

## The UK: More Measurement but Little Comparison\*

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Measuring the worthiness of charities makes sense. It is also a timely subject for discussion. As the sector has grown in scope and size, charities are playing an increasingly important role in the provision of public services on behalf of national and local government. Their enhanced role, coupled with the fact that many charities receive public subsidies in one form or another, puts them in the spotlight and this increased visibility makes it all the more important that their worthiness is measured. Funding from Government accounts for 34.6 per cent of charities' annual £33.2 billion income, according to the National Council for Voluntary Organisations (NCVO).<sup>1</sup> Whilst three-quarters of charities receive no government income, the average medium-sized and large charities now make almost 40% of revenue in this way.

This paper will break down this topic of measuring the comparative worthiness of charities into two distinct areas. First, there is the need to measure 'worthiness' of charities in the UK<sup>2</sup> and the way in which that exercise is undertaken will be examined. There is much to say on this matter, with important recent developments to consider. The second area to be examined is the question of whether there are any elements of recognition of 'comparative' worthiness. There is less to say about that. In general terms, with some minor exceptions, it is an either/or situation, wholly dependent upon an organisation's ability to fall within the definition of charity or not. Once that definition is

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<sup>1</sup> D. Kane et al, *UK Civil Society Almanac 2009* (London, NCVO, 2009).

<sup>2</sup> Future references in this paper to England or English refer to England and Wales or English and Welsh. For constitutional purposes, charity law is a devolved matter in the UK. The supervision and regulation of charities have been devolved to the Scottish Executive (Scottish Charities Office) and to the Northern Ireland Assembly (the Charities Branch in the Department for Social Development) for purposes other than tax. Reform in Scotland and Northern Ireland has been the subject of separate local initiatives. In the past, provisions for regulating charities have differed significantly in each jurisdiction, but Scotland now has a similar regulatory regime to that in England and Wales, as a result of the implementation of the Charities and Trustee Investment (Scotland) Act 2005, and it is expected that reforms in Northern Ireland, once the Charities Act (Northern Ireland) 2008 is fully in force, will also result in the introduction of a similar regime.

satisfied, there tend to be no distinctions or differences between charities, so no striation or 'grades' of charity. Before turning to examine those two areas, some comment needs to be made upon the identity of the 'measuring body' in the UK.

### The 'Measuring' Body

Unlike in the US, where the IRS is the body measuring comparative worthiness, in England, it is not the tax authorities, but the Charity Commission, even when it comes to a consideration of fiscal treatment. This is due to the fact that a charity is defined in the tax legislation<sup>3</sup> as 'a body of persons or trust established for charitable purposes only' and the legislature has nowhere defined what are charitable purposes within the meaning of these Acts. In practice, before a UK charity may take advantage of any relevant tax relief, the charity needs to be formally recognised by Her Majesty's Revenue & Customs (HMRC) for tax purposes. However, if a charity has already been registered<sup>4</sup> as a charity by the Charity Commission or the Office of the Scottish Regulator (OSCR), this will usually<sup>5</sup> be accepted as sufficient evidence for HMRC to consider it as a charity for tax purposes. This is because the case of *Income Tax Special Purposes Commissioners v Pemsel*,<sup>6</sup> most famous for classifying the four 'heads' of charity (see below), actually held that the words 'charitable purposes' in the tax legislation were not restricted to the meaning of relief from poverty, but must be construed according to the legal and technical meaning given to those words by English Law and by legislation applicable to Scotland and Ireland as well as England.<sup>7</sup>

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<sup>3</sup> See e.g. Income Taxes Act 2007, s.989. This is basically the same as the definition given for the first exemption from income tax in the Income Tax Act 1799, s.5.

<sup>4</sup> If a charity is exempt from registration with the Charity Commission, HMRC will still consider it as a charity for tax purposes if satisfied that it is established for charitable purposes only.

<sup>5</sup> Rarely, because of differences between Scottish charity law and UK tax law, a body that is entered on the Scottish Charity Register may not be entitled to the charity tax reliefs. This is due to slight differences in the new statutory definitions of charitable purposes in the English Charities Act 2006 and the Scottish Charities and Trustee Investment (Scotland) Act 2005. See further, HMRC and OSCR, *Memorandum of Understanding between the Office of the Scottish Charity Regulator and HM Revenue & Customs (Charities)* (Dundee, March 2008).

<sup>6</sup> [1891] AC 531 (HL).

<sup>7</sup> For criticisms of this general principle and proposals for reform which have been suggested over the years, see e.g.: G. Cross 'Some Recent Developments in the Law of Charity' (1956) LQR 187; N. Gravells 'Public

## MEASURING 'WORTHINESS'

Whilst the task of measuring worthiness falls primarily upon the Charity Commission (with appeal hitherto to the High Court and now to the Charity Tribunal<sup>8</sup>) the question to be examined now is how this is achieved. The short answer is that it is through the 'gateway' of registration as a charity that the measurement takes place. This is because, in order, to be registered as a charity, an organisation must have purposes all of which are exclusively charitable and it must be set up for the 'public benefit'.<sup>9</sup> An organisation is deemed to be a charity while it is on the register of charities.<sup>10</sup>

### The Definition of Charity and Public Benefit

Public benefit has always been an essential element of charities. It is this factor that distinguishes private trusts from charitable trusts, and it is the public benefit that is often said to justify the advantageous taxation treatment afforded to charities.<sup>11</sup> In England, for example, the Charity Commission describes it as a kind of covenant that charities have with society: charities bring public benefit and, in their turn, are accorded high levels of trust and confidence and the benefits of charitable status.<sup>12</sup> These mutual benefits are considerable: as well as significant tax advantages and certain legal privileges, charities can access funds which others - even other voluntary organisations - cannot; volunteers and donors give, respectively, time and money.

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Purpose Trusts' (1970) 40 MLR 397; S. Bright 'Charity and Trusts' [1989] Conv 28; M. Chesterman 'Foundations of Charity Law in the New Welfare State (1999) 62 MLR 333.

<sup>8</sup> Charities Act 2006, s.8(1) provides for a new Pt 1A of the Charities Act 1993 to be inserted after s.2. Pt 1A contains new ss.2A-2D covering, respectively: the creation of the Tribunal; its practice and procedure; appeals from the Tribunal to the High Court; and the powers of the Attorney General to intervene. Since September 2009, the work of the Charity Tribunal has transferred to the First-tier Tribunal and Upper Tribunal of the General Regulatory Chamber. See also Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, SI 2009 No.1976.

<sup>9</sup> See now Charities Act 2006, ss.1-2.

<sup>10</sup> Charities Act 1993, s.4(1).

<sup>11</sup> See e.g. dicta of Lord Cross in *Dingle v Turner* [1972] AC 601 (HL).

<sup>12</sup> Charity Commission, *Charities and Public Benefit. The Charity Commission's general guidance on public benefit* (London, January 2008) 3.

The English common law tradition provided no statutory definition of charity. The starting point was the Preamble to the English Statute of Charitable Uses 1601 (known as the Statute of Elizabeth). Though it has been repealed,<sup>13</sup> it has remained of significance throughout the common law world. The Preamble set out the most typical charitable purposes of the time, ranging from the ‘relief of the aged, impotent and poor people’ to the ‘education and preferment of orphans’ and it has formed the basis for modern judicial pronouncements on how to establish a charitable purpose. The courts and, in England, the Charity Commission, have been much influenced by Lord Macnaghten’s attempt to distill the spirit of the Preamble by formulating it into clear guidance. In *Income Tax Special Purposes Commissioners v Pemsel*,<sup>14</sup> he said:

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 other purposes beneficial to the community not falling under any of the preceding heads.

There was always a presumption that purposes within the first three of these four ‘heads of charity’ i.e. for the relief of poverty, the advancement of education or the advancement of religion, were for the public benefit.<sup>15</sup> No other purposes benefitted from that presumption. The effect of the presumption was that, when the charitable status of an organisation established for the relief of poverty, the advancement of education, or the advancement of religion was being considered, the organisation’s purpose was presumed to be for the public benefit, unless there was evidence that it was not for the public benefit. By contrast, organisations established for all other purposes, which did not benefit from that presumption, were required, at the time that their status was being considered, to provide evidence that their purpose was for the public benefit.

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<sup>13</sup> By a combination of the Mortmain and Charitable Uses Act 1888 and the Charities Act 1960, s.38(1).

<sup>14</sup> [1891] AC 531 (HL) at 583.

<sup>15</sup> *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) 42 *per* Lord Wright.

In England, the Charities Act 2006<sup>16</sup> now provides a statutory definition of charity for the first time and, what the Charity Commission at least,<sup>17</sup> is regarding as a positive requirement for all charities to prove public benefit.<sup>18</sup> To be considered charitable, under section 2 of the Act, an organisation must demonstrate that its purposes, as set out in its constitution, fall within one or more of those in the new list of twelve charitable purposes, and also that it is established for the public benefit.<sup>19</sup> In general terms, the list covers all purposes which have, over the years, become recognised as charitable purposes, but none of them brings with them a presumption that public benefit is automatically provided.<sup>20</sup> It is, therefore, a vital second step for all charities to prove the existence of public benefit. However, the key issue of defining ‘public benefit’ is side-stepped<sup>21</sup> under the Charities Act 2006. The Government has decided that the current non-statutory approach will remain, giving flexibility and the capacity to accommodate the diversity of the sector.<sup>22</sup> Public benefit will be determined, case by case, by the Charity Commission on the basis of the law as it is. Unfortunately, due to the fact that there has always been a presumption of public benefit in favour of particular charitable purposes in the past, the law as it relates to public benefit is not well developed in the case law. Another problem with the case law,

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<sup>16</sup> On the background to this Act, see e.g.: Commission on the Future of the Voluntary Sector, *Meeting the Challenge of Change: Voluntary Action into the 21st Century* (London, Commission Secretariat/NCVO, 1996) - also known as the ‘Deakin Report’; Strategy Unit, *Private Action, Public Benefit. A Review of Charities and the Wider Not-For-Profit Sector* (London, September 2002); Home Office, *Charities and Not-for-Profits: A Modern Legal Framework. The Government’s Response to ‘Private Action, Public Benefit’* (London, July 2003).

<sup>17</sup> See discussion below on the Charity Commission guidance.

<sup>18</sup> The provisions of the Charities Act 2006 on the new definition of charity and the public benefit requirement were brought into force in April 2008: Charities Act 2006 (Commencement No.4, Transitional Provisions and Savings) Order 2008, SI 2008 No.945.

<sup>19</sup> Charities Act 2006, s.2(1).

<sup>20</sup> Charities Act 2006, s.3(2).

<sup>21</sup> Or ‘skirted around’. See the comment to this effect in K. O’Halloran, M. McGregor-Lowndes and K. Simon, *Charity Law and Social Policy. National and International Perspectives on the Functions of the Law Relating to Charities* (Heidelberg, Springer, 2008) 481.

<sup>22</sup> Secretary of State for the Home Department, *The Government Reply to the Report from the Joint Committee on the Draft Charities Bill, Session 2003–04 HL Paper 167/HC 660* (Cm 6440, December 2004) 7.

that Jean Warburton notes,<sup>23</sup> is that, due to the age of many of the cases, they tend to be decisions restricted very much to facts of the particular case.<sup>24</sup>

Throughout the long parliamentary debates on the Charities Act 2006, the public benefit test was one of the most controversial issues, with much of the inquiry endeavouring to establish what the consequences of the proposed changes would be. Much has been made of the lack of clarity surrounding the new public benefit requirement. Some seek to rely on the new requirement as a way of doing away with the more controversial fee-charging charities, such as independent schools. Others argue that the new public benefit test should have little impact in this area. Even at the draft Charities Bill stage, the Joint Parliamentary Committee set up to examine the Bill was concerned that the Home Office and the Charity Commission disagreed as to the extent to which the new provisions would impact on the existing charitable status of fee-charging bodies.<sup>25</sup> The Charity Commission appeared (initially) to be suggesting that there would be little change,<sup>26</sup> whilst the Home Office was of the view that the Act would have a real impact, with some schools, for example, losing their charitable status. The Joint Committee accepted that including a definition of public benefit in the Charities Act 2006 would stifle development of the law and perhaps lead to uncertainty. It noted that the Home Office and the Charity Commission had agreed a ‘concordat’ as to how public benefit would be tested. The Joint Committee felt that the principles in the concordat could be set out either as non-exclusive criteria of public benefit in the Act, or in non-binding statutory guidance issued by the Secretary of State.<sup>27</sup> The Government accepted that guidance as to the operation of the public benefit requirement should be issued, but

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<sup>23</sup> J. Warburton, ‘Charities and Public Benefit – From Confusion to Light?’ (2008) 10 *Charity Law & Practice Review* Vol.3 1 at 3.

<sup>24</sup> The Charity Law Association, in *Response to the Charity Commission’s Consultation on the Draft Public Benefit Guidance* also notes that many of the old cases on public benefit are about charitable *trusts*, where one of the court’s concerns is to ensure that it can enforce the trusts. Considerations may be different for charities which have the legal structure of a company.

<sup>25</sup> Joint Committee on the Draft Charities Bill, *The Draft Charities Bill, Vol.1: Report* (HL 167-I/HC 660-I) September 2004, 25 para.79.

<sup>26</sup> The Charity Commission has clearly changed its view, bearing in mind the content of its voluminous guidance on public benefit that has been published since 2004. See below.

<sup>27</sup> Joint Committee on the Draft Charities Bill, *The Draft Charities Bill, Vol.1: Report* (HL 167-I/HC 660-I) September 2004, 33 para.102.

that it should be published by the Charity Commission rather than the Secretary of State, in order to emphasize the independence of the Commission from Government.<sup>28</sup>

### The Charity Commission Guidance

Under the Charities Act 2006, the Charity Commission must promote awareness and understanding of the public benefit requirement,<sup>29</sup> and how it will test this, as one of its statutory objectives.<sup>30</sup> It was required to consult with the public and others before issuing or revising any related guidance and to publish this guidance once agreed. Following a four-month public consultation on draft guidance,<sup>31</sup> which generated nearly 1,000 responses, in January 2008, the Charity Commission published its general guidance on public benefit.<sup>32</sup> Following publication of this general guidance, the Commission launched a series of consultations on draft supplementary sub-sectoral guidance on the public benefit of those charities most directly affected by the changes in the Act - that is charities established for the prevention and relief of poverty, the advancement of education, the advancement of religion and also fee-charging charities, which were highlighted during debates on the Charities Bill. Finalised versions of these guidelines were published in December 2008.<sup>33</sup>

Under the Charities Act 2006,<sup>34</sup> charity trustees must have regard to the Charity Commission public benefit guidance when exercising any powers or duties where the guidance may be relevant and they must report in their Annual Report on how they are

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<sup>28</sup> Secretary of State for the Home Department, *The Government Reply to the Report from the Joint Committee on the Draft Charities Bill, Session 2003–04 HL Paper 167/HC 660* (Cm 6440, December 2004) 7.

<sup>29</sup> Charities Act 2006, s.4.

<sup>30</sup> Charities Act 2006, s.7.

<sup>31</sup> Charity Commission, *Consultation on Draft public benefit guidance* (London, March 2007).

<sup>32</sup> Charity Commission, *Charities and Public Benefit. The Charity Commission's general guidance on public benefit* (London, January 2008). Separate guidance that explains the legal underpinning for the principles of public benefit set out in this guidance can be found in Charity Commission, *Analysis of the law underpinning Charities and Public Benefit* (London, December 2008).

<sup>33</sup> Charity Commission, *The Prevention or Relief of Poverty for the Public Benefit* (London, December 2008); Charity Commission, *The Advancement of Education for the Public Benefit* (London, December 2008); Charity Commission, *The Advancement of Religion for the Public Benefit* (London, December 2008); Charity Commission, *Public Benefit and Fee-Charging* (London, December 2008).

<sup>34</sup> Charities Act 2006, s.4(6).

carrying out their charity's aims for the public benefit.<sup>35</sup> The Annual Report will also include a statement as to whether the trustees have complied with the duty to have due regard to Charity Commission public benefit guidance. It has recently been stated that the main impact of the public benefit requirement will be on charities' Annual Reports and the Charity Commission's monitoring of them.<sup>36</sup> The Charity Commission must ensure that all registered charities meet the public benefit requirement. From April 2008, as part of the application process, trustees of organisations applying for registration have been required to have regard to the Commission's public benefit guidance and to demonstrate that their organisation's aims are for the public benefit. The Commission's guidance should reflect the common law, as amended by the Charities Act 2006. It should not change the law in any other way, nor re-interpret the limited existing case law on public benefit,<sup>37</sup> which can only be tested further by the courts or otherwise changed by additional legislation. Also, the Explanatory Notes to the Charities Act 2006 make it clear that whilst the Commission is legally required to issue guidance, the guidance is not legally binding on charity trustees.<sup>38</sup>

Subsection (6) [of section 4] will not put charity trustees under a legal obligation to agree with or to follow the guidance but it will require them to take the guidance into consideration when doing anything, in the administration of their charity, to which the guidance is relevant.

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<sup>35</sup> Charities Act 1993, s.45 and the Charities (Accounts and Reports) Regulations 2008, SI 2008 No.629, Pt 5. The level of detail required will depend on whether the charity is above or below the audit threshold. An audit is required when a charity's gross income in the year exceeds £500,000, or where income exceeds £100,000 and the aggregate value of its assets exceeds £2.8m.

<sup>36</sup> 'Andrew Hind defends Charity Commission against charges of political bias' *Third Sector*, 1 October 2009.

<sup>37</sup> Under Charities Act 2006, s.3(3) it is stated that 'any reference to the 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.'

<sup>38</sup> Charities Act 2006 Explanatory Notes, para.31.

Nevertheless, there are a number of areas of controversy which have arisen as a result of the approach taken by the Charity Commission to its statutory obligations relating to public benefit.<sup>39</sup>

The general guidance provides (in summary<sup>40</sup>) two principles of public benefit:

Principle 1: There must be an identifiable benefit or benefits and,

Principle 2: Benefit must be to the public, or a section of the public.

These two principles are themselves broken down into three and four factors respectively:

1(a): It must be clear what the benefits are;

1(b): The benefits must be related to the aims; and,

1(c): Benefits must be balanced against any detriment or harm.

2(a): The beneficiaries must be appropriate to the aims;

2(b): Where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted by geographical or other restrictions or by ability to pay any fees charged;

2(c): People in poverty must not be excluded from the opportunity to benefit; and,

2(d): Any private benefits must be incidental.

Principles 2(b) and 2(c) as they relate to fee-charging charities have been most controversial.

The fact that charitable facilities or services will be charged for, and will be provided mainly to people who can afford to pay the charges, does not necessarily mean that an organisation providing such facilities or services does not have aims that are for the

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<sup>39</sup> These are not explored in any depth in this paper. See e.g. Charity Law Association, *Response to the Charity Commission's Consultation on the Draft Supplementary Guidance on Public Benefit and Fee Charging Charities* (London, August 2008); P. Luxton, 'A Three-Part Invention: Public Benefit under the Charity Commission' (2009) 11 *Charity Law & Practice Review* Vol.2 19; J. Hackney, 'Charities and Public Benefit' [2008] *LQR* 347.

<sup>40</sup> The general guidance consists of over 19,000 words.

public benefit. Charities may charge their users for access to their facilities or services and indeed many do.<sup>41</sup> If this were not the case, charitable status would be severely limited to those organisations that were sufficiently well endowed that they could provide their services without cost. *Re Resch*<sup>42</sup> is a Privy Council case from New South Wales, Australia concerning a gift to a private hospital which charged fees. The hospital was established to relieve demand for admission to an adjacent public hospital by providing medical and nursing care for which there was a need. It was open to contributors under medical benefit schemes and was not conducted for profit. The Privy Council confirmed the principle that charges could be raised by a charity for the services that it provides, even if the charges produce a profit. Further, in *Joseph Rowntree Memorial Trust Housing Association Limited v AG*<sup>43</sup> it was held that a charity's beneficiaries could be required to pay, and that, provided that they fell within the beneficiary class,<sup>44</sup> their economic circumstances did not have to be modest. Relief of need in the field of charity is not limited to the relief of the poor. The elderly have needs which require relief by the provision of sheltered housing, and it would be no objection to a charity designed to meet that need that some residents would pay for their benefits because what they needed was the physical amenity, not an economic subsidy. In certain circumstances, persons may be in need of assistance in an area where charity law recognises the need for relief, but relief in exchange for payment may be the appropriate manner in which to provide that relief.

Dicta in *Re Resch* confirm that an organisation which wholly excluded 'the poor' from any benefits, direct or indirect, would not be for the benefit of the public and therefore would not be a charity.<sup>45</sup> Relying heavily on this dicta, the Charity Commission has stated that, in cases where fees are charged for facilities or services provided, if the

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<sup>41</sup> See e.g. *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138 (HL) where the provision of cremations did not cease to be a charitable purpose merely because fees were charged.

<sup>42</sup> [1969] 1 AC 514 (PC).

<sup>43</sup> [1983] Ch 159 (Ch).

<sup>44</sup> Effectively, in that case, elderly people with a disability or infirmity which necessitated specially adapted accommodation.

<sup>45</sup> [1969] 1 AC 514 (PC) 544 *per* Lord Wilberforce. See also Charity Commission, *Review Decision made on the application for registration of Odstock Private Care Limited*, 25 September 2007.

level at which fees are set has the effect of excluding ‘people in poverty’<sup>46</sup> from the opportunity to benefit, there will be no public benefit.<sup>47</sup> There are objections to this principle. For example, it has been suggested that it would be more accurate to state that people in poverty must not be expressly excluded from benefit.<sup>48</sup> None of the case law supports the view that where charities charge fees, the poor must be capable of benefitting in a material way.

### Stepping up the Measurement: Public Benefit Assessment Programme

In October 2008, the Charity Commission announced that it was beginning a public benefit assessment programme, looking closely at individual charities, as part of its work to fulfill its public benefit objective.<sup>49</sup> This first of all involves an identification of the charity’s aims<sup>50</sup> to ensure that they are charitable. However, as well as looking at the charity’s stated objects in its governing document, the Charity Commission is insistent that the charity will also need to show that in practice it is furthering these aims for the public benefit. The Commission is therefore looking at the charity’s relevant activities to see what benefits arise from the operation of the charity’s aims and what restrictions there are,

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<sup>46</sup> The draft public benefit guidance referred to ‘people on low incomes’ rather than ‘people in poverty’: Charity Commission, *Consultation on Draft public benefit guidance* (London, March 2007) 28. Neither phrase is a term of art. The Charity Commission suggests that, for a charity carrying out its aims in England, ‘people in poverty’ might typically mean households living on less than 60% of average income or people living on or below the level of ‘income support’. However, even then, it is accepted that ‘poverty’ is a relative term that may be interpreted differently depending upon the organisation’s aims. See also Charity Commission, *The Prevention or Relief of Poverty for the Public Benefit* (London, December 2008) and Charity Commission, *Public Benefit and Fee-Charging* (London, December 2008).

<sup>47</sup> Charity Commission, *Charities and Public Benefit. The Charity Commission’s general guidance on public benefit* (London, January 2008) 26. See also the Charity Commission supplementary guidance, *Public Benefit and Fee-Charging* (London, December 2008) which provides more detailed guidance on how the public benefit principle applies to charities that charge fees. See further on charities and fees, D. Morris, ‘Fee-Paying Hospitals and Charitable Status: A New Dawn or Lost Opportunities?’ (2007) 18 *Kings Law Journal* 455.

<sup>48</sup> Charity Law Association, *Response to the Charity Commission’s Consultation on the Draft Supplementary Guidance on Public Benefit and Fee Charging Charities*, (London, August 2008) 6. See also P. Luxton, ‘A Three-Part Invention: Public Benefit under the Charity Commission’ (2009) 11 *Charity Law & Practice Review* Vol. 2, 19.

<sup>49</sup> Charity Commission Press Release, ‘Commission publishes summary of public benefit responses and starts programme of public benefit assessments’ Charity Commission Press Release, PR 35/08, 7 October 2008. See also Charity Commission, ‘Public Benefit Assessment Information’ October 2008.

<sup>50</sup> The Act talks of ‘purposes’ but the Charity Commission consistently uses the term ‘aims’.

if any, on who can have the opportunity to benefit. The Charity Commission has placed great emphasis in its various public benefit guidance documents on examination of a charity's activities (as opposed to its objects) when it comes to satisfying the public benefit requirement.<sup>51</sup> Many charity lawyers have objected to this requirement for charities to prove public benefit through their activities (as opposed to their objects), arguing that it is not in line with the existing case law on public benefit, which does not support an activities test. It should be remembered that section 3(3) of the Charities Act 2006 states:

any reference to the 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 would suggest that there is no change to the public benefit test and therefore the common law, as identified through the case law, should still apply. This is the view, for example, of the Charity Law Association – an association of around 900 members, largely made up of lawyers, but also accountants and other professionals (including charity representatives) all of whom are concerned with advising in the area of charity law.<sup>52</sup>

Whilst all would accept that it is correct for the Charity Commission to monitor activities in order to ensure trustees' compliance with their trusts, the case law (and the Charities Act 2006 itself<sup>53</sup>) does support the view that it is an organisation's purposes which must be for the public benefit:<sup>54</sup>

Actual or proposed activities can indicate ways in which the purposes might be furthered. However, if an organisation's actual activities do not offer public benefit but the objects do, then the problem is that the activities are not furthering the objects, not that the objects themselves do not benefit the public.

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<sup>51</sup> See e.g. Charity Commission, *Charities and Public Benefit. The Charity Commission's general guidance on public benefit* (London, January 2008) 9.

<sup>52</sup> See e.g. Charity Law Association, *Response to the Charity Commission's Consultation on the Draft Public Benefit Guidance*. Academics have also written in support of this view. See e.g. P. Luxton, 'A Three-Part Invention: Public Benefit under the Charity Commission' (2009) 11 *Charity Law & Practice Review* Vol.2 19.

<sup>53</sup> Charities Act 2006, s.2(1)(b) and s.3(1) refer to a charity's *purposes* needing to be for the public benefit.

<sup>54</sup> Charity Law Association, *Response to the Charity Commission's Consultation on the Draft Public Benefit Guidance*, 12. See also Charity Law Association, *Response to the Charity Commission's Consultation on the Draft Supplementary Guidance on Public Benefit and Fee Charging Charities* (London, August 2008); C. Buckley, 'The Charities Act 2006: Consolidation or Reform?' (2008) 11 *Charity Law & Practice Review* Vol.1 1.

It is interesting to note by comparison, that the equivalent Scottish legislation states:<sup>55</sup>

a body meets the charity test if (a) its purposes consist only of one or more of the charitable purposes, and (b) it provides (or, in the case of an applicant, provides or intends to provide) public benefit in Scotland or elsewhere.

The reference to the requirement for the provision of public benefit clearly makes a charity's activities its yardstick to measure the required public benefit:<sup>56</sup>

In Scotland, public benefit is assessed on the basis of how a body exercises its functions; in England and Wales, the issue is whether a particular charitable purpose is for the public benefit.

Within the first round of Charity Commission public benefit assessments were three groups of charities; independent schools (five), charities for the advancement of religion (four) and fee-charging residential care charities (three). The first two categories were chosen because charities for the advancement of education and for the advancement of religion are two of the categories of charity which were clearly presumed to be for the public benefit before the Charities Act 2006. The third category was chosen because of the high level of public interest in how the public benefit requirement may affect fee-charging charities.

### The First Round of Results

The first round of assessments,<sup>57</sup> whose results were published in July 2009,<sup>58</sup> led to the publication of individual reports of the findings. These reports describe the charity, examine whether its aims are capable of being charitable for the public benefit (by reference to the Charity Commission guidance on public benefit) and summarise the extent to which the charity is currently fulfilling that requirement. Conclusions and any

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<sup>55</sup> Charities and Trustee Investment (Scotland) Act 2005, s.7(1).

<sup>56</sup> OSCR, *Meeting the Charity Test* (Dundee, 2008) 4.

<sup>57</sup> The Charity Commission plans to undertake more public benefit assessments, once a costs benefit analysis of the programme has been carried out. The next wave of assessments is due to include 'other types of fee-charging charities', some small charities and charities for which private benefit may be an issue: *Public Benefit Assessments - Emerging findings for Charity Trustees* (London, July 2009).

<sup>58</sup> See Charity Commission, "Show what makes you a charity", says regulator - Charity Commission assesses charities' public benefit' Charity Commission Press Release, PR 26/09, 14 July 2009.

recommended or required actions are also included. All the charities established for the advancement of religion passed the Charity Commission's test, but two independent schools and one fee-paying care home<sup>59</sup> failed. The main issue facing the failing schools was the disproportionate provision of bursaries relative to overall income. Similarly, the care home was not doing enough for those who could not afford fees and the level of top-up required over and above any statutory body support was considered to be prohibitive.

The two schools and the care home were unable to prove that there was sufficient opportunity to benefit in a material<sup>60</sup> way for those who could not afford the fees, including those in poverty. This meant that the second Charity Commission public benefit principle (in particular, sub-principles 2(b) and 2(c)) was not met. The questions asked by the Commission were:

1. Does the level at which fees are set have the effect of preventing people who are unable to pay the fees from benefiting from the services or facilities?
2. In relation to those who cannot afford to access the services because of charges made, to what extent are those charges moderated (in whole or in part) in order to: permit access to the services charged for; or give other access to benefits of the charity.

The individual reports make reference to the totality of benefits provided, including means-tested and non-means tested fee reductions and other measures to provide access to some of the benefits provided. However, in line with the Charity Commission's earlier pronouncement,<sup>61</sup> to the effect that well and appropriately publicised measures that are designed specifically, and exclusively, to assist people who cannot afford the fees are likely to provide greater opportunity to benefit than other measures, it appears that it was the lack of adequate means-tested assistance that was the charity's downfall, in every case. Taking all of the assessments together, it is clear that none of the other benefits provided,

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<sup>59</sup> The Charity Commission concluded that it could not assess the public benefit provided by another care home because it appeared to be operating outside its objects.

<sup>60</sup> Material opportunities to benefit are considered to be those that are more than minimal or tokenistic or which occur by chance: Charity Commission, *Public Benefit Assessments - Emerging findings for Charity Trustees* (London, July 2009) p.17.

<sup>61</sup> Charity Commission, *Public Benefit and Fee-Charging* (London, December 2008) p.13.

such as partnerships with state schools and local communities, were significant on their own to satisfy the public benefit test.<sup>62</sup>

One of the schools that failed to meet the public benefit requirements did not provide any means-tested awards. The other school had introduced a bursary scheme two years earlier, but the number of bursaries currently awarded was two, representing only 0.8% of pupils. On the other hand, at one of the schools that did pass the public benefit test, (in addition to other opportunities to benefit, such as access to lessons and support for pupils at state schools to help prepare them for university) the value of bursaries and hardship awards in 2008/9 as a percentage of the gross fee income of the preceding year was 14.3%. The school provided a total of 203 means-tested awards, representing 14% of its pupils, and 120 pupils received 100% bursaries.

In relation to the care home that failed the test, the principal means by which the charity provided opportunities to benefit to those who could not afford the high fees was through the provision of places to people who qualified for means-tested assistance from local authorities<sup>63</sup> and other statutory bodies. However, the provision of statutory financial assistance did not cover the full amount of the fees, which still led to the need to fund high top-up fees. Whilst, in a few cases, this was provided through fee reduction by the charity, the Charity Commission pointed to: the lack of clear information that such assistance may be available for those who cannot afford the fees; the low level of such assistance, relative to the size of the charity; the haphazard way in which such assistance was provided; and, the expectation conveyed in the charity's literature that top-up fees would be paid by third parties.

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<sup>62</sup> Charity Commission, *Public Benefit Assessments - Emerging findings for Charity Trustees* (London, July 2009) p.26.

<sup>63</sup> If a person is eligible for a place in a home following an assessment of their care needs, a financial assessment will be conducted to establish how the costs of care will be met. What proportion of the fees an individual may be required to pay depends on how much money they have. Currently, the savings limit above which an individual must meet the full cost of fees is £23,000. The limits below which savings are ignored is £14,000. See National Assistance Act 1948, Pt III and National Assistance (Assessment of Resources) Regulations 1992, (SI 1992 No.2977) as amended.

The ironic but undeniable conclusion appears to be that charities that charge the highest fees, in order to build up reserves so as to provide the most charitable funding to cover the costs of fees for those that cannot afford to pay, are more likely to pass the public benefit test. The richest charities, with large endowments and wealthy supporters will have least difficulty. This is despite the fact that, of course, those charities charging the highest fees, must, in reality be least accessible, arguably providing least ‘public benefit’ to those who need it most. In the present economic climate, especially, this appears to be a lose/lose situation, for both charities and their beneficiaries.

As well as assessing whether the individual charities meet the public benefit requirement, the Charity Commission public benefit assessment programme is intended to identify wider themes and points of interest generally for the sector. Consequently, in addition to the individual reports, the Charity Commission has identified some general points of interest and initial observations, together with some emerging findings. These are drawn together in a report,<sup>64</sup> intended to provide trustees with even further<sup>65</sup> information on the public benefit principle such as: good practice examples of ways in which charities have demonstrated that they meet the public benefit principles; and, examples of where public benefit principles were not met, and why.

Unsurprisingly, the publication of the results of the assessments prompted the Independent Schools Council (ISC)<sup>66</sup> to protest that the Charity Commission was focusing on the provision of means-tested bursaries and downplaying the significance of partnerships with local schools and communities.<sup>67</sup> The ISC went on to note that this will inevitably lead to fee increases for the vast majority of parents, putting the benefits of an

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<sup>64</sup> Charity Commission, *Public Benefit Assessments - Emerging findings for Charity Trustees* (London, July 2009).

<sup>65</sup> The general guidance on public benefit consists of over 19,000 words that try to describe what public benefit is and what charity trustees should consider in order to show that their charity’s aims are for the public benefit.

<sup>66</sup> The ISC represents the eight leading independent schools associations in the UK, collectively educating more than 500,000 children in 1,265 schools in the UK and select British schools overseas. More than half a million children are educated in these schools, representing 80% of the pupils in UK independent schools. In total, there are around 2,600 independent schools in the UK. See ISC, *ISC Census 2009* (London, April 2009).

<sup>67</sup> ISC, Public Benefit Reviews, ISC Press Release, 14 July 2009.

independent education beyond the reach of a greater number of children. The publication of the reports also led to significant attacks on the Charity Commission in the media, with attention focussed on its Chair, Dame Suzi Leather, who was accused of carrying out a political vendetta against fee-charging schools.<sup>68</sup> In a highly critical piece, in which he points out errors and inconsistencies in the Commission's approach, Peter Luxton concludes:<sup>69</sup>

the Commission appears intent on making law in respect of public benefit in order to further the political intentions of government, rather than confining itself to its duties under the relevant statutes.

In a highly unusual move, as a result of the negative media coverage that the publication of the public benefit assessments triggered, the Charity Commission Chief Executive and Chair published an open letter,<sup>70</sup> sent to all Members of Parliament and Peers, seeking to defend the Commission's approach:

The Charity Commission has a long history of making decisions independently, transparently and impartially, based on the legal framework within which we are required to operate. That is exactly what we are doing now.

The letter also stated that the public benefit requirement for charities did not come from the Charity Commission, but from Parliament as a result of a change to charity law through the Charities Act 2006.

Before the first round of assessments was completed, whilst making it clear that no charity will be expected to make changes to their objects, or the way that they carry them out, overnight, Andrew Hind, Chief Executive of the Charity Commission stated:<sup>71</sup>

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<sup>68</sup> See e.g.: 'Who better to lead the attack on private education than a class war activist (who, yes, went to a top public school herself?)' Daily Mail, 15 July 2009; 'There's a class war to be fought over the future of private schools' The Telegraph, 14 July 2009.

<sup>69</sup> P. Luxton, *Making Law? Parliament v The Charity Commission* (London, Politeia, 2009) p.28. This was written before the assessment results were published.

<sup>70</sup> See <http://www.charity-commission.gov.uk/publicbenefit/letter.asp>

<sup>71</sup> 'The public benefit guidance is how charities can build on high regard' *Third Sector*, 7 January 2009.

The small number of charities that are expected not to meet the public benefit requirement will be given up to three years to make the necessary changes in a spirit of ‘cooperation and partnership’.

However, upon publication of the results, the failing charities were given three months in which to confirm that they had considered the assessment report and that they were seeking to address their failure to comply with the public benefit requirement. The charities were then given a period of a further nine months to submit a credible and timely plan to the Commission. Similar time periods have been used previously by the Scottish charities regulator, OSCR, in its ongoing ‘Rolling Review’ of the public benefit of all charities on the Scottish charities register. There, however, within three months, a ‘failing’ charity is asked to provide an assurance that it will be seeking to comply with OSCR’s direction and if this confirmation is not forthcoming, OSCR will remove it from the Register on the grounds that it has failed to comply with the direction and does not meet the charity test.<sup>72</sup> On the other hand, the Charity Commission’s approach at this stage is to work with each charity on a consensual basis.<sup>73</sup> If a charity which failed the assessment does not provide the required confirmation of its co-operation, it is unclear what action the Commission may take at that stage. Importantly, the Charity Commission has not specified under what authority it requires the charity trustees to act.<sup>74</sup> Equally, from the charity’s point of view, it is uncertain what a failed charity can do if it is dissatisfied with the result of the assessment. The Charity Commission is clear that an assessment conclusion represents its ‘final position’ and is therefore not open to internal review by the Commission itself.<sup>75</sup> Also, the decisions cannot be taken to appeal to the Charity Tribunal

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<sup>72</sup> Under powers given in Charities and Trustee Investment (Scotland) Act 2005, s.30. See further, OSCR, *Rolling Review – Phase 1a. OSCR’s decisions on 30 charities*, (Dundee, October 2008).

<sup>73</sup> See Charity Commission, “‘Show what makes you a charity’”, says regulator - Charity Commission assesses charities’ public benefit’ Charity Commission Press Release, PR 26/09, 14 July 2009.

<sup>74</sup> A Freedom of Information request asking the Charity Commission to identify the power being exercised elicited the response: ‘acting in furtherance of our general objectives and functions, indicating actions which it is clear to us must be taken’; ‘Public benefit: it is time for some clarity and stability’ *Third Sector*, 1 September 2009.

<sup>75</sup> See Charity Commission, “‘Show what makes you a charity’”, says regulator - Charity Commission assesses charities’ public benefit’ Charity Commission Press Release, PR 26/09, 14 July 2009.

at this stage.<sup>76</sup> Presumably, if a charity does not ultimately produce a plan to the Commission's satisfaction, regulatory powers may be used at some point in the future, as a result of the initial conclusion that the public benefit requirement was not satisfied. For example, under the Charities Act 2006, there is a new power given to the Charity Commission to direct proper application of charity property.<sup>77</sup> There is no need for an inquiry<sup>78</sup> to be held before making such an order. If such an order is made, a charity could then appeal to the Tribunal.<sup>79</sup>

An alternative way to challenge the Charity Commission's approach to the public benefit test might be for the Attorney General to use the powers of reference given to her to bring cases before the Tribunal. The Attorney General may refer to the Tribunal a question which involves either the operation of charity law<sup>80</sup> in any respect or its application to a particular state of affairs.<sup>81</sup> Rather than dealing with the principles in a particular case, through a reference procedure, the Tribunal would be able to review the public benefit guidance generically, allowing individual charities to become parties to the reference as interveners if appropriate. One academic has gone as far as to state that a challenge to the legality of the Commission's guidance is 'inevitable'<sup>82</sup> and it is suggested that the best way for this to happen would be by way of a reference to the Tribunal.

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<sup>76</sup> Appeals can only be brought to the Tribunal on specified decisions, directions or orders of the Charity Commission laid down in Charities Act 1993, Schedule 1C.

<sup>77</sup> Charities Act 1993, s.19B, inserted by Charities Act 2006, s.21.

<sup>78</sup> Under Charities Act 1993, s.8.

<sup>79</sup> An appeal may be brought to the Tribunal against an order made under Charities Act 1993, s.19B(2) by virtue of Charities Act 1993, Schedule 1C, Table.

<sup>80</sup> 'Charity law' is defined widely in Charities Act 1993, Schedule 1D, para.7(1).

<sup>81</sup> Charities Act 1993, Schedule 1D, para.2.

<sup>82</sup> P. Luxton, 'A Three-Part Invention: Public Benefit under the Charity Commission' (2009) 11 *Charity Law & Practice Review* Vol. 2, 19 at 32. At the Charity Commission's annual public meeting, its Chief Executive also accepted that the legal basis for the public benefit assessments might need to be tested in the Tribunal: 'Andrew Hind defends Charity Commission against charges of political bias' *Third Sector*, 1 October 2009.

In a welcome and conciliatory announcement, it was recently stated by the Charity Commission Chair at the annual conference of head teachers of independent schools, that charities will be given up to five years to meet the new public benefit requirements.<sup>83</sup>

#### ANY COMPARATIVE WORTHINESS?

In terms of measuring comparative worthiness i.e. differentiating between different types of charities for different treatment, it has to be said that there is very little evidence of this in practice. It is an all or nothing test – in general, all charities get all the fiscal and legal benefits of charitable status. However, a few minor exceptions will be mentioned.

#### Charitable Donations - Millennium Gift Aid

One notable past exception was in relation to Millennium Gift Aid. This was a time-limited scheme to encourage charitable giving to particular types of charity only. So, special tax incentives<sup>84</sup> were given to gifts to UK charities which would then benefit educational and anti-poverty projects in the world's poorest countries. Eligible countries were those designated as 'low income countries' by the World Bank for the purpose of granting International Development Aid loans, and these are predominantly the developing countries in Africa and Asia.<sup>85</sup>

This incentive ended at the end of the year 2000.

#### Charitable Donations – Gift Aid in General

There was a time when charities whose sole or main purpose was the preservation of property or the conservation of wildlife were allowed to disregard<sup>86</sup> any consideration for payment under a deed of covenant, if it consisted of the right of admission to view the

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<sup>83</sup> 'Charity Commission relaxes rules for private schools' *The Guardian*, 7 October 2009.

<sup>84</sup> Under Finance Act 1998, s.48, the concession was that the normal (at that time) minimum donation qualifying for tax relief was reduced from £250 to £100, which could be paid by installments. Later on, the Finance Act 2000, s.25 removed the £250 minimum donations threshold for all charitable giving.

<sup>85</sup> Gifts for Relief in Poor Countries (Designation) Order 1998, SI 1998 No.1868.

<sup>86</sup> It was generally the case that any significant benefits received in exchange for a covenanted payment would remove the covenant's tax effectiveness.

property or to observe the wildlife.<sup>87</sup> Tax relief for payments made by an individual (or a company) under a deed of covenant was abolished and all tax relief for such payments is now under the Gift Aid scheme, but a similar differentiation between charities still exists. This means that within the Gift Aid scheme in general, charities with certain objects have been given fiscal advantages through statute.

The basic requirement for Gift Aid Relief is that the gift should be a ‘qualifying donation’<sup>88</sup> which means inter alia that there are no ‘benefits associated with the gift’<sup>89</sup> beyond those authorised by statute.<sup>90</sup> Benefits associated with a gift are not authorised for the purposes of satisfying the definition of a qualifying donation if either:<sup>91</sup>

- (1) the total value of the benefits associated with the gift exceeds the variable limit, which is
  - (a) 25% of the amount of the gift, where the amount of the gift is £100 or less,
  - (b) £25, where the amount of the gift is between £100 and £1,000,
  - (c) 5% of the amount of the gift, where the amount of the gift is more than £1,000; or
- (2) the sum of
  - (a) the total value of the benefits associated with the gift, and
  - (b) the total value of the benefits (if any) associated with each relevant prior gift,<sup>92</sup>is more than £500.

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<sup>87</sup> Finance Act 1989, s.59. This was mainly to assist the National Trust which, at that time, had 900,000 members paying their subscription fees by covenant, even though each obtained substantial benefits in kind - unlimited free entry to all its properties plus newsletters - worth about 40% of the amount covenanted. See D. Morris, ‘Charitable Covenants: A Benefit Or Not?’ [1989] *Conv* 321.

<sup>88</sup> Income Taxes Act 2007, s.416.

<sup>89</sup> Defined in Income Taxes Act 2007, s.417

<sup>90</sup> See Income Taxes Act 2007, ss.418-421.

<sup>91</sup> Income Taxes Act 2007, s.418. See also Income Taxes Act 2007, s.419 for a modified version of these rules where gifts and benefits are linked to periods of less than one year.

<sup>92</sup> Defined in Income Taxes Act 2007, s.418(4) to mean any other qualifying donations to the same charity in the same tax year.

However, a benefit consisting of a ‘relevant right of admission’ is ignored, so that a donation to a charity with which such a benefit is associated may be a qualifying donation regardless of the value of the benefit.<sup>93</sup> ‘Right of admission’ means a right which:<sup>94</sup>

- (1) benefits the donor or the donor and one or more members of his or her family (whether or not the right must be exercised by all of them at the same time),
- (2) authorises admission to premises or property to which the public are admitted on payment of an admission fee, and
- (3) authorises admission to those premises or that property without payment of the admission fee or on payment of a reduced fee.

A right of admission is a ‘relevant right of admission’ if:<sup>95</sup>

- (1) the opportunity to make a gift and to receive the right of admission in consequence is available to the public; and
- (2) the right of admission is a right granted by the charity for the purpose of viewing property<sup>96</sup> preserved, maintained, kept or created by a charity for its charitable purposes.<sup>97</sup>
- (3) and, either
  - (a) the right of admission applies, during a period of at least 12 months, at all times at which the public can obtain admission,<sup>98</sup> or
  - (b) a member of the public could purchase the ‘same right of admission’,<sup>99</sup> and the amount of the gift is greater by at least 10% than the amount the member of the public would have to pay.

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<sup>93</sup> Income Taxes Act 2007, ss.420-421.

<sup>94</sup> Income Taxes Act 2007, ss.420(2).

<sup>95</sup> Income Taxes Act 2007, ss.420(3)(4)(5)(7)(8). See also HMRC, *Detailed Guidance Notes for Charities*, Chapter 3, Gift Aid.

<sup>96</sup> The ‘property’ includes, in particular: buildings; grounds or other land; plants; animals; works of art (but not performances); artefacts; and, and property of a scientific nature: Income Taxes Act 2007, s.420(6).

<sup>97</sup> Originally, this concession only applied to admission to property belonging to conservation and heritage charities.

<sup>98</sup> When private event days could be held to interrupt the public availability of a right of admission, reducing it to a period of less than 12 months, the condition is still satisfied if there are no more than five event days in it: Income Taxes Act 2007, s.421(2)-(4).

<sup>99</sup> See Income Taxes Act 2007, s.421(5) for the definition of the ‘same right of admission’.

Clearly, only charities with particular purposes can take advantage of this concession.

### Targets for assessments

It could be argued that the way in which the Charity Commission is viewing its role in relation to the statutory public benefit requirement<sup>100</sup> is having the effect of ‘striating’ the charitable sector so that charities that carry out their activities in a certain way – in particular where there is a charge for the provision of facilities or services – are more likely to be put under the microscope than other charities. They are then being subject to an unreasonable level of interference by the Charity Commission. Despite the Charities Act 2006 setting out at considerable length the objectives, functions and duties of the Charity Commission in a very different way to previously, it is still clear that the Commission is not entitled to ‘exercise functions corresponding to those of a charity trustee in relation to a charity, or otherwise be directly involved in the administration of a charity’.<sup>101</sup> It could be argued that fee-charging charities are being interfered with in this way. The Charity Commission is a public authority for the purposes of the Human Rights Act 1998<sup>102</sup> and under that Act, it is unlawful for a public authority to act in a way which is incompatible with Convention<sup>103</sup> rights.<sup>104</sup> In the context of the Charity Commission, this would include its decisions with regard to the registration of charities where any common law authorities would need to be interpreted in a way compatible with such rights, as interpreted by case law of the European Court of Human Rights and opinions and decisions of the European Commission. The Charity Commission itself has noted<sup>105</sup> that the Human Rights Act 1998 requires fair and equal treatment of the application of the public benefit principles to different types of charity, and that any differences in treatment must be necessary, proportionate and legitimate. Here the differentiation is not

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<sup>100</sup> Outlined above.

<sup>101</sup> Charities Act 1993, s.1E, as inserted by Charities Act 2006, s.7.

<sup>102</sup> Human Rights Act 1998, s.6(3).

<sup>103</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>104</sup> Human Rights Act 1998, s.6.

<sup>105</sup> Charity Commission, *Analysis of the law underpinning Charities and Public Benefit* (London, December 2008).

necessarily even between charities with different objects but between charities with different *modi operandi*. The Charity Law Association has recently commented, in response to the Charity Commission's consultation on a Single Equality Scheme, that it would like to see an additional outcome in the Commission's action plan to address the need for the Commission to deal consistently with the charities within its jurisdiction.<sup>106</sup>

The outcomes of the public benefit assessments discussed above rely heavily on the Charity Commission's public benefit guidance. Whilst charity trustees must have regard to the guidance when exercising any powers or duties to which the guidance is relevant, there is no legal obligation to be bound by it. Unless or until the Commission's guidance, or more accurately, its decisions made applying the guidance, are reviewed by the Charity Tribunal or a court, the legal basis for a decision of the Commission which relies upon it will remain uncertain. In this regard, the extent to which this 'striation' of charity by the Charity Commission is lawful is yet to be determined.

### Concluding Comments

It has been seen that hitherto there has been very little measurement of comparative worthiness of charities. It tends to be, with some very minor exceptions for specific tax incentives, an all or nothing situation. The Charity Commission's recent activity in the context of the rejuvenated public benefit test has, however, not only led to significantly more measurement, but also to some development towards striation of the charity sector. So far, this striation has been focussed on separating out fee-charging charities for different treatment. Whether this comparative measurement stands up to legal scrutiny remains to be seen.

11 October 2009

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<sup>106</sup> Charity Law Association, *Response of the working party to the Charity Commission's consultation on a Single Equality Scheme* (London, September 2009). It was suggested that this sort of equality of process concept could usefully be added to an existing outcome within the action plan which requires that all charities be treated 'fairly'.