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# Where public interest and public benefit meet: the application of charity law to journalism

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## ABSTRACT

Under-investment in public service journalism has led to growing interest in the possibility of philanthropic support for the sector. Though long associated with non-profit journalism in North America, there is little tradition of philanthropy in UK journalism. This paper explains how recognition of public interest journalism as charitable can be achieved through more constructive interpretations of the existing law. Despite its initially conservative response, the Charity Commission has recently taken important steps towards recognising defined forms of journalism as charitable under the existing law. This paper reviews the democratic imperatives fulfilled by public interest journalism which justify such developments; and seeks to demonstrate how this framework for defining public interest journalism aligns with the public benefit requirement in charity law, opening up the possibility of new forms of charitably funded 'public benefit journalism'.

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## Introduction

Across the democratic world, it is a generally recognised axiom that a healthy, functioning democracy requires trusted, reliable news and information – not only to enable informed citizens to participate in civic life but also to promote rational decision making by elected representatives or those in positions of authority. A vital contribution to the reliable flow of information is high quality, properly resourced public interest journalism in which the public can have faith. This was never more apparent than during a pandemic in which disinformation flourished and, even as that particular issue recedes, is further emphasised by equally urgent global issues such as climate change and the repercussions of Russia's invasion of Ukraine.

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And yet, at the very moment that reliable sources of information are more important than ever, there appears to be a collective failure to intervene effectively in order to protect and enhance the essential, beneficial role played by public interest journalism. This inertia is contributing to a dearth of independent, trustworthy news sources – at local, regional and national level – which is greatly exacerbated by the well documented economic travails of the news industry which we describe in greater detail below.

In the UK, there is growing recognition that this is becoming a fundamental problem for democracy itself, and therefore urgently needs addressing. In 2019, a report commissioned by the government into sustainable journalism, led by Dame Frances Cairncross, argued that

... there are two areas of public-interest news that matter greatly [and] ... both are essential in a healthy democracy. One is investigative and campaigning journalism, and especially investigations into abuses of power in both the public and the private sphere. Such journalism is particularly high-cost and high-risk. The second is the humdrum task of reporting on the daily activities of public institutions, particularly those at local level, such as the discussions of local councils or the proceedings in a local Magistrates Court.<sup>1</sup>

Similar concerns about the damaging impact on civic knowledge and democratic participation have been aired in parliamentary and civil society reports, and a number of policy and regulatory interventions have been canvassed aimed in particular at fostering new journalism enterprises with clear public interest objectives.<sup>2</sup> In particular, as advertising revenue diminishes and commercial publishers reduce their investment in public interest journalism accordingly, attention has turned to ways in which public interest journalism might attract philanthropic contributions – a tradition long associated with the non-profit journalism sector in the United States but with little history or tradition in the UK.

The vast majority of foundations or trusts which might be candidates for such contributions will only make donations to charities (either by choice or as dictated by their own rules). There has therefore been a particular focus on ways in which journalism may obtain charitable status, and perhaps whether legislation may be necessary to provide that public interest journalism is charitable in its own right. The question remains relatively unexplored in the academic legal literature, however, and mainly confined to Parliamentary reports and working papers. In a bid to address this gap, we provide a detailed analysis of the existing law and policy, and argue that a legislative intervention is not necessarily required.

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<sup>1</sup>Frances Cairncross, 'The Cairncross Review: A Sustainable Future for Journalism' (Department for Digital, Culture, Media & Sport 2019) 17.

<sup>2</sup>See, for example, notes 13, 26, 31, 38, 48.

Our paper explains how recognition of public interest journalism as charitable can be achieved through more constructive interpretations of the existing law. Charity law is not static. It can and does develop over time, as the needs of society change and become reflected in decisions of the courts. In the meantime, the Charity Commission for England and Wales interprets the courts' decisions in accordance with its responsibilities as regulator of charities.

Despite the Charity Commission's conservative approach to guidance that accompanied the Government's response to the Cairncross Report (see below), this paper explains how the charities regulator has recently taken important steps towards recognising defined forms of journalism as charitable under the existing law.

It reviews the evolving needs of society in relation to public interest journalism which justify such developments. It also seeks to demonstrate how this framework for public interest journalism aligns with the public benefit requirement in charity law, opening up the possibility of new forms of charitable 'public benefit journalism'.

## Context

### *The crisis in journalism*

Throughout the Western world, traditional media companies which have been the mainstay of original journalism have been subjected to an economic 'perfect storm' which has probably been more destructive than at any time since the beginnings of a free press. In particular, two structural changes have irreversibly damaged journalism's sustainable business model.

First, the emergence of huge social media and aggregator tech companies, especially Facebook and Google, have cannibalised much of the advertising revenue that used to go in particular to print publishers. Second, this shift in advertising spend is exacerbated by a fragmentation of audiences to a plethora of different media platforms and a concomitant decline both in newspaper circulation and audiences for television news bulletins. Revenue is thus lost both from reduced cover price sales, and from reduced advertising impacts. And of course, the impact of these permanent structural changes has been exacerbated over the last two years by the COVID-19 pandemic.

Although publishers can recoup some revenue through online digital advertising, according to one estimate a single print reader is worth eight digital readers – the revenue equation is 'digital pennies for print pounds'.<sup>3</sup>

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<sup>3</sup>Mediatique, 'Overview of Recent Dynamics in the UK Press Market' (Department for Digital, Culture, Media & Sport 2018) 59. <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/778155/180621\\_Mediatique\\_-\\_Overview\\_of\\_recent\\_dynamics\\_in\\_the\\_UK\\_press\\_market\\_-\\_Report\\_for\\_DCMS.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778155/180621_Mediatique_-_Overview_of_recent_dynamics_in_the_UK_press_market_-_Report_for_DCMS.pdf)>

Some publishers have worked creatively to introduce pay models, and for a minority of publishers these have helped to stem the losses. But these models only work for certain kinds of media organisations, in particular the specialist financial and higher end broadsheet press. For tabloid and mid-market publications, and particularly for the local and regional press, subscription models have shown little evidence of success.

In the UK, the Cairncross Report laid bare the full consequences for media companies and journalists in the 10 years between 2007 and 2017: advertising revenue cut by over two thirds from £4.6 m to £1.4 m, average circulations halved,<sup>4</sup> number of local and regional publications down by a third, and – crucially – number of frontline journalists employed by newsbrands down by over a quarter from around 23,000 to around 17,000.<sup>5</sup> Similar patterns have been recorded in the United States and Australia.<sup>6, 7</sup> Although the internet has enabled the development of hundreds of ‘hyperlocal’ and independent media initiatives since the 1990s, many are operating on shoestring budgets, as shown by one recent report which surveyed 56 UK-based independent publishers with a combined total annual revenue of less than £5.4 m and a median income under £50,000.<sup>8</sup>

In TV, the BBC has seen a real-terms cut in licence fee income of 25% since 2010, with journalism and current affairs taking its share of redundancies throughout the Corporation. Further cuts are likely, across all departments including news, as the BBC struggles with increased production costs and a further freezing of its income for two years announced by the Culture Secretary in February 2022.<sup>9</sup> And while it is true that ‘digital-native’ online news operations such as BuzzFeed, Vice and Huffington Post have emerged to pick up some of the slack, they are as vulnerable as traditional publishers to the vicissitudes of advertising revenue and a fickle consumer demand for news.<sup>10</sup> Moreover, these well-known brands operate almost exclusively at the national level, leaving local communities particularly poorly served by high quality, original and relevant journalism.

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<sup>4</sup>11.2 m to 6.1 m for national dailies, 63.4 m to 31.4 m for weekly local/regional newspapers.

<sup>5</sup>Mediatique (n 3).

<sup>6</sup>Mason Walker, ‘U.S. Newsroom Employment Has Fallen 26% since 2008’ (*Pew Research Center*, 13 July 2021) <<https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/>> accessed 20 May 2022.

<sup>7</sup>Gay Alcorn, ‘Australia’s Journalism Is in Mortal Danger. Politicians Should Join the Fight to Save It’ *The Guardian* (3 May 2017) <<https://www.theguardian.com/media/2017/may/04/australias-journalism-is-in-mortal-danger-politicians-should-join-the-fight-to-save-it>> accessed 20 May 2022.

<sup>8</sup>Clare Cook and others, ‘PINF Index 2021’ (2021) <<https://www.publicinterestnews.org.uk/index2021>> accessed 20 May 2022, 8.

<sup>9</sup>As outlined by the campaigning group Voice of the Listener & Viewer in ‘BBC Public Funding and Top Slicing 2010–2021’ (2021) <<https://www.vlv.org.uk/wp-content/uploads/VLV-Briefing-note-BBC-Public-Funding-2010-2021-the-Challenge-Ahead-July-2021-FINAL.pdf>> accessed 20 May 2022.

<sup>10</sup>Buzzfeed’s UK editorial team was cut by half in January 2019. Following the acquisition of HuffPo by BuzzFeed in February 2021, there were major layoffs in the HuffPost newsroom.

## **The local problem**

It is at the local level that these economic problems are most keenly manifested. In the UK, while television journalism has a well-established quality pedigree at national level through the BBC, ITN (which services ITV, Channel 4, and Channel 5) and Sky, there is no such tradition at the local level. There are brief regional news bulletins on both BBC and ITV, covering huge population regions of well over a million, and an ill-fated experiment in local television for around 35 major cities which was, until 2017, subsidised through a BBC subvention; it barely survives today, with tiny audiences and virtually no investment in original journalism.<sup>11</sup>

Towns and cities throughout the UK, as with the US and most western countries, have therefore relied on local newspapers and freesheets for their local news. These, in turn, saw healthy profits for decades, even in relatively small communities, on the back of classified advertising by local readers and display advertising by local retailers and service providers. Both have been victims of the digital revolution as readers have moved online to both search and buy: classified advertising has virtually disappeared, and display ads usually consist of compulsory local council notices and a few supermarket promotions. Even while demand for local news and information remains as healthy as ever,<sup>12</sup> economic imperatives have seen dailies turn to weeklies, and both increasingly disappear altogether.

Both the scale and quality of the problem was well illustrated by a 2016 King's College study in which the authors found that well over half the UK population now live in areas not served by a local daily (this study is covered in more detail below). While weekly papers do cover the majority of remaining areas, these have become increasingly diminished operations, mostly belonging to large conglomerates with their main operation far removed from the paper's catchment area.<sup>13</sup> The authors offer one stark example of the damage, provided by a former editor of the Leicester Mercury, serving a city with a population of over 400,000: in 1996, it brought in almost £59 million revenue and employed 581 staff. By 2011, revenues had plummeted 80% to £16 million and it employed just 107 staff.<sup>14</sup>

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<sup>11</sup>Ian Young, 'Whatever Happened to Local TV?' (*BBC News*, 9 February 2021) <<https://www.bbc.com/news/entertainment-arts-55854307>> accessed 8 September 2022; 'Ofcom Seeks to Scrap Local TV Roll-Out' *BBC News* (20 April 2018) <<https://www.bbc.com/news/technology-43837949>> accessed 13 September 2022.

<sup>12</sup>According to Ofcom, members of the public are just as likely to follow news for information on their local area or region as for national or international news. Ofcom, 'News Consumption in the UK: Report 2021' (2021) <<https://www.ofcom.org.uk/research-and-data/tv-radio-and-on-demand/news-media/news-consumption>> accessed 20 May 2022, figure 11.3.

<sup>13</sup>Gordon Ramsay and Martin Moore, 'Monopolising Local News: Is There an Emerging Local Democratic Deficit in the UK Due to the Decline of Local Newspapers?' <[https://kclpure.kcl.ac.uk/portal/en/publications/monopolising-local-news\(b26eb94e-946f-420f-963c-709556f1cd60\)/export.html](https://kclpure.kcl.ac.uk/portal/en/publications/monopolising-local-news(b26eb94e-946f-420f-963c-709556f1cd60)/export.html)> accessed 20 May 2022, 47.

<sup>14</sup>*ibid* 28.

Thus, even where closures have been avoided, consolidation and contraction have led to a hollowing out of the journalistic resources available for original newsgathering.

### **Why it matters**

It is information and decision-making at the local level that most impacts the everyday lives of the vast majority of people: relevant and up to date information about local hospitals, local schools, local transport and local shops, about police forces and local crime, about what is happening to local businesses and in local courts. This is a vital requisite for a healthy civic environment in which citizens feel both properly engaged in and properly informed about issues of immediate relevance. When local journalism businesses fail, there are profound implications for local communities and for the accountability of local elites who are no longer subjected to independent scrutiny. In the words of one author, describing the transformative effect of the tech industries:

What are most at threat are the local-issue stories, the nitty-gritty research, the expensive long investigations and the everyday reportage. It is the journalist sitting at the back of the courtroom, in the council meeting, digging up dirt on a dodgy planning permission decision and scribbling furiously during a local demonstration. It is the reporters who listen to communities and really understand what is going on in an area, who confront the daily abuses of power that most matter to people.<sup>15</sup>

A graphic and tragic illustration of what can happen when local journalism fails was the Grenfell Tower fire in June 2017, when 72 people died in a social housing block in West London in the early hours of the morning. Local residents had been trying to alert authorities for years about the potentially lethal fire hazard of the building's external cladding, a local issue that in normal circumstances would surely have been covered by a local news outlet. But the local paper, the Kensington and Chelsea News had closed two months earlier and the only journalist covering the area lived over 150 miles away.<sup>16</sup> On a more mundane, everyday level a detailed study into the impact of one paper's closure in the Welsh town of Port Talbot depicted the sense of alienation and resentment felt by local residents at the lack of information about local council decisions or unexplained local events.<sup>17</sup>

Beyond the democratic deficit that leaves local communities uninformed and unheard, there are serious implications for plurality as the number of

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<sup>15</sup>Carl Miller, *The Death of the Gods: The New Global Power Grab* (William Heinemann 2018) 150.

<sup>16</sup>Martin Moore, *Democracy Hacked: How Technology Is Destabilising Global Politics* (Paperback edition, Oneworld 2019) 167–8.

<sup>17</sup>*ibid* 183–4.

diverse voices is whittled down.<sup>18</sup> Moreover, given the vital and long-standing role of local news outlets as a professional training ground for aspiring journalists, there are fewer opportunities for developing the necessary craft skills for high quality journalism.

Finally, at both local and national level – as well as international – there is far less scope for properly resourced and independent investigative journalism. Investigations into corruption, negligence or incompetence can take weeks or months of careful preparation and groundwork, sometimes with little or nothing that is publishable at the end. For every successful Watergate or MPs’ expenses scandal that is exposed by diligent journalists tackling abuses of power – all requiring substantial investment of time and resources – there are at least as many enquiries which have failed to generate sufficient evidence for publication. Very few news operations can afford such non-publication luxury today.

## Current provision for charitable journalism in the United Kingdom

### *Recent initiatives*

For at least ten years, there has been a recognition by governments in the UK and around the world that the collapse of journalism’s business model requires intervention. The UK’s Cairncross Review was one response, and followed a similar government statement in Canada where the government recognised ‘the vital role that local journalism plays in communities all across the country’. In 2018, it pledged \$50 million over five years to support local journalism in under-served communities and committed to exploring new funding models.<sup>19</sup>

At the same time, both Google and Facebook have committed large sums of money to help sustain original journalism. In 2018 Google promised \$300 m of support for a range of media and journalism projects over 3 years,<sup>20</sup> while Facebook announced a £4.5 m injection into UK journalism to fund 80 community journalists in local and regional newsrooms, followed by a further pledge of \$300 m over three years to journalism content, partnerships and programmes.<sup>21</sup>

<sup>18</sup>Mergers, acquisitions and consolidation across the industry are tracked by the Media Reform Coalition in their regular reports, for example, ‘Report: Who Owns the UK Media?’ (2021) <<https://www.mediareform.org.uk/media-ownership/who-owns-the-uk-media>> accessed 23 May 2022.

<sup>19</sup>Department of Finance Canada, ‘Investing in Middle Class Jobs’ (2018) <<https://www.budget.gc.ca/fes-eea/2018/docs/statement-enonce/fes-eea-2018-eng.pdf>> accessed 23 May 2022, 40.

<sup>20</sup>Mathew Ingram, ‘The Media Today: Google Offers News Business a \$300 Million Olive Branch’ (Columbia Journalism Review, 21 March 2018) <[https://www.cjr.org/the\\_media\\_today/google-news-initiative.php](https://www.cjr.org/the_media_today/google-news-initiative.php)> accessed 23 May 2022.

<sup>21</sup>Freddy Mayhew, ‘Facebook Pledges £4.5m to Fund 80 New UK Community Journalists in Global First for Social Network’ (*Press Gazette*, 19 November 2018). <<https://pressgazette.co.uk/facebook-pledges-4-5m-to-fund-80-new-uk-community-journalists-in-global-first-for-social-network/>> accessed 23 May 2022.



To what extent either of these digital giants are genuinely interested in original or quality journalism, rather than fending off pressure from governments and traditional publishers around the world, is a moot point. More recently, pioneering legislation in Australia introduced a ‘News Bargaining Code’ which has forced the tech companies to make deals with publishers that compensate them for use of news stories on their platforms. However, the deals are highly confidential and the vast bulk of revenue flows to the biggest publishers, thereby entrenching media concentration and doing little for plurality.<sup>22</sup> Moreover, dependence on contributions from two global corporations for ameliorating the growing democratic deficit at the local level distracts attention from finding longer term, structural solutions that can enhance sustainability and independence in the public interest.

One alternative approach that has been canvassed for some time in the UK is to apply charitable status to certain kinds of journalistic enterprises that fulfil certain criteria. For successful applicants, the benefits are considerable: apart from a clear reputational and public confidence value, they will attract grants from individual benefactors, charitable foundations and bequests, as well as tax benefits through relief from corporation tax, inheritance tax, capital gains tax and business rates.<sup>23</sup> Trustees can be drawn from trusted members of the local community, which in turn is likely to feel more invested and more inclined to volunteer or contribute. As one former editor of a charitable publication has written, such ventures ‘should attract talented and enthusiastic candidates as a community newspaper would be a very visible sign of community leadership and cohesiveness’.<sup>24</sup>

As part of a comparative multi-authored report for the Reuters Institute and the Yale Information Society Project in 2016,<sup>25</sup> Judith Townend set out the ways in which news and journalism had been charitably funded in the UK within the constraints of the current system – through, for example, the creation of separate trusts that fund the charitable activity of a journalistic operation. A different report from the Cass Business School in 2017 also provided current examples of UK journalism benefiting from

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<sup>22</sup>For details of the legislation and an even-handed critique, see Bill Grueskin, ‘Australia Pressured Google and Facebook to Pay for Journalism. Is America Next?’ (Columbia Journalism Review) <[https://www.cjr.org/business\\_of\\_news/australia-pressured-google-and-facebook-to-pay-for-journalism-is-america-next.php](https://www.cjr.org/business_of_news/australia-pressured-google-and-facebook-to-pay-for-journalism-is-america-next.php)> accessed 23 May 2022.

<sup>23</sup>The latter can be particularly valuable to a local newspaper; with a mandatory 80% business rates relief and further 20% relief available at the local authority’s discretion.

<sup>24</sup>Neil Fowler, ‘Regional Press Challenges Promote Calls for New Ownership Forms and Legal Bases’ in David AL Levy and Robert G Picard (eds), *Is There a Better Structure for the News Providers? The Potential in Charitable and Trust Ownership* (Reuters Institute for the Study of Journalism 2011) 49.

<sup>25</sup>Judith Townend, ‘The United Kingdom: The Impact of Charity and Tax Law/Regulation on Not-for-Profit News Organizations’ in Robert G Picard, Valerie Belair-Gagnon and Sofia Ranchordás (eds), *The Impact of Charity and Tax Law/Regulation on not-for-profit News Organizations* (Reuters Institute for the Study of Journalism, University of Oxford; Information Society Project, Yale Law School 2016) <<https://reutersinstitute.politics.ox.ac.uk/our-research/impact-charity-and-tax-lawregulation-not-profit-news-organizations>> accessed 23 May 2022.

philanthropy.<sup>26</sup> Examples from both these reports informed a collective submission to the Cairncross Review by the Public Benefit Journalism Research Centre (now renamed the Charitable Journalism Project) with which the authors of this paper are affiliated.<sup>27</sup>

### **Initiatives to develop charitable journalism**

Although there are numerous examples of philanthropic journalism in the UK, evidenced by these initiatives,<sup>28</sup> ‘charitable journalism’ remains a contentious and difficult endeavour, and attempts in this area have tended to face a conservative response from the Charity Commission of England and Wales.<sup>29</sup> Organisations – such as the charity Full Fact and the not-for-profit Bureau of Investigative Journalism (now, in part, supported by a charitable trust) – attest to the difficulties encountered in making applications to become charities and the resource this took over several years.<sup>30</sup> For this reason, there have been a number of calls for legislative intervention.

In 2012, the UK’s House of Lords Communications Committee, as part of their inquiry into the future of investigative journalism, recommended that the Charity Commission provide greater clarity about what media activities might be classed as charitable under current law. It acknowledged the government’s ‘disinclination to legislate in this area’ but urged it to reconsider and to reform charity law as ‘the only way in which certainty in this area could be achieved’.<sup>31</sup>

In 2018, the Cairncross Review received a number of submissions suggesting that some forms of journalism should qualify for charitable status, and reported that ‘inclusion of journalism as a charitable endeavour

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<sup>26</sup>Jenny Harrow and Cathy Pharoah, ‘Philanthropic Journalism Funding in the UK’ (Cass Business School 2017) <[https://journalismfundersforum.com/uploads/downloads/jff\\_london\\_report.pdf](https://journalismfundersforum.com/uploads/downloads/jff_london_report.pdf)> accessed 8 September 2022.

<sup>27</sup>Also see: George Brock, ‘Public Benefit Journalism Research Centre – Written Evidence to Inquiry into the Future of Journalism (FOJ0047)’ (House of Lords Communications and Digital Committee 2020) <<https://committees.parliament.uk/writtenevidence/2219/html/>> accessed 23 May 2022.

<sup>28</sup>These have been acknowledged by both the Charity Commission and the Government in their responses to the Cairncross Review.

<sup>29</sup>The Charity Commission has a quasi-judicial role as the principal regulator for charities in England and Wales, which includes a statutory function of determining whether or not institutions are charities. In doing so, it applies the law (as set out by Parliament and the Courts), issues guidance on its interpretation of the law and from time to time publishes registration decisions which it considers may assist the general public understand its approach. For the purposes of this paper, although the test for charitable status differs, the situation is similar in Scotland and Northern Ireland.

<sup>30</sup>As documented in Townend (n 25) 59–60; also Judith Townend, ‘Charitable Journalism: Oxymoron or Opportunity?’ (2016) 13 *Ethical Space* 84–85. Also see: *Full Fact – Application for Registration* (The Charity Commission for England and Wales) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/372962/Full\\_Fact\\_Decision.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/372962/Full_Fact_Decision.pdf)> accessed 8 September 2022; *Full Fact v The Charity Commission for England and Wales* [2011] General Regulatory Tribunal (Charity) First Tier Tribunal CA/2011/0001; n 27.

<sup>31</sup>House of Lords Communications Committee, ‘The Future of Investigative Journalism – Third Report’ (2012) <<https://publications.parliament.uk/pa/ld201012/ldselect/ldcomuni/256/25608.htm#n152>> accessed 23 May 2022, para 201–2.

might go a long way to attract funding for those enterprises ... which specialise in supplying public-interest journalism'.<sup>32</sup> It recommended that the government should explore tax relief options 'ideally under the Charities Act', perhaps through the addition of an additional charitable purpose.

So far, these recommendations and policy ideas have received little or no encouragement from Government. Although the Government initially indicated support for 'moving forward' with Cairncross's recommendations on charitable journalism, under the then Culture Secretary Jeremy Wright,<sup>33</sup> there was a change in tune from his successor, Baroness Nicky Morgan, who rejected the need for any change in legislation or the existing framework.<sup>34</sup>

The latest developments, however, suggest that legislation may not be necessary to extend charity law so that public interest journalism is explicitly included.

Until recently, organisations have required huge resources and patience to attain charitable status and experienced multiple rejections, suggesting a cautiousness on the part of the Commission when interpreting charity law. This is partly because, while the Commission had accepted in principle that journalism could potentially support charitable citizenship or community development purposes,<sup>35</sup> in practice it generally required journalistic activity to be either focused on the narrow charitable 'educational' benefits of journalism, or to advance a more conventional charitable purpose like addressing deprivation or protecting the environment. Identifying these educational or other charitable benefits in order to justify journalism, can be challenging in practice and even feel artificial or contrived. A better fit with a recognised charitable purpose is required (see 'Charitable Purposes', below).

The recent recognition of a broader charitable purpose which more comfortably accommodates public interest journalism, reflecting the charitable public benefit in defined types of journalism, is therefore highly significant.

Founded by Jonathan Heawood in 2019, the Public Interest News Foundation (PINF) provides financial and other support to public interest news providers. In recognising PINF as a charity in September 2020,<sup>36</sup> the Charity Commission accepted a definition of public interest news, based

<sup>32</sup>(n 1) 87.

<sup>33</sup>Jeremy Wright's Statement on the Cairncross Review' (*Gov.uk*, 12 February 2019) <<https://www.gov.uk/government/speeches/jeremy-wrights-statement-on-the-cairncross-review>> accessed 23 May 2022.

<sup>34</sup>'Government Response to the Cairncross Review: A Sustainable Future for Journalism' (*Gov.uk*, 27 January 2020) <<https://www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism/government-response-to-the-cairncross-review-a-sustainable-future-for-journalism>> accessed 23 May 2022.

<sup>35</sup>Arti Thakor, 'Read All about It: When Can Journalism Be Charitable? – Charity Commission' (27 January 2020) <<https://charitycommission.blog.gov.uk/2020/01/27/read-all-about-it-when-can-journalism-be-charitable/>> accessed 23 May 2022.

<sup>36</sup>'Application for Registration of Public Interest News Foundation (PINF), Decision of the Charity Commission' (*Gov.uk*, 22 September 2020) <<https://www.gov.uk/government/publications/charity-registration-decision-public-interest-news-foundation/charity-registration-decision-public-interest-news-foundation>> accessed 23 May 2022.

upon the vital role which public interest journalism plays in society, informing local communities, promoting citizenship and supporting the democratic process.

This is a very helpful development, which will make charitable status a real possibility for public interest news providers (the definition requires public interest news to be objective, impartial and accurate; we consider the definition of ‘public interest news’ further below). The Commission has published the PINF decision<sup>37</sup> to help others understand the basis on which it was made and on which it might accept equivalent applications.

The PINF decision illustrates that defined public interest journalism may be charitable in itself because it provides wider benefits to the public, including serving the information requirements of citizens and communities. It potentially embraces a much wider range of journalism which is carried out for charitable public benefit, and in the public interest.

As we will see, these two concepts, ‘public interest’ and ‘public benefit’, clearly differ; but we find that there is also significant overlap, which supports a finding that defined forms of public interest journalism are potentially charitable under the existing law.

The PINF decision was noted by the House of Lords select committee on Communications and Digital in its 2020 report on the future of journalism, which re-iterated support for charitable status for journalism. Citing the decision, it encouraged the ‘Charity Commission to continue to recognise public interest journalism as a charitable purpose’.<sup>38</sup> We hope that this paper will assist with this.

## Public interest journalism

### *What is the public interest in journalism?*

We have identified and focus on two approaches to defining the public interest in journalism for the purposes of this paper. The first is a narrow operational and often negatively or defensively conceived definition incorporated into professional codes of conduct (and occasionally as a statutory defence within the criminal and civil law). The second is a broader and positively conceived approach which links journalism to the wider imperative of a well-functioning democracy.<sup>39</sup> The latter, though broad, is confined to matters of a normatively defined public interest – described below – rather than encompassing all matters that the public finds interesting, a distinction frequently made by

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<sup>37</sup> *ibid.*

<sup>38</sup> Communications and Digital Committee, ‘Breaking News? The Future of UK Journalism’ (House of Lords 2020) HL Paper 176, 81–82.

<sup>39</sup> For a collection of essays on ‘positive free speech’ exploring an approach which conceives of the right to freedom of expression as a positive as well as negative liberty, see Andrew T Kenyon and Andrew Scott (eds), *Positive Free Speech: Rationales, Methods and Implications* (Hart 2020).

the court.<sup>40</sup> Neither the first ‘defensive’ approach nor the second ‘normative’ approach offer a precise definition. This section examines each approach in turn in order to better understand the relationship between public interest and public benefit.

Looking first at the ‘defensive’ approach, Ofcom’s Broadcasting Code notes that a broadcaster might invoke the public interest to justify intruding into someone’s private life: ‘revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public’.<sup>41</sup> A similar approach is taken in print and online codes by press regulators IPSO and IMPRESS. IPSO provides a public interest exemption to nine of its sixteen clauses, again providing a non-exhaustive list which includes: ‘Raising or contributing to a matter of public debate’ and noting that ‘There is a public interest in freedom of expression itself’.<sup>42</sup> IMPRESS is a little more nuanced, drawing a clear distinction between ‘journalism that simply interests the public’ and ‘matters in which we have a stake as members of society’. However, it too emphasises that its examples are ‘illustrative’ and does not provide a comprehensive definition.<sup>43</sup>

Exceptionally, there are limited defences and exemptions provided in law for public interest journalism, for example within the Data Protection Act 2018. The public interest remains undefined, however: Part 5 Schedule 2 (para 26), detailing a special purposes exemption for journalism, refers back to the relevant industry codes as a means of determining applicability, and therefore returns us to the ambiguities above. Ambiguity is also evident elsewhere, for example a specific public interest defence provided by s.4 Defamation Act 2013 (replacing *Reynolds* privilege), and in the balancing of ECHR Article 10 and 8 rights in privacy cases. Though it has been asserted – prior to the statutory defence in defamation – that the ‘standard of responsible journalism’ required for a public interest defence is objective and ‘no more vague’ than in other standards in law,<sup>44</sup> the public interest remains a problematic and contested concept, with ‘difficulties in identifying the scope of public interest arguments’ and an ‘absence of bright line rules’ leading to unpredictable outcomes.<sup>45</sup>

The Freedom of Information Act 2000 contains a public interest test to be applied by public authorities when considering release of information and in

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<sup>40</sup>Related, see Rowbottom’s analysis of the ‘economic public interest’ whereby courts have accepted a broad argument that newspaper need to be able to publish interesting information to sustain sales; he ultimately rejects it, however, as an overly broad justification that is under-protective of competing rights: Jacob Rowbottom, *Media Law* (Hart Publishing 2018) 88.

<sup>41</sup>‘Section Eight: Privacy’ (*Ofcom*, 6 January 2021) <<https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/section-eight-privacy>> accessed 23 May 2022.

<sup>42</sup>‘Editors’ Code of Practice’ <<https://www.ipso.co.uk/editors-code-of-practice/#ThePublicInterest>> accessed 23 May 2022.

<sup>43</sup>‘Standards’ <<https://www.impress.press/standards/>> accessed 23 May 2022.

<sup>44</sup>Lord Hoffman, in *Jameel & Ors v. Wall Street Journal Europe Sprl* [2006] UKHL 44 (11 October 2006): 55.

<sup>45</sup>For a fuller discussion, see Rowbottom (n 40) 108–109.

other contexts. In its guidance, the Information Commissioner states ‘the public interest here means the public good, not what is of interest to the public ...’. It continues:

The public interest can cover a wide range of values and principles relating to the public good, or what is in the best interests of society. Thus, for example, there is a public interest in transparency and accountability, to promote public understanding and to safeguard democratic processes. There is a public interest in good decision-making by public bodies, in upholding standards of integrity, in ensuring justice and fair treatment for all, in securing the best use of public resources and in ensuring fair commercial competition in a mixed economy. This is not a complete list; the public interest can take many forms.<sup>46</sup>

This leads us to the second approach, which is more wide-ranging and is premised on the inter-dependent relationship between democracy and the media, specifically those journalistic functions which the media perform. Identifying those functions allows us to move beyond a narrow industry and defensive or regulatory approach and focus on how journalism can make a real life contribution to democratic and civic life by positively engaging free speech rights. That in turn permits a further comparison with the ‘public benefit’ concept in charity law. In doing this, we build on James Curran’s approach, which draws on what he calls the ‘classic liberal theory of a free press’, identifying the core journalistic functions as watchdog, voice of the people, and information and debate.<sup>47</sup> Steven Barnett has adapted each of these and added a fourth.<sup>48</sup>

**Interrogating:** the ‘watchdog’ role. A democratic media must be able to hold public authorities and private corporations to account – from elected local and national representatives and the judiciary to chief executives of corporations, banks, and regulatory bodies. Independent investigative journalism is essential for uncovering corruption, miscarriages of justice, public waste, corporate greed and other examples of wrongdoing. Effective scrutiny depends on institutional support, adequate resources and a sufficient plurality of media organisations, at national and local level, to ensure that this accountability function will not be compromised.

**Informing.** To participate meaningfully in national politics and in their local communities, citizens must have relevant, accurate and accessible information about the decisions which are being taken on their behalf. Effective democracy requires that citizens are properly informed about the impact of, for example, reducing expenditure on health, transport, or criminal justice.

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<sup>46</sup>ICO, ‘The Public Interest Test: Freedom of Information Act’ <[https://ico.org.uk/media/for-organisations/documents/1183/the\\_public\\_interest\\_test.pdf](https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf)> accessed 23 May 2022.

<sup>47</sup>James Curran, ‘Mediations on Democracy’ in James Curran and Michael Gurevitch (eds), *Mass Media and Society* (4th ed, Hodder Arnold; Distributed in the USA by Oxford University Press 2005) 122–149.

<sup>48</sup>Steven Barnett, ‘Journalism, Democracy and the Public Interest: Rethinking Media Pluralism for the Digital Age’ (Reuters Institute for the Study of Journalism 2009) <<https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2017-11/Journalism%20Democracy%20%26%20Public%20Interest.pdf>> accessed 23 May 2022. This is an abbreviated version of the typology outlined in that paper.

**Representing.** Information also flows in the opposite direction, conveying the popular voice from citizens and voters to local and national elites, and facilitating the expression of popular opinion (through letters pages, below-the-line comments, blogs or discussion programmes). Local newspapers, radio stations and online sites with their roots in the community have historically been important vehicles for large-scale expressions of dissatisfaction over, for example, a major stadium building project or the inadequacy of local hospital wards.

**Campaigning.** Beyond simply representing the electorate's views to decision-makers, newspapers in particular have a long tradition of identifying issues directly relevant to their readers, and demanding appropriate action from relevant authorities. Local media have traditionally regarded such campaigns as an integral element of their rootedness in the local community, with campaigns varying from charity appeals to protesting against the closure of a local amenity.

There is plenty of evidence that even small, bespoke journalistic enterprises operating with limited resources are fulfilling at least one, and in some cases all four, of these normative criteria. At the national level, relatively recent online operations such as openDemocracy and Byline News have been conducting important investigative work, with openDemocracy shortlisted for the 2021 Paul Foot award. At the local level, a comprehensive survey by two of the authors of this paper, which involved 183 hyperlocal sites in 2014–15, established that many were involved in important journalistic work under at least one of those headings. In reviewing the policy implications of this evidence, the authors concluded: 'Given the tiny budgets and relative lack of resources, it is perhaps particularly surprising to see the number of sites which have adopted both campaigning and investigative roles across a wide range of issues.'<sup>49</sup>

Like all normative frameworks, these are theoretical aspirations which are not necessarily easy to operationalise within a charitable framework. Clearly, not all journalistic organisations which carry out these functions will do so in order to advance charitable purposes or would be suitable for registration. In some cases, the 'campaigning' element of the framework outlined above may conflict with restrictions on political activity which apply to charities. We consider this in greater detail below.

The key question – central to this paper – is to what extent does this framework for public interest journalism align with the public benefit requirements of charitable status?

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<sup>49</sup>Steven Barnett and Judith Townend, 'Plurality, Policy and the Local' (2015) 9 *Journalism Practice* 332. The survey was a collaboration between the authors at University of Westminster, Cardiff University and Birmingham City University.

## 'Public benefit' in charity law

In order to satisfy the legal test of a charity, an organisation must have an exclusively charitable purpose *and* be 'for the public benefit' (Charities Act 2011, s.2, 'the Act').

The Act describes 13 such purposes, many of which might involve some journalistic activity: the advancement of health, or the prevention of poverty, for example, might involve publishing relevant information for the public. A number of charities advance education by researching and publishing material, but as we have explained this is only permissible where this leads to identified educational outcomes. This is one reason why the PINF decision is so helpful: purposes associated with advancing citizenship and community development potentially encompass a broad spectrum of public interest journalism.

In addition to advancing a charitable purpose, an applicant organisation must also satisfy the 'public benefit requirement'. It is not enough simply to assert that an activity will be beneficial; the public benefit has to be identifiable. As we have seen, the public interest concept is well-established in journalism, albeit variously and in a number of different contexts. Questions for this paper include: to what extent might public interest journalism also evidence charitable public benefit? Do the concepts of 'public interest' and 'public benefit' conflict or overlap with each other? Is it possible to define certain forms of public interest journalism as 'public benefit' or 'charitable' journalism?

However, first it is necessary to look at which charitable purposes may be advanced by certain forms of journalism. The public benefit a charity provides must flow from the purpose it advances. The purpose and the benefit are therefore inextricably linked.<sup>50</sup>

### **Charitable purposes**

The 13 descriptions encompass a wide range of possible purposes, that can apply to charities undertaking journalistic activities. The Charity Commission recognises this: '... charities can and do use journalism as a tool to further their charitable purposes'.<sup>51</sup>

As we have explained above, in most cases, this is restricted to a narrow purpose expressed in their objects; for example 'the advancement of health', by publishing material to help the public understand a health risk; or 'the conservation of the environment', by informing the public about the environmental impacts of consumer habits. Only content which is restricted to the purpose specified may be justified in this way.

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<sup>50</sup>'Public Benefit: Rules for Charities' (Gov.uk) <<https://www.gov.uk/guidance/public-benefit-rules-for-charities>> accessed 23 May 2022.

<sup>51</sup>n 35.



Other types of charity exist solely to inform the public. These charities are typically educational in law. At one end of the spectrum are schools, universities and research institutions, for example, and at the other end are charities involved in current affairs, public policy and so on, including charitable think tanks. These can justify much broader content, but the Commission finds this difficult.<sup>52</sup> In part, this is because of the potential for political bias (see ‘Political Activity Restrictions’, below), but it is also because of the formal requirements of ‘educational’ output required by law. These include an objective level of educational ‘merit’ in the material produced; ‘merely increasing public knowledge’ is not educational.<sup>53</sup> As a result, much local and investigative journalism would not fit comfortably within the definition of ‘education’ in charity law. Another purpose is required.

Charity law develops by finding analogies with already-recognised purposes.<sup>54</sup> In submissions to the House of Lords<sup>55</sup> and elsewhere, it has been argued (prior to the PINF decision) that the Charity Commission has not been constructive in identifying analogous purposes which would permit the recognition of public interest journalism.<sup>56</sup>

One possible analogy for the recognition of public interest journalism is the so-called ‘fourth head’ of charitable purposes, which includes a wide range of purposes of ‘general public utility’ or ‘purposes beneficial to the community’. Many possible analogies for the recognition of public interest journalism exist under this and related headings. A full exploration of these is beyond the scope of this paper, but they include:

- the public utility in consumers being provided with reliable information about products was recognised by the Charity Commission when it registered the Consumers’ Association (now Which?) as charitable – this would provide an obvious analogy with promoting information useful to members of the public as citizens through public benefit journalism;<sup>57</sup>

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<sup>52</sup>See, e.g., Kirsty Weakley, ‘Official Warning to Institute of Economic Affairs Is Withdrawn by Charity Commission’ (28 June 2019) <<https://www.civilsociety.co.uk/news/charity-commission-withdraws-official-warning-to-institute-of-economic-affairs.html>> accessed 23 May 2022.

<sup>53</sup>*Re Shaw, Public Trustee v Day* [1957] 1 WLR 79, see also Charity Commission for England and Wales, ‘Analysis of the Law Underpinning The Advancement of Education for the Public Benefit’ (2008).

<sup>54</sup>S.3(1)(m) Charities Act – the list of 13 descriptions of purposes in the Charities Act expressly includes purposes recognised by analogy to other existing purposes.

<sup>55</sup>n 27.

<sup>56</sup>Charity Commission for England and Wales, ‘Recognising New Charitable Purposes’ <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/358849/rr1atext.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/358849/rr1atext.pdf)> accessed 23 May 2022.

<sup>57</sup>*The Consumers Co* [1985] Charity Commission Report, 12–14, paras 28–32 with objects ‘to promote in the UK in a manner beneficial to the community and for the public benefit (a) the maintenance of proper standards for goods and services available to the public as consumers; (b) the maintenance and improvement of the quality and availability of such goods and services; with ‘the public as consumers’ describing the goods and services, not the beneficiaries, who were the public, and ‘proper’ meaning from the standpoint of consumers; again, the analogy with the public interest in high quality Public Interest News is clear (albeit that the latter is a decision of the Commission, not a legal precedent).

- the public utility in providing the general public with encyclopaedic information via Wikipedia has been recognised as charitable,<sup>58</sup> by analogy to a public reading room – there is an obvious analogy with other facilities which provide encyclopaedic information in the public interest.
- the Courts and the Charity Commission have recognised that ‘research into and dissemination of information useful to the community’ is charitable. This is another obvious area in which an analogy could be drawn with public benefit journalism.<sup>59</sup>

The decision of the First Tier Tribunal in relation to the Independent Press Regulation Trust (founded to fund IMPRESS)<sup>60</sup> further illustrates that the promotion of high ethical standards in news publishing is capable of being recognised as charitable by analogy with trusts to promote the ethical and moral improvement of the community; there is an obvious analogy with promoting ethical well-being through the provision of information which is useful to the members of the community.

### **The Public Interest News Foundation decision**

This is why the recognition of charitable journalism purposes in the PINF case is so important. Although advancement of journalism was not accepted by the Commission in January 2020 ‘as a charitable purpose in and of itself’,<sup>61</sup> PINF does arguably have an explicitly journalism-based purpose. Its ‘objects’ (or legal purposes) include the old and new:

- to promote public understanding and knowledge of the principles and practice of investigating, reporting and disseminating Public Interest News, including relevant law, ethics, codes of conduct and practical aspects of related activities;
- to promote citizenship and civic responsibility and encourage and facilitate informed participation and engagement by members of the public in their communities, including by supporting the provision of Public Interest News by exclusively charitable means; and
- to promote high standards of ethical conduct and best practice in journalism and the editing and publication of news in the print and other media for the benefit of the general public, having regard to the need to act within the law and to protect both the privacy of individuals and freedom of expression.

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<sup>58</sup>‘WIKIMEDIA UK – Charity 1144513’ <<https://register-of-charities.charitycommission.gov.uk/charity-search/-/charity-details/5005466/governing-document>> accessed 8 September 2022.

<sup>59</sup>*Re Besterman’s Will Trusts* (1980) Times 22 January, repeated in *McGovern v AG* [1982] Ch 321.

<sup>60</sup>*Wilfred Vernor-Myles and others v Charity Commission*, 15 June 2015, Appeal no: CA/2014/0022.

<sup>61</sup>n 35.

The second of these objects, in particular, is a significant development. It expressly links, in a recognised charitable purpose, the delivery of Public Interest News (as defined below) to citizenship and informed communities. This embraces a potentially wide range of public interest journalism – entirely consonant with our normative criteria outlined above – provided it is directed at achieving these charitable purposes.

### **What is the public benefit?**

Having established that certain forms of journalism can advance charitable purposes, we now turn to the public benefit provided by those purposes. In law, for a purpose to be ‘for the public benefit’ it must be both ‘beneficial’ and ‘public’ in character.<sup>62</sup> Commission guidance<sup>63,64,65</sup> states that it:

- must be beneficial, and any detriment or harm that results from the purpose must not outweigh the benefit; and
- must benefit the public in general, or a sufficient section of the public.

Parliament has not defined public benefit. Its meaning has evolved in case law, based on the evidence available in individual cases. The following case law principles are identified in the Commission’s guidance:

- The benefit must be identifiable and, in principle, be capable of being proved by evidence.<sup>66</sup>
- In general, the benefit to the public should be tangible and objective, although an intangible benefit may suffice if there is ‘approval by the common understanding of enlightened opinion for the time being’ that it is beneficial.<sup>67</sup>
- Some benefits are too obvious to require formal proof: ‘... there are many cases ... where the purpose is so obviously beneficial to the community that to ask for evidence would really be quite absurd’.<sup>68</sup>

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<sup>62</sup>*Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 421 (TCC), [2011] ELR 529 (2 December 2011).

<sup>63</sup>The Charity Commission does not make the law; it issues guidance on its interpretation of the law to assist charity trustees and the general public understand its approach. It has a general duty to apply the law in the performance of its functions, a statutory objective to promote awareness and understanding of the operation of the public benefit requirement (s.14 Charities Act 2011) and a duty, in performing its functions, in appropriate cases, to have regard to the desirability of facilitating innovation by or on behalf of charities (s.16 Charities Act 2011).

<sup>64</sup>See: The Charity Commission for England and Wales, ‘Public Benefit: Analysis of the Law Relating to Public Benefit’ (2017).

<sup>65</sup>‘Public Benefit: The Public Benefit Requirement’ (*Gov.uk*, 16 September 2013) <<https://www.gov.uk/government/publications/public-benefit-the-public-benefit-requirement-pb1/public-benefit-the-public-benefit-requirement>> accessed 23 May 2022.

<sup>66</sup>*Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138 at 146E (Lord Reid); *Re Hummeltenberg* [1923] 1 Ch 237 at 242, approved by Lord Wright in *National Anti-vivisection Society v IRC* [1947] AC 31 at 44.

<sup>67</sup>*National Anti-Vivisection Society v. IRC* [1948] AC 31 at 49 (Lord Wright).

<sup>68</sup>*Re Shaw’s Will Trusts* [1952] Ch 163 at 169 (Vaisey J).

- What Parliament regards as being for the public benefit is relevant,<sup>69</sup> as are obvious facts.<sup>70</sup>
- Expert evidence may be accepted to assist courts determine whether a purpose is beneficial.<sup>71</sup>
- The concept of public benefit is not static. It is not ‘frozen at some time in the past’ ... ‘it must be remembered that the concept of what is and is not for the public benefit (as seen by society generally, and as reflected in judicial recognition of the views of society) changes over time ...’<sup>72</sup>

It is also necessary to weigh any benefit which will result to the public from the pursuit of the purpose against any detriment which might also occur.<sup>73</sup> In practice, this is a balancing exercise, which takes account of beneficial outcomes and any possible harm. This sort of exercise is similar to those in cases involving competing human rights and is comparable to public interest balancing exercises, as we see below.

Like detriment, ‘private benefit’, or non-charitable benefits to third parties, may also be relevant. This is another balancing exercise: if excessive or unreasonable private benefit to individuals is likely, or where private benefit is more than an incidental side effect, the charitable nature of the organisation may be questioned.<sup>74</sup> (In practice, profits generated from charitable news provision, which might be significant, would need to go back into the provision of public interest news, rather than being retained by or distributed to the owners of the provider, although hybrid charity and non-charity legal structures may also be possible.)

As we have said, in each case, the courts (and the Commission) look for the benefit which will be achieved if the specific charitable purpose is advanced. Where it is not clear that pursuing a purpose will lead to beneficial outcomes, the Commission may need to ask for evidence of this.

Historically, this has been a problem for journalism. For example, when the Bureau of Investigative Journalism applied to register as a charity (initially unsuccessfully),<sup>75</sup> the Charity Commission said the application had ‘not presented any evidence to show that the company’s input to

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<sup>69</sup>See for example *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138 at 146F, 151B, 156E.

<sup>70</sup>See (n 64) 11.

<sup>71</sup>For example, *Re Hopkins’ Will Trusts* [1964] Ch 669; *Re Pinion* [1965] Ch 85; but see also the Tribunal’s decision in relation to a trust funding Impress, the press regulator (n 70).

<sup>72</sup>*The Independent Schools Council* case (see n 62).

<sup>73</sup>The court ... has to balance the benefit and disadvantage in all cases where detriment is alleged and is supported by evidence. But great weight is to be given to a purpose which would, ordinarily, be charitable; before the alleged disadvantages can be given much weight, they need to be clearly demonstrated.’ See *The Independent Schools Council* decision (n 62) [106].

<sup>74</sup>See for example *Oppenheim v. Tobacco Securities Trust Co. Ltd.* [1951] A.C. 297 Lord Simonds at p 305.

<sup>75</sup>The Bureau has now registered a supporting trust as charitable. It restricts its activities to funding the charitable work of the Bureau and other public interest news providers (not their non-charitable activities).

investigative journalism translates into participation/engagement either in terms of decision making or participation in democratic processes'.<sup>76</sup> It was clear that it was not enough to show that journalism has an effect, it was necessary to show that 'the outcome results from engagement or participation or better informed decision making of citizens arising from the company's activities'.<sup>77</sup> Baylis Media, publisher of the Maidenhead Advertiser, experienced similar difficulties.<sup>78</sup>

## Public benefit in advancing citizenship and supporting communities through public interest news

We have seen how it is important that a news provider seeking charitable status can point to a solid body of evidence that demonstrates how pursuit of its purposes will lead to an identified benefit. As outlined above, the approach to evidencing public benefit requires that the benefit must be identifiable, and ideally tangible (though an intangible benefit may suffice); and evidence may not be needed if the benefit is generally accepted, obvious or confirmed by parliament or expert opinion.

Fortunately, there is a wide range of sources which confirms the importance and beneficial effects of promoting citizenship and supporting communities, ranging from parliamentary and regulatory authorities to independent academic research. In this section, we provide extracts of the evidence presented by PINF, which was accepted by the Commission. It is illustrative of the material available, but not exhaustive: new research being conducted by the Charitable Journalism Project, for example, provides further evidence.<sup>79</sup>

Citizenship is referenced in a wide range of governmental policies relevant to public life. For example, a government policy document published in 2019, states:

### Citizens

Every citizen owns our democracy, and has an active part to play in it. Whether it's registering to vote to ensure you have your say, ... discussing with your friends, family or students on how government and UK Parliament works, each and every citizen has a role to play to protect, respect and promote our democracy.

<sup>76</sup>In fact, the Bureau had not sought to put forward evidence of its impact in furthering citizenship. See (n 27) 30.

<sup>77</sup>University of Westminster, 'Discussion Seminar: Charitable Initiatives for Journalism and Media – Summary' (2014) <[http://www.mediaplurality.com/wp-content/uploads/2014/04/Charity-seminar-summary-June-2014\\_updated.pdf](http://www.mediaplurality.com/wp-content/uploads/2014/04/Charity-seminar-summary-June-2014_updated.pdf)> accessed 23 May 2022.

<sup>78</sup>As reported in Brock (n 27).

<sup>79</sup>Barnett and Townend were among the co-authors: Steven Barclay and others, 'Local News Deserts in the UK: What Effect Is the Decline in Provision of Local News and Information Having on Communities?' (JRSST Charitable Trust 2022).

## Wider society

Businesses, charities, media publications ... and many others are invested in our democracy. In a world of rapidly changing technology and shifting threats, we look to the relevant organisations to work with and support government and our citizens to protect, respect and promote our democracy. Whether it be tackling disinformation ... or explaining current affairs, many outside of government are helping to sustain a flourishing democracy.<sup>80</sup>

Successive governments have supported the concept of citizenship and efforts to promote public understanding and fulfilment of civic responsibilities. The Charity Commission has accepted that fostering principles of good citizenship is conducive to public benefit.<sup>81</sup> A number of charities are registered for charitable purposes of this sort, such as the Citizenship Foundation<sup>82</sup> and the Project For Modern Democracy,<sup>83</sup> whose purposes include:

encouraging and facilitating participation and engagement by the public in government and democratic decision making processes with an intended outcome of enabling people develop their capacities, help meet their needs and participate more fully in society.

The National Curriculum on Citizenship (September 2013)<sup>84</sup> further emphasises the beneficial connection between citizenship and participation in democratic processes; the GCSE Citizenship programmes have explicit aims to ensure, amongst other things, that all pupils acquire knowledge of UK government and how citizens participate; understand the law and justice system; develop a commitment to participation and volunteering; and are equipped with critical thinking and debating skills.

An understanding of the democratic system and an ability to actively participate in it are fundamental features of citizenship and civic rights and responsibilities. A House of Lords Select Committee report in 2018 stated that ‘... the rule of law, together with a commitment to democracy, individual liberty and respect for the inherent worth and autonomy of all people, are the shared values of British citizenship from which everything else

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<sup>80</sup>HM Government, *Democratic Engagement: Respecting, Protecting and Promoting Our Democracy* (2019).

<sup>81</sup>‘instruction of ... good citizenship’ in *Re Webber* [1954] 1 WLR 1500; the aim of the modernised Scout Movement is to promote the ‘development of young people in achieving their full ... social ... potential’ and to create ‘responsible citizens’; the Commission has accepted that a trust ‘likely to foster ... good citizenship’ is charitable on various occasions (for example in accepting a trust to provide a statue of Earl Mountbatten).

<sup>82</sup>Registered charity 801360; with charitable objects ‘to promote good citizenships for the public benefit and for that purpose to advance the active understanding of law, politics, sociology, religion and morals, commerce, industry, the arts, ecology and other subjects in so far as likely to be conducive to good citizenship.’

<sup>83</sup>Registered charity 1154924.

<sup>84</sup>‘National Curriculum in England: Citizenship Programmes of Study’ (*Gov.uk*, September 2013) <<https://www.gov.uk/government/publications/national-curriculum-in-england-citizenship-programmes-of-study>> accessed 23 May 2022.

proceeds'.<sup>85</sup> It continued: 'Active citizenship is too often defined purely in terms of volunteering, social action or learning facts, and too rarely in terms of learning about and practising democracy in the sense of political engagement and democratic participation'.<sup>86</sup> The Committee elaborated on the many beneficial effects of democratic engagement, including government decision-making that reflects a plurality of views; more public confidence in government officials; and better employment, education and health prospects for civically engaged individuals. It quoted one expert witness who concluded that '[C]ivic engagement makes better citizens . . . . In all, the overwhelming weight of evidence points to a series of benefits associated with civic participation which are felt in numerous areas of social and political life.'<sup>87</sup>

Obviously, for these public rights and responsibilities to make sense, citizens need relevant information. Communities need information in order to elect representatives, function effectively, and collectively articulate their interests. Civic information of this sort strengthens communities, fosters democratic engagement, and reinforces community cohesion. In order for communities and democratically accountable structures to function healthily, members of the public need information about matters of public importance.

Most public bodies, political parties, companies, campaign groups and other civil society groups provide public information, but this is invariably geared towards advancing their own interests. Below we see how 'public interest news' is defined as disinterested, reliable information geared towards the interests of the public as a whole, not a special interest group.

Access to disinterested information from local media has become increasingly constrained. In the 2016 Kings study referenced above, over two-thirds of local authority districts in the UK and over half of all parliamentary constituencies were not served by a dedicated local daily newspaper that either reaches a significant number of households or circulates a significant number of copies in the area. Of those constituencies that are not covered, 206 were only reported on five times or fewer during the official 2015 general election campaign across all major UK national news outlets, meaning that these constituents are likely to have received limited independent news and information about their local candidates immediately prior to that election.<sup>88</sup> Local coverage – and thus the quantity and quality of information available to local citizens – will certainly have deteriorated further since then.

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<sup>85</sup>The Ties That Bind: Citizenship and Civic Engagement in the 21st Century: Report of Session 2017–19' (House of Lords Select Committee on Citizenship and Civic Engagement) 4.

<sup>86</sup>*ibid* 10.

<sup>87</sup>*ibid* 66. Evidence from Dr Rod Dacombe, Department of Political Economy, Kings College London.

<sup>88</sup>Ramsay and Moore (n 13).

This critical role of public interest information to informed and active citizenship was central to the Cairncross Review which asked: ‘... how should society continue to support the monitoring of, and reporting on, the activities of public bodies not just in central government, but also in localities: local councils, courts, inquests?’ It continued: ‘This area of reporting, which this Review calls “public-interest news”, has always been one of the most important functions of journalism, and brings undeniable public benefit.’<sup>89</sup>

Cairncross refers to a doctoral thesis by Rachel Howells,<sup>90</sup> which quotes a number of studies supporting the conclusion that there is a failure in democratic accountability when local citizens do not receive information necessary to participate in elections effectively: ‘All of these studies ... demonstrate a clear link between the disappearance of local journalists and a local newspaper, and a decline in civic and democratic activities, such as voter turnout, and well-managed public finances’.

This argument is reinforced by Steven Barnett and Judith Townend on the basis of their own research on media plurality:

Whether towns with no journalistic presence or cities with an increasingly emasculated presence, the implications for local democracy are profound. Issues of enormous relevance to citizens in their everyday lives—about their local hospitals, local schools, local transport, police forces, businesses and courts—are simply not being addressed. Local elites and decision-makers are not being questioned or held to account.<sup>91</sup>

In summary, the provision of Public Interest News provides clear public benefits, including fostering good citizenship, community development and cohesion, public accountability and democratic legitimacy through informed participation in all aspects of the democratic process.

## The intersection of public interest and public benefit

Earlier in this article, we identified two approaches to defining the public interest in journalism for the purposes of this paper: a narrow operational and often negatively or defensively conceived definition; and a broader normative and positively conceived approach which links journalism to the wider imperative of a well-functioning democracy by interrogating, informing, representing, campaigning on behalf of the public. We then outlined the public benefit of certain forms of journalism, as understood in terms of charity law. Our next task, then, is to join these two discussions, to see

<sup>89</sup>Cairncross Review (n 1) 6.

<sup>90</sup>Rachel Howells, ‘Journey to the Centre of a News Black Hole: Examining the Democratic Deficit in a Town with No Newspaper’ (University of Cardiff 2015) <<https://orca.cardiff.ac.uk/id/eprint/87313/1/2016howellsrphd.pdf>> accessed 23 May 2022.

<sup>91</sup>See (n 49) 334–335.



where they intersect, and areas of commonality and dissimilarity. To what extent does our framework for public interest journalism align with the public benefit requirements of charitable status?

Clearly, the public interest in defensive terms is not the same as public benefit. Nevertheless, it is a framework against which standards of journalism are assessed in regulatory and legal contexts. It is relevant because it includes lists of outcomes with accepted benefit to the public. Like the public benefit test, it involves balancing exercises. For example, the ICO's guidance on the Freedom of Information Act's public interest tests provides a non-exhaustive definition of public interest, in order to assist public authorities balance competing interests in disclosure decisions. Tests of this sort are also used in a journalistic context to justify activities that may compromise an individual's or group's human rights (for example, intrusion into private life or use of subterfuge to gather materials), for which guidelines are required to ensure a proper balance in determining the public interest.

Similarly, we can look to the BBC editorial guidelines, which explain how the public interest is served by 'preventing people being misled by the statements or actions of individuals or organisations' and 'exposing or detecting crime or significantly anti-social behaviour and by exposing corruption, injustice, significant incompetence or negligence'.<sup>92</sup> In this way, editors and reporters must decide if detrimental activity (e.g. an intrusion into privacy) is outweighed by the overall benefit of the journalism, described as serving the public interest (which is usually not equated to what the public is interested in).

In this narrow defensive sense of the public interest, we see some parallels with the public benefit, but not equivalence. In *The Independent Schools Council* case,<sup>93</sup> the court considered whether there was any detriment caused by charitable independent schools and weighed this against advantages to their beneficiaries. Trustees of charities may routinely need to make difficult decisions that are akin to the balancing exercise in editorial decision making – for example, whether the public benefit achieved by a particular course of action outweighs any possible detriment.

The public interest, even in these defensive terms, can be used as a rationale for public service journalism, by exposing crime or wrongdoing, for instance. But beyond its use as a pre-emptive or reactive defensive mechanism, it is – as already outlined – a widely conceived normative ideal, or *purpose*. This is perhaps where the comparison and possible overlap with the public benefit requirement is closest and most interesting, given the purpose-based test for charitable status.

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<sup>92</sup>Section 1: The BBC's Editorial Standards' <<https://www.bbc.co.uk/editorialguidelines/guidelines/editorial-standards/bbc.com/editorialguidelines/guidelines/editorial-standards/>> accessed 23 May 2022.

<sup>93</sup>See (n 62).

We find a purpose or ‘mission’ expressed in the first part of the public interest section of the BBC Editorial Guidelines:

It is in the public interest to fulfil our mission to produce output to inform, educate and entertain. There is no single definition of public interest, but it includes freedom of expression; providing information that assists people to better comprehend or make decisions on matters of public importance (...)<sup>94</sup>

This also illustrates a clear difference with the public benefit concept. The premise of this paper is not that there is a perfect overlap between the concepts. Entertainment of the public is not a charitable benefit.

However, we can see how the informing and educating elements relate to the charitable purposes and public benefit in public interest journalism above, and how they relate to the rationale for public service journalism itself, which has shaped Barnett’s (following Curran) framework outlined above. It is in this wider sense, in which the public interest is normatively and positively conceived as something akin to a purpose, that we can see most clearly the overlap between the two concepts of public interest and public benefit. In delineating certain forms of journalism that ‘provides information that assists people to better comprehend or make decisions on matters of public importance’ (in the BBC’s terms); or ‘promotes citizenship and civic responsibility and encourages and facilitates informed participation and engagement by members of the public in their communities’ (in PINF’s charitable purposes); or interrogates, informs, represents and campaigns on behalf of the public (in Barnett and Curran’s terms), we see a convergence and overlap of public function and purpose.

There appear to be clear parallels between the charity law test, as it would apply to an organisation advancing citizenship, supporting communities and satisfying the public benefit requirement, and the rationale for responsible, ethical journalism that is conducted in the public interest. This shared territory between public interest journalism and charitable public benefit might be described as ‘public benefit journalism’.

The convergence is even more clearly visible in the definition of ‘Public Interest News’ which is employed by PINF and which was accepted by the Charity Commission in its PINF decision. As we explain above, PINF’s objects include the following purpose:

to promote citizenship and civic responsibility and encourage and facilitate informed participation and engagement by members of the public in their communities, including by supporting the provision of Public Interest News by exclusively charitable means.<sup>95</sup>

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<sup>94</sup>See (n 92).

<sup>95</sup>(n 36).

In PINF's objects, 'Public Interest News' is defined as 'news and other information which is produced and disseminated to the public according to high standards of ethical conduct and best practice in journalism and which provides one or more of the following benefits to the public:

- informs members of the public about matters of relevance to their role and responsibilities as citizens;
- enables members of local communities to become aware of and understand matters of common concern to them as members of their community and which promotes their involvement and cooperation in such matters and community cohesion accordingly;
- enables members of the public to understand the activities of public office holders, engage with them and to participate in an informed manner in relevant democratic processes and, as a result, supports the legitimacy of the democratic process as a whole;
- benefits the public by promoting charitable educational outcomes, such as improving public understanding of health and medical matters or the conservation of the environment.'

In other words, public interest news (or, alternatively, public benefit journalism) embraces both worlds: journalism which is conducted to high standards of ethical conduct and best practice, in the public interest; and charitable purposes which advance citizenship and support communities through providing these defined benefits to the public.

The PINF definition is clearly not an exhaustive list of the beneficial effects of public interest news. However, it provides a clear framework for demarcating forms of journalism that serve both a public interest and public benefit, as conceived in charity law. It can be summarised in this way: public benefit journalism means journalism which is produced for the benefit of the general public, in accordance with high ethical and quality standards and which generates reliable, objective, unbiased, fact-based information and as a result enables members of the public to be informed and engaged citizens and participants in their communities.

### ***Practical applications***

The definition above (and variations on it, which are undoubtedly possible) is potentially broad and could encompass a wide range of journalistic activity conducted, in the public interest, for public benefit. It could not cover poorly researched, inaccurate, or politically motivated journalism (and we consider these and other restrictions further below), but it might include, for example:

- local news, produced and published according to high standards of ethical conduct and best practice in journalism, which informs local citizens about matters relevant to the exercise of their civil rights and duties;
- reliable and locally relevant information that leads to increased engagement among members of the community and informed participation in elections; and
- investigative journalism carried out to high standards which generates fact-checked, unbiased information; for example about the conduct of government bodies like the NHS.

Activities like these enable the public to better understand matters of public importance, participate in their communities and wider societies as informed citizens, and make informed democratic decisions. In wider terms, the PINF registration offers:

- a new operating model, charitable status, for suitable providers of public benefit journalism, one which confers both public trust and confidence, which will be important to readers and potential funders, permitting access to charitable and philanthropic sources of funding as well as tax advantages; and
- a new ownership and funding model, so that valuable community news resources can be placed in secure ownership for the benefit of their communities, which reflects their nature as public assets.

### ***Political restrictions***

It is important to note the qualifier in the PINF definition of Public Interest News: it requires the content to be ‘produced and disseminated to the public according to high standards of ethical conduct and best practice in journalism’. By definition, that would not include carelessly researched or politically motivated content, or content that does not pay due regard to privacy rights. Nor would it encompass material produced solely for entertainment value, because that would not generate any of the four benefits identified.

Our description of charitable public benefit journalism is also shaped by the restrictions on political activity that exist for charities. Of course, many charities can and do campaign extensively. Charities can campaign for changes in law or policy or decisions that would support the charity’s purpose, and can campaign to ensure that existing laws are observed, but a charity cannot exist for a political purpose. This would include any purpose directed at furthering the interests of any political party, or securing or opposing a change in law or policy. A charity ‘may express support for particular policies which will contribute to the delivery of its own charitable

purposes so long as its independence is maintained, and perceptions of its independence are not adversely affected'.<sup>96</sup>

These requirements would exclude those forms of journalism which overtly support a political party and/or engage in political campaigning as interpreted in charity law. Although this type of journalism is commonly associated with the UK national press – which has a long tradition of implicit and explicit political partisanship – it is not typical of the vast majority of broadcast, online or local journalism that tends broadly to follow the normative aspirations outlined above. These forms of public benefit journalism, that are impartial and non-politically motivated, with appropriate safeguards in place, are consistent with the restriction. The ‘campaigning’ function of press, identified by Barnett (above), is therefore possible, within this constraint.

In practice, oversight will be needed to ensure that appropriate editorial policies are in place and that high journalistic standards are maintained. Ultimately, in charity law, the trustees of the charity will be responsible for this, but it also raises a broader question about whether it would be helpful to have a separate and independent arbiter of whether a news provider is adhering to the high standards required by public interest journalism. The Charity Commission will rightly confine its interest to charity law, including whether a provider is advancing its charitable purposes for the *public benefit*. Would equivalent scrutiny of *public interest* activity also be helpful? The BBC has editorial guidelines and an oversight structure which is managed through its internal Unitary Board but with clear accountability and scrutiny lines to Ofcom. Would something similar be appropriate for public interest providers, or is satisfying charity law requirements enough?

IPSO and IMPRESS confine themselves to editorial codes and complaints handling, which relate to the ‘defensive’ approach discussed above. Is there a potential role here for the Press Recognition Panel? It was set up by Parliament in 2014 as a wholly independent scrutiny body to ensure that the Leveson principles of effective and independent regulation of journalistic standards were properly implemented. Although eschewed by the largest press groups on grounds of its statutory basis and therefore (albeit tenuous) connection with the State, this would not be an issue for journalism organisations seeking the advantages of charitable status. We are not suggesting there should be a registration or recognition requirement: the PRP might instead have a scrutiny role, perhaps carrying out periodic reviews, recommending improvements, and noting any concerns about operational deficiencies. In the authors’ view, this remains an area which would benefit from further thought and we have not set out to answer these questions here.

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<sup>96</sup>Charity Commission, ‘Speaking out: Guidance on Campaigning and Political Activity by Charities’ (Gov.uk, 1 March 2008) <<https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9/speaking-out-guidance-on-campaigning-and-political-activity-by-charities>> accessed 23 May 2022.

## Conclusion and next steps

We propose that certain forms of non-political and non-profit public interest journalism provides substantial benefits to the general public that are consistent with charitable status and satisfy the public benefit requirement in law. We have identified a clear overlap between the principles of public interest journalism and the public benefit requirement of charity law, which relates to the purpose and function of qualifying journalism. We explore a new, charitable model for public benefit journalism which is available to appropriate applicants. Their success will depend upon the purpose for which they are established, evidence that their activities will achieve the intended beneficial outcomes, and rigorous constitutional and operational oversight to ensure that the necessary public benefit criteria are implemented in practice.

This new model for carrying on and funding public benefit journalism has been achieved without legislative change. It brings the possibility of charitable status to many news providers and opens new possibilities for funding the sector. However, further progress is needed. The Charity Commission is to be commended for taking a constructive approach to recognising public benefit journalism charities (in PINE, and now the Charitable Journalism Project, Full Fact and others), and must be encouraged to continue this approach. Still more positive steps might include a binding legal precedent established in the courts, to provide greater legal authority for this charitable purpose; or, better yet, legislation which expressly incorporates public benefit journalism as a charitable purpose among the 13 others in the Charities Act 2011.

## Disclosure statement

All three authors are members of the Charitable Journalism Project (Charity no. 1195041). Tom Murdoch is Partner at Stone King LLP and has acted in some of the cases discussed.

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