And this, I think, must be the case whether the relationship be near or distant.<sup>80</sup>

*Re Compton* was approved in the leading case *Oppenheim v Tobacco Securities Trust*,<sup>81</sup> where the majority of the House of Lords (Lord MacDermott dissenting) held that a trust for the education of children of employees, however numerous, is a private purpose, which the courts and taxpayers should not subsidise.

In his *ratio* judgment, Lord Simonds states:

The words 'section of the community'...indicate first, that the possible beneficiaries must not be numerically negligible, and secondly, that the quality which distinguishes them from other members of the community...must be a quality which does not depend on their relationship to a particular individual.<sup>82</sup>

He continues: 'A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes.'<sup>83</sup>

Dissenting, Lord MacDermott criticised the 'personal nexus' test as inconclusive and unsatisfactory in determining, in all cases, whether a trust purpose is sufficiently public to qualify as charitable, preferring instead 'a general survey of the circumstances and considerations regarded as relevant rather than of making a single, conclusive test'.<sup>84</sup>

In following *Re Compton, Oppenheim* confirmed that a trust purpose cannot, generally, be charitable where the class of beneficiaries is defined by its relationship, personal or contractual.<sup>85</sup> However, the House of Lords refrained from considering whether the 'personal nexus' rule extended to trusts for the relief of poor relations, which were considered anomalous to the public aspect of the public benefit requirement.<sup>86</sup>

#### *The poor relations anomaly*

Unlike other trust purposes, trusts for the relief of poor relations can be valid charitable purposes,<sup>87</sup> provided there are no further restrictions on the class of beneficiaries.<sup>88</sup> In the Court of Appeal case *Re Scarisbrick*,<sup>89</sup> Lord Jenkins distinguished between a trust for the relief of poor relations and a gift to poor relatives:

I think the true question in each case has really been whether the gift was for the relief of poverty amongst a class of beneficiaries, or rather...was merely a gift to individuals, albeit with relief of poverty amongst those individuals as the motive of the gift.<sup>90</sup>

The poor relations anomaly is considered to have stemmed from the Chancery practice, in the 19th century, of declaring as charitable, express trusts for poor relations, which would otherwise fail for lack of certainty or perpetuity.<sup>91</sup> These early decisions have been justified by the assumption that they were founded on the principle that trusts for the relief of poor relations were considered beneficial to the public, generally, owing to their altruistic purposes<sup>92</sup>(and because they reduce the financial burden upon the community<sup>93</sup>).

In *Re Compton*, Greene MR surmised that the original decisions in the poor relations cases were provided at a time when the public aspect of a charitable gift had not been as clearly laid down:

If the question of the validity of gifts of this character had come up for the first time in modern days I think that it would very likely have been decided

differently on the ground that their purpose was a private family purpose, lacking the necessary public character.<sup>94</sup>

The House of Lords was subsequently presented with an opportunity to consider the poor relations cases in the leading case *Dingle v Turner*.<sup>95</sup> In giving his judgment, Lord Cross expressly approved Lord MacDermott's *obiter* judgment in *Oppenheim*: 'Whether a trust is charitable and for the public benefit involves a general survey of all relevant circumstances and considerations rather than the application of a dogmatic and inconclusive test.'<sup>96</sup> Lord Cross went on to state:

In truth the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust.<sup>97</sup>

The House of Lords held, unanimously, that it was a natural development for the accepted rule on charitable trusts for poor relations to extend to trusts for poor employees and poor members of a club or society,<sup>98</sup> thus further limiting the scope of the personal nexus rule developed in *Re Compton* and *Oppenheim*.<sup>99</sup> *Dingle* was re-affirmed in *Re Segelman*:<sup>100</sup> 'a gift for the relief of poverty is no less charitable because those whose poverty is to be relieved are confined to a particular class limited by ties of blood or employment.'<sup>101</sup>

Some courts have interpreted the less restrictive public benefit test confirmed in *Dingle* as suggesting that purposes for the relief of poverty are exempt from the public benefit requirement. For example, in *McGovern*, Slade J states: 'Save in the case of gifts to classes of poor persons, a trust must always be shown to promote a public benefit of a nature recognised by the courts as being such if it is to qualify as being charitable.'<sup>102</sup>

In following the assertion put forward by Slade J in *McGovern*, trusts for the relief of poor relatives/employees would fall foul of s 4(2) CA 2011;<sup>103</sup> conversely, this would, arguably, contradict s 4(3) CA 2011.<sup>104</sup>

This matter was addressed in the Attorney General's 2012 poverty reference, *Attorney General v Charity Commission*, where the Upper Tribunal held that there had not been a presumption that trusts for the relief of poverty were for the public benefit, prior to the CA 2006.<sup>105</sup> Case law, in fact, had developed different public benefit tests for different charitable purposes.<sup>106</sup>

### ***R (Independent Schools Council) v Charity Commission: the public benefit requirement revisited***

The CA 2006<sup>107</sup> sought to address the uncertainties regarding public benefit by providing that all charitable purposes must satisfy the public benefit requirement<sup>108</sup> as determined under existing charity law,<sup>109</sup> and by clarifying the legal position on the non-existence of any presumption as to public benefit requirement for charitable purposes.<sup>110</sup>



Charity lawyer Francesca Quint states that the CA 2006 had 'brought to the fore the fact that the public benefit principle is an essential part of charitable status and that no purpose is charitable unless it benefits the public in some way'.<sup>111</sup>

However, the CA 2006 has been criticised for creating as many uncertainties as it sought to rectify.<sup>112</sup> In *Charities Act 'critically flawed' on public benefit*,<sup>113</sup> the chairperson of the Public Administration Select Committee, Bernard Jenkin, MP, criticised the Act for creating ambiguity with regard to public benefit and called for the public benefit provisions to be repealed.

In *R (Independent Schools Council)*, the Upper Tribunal was provided with an opportunity to review the public benefit requirement of charitable purposes in light of the enactment of the CA 2006, with particular regard to educational purposes.

The Upper Tribunal held that the CA 2006 had not substantially changed the law regarding the public benefit requirement, but had merely clarified the existing position:

[W]hat the 2006 Act has done is to bring into focus what it is that the pre-existing law already required, and what the law now requires by way of the provision of benefit and to whom it must be provided.<sup>114</sup>

Namely, that the benefits of the educational purposes of independent schools must not be outweighed by any detriment arising from the charging of fees,<sup>115</sup> and that the poor<sup>116</sup> must not be expressly excluded from benefiting.<sup>117</sup>

The Tribunal made it quite clear that the balancing of the public benefit/detriment aspect of the educational purposes of independent schools should not be a political exercise on the benefits/detriment of private education, generally:

It cannot, we think, be for the Charity Commission or for us or the higher courts to carry out what is an essentially political exercise to determine whether and if so what, if any disbenefits there are of the private schools sector generally and then to balance the benefits and to form a view about public benefit.<sup>118</sup>

The Tribunal went on to state that the 'allegedly divisive result of private education is not to be laid at the door of any particular school'.<sup>119</sup>

With regard to the second aspect of the public benefit requirement, the non-exclusion of the poor, the Tribunal acknowledged that there was no existing authority supporting the decision that the poor must not be expressly excluded from benefiting; it was considered right as a matter of principle, given the underlying concept of charity.<sup>120</sup>

The Tribunal concluded that a charitable independent school would be failing to act for the public benefit if it failed to provide adequate benefits for its potential beneficiaries other than fee-paying students. Preference should be given to direct benefits such as bursaries and fee subsidies, although indirect benefits such as access to teaching resources would suffice,<sup>121</sup> provided that in all cases there is

more than *de minimis* or token benefit for the poor. It is, however, a matter for the trustees (not the Charity Commission or the Tribunal) to decide what is appropriate, in their particular circumstances.<sup>122</sup>

The chief executive of National Council for Voluntary Organisations, Sir Stuart Etherington, heralded the decision of the Upper Tribunal as ‘the most significant development in charity law for nearly 50 years. It reaffirms that public benefit is the cornerstone of charitable law, and sets out how to make this fit for purpose in the 21st century.’<sup>123</sup> However, the Tribunal decision has been criticised as a missed opportunity:

[T]he bright line test as to what will amount to sufficient public benefit, and what will not, that many hoped the decision would provide was sadly absent,<sup>124</sup> ...we are still no closer to understanding truly wherein lies the balance between private and public benefit and charitable purpose.<sup>125</sup>

This criticism, however, seems to place an unrealistic expectation upon the Upper Tribunal. Case law has developed different public benefit requirements, depending upon the charitable purpose.<sup>126</sup> In taking a ‘one test fits all’ approach to public benefit, the Upper Tribunal would, arguably, undermine the very intention behind s 3(3) CA 2006,<sup>127</sup> namely the preservation of the flexibility, inherent in the existing case law. As Lord Hodgson observes in *Trusted and Independent: Giving charity back to charities*:<sup>128</sup>

The flexibility of the case law basis of the existing definition has undoubtedly had its benefits over the years, allowing the definition of what is charitable to change and develop along with society. This has permitted the evolution of the sector in a way that a statutory definition would most likely have been unable to.<sup>129</sup>

In ‘Analysis: the Upper Tribunal decision on fee-charging schools and public benefit’,<sup>130</sup> Kaye Wiggins argues that the Tribunal decision raises as many questions as it answers. Wiggins highlights the fact that, although the Upper Tribunal states that the poor must not be excluded from benefiting, it fails to define what would constitute more than a *de minimis* or token benefit for the poor.

Mary Synge expresses similar concerns when she questions the Tribunal’s conclusion that trustees must ensure adequate benefits other than the provision of education to its fee-paying students:

[I]t seems almost impossible to know what is ‘adequate’ for these purposes. An endowed school might be expected to provide more, for example, but it cannot be said how much is ‘enough’. A specialist music school might have a lower threshold, apparently on the basis that it is more expensive to run and because it fulfils a need not generally met by the State.<sup>131</sup>

These arguments, however, fail to appreciate the point that ‘adequate’, ‘*de minimis*’ and ‘token’ are relative concepts, having a multitude of different meanings, depending on the individual independent school’s resources and the needs of its

wider community. As stated by the Upper Tribunal, it is a matter for the trustees to determine what is appropriate,<sup>132</sup> as they are the ones best placed to do so.

Herein, however, may lie a problem. If trustees are to exercise greater judgement in the operation of their organisation, the law should be clear, comprehensible and supported by effective guidance.<sup>133</sup> The CA 2011 undoubtedly provides greater clarity on what constitutes charitable purposes<sup>134</sup> and on the non-existence of a presumption of public benefit.<sup>135</sup> However, the CA 2011 does not provide a statutory definition of public benefit; instead, public benefit is determined under existing case law<sup>136</sup> and the guidance published by the Charity Commission.<sup>137</sup>

Charity lawyer Francesca Quint notes:

[W]hile it was helpful that the Act confirmed that ‘public benefit meant what it always meant in charity law’, this was not particularly helpful in defining what it did mean, because one then had to work out what charity law said it was.<sup>138</sup>

The difficulties of interpreting charity law were highlighted in the lengthy and costly litigation between the Charity Commission and the Independent Schools Council,<sup>139</sup> which resulted in the Charity Commission withdrawing and rewriting their guidance on the public benefit requirements for independent schools.

Phillip Kirkpatrick and Francesca Quint observe that fault did not lie solely with the Charity Commission: ‘the Commission was required to produce guidance, which reflected centuries and thousands of pages of sometimes contradictory case law’.<sup>140</sup> Nonetheless, ‘the Commission’s original guidance on public benefit did not recognise sufficiently the discretion given to trustees to determine how to pursue their charitable purposes’.<sup>141</sup>

Arguably, a statutory definition of what constitutes public benefit would provide greater certainty and clarity, giving trustees more confidence in discharging their responsibilities,<sup>142</sup> while removing the statutory obligation<sup>143</sup> on the Charity Commission to provide guidance based on their interpretation of vast and complex case law.

Conversely, however, the inflexibility of a statutory definition of public benefit would hinder innovation and diversity in the charity sector, making it difficult for charities to adapt to the changing needs and attitudes of society.<sup>144</sup> In the statutory review of the CA 2006,<sup>145</sup> the overwhelming majority of views received during its consultation process supported the flexibility of case law. A statutory definition of public benefit was considered too inflexible to accommodate the diversity and complexity of the charity sector.<sup>146</sup>

Despite the legal flaws<sup>147</sup> and criticisms<sup>148</sup> regarding the Charity Commission’s original guidance on public benefit, public consensus arguably favours the flexibility of case law preserved within the provisions of the CA 2006 and its successor, CA 2011.<sup>149</sup>

## Conclusion

As a means of recognising and supporting the important role charities play within UK society,<sup>150</sup> Parliament passed the Charities Act 2006 in November 2006, with the aim of modernising charity law, which was considered outdated and unclear.<sup>151</sup> However, the CA 2006 has been heavily criticised for raising as many uncertainties as it sought to clarify, particularly with regard to public benefit,<sup>152</sup> with some commentators calling for a repeal of the statutory provisions on public benefit.<sup>153</sup>

In the post-CA 2006 case *R (Independent Schools Council)*, the Upper Tribunal found that, although the Charity Commission's original guidance on the public requirement for independent schools had been legally flawed,<sup>154</sup> the CA 2006 had not substantially changed the law regarding public benefit. The CA 2006 had merely re-emphasised and re-affirmed the importance of public benefit<sup>155</sup> by removing any uncertainty regarding the non-existence of a presumption of public benefit, via the provisions of s 3(2) CA 2006<sup>156</sup> and s 2(1)(b) CA 2006.<sup>157</sup>

The post-CA 2006 position of the public benefit requirement was also confirmed in the Attorney General's poverty reference of 2012.<sup>158</sup> The Upper Tribunal held that there had not been a presumption of public benefit for the purposes of the relief of poverty prior to the CA 2006;<sup>159</sup> case law had developed different public benefit requirements, depending on the charitable purpose.<sup>160</sup> Therefore, the CA 2006 had not fundamentally changed the public benefit requirement for charitable purposes for the relief of poverty.<sup>161</sup>

Arguably, criticism that the CA 2006 placed too much responsibility on the Charity Commission to interpret vast and complex case law<sup>162</sup> may hold some merit, as seen in *R (Independent Schools Council)*. It is, however, debatable as to the extent to which fault lay with the Charity Commission.<sup>163</sup> Alternatively, a statutory definition of public benefit would create certainty and clarity, but this would, undoubtedly, be at the price of innovation and diversity within the charity sector.<sup>164</sup>

In preserving the flexibility of case law as the basis for determining the public benefit requirement for charitable purposes, the CA 2006 and its successor, the CA 2011, allow the definition of what is charitable to develop in accord with changing social needs and attitudes,<sup>165</sup> thereby maintaining the spirit and intention behind the preamble to the Statute of Charitable Uses (1601).

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21. *Hobourn Aero Components Limited's Air Raid Distress Fund* [1946] 1 Ch 194
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27. *Inland Revenue Commissioners v Oldham Training and Enterprise Council* [1996] STC 1218
28. *Issac v DeFriez* (1754) Amb 595
29. *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney General* [1983] 1 All ER 288
30. *London Hospital Medical College v IRC* [1976] 1 WLR 613
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32. *Moggridge v Thackwell* (1792) 1 Ves Jr 464
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36. *Neville Estates v Madden* [1962] Ch 832
37. *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297
38. *Pirbright v Salwey* [1896] WN 86
39. *R(Independent Schools Council) v Charity Commission* [2012] Ch 214
40. *Re Astor* [1952] Ch 53
41. *Re Bushnell* [1975] 1 WLR 1596
42. *Re Compton* [1945] 1 Ch 123
43. *Re Coulthurst* [1951] Ch 661
44. *Re Delius* [1957] 1 All ER 854
45. *Re Drummond* [1914] 2 Ch 90
46. *Re Endacott* [1960] Ch 232 CA

47. *Re Grove-Grady* [1929] Ch 557
48. *Re Gwyon* [1930] 1 Ch 255
49. *Re Hooper* [1932] 1 Ch 38
50. *Re Hummeltenberg* [1923] 1 Ch 237
51. *Re Koeppler WT* [1986] Ch 423
52. *Re Koettgen* [1954] 1 All ER 581
53. *Re Macduff* [1896] 2 Ch 451
54. *Re Pinion* [1965] Ch 85 at 106
55. *Re Sanders Will Trusts* [1954] Ch 265
56. *Re Scarisbrick* [1951] Ch 622
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58. *Re Shaw* [1957] 1 All ER 748
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6. <http://www.independent.co.uk/news>
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9. <http://www.publications.parliament.uk>
10. <http://www.solicitorsjournal.com>
11. <http://www.thirdsector.co.uk>

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<sup>1</sup> Lord Hodgson R, *Trusted and Independent: Giving charity back to charities* (July 2012, London Stationery Office) para 1.

<sup>2</sup> Public Administration Select Committee, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office) para 1.

<sup>3</sup> Charities Aid Foundation, *UK Giving 2012* <[www.cafonline.org](http://www.cafonline.org)> p. 5.

<sup>4</sup> The independent regulator and registrar of charities in England and Wales (established 1853).

<sup>5</sup> Commons Select Committee, *Charities Act 'critically flawed' on public benefit* (6 June 2013 London Stationery Office); Public Administration Select Committee, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office) para 1.

<sup>6</sup> Green C, 'There are too many charities doing the same work, claims Charity Commission chief executive' *The Independent* (25 June 2014) <http://www.independent.co.uk/news/uk/home-news/there-are-too-many-charities-doing-the-same-work-claims-charity-commission-chief-executive-9562997.html> accessed 31 July 2015.

<sup>7</sup> *Moggridge v Thackwell* (1792) 1 Ves Jr 464; *Morice v Bishop of Durham* (1805) 10 Ves 522; *Re Endacott* [1960] Ch 232 CA.

<sup>8</sup> *Christ's Hospital v Grainger* (1849) 1 Mac & G 460; *Pirbright v Salwey* [1896] WN 86; *Re Hooper* [1932] 1 Ch 38.

<sup>9</sup> *Re Astor* [1952] Ch 534.

<sup>10</sup> *Brooks v Richardson* [1986] 1 All ER 952.

<sup>11</sup> See *National Anti-Vivisection Society v Inland Revenue Commissioners* [1947] AC 31 at 52 per Lord Wright.

<sup>12</sup> Provided the income/profit is applied to charitable purposes.

<sup>13</sup> Edwards R and Stockwell N, *Trusts and Equity* (11th edn, Pearson Education Ltd 2013) 208.

<sup>14</sup> See Gov.uk, 'Claiming Gift Aid as a charity or CASC' <https://www.gov.uk/claim-gift-aid/overview> accessed 31 July 2015.

<sup>15</sup> See Lord Hodgson R, *Trusted and Independent: Giving charity back to charities* (July 2012, London Stationery Office) para 4.6.

<sup>16</sup> Edwards R and Stockwell N, *Trusts and Equity* (11th edn, Pearson Education Ltd 2013) 207.

<sup>17</sup> See Pearce R and Stevens RJ, *Trusts and Equitable Obligations* (6th edn, Oxford University Press 2015) 432; Hudson A, *Equity and Trusts* (8th edn, Routledge 2015) 1117.

<sup>18</sup> See *Re Compton* [1945] 1 Ch 123 at 135 per Lord Greene MR; *Oppenheim v Tobacco Securities Trust* [1951] AC 297 at 306 per Simonds LJ; *Dingle v Turner* [1972] AC 601 at 625 per Cross LJ.

<sup>19</sup> Allows purposes not previously recognised as charitable to attain charitable status, provided they can be shown to be similar or comparative to purposes already recognised as charitable (see *Scottish Burial Reform and Cremation Society v Glasgow City Corporation* [1968] AC 138 at 154 per Wilberforce LJ).

<sup>20</sup> Cabinet Office, *Private Action, Public Benefit* (September 2002, London Stationery Office).

<sup>21</sup> Cabinet Office, *Private Action, Public Benefit* (September 2002, London Stationery Office) 9; Public Administration Select Committee, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office) para 2.

<sup>22</sup> S 1(1)(a) CA 2011 (formerly s 1(1)(a) CA 2006).

<sup>23</sup> S 2(1)(a) CA 2011 (formerly s 2(1)(a) CA 2006).

<sup>24</sup> S 2(1)(b) CA 2011 (formerly s 2(1)(b) CA 2006).

<sup>25</sup> Formerly s 2(2)(a)–(m) CA 2006.

<sup>26</sup> Formerly s 3(3) CA 2006.

<sup>27</sup> See s17 CA 2011 (formerly s 7 CA 2006).

<sup>28</sup> Public Administration Select Committee, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office) at para 60: 'The 2006 Act,



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while placing a requirement on the Charity Commission to produce guidance on public benefit, did not define, or provide direction on what “public benefit” meant’.

<sup>29</sup> See Cabinet Office, *Private Action, Public Benefit* (September 2002, London Stationery Office) p.9; Public Administration Select Committee, *The role of the Charity Commission and ‘public benefit’: Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office) para 2.

<sup>30</sup> 43 Eliz I c 4.

<sup>31</sup> The Mortmain and Charitable Uses Act 1888 repealed the Statute of Charitable Uses 1601. However, s13(2) of the 1888 Act expressly preserved the preamble to the 1601 Statute.

<sup>32</sup> [1891] AC 531.

<sup>33</sup> *Inland Revenue Commissioners v Pemsel* [1891] AC 531 at 583.

<sup>34</sup> Formerly s 2(2) Charities Act 2006.

<sup>35</sup> Formerly s 2(2)(m) CA 2006.

<sup>36</sup> S 3(1)(m)(i) CA 2011 (formerly s 2(4)(a) CA 2006).

<sup>37</sup> Ss 3(1)(m)(ii) and (iii) CA 2011 (formerly ss 2(4)(b) and (c) CA 2006).

<sup>38</sup> [1968] AC 138.

<sup>39</sup> *Scottish Burial Reform and Cremation Society v Glasgow City Corporation* [1968] AC 138 at 144.

<sup>40</sup> [1948] AC 31.

<sup>41</sup> *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 69.

<sup>42</sup> *Morice v Bishop of Durham* (1804) 9 Ves Jr 399; *Re Macduff* [1896] 2 Ch 451; *Hunter v A-G* [1899] AC 309; *Dunne v Byrne* [1912] AC 407; *Re Gwyon* [1930] 1 Ch 255; *Farley v Westminster Bank Ltd* [1939] AC 430; *Chichester Diocesan Fund and Board of Finance Inc v Simpson* [1944] AC 341; *Williams Trustees v Commissioners of the Inland Revenue* [1947] AC 447; *National Anti-Vivisection Society v IRC* [1948] AC 31; *Tennant’s Plays Ltd v IRC* [1948] 1 All ER 50; *Re Astor* [1952] Ch 534; *Re Sanders Will Trusts* [1954] Ch 265; *Inland Revenue Commissioner v Baddeley* [1955] AC 572; *Incorporated Council of Law Reporting for England and Wales v A-G* [1972] Ch 73; *McGovern v Attorney General* [1981] 3 All ER 493; *Re Koeppler WT* [1986] Ch 423; *Attorney General of the Cayman Islands v Wahr-Hansen* [2001] 1 AC 75; *Hanchett-Stamford v Attorney-General* [2008] 4 All ER 323; *Helena Housing Ltd v Commissioners for Her Majesty’s Revenue and Customs* [2012] EWCA (Civ) 569, [2012] PTSR 1409.

<sup>43</sup> *Re Coxen* [1948] Ch 747; *Inland Revenue Commissioner v City of Glasgow Police Athletic Association* [1953] AC 380; *Chartered Insurance Institute v London Corporation* [1957] 1 WLR 867; *National Deposit Friendly Society v Skegness UDC* [1959] AC 293; *Attorney General v Ross and others* [1985] 3 All ER 334.

<sup>44</sup> [1981] 3 All ER 493.

<sup>45</sup> *McGovern v Attorney General* [1981] 3 All ER 493 at 340 per Slade J.

<sup>46</sup> *National Anti-Vivisection Society v IRC* [1948] AC 31; *Re Bushnell* [1975] 1 WLR 1596; *McGovern v Attorney General* [1981] 3 All ER 493.

<sup>47</sup> See *National Anti-Vivisection Society v IRC* [1948] AC 31 at 42 per Wright LJ; *McGovern v Attorney General* [1981] 3 All ER 493 at 502 per Slade LJ; *R (Independent Schools Council) v Charity Commission* [2012] Ch 214 at [109]–[110].

<sup>48</sup> See *National Anti-Vivisection Society v Inland Revenue Commissioner* [1948] AC 31 at 35 per Simonds LJ.

<sup>49</sup> *Attorney-General v Ross* [1986] 1 WLR 252; *Re Koeppler Wills Trust* [1986] Ch 423.

<sup>50</sup> *Bowman v Secular Society* [1917] AC 406.

<sup>51</sup> See Part 2, Chapter 2, sections 13–19, EA 2010.

<sup>52</sup> See *Catholic Care (Diocese of Leeds) v Charity Commission* [2010] 4 All ER 1041 at 97 per Briggs J.

<sup>53</sup> Formerly s 2(1)(b) CA 2006.

<sup>54</sup> S 4(3) CA 2011 (formerly s 3(3) CA 2006).

<sup>55</sup> See Charity Commission, *Public Benefit: The Public Benefit Requirement* (16 Sept 2013).

<sup>56</sup> See *Attorney-General v Charity Commission* (The Poverty Reference) [2012] WTLR 977 at [32]. Also *Royal Choral Society v Inland Revenue Commissioners* [1943] 2 All ER 101; *Re Delius* [1957] 1 All ER 854; *Re Shaw* [1957] 1 All ER 748.

<sup>57</sup> Charity Commission, *The prevention and relief of poverty for the public benefit* (December 2008) 4.

<sup>58</sup> See *Re Macduff* [1896] 2 Ch 451 at 474 per Rigby LJ; *National Anti-Vivisection Society v IRC* [1948] AC 31 at 40 per Wright LJ; *Re Pinion* [1965] Ch 85 at 106 per Harman LJ; *Catholic Care (Diocese of Leeds) v Charity Commission* [2010] 4 All ER 1041 at 97 per Briggs J; *R (Independent Schools Council) v Charity Commission* [2012] Ch 214 at [106].

<sup>59</sup> *National Anti-Vivisection Society v IRC* [1948] AC 31 at 38.

<sup>60</sup> See Luxton P, ‘Making Law? Parliament v The Charity Commission’, *The Policy Series*, No 64 (June 2009, Politeia), p. 6. Also Cabinet Office, *Private Action, Public Benefit* (September 2002, London Stationery Office) para 21; Joint Committee on the Draft Charities Bill, *The Draft Charities Bill* (30 September 2004, London Stationery Office) para 63; Public Administration Select Committee, *The role of the Charity Commission and ‘public benefit’: Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office) para 93.

<sup>61</sup> Now s 4(2) CA 2011.

<sup>62</sup> Joint Committee on the Draft Charities Bill, *The Draft Charities Bill* (30 September 2004, London Stationery Office) para 12.

<sup>63</sup> *National Anti-Vivisection Society v IRC* [1948] AC 31 at 42.

<sup>64</sup> [1923] 1 Ch 237.

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<sup>65</sup> *Re Hummeltenberg* [1923] 1 Ch 237 at 240–41; expressly confirmed by Simonds LJ in *National Anti-Vivisection Society v IRC* [1948] AC 31 at 35.

<sup>66</sup> [2012] Ch 214.

<sup>67</sup> *R (Independent Schools Council) v Charity Commission* [2012] Ch 214 at [71].

<sup>68</sup> [2012] WTLR 977.

<sup>69</sup> *Attorney General v Charity Commission* (The Poverty Reference) [2012] WTLR 977 at [71].

<sup>70</sup> Government Responses to: 1) The Public Administration Select Committee's Third Report of 2013-14, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office); 2) Lord Hodgson's statutory review of the Charities Act 2006, *Trusted and Independent: Giving charity back to charities* (Cm 8700) (September 2013, London Stationery Office).

<sup>71</sup> *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office).

<sup>72</sup> Government Responses to: 1) The Public Administration Select Committee's Third Report of 2013-14, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office); 2) Lord Hodgson's statutory review of the Charities Act 2006, *Trusted and Independent: Giving charity back to charities* (Cm 8700) (September 2013, London Stationery Office) 13.

<sup>73</sup> See Public Administration Select Committee, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office) para 54.

<sup>74</sup> See *R (Independent Schools Council) v Charity Commission* [2012] Ch 214; *Attorney General v Charity Commission* (The Poverty Reference) [2012] WTLR 977 at [71].

<sup>75</sup> *Goodman v Saltash Corporation* (1882) 7 App Cas 633; *Verge v Somerville* [1924] AC 496; *Re Grove-Grady* [1929] Ch 557; *Gilmour v Coats* [1949] AC 426; *Re Compton* [1945] 1 Ch 123; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297; *IRC v Baddeley* [1955] UKHL 1, [1955] AC 572; *Re St Andrew's (Cheam) Lawn Tennis Club Trust* [2012] 1 WLR 3487.

<sup>76</sup> *IRC v Baddeley* [1955] AC 572 at 590 per Simonds LJ.

<sup>77</sup> See *Verge v Somerville* [1924] AC 496 at 499 per Wrenbury LJ. Also *Re Drummond* [1914] 2 Ch 90; *Re Compton* [1945] 1 Ch 123; *Hobourn Aero Components Limited's Air Raid Distress Fund* [1946] 1 Ch 194; *Gilmour v Coats* [1949] AC 426; *Oppenheim v Tobacco Securities Trust* [1951] AC 297; *IRC v City of Glasgow Police Athletic Association* [1953] AC 380.

<sup>78</sup> *Re Coxen* [1948] Ch 747; *Neville Estates v Madden* [1962] Ch 832; *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 72; *London Hospital Medical College v IRC* [1976] 1 WLR 613; *IRC v Oldham Training and Enterprise Council* [1996] STC 1218.

<sup>79</sup> [1945] 1 Ch 123.

<sup>80</sup> *Re Compton* [1945] 1 Ch 123 at 135 per Lord Greene MR.

<sup>81</sup> [1951] AC 297.

<sup>82</sup> *Oppenheim v Tobacco Securities Trust* [1951] AC 297 at 306.

<sup>83</sup> *Oppenheim v Tobacco Securities Trust* [1951] AC 297 at 306.

<sup>84</sup> *Oppenheim v Tobacco Securities Trust* [1951] AC 297 at 317.

<sup>85</sup> A trust that gives only a preference to a restricted class may, however, be considered charitable (*Re Koettgen Wills Trust* [1954] 1 All ER 581).

<sup>86</sup> *Re Compton* [1945] Ch 123 at 139–140 per Lord Greene MR; *Oppenheim v Tobacco Securities Trust* [1951] AC 297 at 308 per Simonds LJ.

<sup>87</sup> *Issac v DeFriez* (1754) Amb 595; *AG v Price* (1810) 17 Ves 371; *Bernal v Bernal* (1838) 3 My & Cr 559; *Browne v Whalley* [1866] W N 386; *AG v Duke of Northumberland* (1877) 7 Ch D 745; *Re Scarisbrick* [1951] Ch 622; *Dingle v Turner* [1972] AC 601; *Re Segelman* [1996] Ch 171, [1995] 3 All ER 676.

<sup>88</sup> See *Re Scarisbrick* [1951] Ch 622 at 655 per Jenkins LJ; *Dingle v Turner* [1972] AC 601 at [625] per Cross LJ; *Re Segelman* [1996] Ch 171, [1995] 3 All ER 676 at 688 per Chadwick J.

<sup>89</sup> [1951] Ch 622.

<sup>90</sup> *Re Scarisbrick* [1951] Ch 622 at 655.

<sup>91</sup> Wilson S, *Todd & Wilson's Textbook on Trusts* (11th edn, Oxford university Press 2013) 276.

<sup>92</sup> See *Re Scarisbrick* [1951] Ch 622 at 639 per Lord Evershed MR.

<sup>93</sup> See *Gibson v South American Stores Ltd* [1949] Ch 572 at 576.

<sup>94</sup> *Re Compton* [1945] Ch 123 at 139.

<sup>95</sup> [1972] AC 601.

<sup>96</sup> *Dingle v Turner* [1972] AC 601 at 623.

<sup>97</sup> *Dingle v Turner* [1972] AC 601 at 624.

<sup>98</sup> In *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] 1 All ER 288 the rule was extended to classes defined by religion.

<sup>99</sup> *Dingle v Turner* [1972] AC 601 at 623 per Cross LJ: 'it must be accepted that whatever else it may hold sway the *Compton* rule has no application in the field of trusts for the relief of poverty'.

<sup>100</sup> [1996] Ch 171, [1995] 3 All ER 676.

<sup>101</sup> *Re Segelman* [1996] Ch 171, [1995] 3 All ER 676 at 687 per Chadwick J.

<sup>102</sup> *McGovern v Attorney General* [1984] Ch 321 at 333 per Slade J.

<sup>103</sup> Formerly s 3(2) CA 2006.

<sup>104</sup> Formerly s 3(3) CA 2006.

<sup>105</sup> *Attorney General v Charity Commission* (The Poverty Reference) [2012] WTLR 977 at [71].

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<sup>106</sup> See *Attorney General v Charity Commission* (The Poverty Reference) [2012] WTLR 977 at [34] and [64]. Also *Dingle v Turner* [1972] AC 609 at 624 per Cross LJ.

<sup>107</sup> Re-enacted in CA 2011.

<sup>108</sup> S 2(1)(b) CA 2006 (s 2(1)(b) CA 2011).

<sup>109</sup> S 3(3) CA 2006 (s 4(3) CA 2011).

<sup>110</sup> S 3(2) CA 2006 (s 4(2) CA 2011).

<sup>111</sup> Public Administration Select Committee, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office) para 66.

<sup>112</sup> See Public Administration Select Committee, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office).

<sup>113</sup> Commons Select Committee (6 June 2013) <http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-administration-select-committee/news/charities-report> accessed 6 February 2015.

<sup>114</sup> *R (Independent Schools Council) v Charity Commission* [2012] Ch 214 at [88].

<sup>115</sup> *R (Independent Schools Council) v Charity Commission* [2012] Ch 214 at [96].

<sup>116</sup> Poor does not have to mean destitute, but might cover those of modest means (*Re Coulthurst* [1951] Ch 661).

<sup>117</sup> *R (Independent Schools Council) v Charity Commission* [2012] Ch 214 at [42].

<sup>118</sup> *R (Independent Schools Council) v Charity Commission* [2012] Ch 214 at [96].

<sup>119</sup> *R (Independent Schools Council) v Charity Commission* [2012] Ch 214 at [97].

<sup>120</sup> *R (Independent Schools Council) v Charity Commission* [2012] Ch 214 at [44].

<sup>121</sup> The tribunal, however, held that access to sporting facilities would not suffice (at [218]).

<sup>122</sup> *R (Independent Schools Council) v Charity Commission* [2012] Ch 214 at [214]–[220].

<sup>123</sup> Holt A, 'Sector pleased with Upper Tribunal's decision on private schools', *Charity Times* (14 October 2011) [http://www.charitytimes.com/ct/Upper\\_Tribunal\\_private\\_schools\\_public\\_benefit.php](http://www.charitytimes.com/ct/Upper_Tribunal_private_schools_public_benefit.php) accessed 7 February 2015.

<sup>124</sup> Chevalier-Watts J, 'The public benefit requirement in charity law: the mystery of the balancing act' (8 October 2014) 21(4) *Trusts and Trustees* 371–388, 375.

<sup>125</sup> Chevalier-Watts J, 'The public benefit requirement in charity law: the mystery of the balancing act' (8 October 2014) 21(4) *Trusts and Trustees* 371–388, 380.

<sup>126</sup> See *Dingle v Turner* [1972] AC 609 at 624 per Cross LJ. Also *Attorney General v Charity Commission* (The Poverty Reference) [2012] WTLR 977 at [34] and [64].

<sup>127</sup> Now s 4(3) CA 2011.

<sup>128</sup> Lord Hodgson R (July 2012, London Stationery Office).

<sup>129</sup> Lord Hodgson R, *Trusted and Independent: Giving charity back to charities* (July 2012, London Stationery Office) para 4.12.

<sup>130</sup> Wiggins K, *Third Sector* (25 October 2011) <http://www.thirdsector.co.uk/analysis-upper-tribunal-decision-fee-charging-schools-public-benefit/governance/article/1100134> accessed 7 February 2015.

<sup>131</sup> Syngé M, '*Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 421 (TCC)' (2012) 75 *The Modern Law Review*, 624–639, 633.

<sup>132</sup> *R (Independent Schools Council) v Charity Commission* [2012] Ch 214 at [220].

<sup>133</sup> See Lord Hodgson R, *Trusted and Independent: Giving charity back to charities* (July 2012, London Stationery Office) para 3.20.

<sup>134</sup> S 3(1) CA 2011 (s 2(2) CA 2006).

<sup>135</sup> S 4(2) CA 2011 (s 3(2) CA 2006).

<sup>136</sup> S 4(3) CA 2011 (s 3(3) CA 2006).

<sup>137</sup> Guidance on public benefit was first published in January 2008.

<sup>138</sup> Public Administration Select Committee, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office) para 66.

<sup>139</sup> *R (Independent Schools Council) v Charity Commission* [2012] Ch 214.

<sup>140</sup> Public Administration Select Committee, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office) para 60.

<sup>141</sup> Public Administration Select Committee, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office) para 68.

<sup>142</sup> Lord Hodgson R, *Trusted and Independent: Giving charity back to charities* (July 2012, London Stationery Office) para 4.12.

<sup>143</sup> S 17 CA 2011 (s 7 CA 2006).

<sup>144</sup> See Lord Hodgson R, *Trusted and Independent: Giving charity back to charities* (July 2012, London Stationery Office) paras 4.12–4.13. Also *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 69 per Simonds LJ; *Scottish Burial Reform and Cremation Society v Glasgow City Corporation* [1968] AC 138 at 144 per Wilberforce LJ.

<sup>145</sup> See Hodgson R, *Trusted and Independent: Giving charity back to charities* (July 2012, London Stationery Office).

<sup>146</sup> See Hodgson R, *Trusted and Independent: Giving charity back to charities* (July 2012, London Stationery Office) para 4.13.

<sup>147</sup> See *R (Independent Schools Council) v Charity Commission* [2012] Ch 214.

<sup>148</sup> See Public Administration Select Committee, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office); Commons Select Committee, *Charities Act 'critically flawed' on public benefit* (6 June 2013 London Stationery Office); Luxton P, 'Making Law? Parliament v The Charity Commission', *The Policy Series*, No 64 (June 2009, Politeia), p. 6.

<sup>149</sup> Hodgson R, *Trusted and Independent: Giving charity back to charities* (July 2012, London Stationery Office) para 4.13.

<sup>150</sup> See Public Administration Select Committee, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office) para 1.

<sup>151</sup> See Cabinet Office, *Private Action, Public Benefit* (September 2002, London Stationery Office) 8.

<sup>152</sup> See Public Administration Select Committee, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office) at paras 60–68. Also Luxton P, 'Making Law? Parliament v The Charity Commission', *The Policy Series*, No 64 (June 2009, Politeia).

<sup>153</sup> See Public Administration Select Committee, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office); Commons Select Committee, *Charities Act 'critically flawed' on public benefit* (6 June 2013, London Stationery Office).

<sup>154</sup> The Tribunal found the guidance on public benefit for independent schools to be focused on activities, rather than the intention of educational purposes of independent schools.

<sup>155</sup> See *R (Independent Schools Council) v Charity Commission* [2012] Ch 214 at [88].

<sup>156</sup> Now s 4(2) CA 2011.

<sup>157</sup> Now s 2(1)(b) CA 2011.

<sup>158</sup> *Attorney General v Charity Commission* (The Poverty Reference) [2012] WTLR 977.

<sup>159</sup> *Attorney General v Charity Commission* (The Poverty Reference) [2012] WTLR 977 at [71].

<sup>160</sup> See *Attorney General v Charity Commission* (The Poverty Reference) [2012] WTLR 977 at [34] and [64]. Also *Dingle v Turner* [1972] AC 609 at 624 per Cross LJ.

<sup>161</sup> See *Attorney General v Charity Commission* (The Poverty Reference) [2012] WTLR 977 at [71].

<sup>162</sup> See Luxton P, 'Making Law? Parliament v The Charity Commission', *The Policy Series*, No 64 (June 2009, Politeia). Also Public Administration Select Committee, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office) para 60.

<sup>163</sup> See Public Administration Select Committee, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (6 June 2013, London Stationery Office) paras 66 and 68.

<sup>164</sup> See Hodgson R, *Trusted and Independent: Giving charity back to charities* (July 2012, London Stationery Office) paras 4.12–4.13.

<sup>165</sup> See Hodgson R, *Trusted and Independent: Giving charity back to charities* (July 2012, London Stationery Office) para 4.12. Also *Scottish Burial Reform and Cremation Society v Glasgow City Corporation* [1968] AC 138 at 144 per Wilberforce LJ; *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 69 per Simonds LJ.

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