Policy Change, Public Benefit, and the Charities Act 2006

– A Case of the Emperor's New Clothes?

By

Sarah Sophie Flemig

A thesis submitted in conformity with the requirements for the degree of PhD in Political Science

Department of Political Science
University of Toronto

© Copyright by Sarah Sophie Flemig 2015
Abstract

This thesis analyses the policy-making processes leading to the Charities Act 2006 that introduced a renewed focus on the “public benefit” that charities need to provide. It addresses the empirical puzzle why a period of over 400 years of stability in the definition of charitable status ended in 2006 and what factors caused the charity reform that culminated in the 2006 Act. The discussion centres on the two most affected groups of charities, which are fee-charging education and healthcare charities. For this purpose, the thesis compares two radical change theories, i.e. punctuated equilibrium theory (Baumgartner et al., 2011) and path dependency (Pierson, 2000a), and evaluates how they perform against the alternative account of gradual transformation theory (Streeck and Thelen, 2005). Empirical evidence is presented for each of the key stakeholders, the government, the charitable sector, the legal community, and the media. Throughout, the thesis adopts an interdisciplinary multi-method research outlook, including a specifically designed survey, systematic review, statistical analysis, content analysis and archival research. These data are corroborated through in-depth elite interviews with key
personalities who were involved in the charity policy reform process. The “crucial case study” (Eckstein, 2009) is then juxtaposed to the parallel Scottish charity policy reform, leading to the Charities and Trustee Investment (Scotland) Act 2005, to corroborate the findings. In the light of the evidence, the thesis concludes that policy change theories need to differentiate between the concept of legal and political change in order to provide meaningful explanations. Moreover, it finds that welfare state traditions play a key role in charity policy change and that the English Charities Act 2006 is a further instance of the increased judicialisation of politics and the politicisation of judicial bodies. On a theoretical level, the thesis introduces a classification of change at different stages of the policy process.

(300 words)
Acknowledgements

Many individuals have been instrumental for the research and writing of this doctoral thesis. First and foremost, I would like to express my sincere gratitude to my supervisor Professor Neil Nevitte, who has been a most wonderful guide along this adventurous journey and who never failed to show patience and support on all levels whenever I needed it most. My committee members, Professor Carolyn Tuohy and Professor Charles Mitchell, were a constant source of inspiration, astute insights, and kind encouragement, and their contributions to the development of this research project have been invaluable. I would also like to thank my internal examiner, Professor Rodney Haddow, who provided an important and insightful alternative view that sharpened my argument. As one of the policy experts involved in the charity law reform, Professor Albert Weale was the perfect external examiner, and added to the overall clarity of the thesis through his thoughtful comments. To all of my examining committee members, I couldn’t be more grateful.

Of course, the same applies to those who took part in the empirical research, in particular those who kindly agreed to be interviewed or who participated in the survey. Their eagerness to support this project and their willingness to share their first-hand insights was a sine qua non factor in its completion.

Finally, I would like to thank those who provided the equally important moral support and friendship along the way, who listened when I felt stuck, and who never failed to encourage me to take the next step even when I didn’t quite know where it would lead: Masatake Wasa, Lonelle Selbo-Dyett, Raphael Thalakottur, Benoît Guerin, Israela Stein and Eitan Hess, Justin Thompson, Michael and Lundi Youash with Micaela, Marian, Gabriel, Lucian and Clarisse, Melissa Djurakov, Alison Hari-Singh and Jeff Nowers, Christopher La Roche, and last but certainly not least, Maribel Brun and Vicent Lopez. There are too many to be included at this point, which I sincerely regret, but which also makes me feel very blessed in life. In particular, I would like to thank Aruna Nair, without whose friendship, legal advice, and endless patience I would have been lost; Chelsea Nichols for making me see the big picture when all I could see was a 13 inch-
wide screen; Petra and Stella Zauner for listening at all times and helping me navigate the highs and the lows; Max Fries for never failing to cheer me up, no matter in what time zone; Scott Montgomery for all the inspiring conversations and broadening my horizon in directions I had never considered; my two great loves, Lewis and John Armstrong, for their warmth, both literally and figuratively, and for inspiring me to keep going even during the hardest final stage; and finally my wonderful family, Carmen, Reinhard, Konstantin, and Mark Flemig, who silently suffered through dinner conversations on the role of charities in England, Wales, and Scotland yet are still proud of me and love me more for it.
# Table of Contents

Chapter 1. Introduction .......................................................................................................................................... 1
  1.1 PUBLIC BENEFIT AND THE CHARITIES ACT 2006 – A CASE OF THE EMPEROR’S NEW CLOTHES? .... 1
    1.1.1 The “So What?” Question ......................................................................................................................... 2
    1.1.2 Why Public Benefit? ................................................................................................................................... 4
    1.1.3 Why Schools and Hospitals? ................................................................................................................... 6
  1.2 NEED FOR A POLITICAL SCIENCE ANALYSIS ......................................................................................................................... 8
  1.3 OUTLINE OF THE THESIS ........................................................................................................................................... 10

Chapter 2. Methodology and Theory ............................................................................................................. 12
  2.1 INTRODUCTION ............................................................................................................................................... 12
  2.2 THEORIES OF POLICY CHANGE PROCESSES: BEYOND PUNCTUATED EQUILIBRIUM AND PATH DEPENDENCY FRAMEWORKS? ............................................................................................................................ 14
    2.2.1 Punctuated Equilibrium Framework ............................................................... 16
    2.2.2 Path Dependency Framework ............................................................................................................. 21
    2.2.3 Theoretical Caveats: Gradual Transformation Frameworks ................................................. 24
  2.3 METHODOLOGY .............................................................................................................................................. 29
    2.3.1 Definitions, Conceptualisation and Operationalisation of Dependent and Independent Variables ....................................................................................................................................... 29
    2.3.2 A Note on Epistemology in Interdisciplinary Research ........................................................... 33
    2.3.3 Research Hypotheses ............................................................................................................................... 34
    2.3.4 Research Methods ..................................................................................................................................... 35
  2.4 CASE SELECTION ............................................................................................................................................. 38

Chapter 3. Legal Background and Policy Network .................................................................................. 41
  3.1 LEGAL BACKGROUND ......................................................................................................................................... 41
    3.1.1 Pre-19th Century Foundations of English Charity Law ......................................................... 41
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.1.2</td>
<td>Defining “Charitable”</td>
<td>45</td>
</tr>
<tr>
<td>3.1.3</td>
<td>Historical Role of Public Benefit in Charity Law</td>
<td>48</td>
</tr>
<tr>
<td>3.1.4</td>
<td>Charities in English Welfare: Education and Healthcare</td>
<td>50</td>
</tr>
<tr>
<td>3.1.5</td>
<td>Public Benefit pre- and post-Charities Act 2006</td>
<td>58</td>
</tr>
<tr>
<td>3.1.6</td>
<td>Implications for the Charity Commission</td>
<td>69</td>
</tr>
<tr>
<td>3.2</td>
<td>POLICY NETWORK, NODES AND ACTORS</td>
<td>73</td>
</tr>
<tr>
<td>3.2.1</td>
<td>Definition of Policy Network and Policy Process</td>
<td>73</td>
</tr>
<tr>
<td>3.2.2</td>
<td>Variables highlighted by the Theoretical Frameworks</td>
<td>75</td>
</tr>
<tr>
<td>3.2.2</td>
<td>Definition of Concepts</td>
<td>75</td>
</tr>
<tr>
<td>3.2.3</td>
<td>The State</td>
<td>77</td>
</tr>
<tr>
<td>3.2.3</td>
<td>The Charitable Sector</td>
<td>78</td>
</tr>
<tr>
<td>3.2.4</td>
<td>The Legal Community</td>
<td>79</td>
</tr>
<tr>
<td>3.2.5</td>
<td>The Media</td>
<td>79</td>
</tr>
<tr>
<td>3.2.6</td>
<td>Personal Accounts - Interview Data</td>
<td>80</td>
</tr>
</tbody>
</table>

Chapter 4. The State and Parliamentary Actors | 81 |
| 4.1 | INTRODUCTION | 81 |
| 4.2 | PMSU: “PRIVATE ACTION, PUBLIC BENEFIT” | 81 |
| 4.3 | GOVERNMENT’S RESPONSE: “CHARITIES AND NOT-FOR-PROFITS: A MODERN LEGAL FRAMEWORK” | 87 |
| 4.4 | THE JOINT COMMITTEE ON THE DRAFT CHARITY BILL | 90 |
| 4.4.1 | The Report | 92 |
| 4.4.2 | The Appraisal of Public Benefit | 94 |
| 4.5 | THE HOME OFFICE | 100 |
| 4.5.1 | Written Evidence | 100 |
| 4.5.2 | Oral Evidence | 102 |
4.6 THE CHARITY COMMISSION ...................................................................................................................... 108
  4.6.1 Written Evidence .................................................................................................................................... 108
  4.6.2 Oral Evidence ........................................................................................................................................... 115
4.7 THE PARLIAMENTARY DEBATE ................................................................................................................ 122
  4.7.1 The Lords .................................................................................................................................................... 123
  4.7.2 The House of Commons ....................................................................................................................... 134
4.8 THE COURTS ................................................................................................................................................ 139
4.9 A NOTE ON NEW LABOUR ........................................................................................................................ 141
  4.9 CONCLUSIONS .............................................................................................................................................. 149

Chapter 5. The Sector ........................................................................................................................................ 153
  5.1 INTRODUCTION ............................................................................................................................................ 153
  5.2 RELEVANT SECTOR REPORTS .................................................................................................................. 154
    5.2.1 Committee of Enquiry into the Law and Practice Relating to Charitable Trusts – Nathan Report (1952) ................................................................................................................................. 154
    5.2.2 “Charity Law and Voluntary Organizations,” National Council of Social Sciences, 1976 ("Goodman Report") ........................................................................................................................................................................... 155
  5.3 EVIDENCE BEFORE PARLIAMENT: UMBRELLA BODIES ......................................................................... 165
    5.3.1 Written Evidence .................................................................................................................................... 165
    5.3.2 Oral Evidence ........................................................................................................................................... 168
  5.4 INDEPENDENT SCHOOLS AND HOSPITALS ............................................................................................... 173
    5.4.1 Written Evidence.................................................................................................................................... 174
9.4.3 New Variables Identified in Scotland

9.5 Scotland’s Charity Policy Reform from an English Vantage Point

9.5.1 Streamlining between England and Scotland

9.5.2 OSCR v Charity Commission

9.5.3 Public Benefit Test

9.6 Comparative Insights vis-à-vis England and Wales

9.6.1 Structural Factors

9.6.2 Ideological Factors

9.7 Conclusions

Chapter 10. Conclusions

10.1 Introduction

10.2 Hypotheses Testing

10.2.1 Reconciling Empirical Evidence

10.2.2 Technical Legal Change

10.2.3 Contextual Political Change

10.2.4 Translating Technical Legal and Contextual Political Change into Policy Change

10.3 Radical Change versus Gradual Change Frameworks: A Theoretical Appraisal

10.3.1 Differentiating Change in Radical Change Frameworks

10.3.2 GTF: An Alternative Account?

10.4 Theoretical Contributions

10.4.1 Additional Variables

10.4.2 Matching Theories of Policy Change and the Policy Process
10.5 Conclusions and Outlook for Further Research ................................................................. 409

10.5.1 A Case of the Emperor's Clothes? .................................................................................. 409

10.5.2 Facing the “So what?” Question ..................................................................................... 413

10.5.3 Benefit for the Public? ..................................................................................................... 414

10.5.2 Outlook and Further Research ....................................................................................... 415
List of Tables

Table 2.2.1: PEF criteria for policy change ................................................................. 21
Table 2.2.2: PDF criteria for policy change ............................................................... 24
Table 2.2.3.a: Thelen and Streeck (2005) change matrix ......................................... 26
Table 2.2.3.b: Gradual Change Framework Processes ............................................... 28
Table 2.3.1.a: Thesis Criteria Specification ............................................................... 30
Table 2.3.1.b: Research Design Summary ................................................................. 32
Table 2.3.4: Research Methods Overview ................................................................. 36f.
Table 3.2.2: The State Node Actors ........................................................................... 77
Table 5.5.a: Question 2 ............................................................................................ 185
Table 5.5.b: Question 3 ............................................................................................ 186
Table 5.5.c: Question 4 ............................................................................................ 187
Table 5.5.d: Question 5 ............................................................................................ 188
Table 5.5.e: Question 6: Ranking from 1 to 7 with 1 as highest priority and 7 as lowest priority ................................................................. 189
Table 5.5.f: Question 7 ............................................................................................ 190
Table 5.5.g: Question 8 ............................................................................................ 191
Table 5.5.h: Question 9 ............................................................................................ 191
Table 5.5.i: Question 10 .......................................................................................... 193
Table 5.5.j: Question 11 .......................................................................................... 194
Table 5.5.k: Question 12 .......................................................................................... 195
Table 5.5.l: Question 13 .......................................................................................... 196
Table 5.5.m: Question 14 ........................................................................................ 197
Table 5.5.n: Question 15 ........................................................................................ 197
Table 5.5.o: Question 16 ......................................................................................... 199
Table 6.3.1: Systematic Review Coding ................................................................... 219
Table 6.3.2: Origin of Reform ................................................................................... 221
Table 7.2.1.a: Number of “Charit*” in Headlines ...................................................... 231
Table 7.2.1.b: Mentions of “public benefit” in selected newspapers ......................... 232
Table 7.2.1.c: Articles mentioning “public benefit” by newspaper ......................... 233
Table 7.2.1.d: Coding criteria for content analysis ................................................... 233ff.
Table 7.3.a: Coverage of “public benefit” by newspaper ......................................... 235
Table 7.3.b: Types of articles on “public benefit” .................................................... 236
Table 7.3.c: Location of articles in newspapers ....................................................... 236
Table 7.3.d: Titles of Front Page Articles on Public Benefit .................................... 238
Table 7.3.e: Opinion put forward on public benefit test ....................................... 241
Table 7.3.f: Evaluation of Public Benefit Test in Newspapers .............................. 241
Table 7.3.g: Newspapers comments indicating public benefit test as new .......... 242f.
Table 7.3.h: Table indicating public benefit test as existing prior to 2006 .......... 243f.
Table 7.3.i: Positive evaluations of public benefit test ........................................ 244ff.
Table 7.3.j: Negative evaluations of public benefit test ......................................... 246ff.
Table 7.3.k: Evaluation of Charity Commission in Newspapers .......................... 249
Table 7.3.l: Evaluation of Public Benefit Test in Newspapers .............................. 250
Table 7.3.m: Evaluation of Charity Commission according to Attitude towards Public Benefit Test (new or old) .................................................................250
Table 7.3.n: Evaluation of Charity Commission according to Attitude on Public Benefit Test (good or bad) .................................................................251
Table 7.3.o: Evaluation of Public Benefit Test according to Attitude towards Charity Commission .................................................................251
Table 7.5.2: Readership among those who describe their primary source of news as newspapers ........................................................................................................271
Table 10.2.4: Refined Dependent Variable Taking into Account Legal and Political Change ........................................................................................................398
Table 10.3.1: Evaluation of Hypotheses by actor. “L” denotes legal change, “P” denotes political change ........................................................................................................401
Table 10.4.2: The Different Stages of the Policy Process and Their Change Potential (England and Wales) ........................................................................................................407
Table 10.4.2b: The Different Stages of the Policy Process and Their Change Potential (Scotland) ........................................................................................................408
List of Appendices

Appendix A.1 – Timeline of the reform ..........................................................416
Appendix A.2 – List of full survey questions for Chapter 5 .......................417ff.
Appendix A.3 – Glossary .............................................................................420f.
Chapter 1. Introduction

1.1 Public Benefit and the Charities Act 2006 – A Case of the Emperor’s New Clothes?

The central question of this thesis is: what explains the origin, timing and content of the public benefit policy reform in the Charities Act 2006? For some, the public benefit reform (and the Act itself) was a harsh disappointment, for some even “a dog’s breakfast”. Few felt that it was a success that increased public trust in charities and their work - if that had ever been the actual goal of the reforms. In general, however, reactions were at best lukewarm, evaluating the reform as a missed opportunity.

Remarkably, there is no consensus on what the Charities Act 2006 and its public benefit reform actually did change: Did the Act introduce a new public benefit test? Or did it simply alter an existing test? Was the public benefit test changed from a test based on intent to a test based on activity? Or was there never a legal change but just a temporary change in the behaviour of some fee-charging charities as a reaction to what they thought

1 The Independent Schools Council felt that the Charities Act 2006’s public benefit reform affected independent schools with charitable status so much that they referred the Charity Commission’s guidelines on public benefit to the Charity Tribunal, resulting in the important, yet equally disappointing landmark case ISC v Charity Commission. The parliamentary Joint Committee’s report on the Charities Bill expressed its “concern that the draft Bill’s effectiveness is undermined by unconvincing rationale” (p.10) and that the Charity Commission’s “interpretation left the draft Bill in the ludicrous position of promising to bite on the public benefit bullet without having any teeth to do so. (…) For a matter of such public importance and interest to produce such total confusion at the heart of the draft Bill is nothing short of farcical.” (p.22).


3 See in particular Chapters 7 on the Media Account and Chapter 8 on interview data.

4 This was argued, for instance, at the Charity Law Association Annual Conference on October 3, 2013.
might be the potential effects of the Act? In other words, is the public benefit reform in the Charities Act 2006 a case of the emperor’s new clothes?

1.1.1 The “So What?” Question

Why should we care about a public benefit requirement for charities? There are four main reasons:

1) The role of charities in civil society and the welfare state has been increasing. As of July 2014, there are currently over 160,000 registered charities in England and Wales\(^5\), with roughly the same number in estimated unregistered charities.\(^6\) Their annual income amounts to just under £61 billion pounds; while the smallest charities (£0 to £10,000 in annual income) make up for 42% of all registered charities, the biggest players in the sector (i.e. those with over £5 billion pounds annual income, which is 1.2% of the entire sector) account for almost 70% of the overall charity sector income.\(^7\) The sector is also an important employer – of 24 million people in non-public sector employment, almost 900,000 employees (3.75% of the total workforce) and over 1.5 million volunteers are working for and with registered charities in England and Wales. The number of registered charities peaked in 2006 (168,354 registered charities) and has since then returned to its mean of roughly 163,000. Two trends are apparent: Both the number of large charities, defined as those with over £10 million in annual gross income and the charity sector’s overall gross income have drastically increased. Large charities have grown by a third since 2006, while their gross income has increased by over 50%.\(^8\)

---


\(^6\) Please note that not all charities need to register with the Charity Commission. In addition to a minimum yearly income threshold, there are certain exempted charities. Interestingly, Scotland’s policy is different and all charities, no matter how big or small, need to register with the Office of the Scottish Charity Regulator (OSCR) since it was created in 2005.


\(^8\) The Charity Commission statistics since 2009 are based on slightly different accounting measures; historical comparisons in such high-level trends are, however, not affected.
2) Charities are important providers of social welfare services. The current Conservative government’s agenda of the “Big Society” encourages further contracting out of public services to so-called “public service mutuals”, especially within the National Health Service (hereafter abbreviated as NHS). By the end of 2011, just under £900 million worth of services were provided by such public service mutuals that originated in a public body. This seems to be a particularly attractive option for governments in times of economic austerity and general funding cuts. However, experts are warning of an increasing “charitisation of government” and social services.

3) Charities receive indirect public subsidies through tax exemptions. What qualifies as “charity” is therefore a question pertinent to all taxpayers because public money is used to support certain activities under the assumption that society considers them valuable. Public benefit is one of the most crucial criteria for charitable status in the eyes of the law and the tax authorities, Her Majesty’s Revenue and Customs (hereafter abbreviated as HMRC). Any policy reform that affects the concept of public benefit and charities thus has important public finance implications that deserve close scrutiny.

4) Charities are a motor for innovation, either through education and training or through offering new kinds of welfare services. Both healthcare and education charities are crucial for medical and pedagogical training in Great Britain. For instance, charities were

---

the first organisations to provide HIV/AIDS care as well as birth control, both at the time services that governments were at first reluctant to provide.\textsuperscript{14}

In short, charities have assumed an important role in British society and they are here to stay. This is all the more reason to care about how they operate, how they are regulated, and how public policy making processes are shaping the charitable sector overall. Lessons learned in England and Wales are not just instructive for this jurisdiction, or its neighbours North of the border in Scotland and across the sea in Northern Ireland. Other common law jurisdictions have been eagerly following the English reform process to guide their own agenda.\textsuperscript{15} Even beyond the realm of industrial nations, these questions are relevant for the operation of civil society. A vibrant charity sector can operate as a corner stone of civil society and is thus a key contribution to the democratisation process in developing nations.\textsuperscript{16}

\textbf{1.1.2 Why Public Benefit?}

This thesis conducts an empirical analysis of the public benefit reforms in the Charities Act 2006 in England and Wales\textsuperscript{17} with a reference to the Charities and Trustee Investment (Scotland) Act 2005 in Scotland, using the example of independent schools and hospitals with charitable status. Of course, the Charities Act 2006\textsuperscript{18} addressed more issues than public benefit alone\textsuperscript{19}. Yet public benefit certainly received the widest media attention. This is because it is a key requirement to qualify as a charity. More


\textsuperscript{15} See in particular Australia, which passed a new Charities Act in 2013.


\textsuperscript{17} Scotland offers itself as a suitable case of comparison since, despite a separate Scottish definition of charity, it is also subject to the English system of charity law because of the HMRC’s continued responsibility for tax exemptions. Unlike England and Wales, Scotland now has a statutory definition of charity and public benefit; reference will hence be made to the Scottish case whenever it adds to the debate about England and Wales, and an empirical chapter on the Scottish case will be presented in Chapter 9.

\textsuperscript{18} The subsequent Charities Act 2011 was a consolidating measure.

\textsuperscript{19} One of the notable changes mentioned in interviews was the clarification and augmentation of the scope for political activities by charities and the augmented role of the Charity Commission.
importantly, it is also because of the association of the public benefit reform with the controversy regarding the status of independent fee-charging schools\textsuperscript{20}.

In 1997, the Deakin Commission\textsuperscript{21}, a crucial and early driver for the reform of the charitable sector, encouraged a renewed focus on the concept of ‘public benefit’. While public benefit had always been a pre-condition for charitable status, the Deakin Commission recommended it as the core of charity in the 21\textsuperscript{st} century, i.e. the first principle that should guide charity policy. Yet, the translation of this policy principle into a legal principle posed several challenges: how should ‘public benefit’ be defined for the purpose of charity law? Should it become a statutory definition, solving the problem of a confusing and even somewhat contradictory jurisprudential and case law basis, yet binding the courts and the Charity Commission in the future? If not, on what basis should the Charity Commission assess public benefit? And is the Charity Commission configured in such a way that it could provide such an assessment in each case? Stuart Etherington, Chief Executive of the National Council of Voluntary Organisations, summarised the policy process with the following words:

\begin{quote}
In 1996, Nicholas Deakin and his commission's far-sighted report set a series of clear policy objectives that it believed would put the third sector at the heart of our society with a modern legal and fiscal framework. It included proposals that, if implemented, would ensure that voluntary and community organisations were open, accountable and delivering the highest standards. The government and the sector have worked closely together to implement this agenda. Deakin has seen his recommendations gradually being acted upon - from new tax reliefs, to quality standards. The last remaining major recommendation of the commission to be implemented is its belief that public benefit should be at the heart of charity law. At first glance,
\end{quote}

\textsuperscript{20} The public benefit test was seen by some as a means to remove the charitable status of fee-charging schools such as Eton or Harrow, a highly politicised debate about the English education system. For a thorough discussion of the media debate, please see Chapter 7 that contains a content analysis of the newspaper coverage on public benefit from 1996 until 2012.

\textsuperscript{21} Deakin Report, 1997. For a detailed discussion of the Deakin Commission, see Chapter 4.
this seems a relatively simple thing to do. But it has taken us nearly six years, a sector-led commission, two government reports, several consultations, a parliamentary scrutiny committee, the on-going campaigning of more than 40 charities and the support of thousands more just to get us here. And still it seems these changes are at risk.\(^{22}\)

In the end, the Westminster government decided against a statutory definition of public benefit\(^{23}\). Instead, it assigned the Charity Commission the statutory duty to assess whether a charity passed the public benefit test and to provide guidance on what was to count as public benefit provision. This decision created a wide uproar in legal and academic circles but was not fully recognised in the political and the media debates.

The thesis will argue that while the popular focus remained on the status of fee-charging charities, such as independent schools\(^{24}\), it was the role of the Charity Commission that held the potential for radical change around public benefit in the Charities Act 2006. Nonetheless, the special attention vested in the public benefit test and its high visibility (resulting for a short while in a high profile in the public debate) will be discussed in detail throughout the thesis.

1.1.3 Why Schools and Hospitals?

Why did the main policy impetus focus on fee-charging charities? First of all, independent schools and non-profit hospitals were among the ‘target groups’ of charities that were supposed to undergo a first round of assessment.\(^{25}\) But there is another reason for targeting education and healthcare charities: Charities operating in these two sectors

\(^{22}\) *The Guardian*, “Changes to charity law must not be put at risk by rows over a public benefit test, says Stuart Etherington.” 15\(^{th}\) September 2004.

\(^{23}\) In contrast, Scotland introduced statutory criteria for public benefit (Charities & Trustees Investment (Scotland) Act 2005) that are part of its charitable status test.

\(^{24}\) See Chapter 7 for an in-depth analysis of the media account of the reforms.

\(^{25}\) Religious charities were also singled out due to the removal of the alleged presumption of public benefit these organisations previously enjoyed.
often charge substantial fees. In fact, some commentators have remarked that they should be seen as businesses rather than classical volunteer-driven charities.

Education bears an additional layer of complexity as it epitomises centuries of class struggle. The charitable status of fee-charging independent schools (also known as ‘public schools’) is a political hot potato. Although Tony Blair’s modernisation of the Labour party prior to 1997 did away with much of the old language of class struggle, some Labour backbenchers still believe that the likes of Eton, Winchester, and Harrow continue to perpetuate class barriers. Therefore, these institutions do not deserve any form of charitable presumption and tax exemptions in their eyes. Conservative proponents, however, seem to favour free choice in educational matters and do not tire to point out that fee-charging schools are a quintessentially English tradition that alleviates the strain on the already overstretched state school system.

The debate regarding charitable hospitals has not been as passionate, which is surprising. Private healthcare might not have gained the same controversial status as private education, yet in the light of rising costs, longer NHS waiting lists, and an aging society, their charitable status is likely to gain a similarly important position soon. The culture of ‘contracting out’ introduced by the Thatcher government throughout the 1980s has further aggravated the situation. The Joint Commission on the Draft Charities Bill has acknowledged this fact and invited representatives of the Nuffield Hospitals chain to provide evidence before the committee.

The political and social salience of education and healthcare charities is also reflected in the case law. Overall, there is a considerable body of charity case law, however, it is riddled with contradictions and lacks a clear line. During interviews, some stakeholders commented that there were not enough 20th century cases that could help remedy these contradictions. Charities often do not possess access to adequate legal advice, let alone

---

26 As Alison Dunn finds, independent school fees start at 20% of the median UK salary per annum; see Dunn, Alison. “Using the Wrong Policy Tools: Education, Charity, and Public Benefit.” *Journal of Law and Society* 39 no.4 (December 2012): footnote 10, p.493.


28 See Chapter 5.
the financial resources to enforce their legal position in court. And if they do, using their resources for litigation tends to unleash an avalanche of accusations regarding the proper use of donations.\footnote{See for instance the controversy surrounding the RSPCA’s legal action on fox hunting, e.g. \textit{Metro}, “RSPCA spent ‘staggering’ £330,000 on fox hunting case.” 17\textsuperscript{th} December 2012, retrieved online on 27\textsuperscript{th} January 2014 at \url{http://metro.co.uk/2012/12/17/rspca-spent-staggering-330000-on-fox-hunting-case-3320334/}}

The majority of case law that features prominently in the policy agendas pre-Charities Act 2006 and in the Charity Commission’s guidance notes on public benefit focuses on education and healthcare. A Privy Council case regarding a private hospital, \textit{Re Resch}\footnote{For a discussion of \textit{Re Resch}, please see Chapter 3.}, has become the prime point of reference for the status of fee-charging charities, and \textit{Independent Schools Council v Charity Commission}\footnote{For a summary of \textit{ISC v Charity Commission}, please see Chapter 4.} is so far the first high profile case decided by the Charities Tribunal. Current developments on the status of religious charities\footnote{See for instance Belger, T. “Supreme Court ruling on Church of Scientology could affect legal meaning of religion, Charity Commission says”, \textit{Third Sector}, 12\textsuperscript{th} December 2013, retrieved online on 27\textsuperscript{th} January 2014 at \url{http://www.thirdsector.co.uk/news/1224712}} may provide further contributions, but for now, education and healthcare are the main sources for the body of case law the Charities Act 2006 refers to.\footnote{Charities Act 2006, section 3.2}

\section*{1.2 Need for a Political Science Analysis}

At first sight, charity law and the Charities Act 2006 seem to belong in the domain of legal research and both topics have been largely overlooked by the political science community. This may be because charity law is a subcategory of trust law, one of the most complex doctrinal areas of English jurisprudence. Charity law is also often considered a technical-legal issue that requires a very strongly legalistic perspective. Previous Charities Acts (e.g. the Charities Act 1991, consolidated in the Charities Act 1993) were indeed technical matters. But the debate that led to the Charities Act 2006 was markedly different.
Those involved in the policy process have described the Charities Act 2006 policy process as political\textsuperscript{34}, or even as “charity law being hijacked” to pursue a political agenda. The media\textsuperscript{35} painted a similar picture. Where does this difference stem from? This is one of many questions that require a broader political science approach. Political science methods can cast a different perspective on the issue by not just looking at the word of the law but by gathering empirical data on policy processes and actors. In other words, a political science analysis provides the contextual background that will a) ascertain whether the Charities Act 2006 and its policy process were in fact different from its predecessors, and b) how they were different, and c) why this was the case.

There are (at least) three added benefits to an empirical political science analysis:

1. **Context**: Laws do no operate in a vacuum but are contingent on many factors – institutions, history, event sequences, individual actions\textsuperscript{36} – both for their creation as well as for their operation. Because of this multiplicity of factors, we require a political science analysis that can uncover and unravel these contextual factors and put them in relation to each other.

2. **Empirics**: Of course, the Charities Act 2006 requires a legal interpretation\textsuperscript{37}; yet the actual operation of the Act in the policy environment can be markedly different. As Chapter 2 on theoretical frameworks will show, change ‘on paper’ does not automatically amount to change in policy terms. And even when change on paper does lead to change in policy terms, the former does not necessarily mirror the latter. For this purpose, we need to look beyond the legal text; a political science analysis provides the empirical evidence that helps us understand the Act and its operation upon implementation.

3. **Lessons for the Future**: Even though Lord Hodgson’s five-year review\textsuperscript{38} does not indicate any interest in further charity law reforms and the current Conservative

\textsuperscript{34} See Chapter 8 with interviews from experts and stakeholders within the sector.
\textsuperscript{35} See Chapter 7 for a content analysis of major British newspapers.
\textsuperscript{36} See for instance Howlett and Rayner (2006), p. 2
\textsuperscript{37} There is a considerable amount of controversy around this “legal interpretation” with the academic community being far from in agreement on the matter. See Chapter 6 for a full discussion.
government even explicitly “rejects new legislation on public benefit”\textsuperscript{39}, the Charities Act 2006 and its subsequent consolidation in the Charities Act 2011 will not close the chapter for long. New discussions on political campaigning\textsuperscript{40}, the role of equality legislation\textsuperscript{41}, and new impetus from the European Union on registration require new strategies from all actors. A political science analysis can formulate lessons drawn from the policy-making process that help to formulate future strategies. Informed legislation must take into account these lessons from past, and so do informed policy actors in the public, private, and charitable sectors.

1.3 Outline of the Thesis

The thesis is divided into three sections and ten chapters. Chapter 1 has provided the foundation for the following analysis chapters, setting out the context of the research question and its relevance. Following this overview, Chapter 2 presents the theoretical and methodological approach adopted for the purpose of the study. It sets also defines the research hypotheses together with a quick overview of the methods used. Chapter 3 explains the legal background of the discussion and defines the policy network that can be identified based on the theoretical frameworks presented in Chapter 2.

Section 2 presents the empirical evidence and is divided into the individual policy nodes that make up the network. Chapters 4, 5, 6 and 7 discuss the contribution and agendas of the state policy node, the sector node, the legal community, and the media node, respectively. In addition to written and oral evidence provided to the Joint Committee on the draft Charities Bill and other written publications, the chapters also present additional

\begin{itemize}
  \item Ainsworth, David. ‘Government responds to charity law reviews by select committee and Lord Hodgson’, \textit{Third Sector}, September 2013, accessed online on 6\textsuperscript{th} July 2014 at \url{http://www.thirdsector.co.uk/Policy_and_Politics/article/1210674/government-responds-charity-law-reviews-select-committee-lord-hodgson/}.
  \item For the controversy around the lobbying bill, see for instance \textit{Third Sector}, “One bill gets a post-mortem; another Bill is fighting fires.” 7\textsuperscript{th} February 2014, retrieved online on 10\textsuperscript{th} February 2014 at \url{http://www.thirdsector.co.uk/news/1229604/One-bill-gets-post-mortem-Bill-fighting-fires/?DCMP=ILC-SEARCH}.
\end{itemize}
methodological contributions: Chapter 5 on the sector node includes a survey of independent schools and private non-profit hospitals with charitable status. Chapter 6 on the legal community entails a systematic review of the legal literature; finally Chapter 7 on the media node is based on a content analysis of newspaper articles from major national papers between 1997 and 2012.

Chapters 8 and 9 occupy a special role in this empirical section. The personal, subjective account of key stakeholders is discussed in Chapter 8 based on interviews conducted over the course of 2013. Parts of the interview data are also presented in Chapter 9 on the Scottish public benefit reform and the Charities and Trustee Investment (Scotland) Act 2005.

Finally, section three concludes the analysis in Chapter 10 by drawing together the empirical evidence and the theoretical framework to present the thesis’s conclusions and a call for future research. This chapter also draws from the empirical findings to introduce a refinement of the change theories discussed throughout the thesis: it suggests a) a differentiation of the types of change into technical-legal and political-contextual change, and b) a shift in the level of analysis to individual policy stages.
Chapter 2. Methodology and Theory

2.1 Introduction

To talk about a theory of policy change seems almost tautological. Change is so ubiquitous that it is the absence of change that requires an explanation. One way or another, change is at the heart of political life and so every theory of the policy making process also must account for policy change.42

The thesis’s core question deals with change in the definition of charitable status, in particular through a (renewed) focus on the concept of public benefit. Answering that question requires identifying what has changed, who changed it, when it changed, and most importantly, the process of how change took place. Relatedly, the question of what ‘change’ actually denotes also needs to be addressed.

But there is one underlying premise: The research question assumes that there actually was a perceivable change. The empirical evidence turns out to be somewhat equivocal on that point. On the one hand, a new Charities Act 2006 was passed that entailed a statutory definition of what it means to be a ‘charity’. On the other hand, legal scholars keep pointing out that there is not much change to speak of, at least on public benefit.43 At the same time, parliamentary debate transcripts, media reports, and countless pages of not-for-profit sector briefs and opinions signify that there was at least the intention to induce change. Finding whether or not this change materialised, and whether it did so in the way the different actors had envisioned, is part of analysing the change process. It is apparent that the ‘what?’ and the ‘how?’ of change are thus the most central questions that need to be answered. Given the context of the common law environment in which the change

---


43 It must be noted that the statutory definition of charitable status is referring to a large extent to the existing body of case law; to talk of a purely statutory definition of charitable status can thus be misleading.

44 See Chapter 6.
process occurred, any attempt to answer the ‘what’, ‘how?’, ‘who?’, ‘why?’ and ‘when?’ will entail a significant historical dimension.\textsuperscript{45}

Two candidate theories to explain the change process are the Punctuated Equilibrium Framework (PEF) and the Path Dependency Framework (PDF)\textsuperscript{46}; while the former focuses on process tracing to elucidate the policy-making process with a special emphasis on the role of the media, the latter stands for historical institutionalism\textsuperscript{47} and its reliance on the power of self-enforcing feedback loops that ‘lock in’ policies. As with all theories, these are but road maps that help us navigate – seemingly – disparate facts and events. They are tools that bring order to information that might at first sight appear chaotic and random. In doing so, any theory will necessarily have to prioritise certain aspects and thus inevitably fall short in others.

The following sections will critically discuss both approaches and explain their advantages and disadvantages for the analysis of the particular policy change process discussed in this thesis. Before addressing the specific case selection of England and Wales with select references to Scotland in the section to follow, the paramount question of how to define and conceptualise change for the purpose of this thesis is discussed. This chapter will then set out the core hypothesis flowing from the two theoretical frameworks, juxtaposing them for empirical testing, and then address the possibility of negating or modifying either (or both) theories. This chapter also sets out the research methodology employed to gather the empirical evidence that forms the basis of the thesis.

\textsuperscript{45} Consider, for instance, Van Caenegem’s remark that the “English legal development appears as a historical continuum. There is no obvious rupture, no wholesale wiping out of the legal wisdom of centuries and no division of the law into a pre- and post-revolutionary era. In English law the present is never completely shut off from the past and its historical roots are easily perceived.” Van Caenegem, R.C. Judges, Legislators and Professors: Chapters on European Legal History. Cambridge: Cambridge University Press, 1986: 8.

\textsuperscript{46} Howlett and Rayner (2006) discuss a wider range of theories, yet as the following section will indicate, only PEF and PDF are suitable for the context of this thesis. See “Understanding the historical turn in the policy sciences: A critique of stochastic, narrative, path dependency and process-sequencing models of policy-making over time”, Policy Sciences 39 (2006):1-18.

2.2 Theories of Policy Change Processes: Beyond Punctuated Equilibrium and Path Dependency Frameworks?

It is clear that any causal theory of policy change will have to take into account the historical dimension of change in order to explain the changes to the public benefit requirement in the Charities Act 2006. But it is less clear which one to adopt. Classical stochastic models can be ruled out since their ahistorical connection between dependent and independent variable does not allow for the contextual “thickness” that is required to explain why similar variables did not trigger a change process in one circumstance but did so years or even decades later. This seems to be the case in the development of the public benefit reform, which culminated in the Charities Act 2006: 400 years of relative stability are followed by what has been heralded by some as a fundamental departure from the previous status quo, even though other attempts at updating the legal definition of “charity” had been launched before.48 Still, there remain several contenders that have taken a sufficiently strong “historical turn”, to follow Howlett and Rayner’s terminology.49

Howlett and Rayner identify narrative, path dependency and punctuated equilibrium frameworks as suitable options for a policy change process analysis. This largely corroborates Gilberto Capano’s choice of theoretical frameworks.50 However, the narrative approach does not lend itself to theory-making, standing at the other extreme of the stochastic, ahistorical model. Here, everything is contingent on the particular

---

48 For instance, the Charities Bill leading to the Charities Act 1993 contained an activity-based test for public benefit that was dropped in the actual Act.
51 Capano further adds the Multiple Stream Approach (MSA), and the Advocacy Coalition Framework to his discussion. These can however be disregarded for the purpose of this thesis: The MSA is less useful at the operationalization stage of policy change and can thus not capture the often subtle discrepancy between political and legal language and the resulting problems within the policy-making process (Capano, 2009:19). The Advocacy Coalition Framework, on the other hand, places its main focus on competing belief systems that do not take into account the asymmetrical power position presented by the technical-legal content of the reform.
combination of factors and further extrapolation regarding lessons for any other context are precluded from the analysis.

Thus, we arrive at a choice of two competing frameworks: the Path Dependency Framework (PDF) and Punctuated Equilibrium Framework (PEF). Howlett reaches the same conclusion, suggesting the “Path Dependency and Punctuated Equilibrium as Generational Models of Policy Change”\textsuperscript{52} in his title.

There is another alternative. As Thelen and Streeck\textsuperscript{53} point out, both PDF and PEF share one characteristic: both theories focus on the importance of \textit{radical} change as sole option that can truly alter the policy path. Instead, Thelen and Streeck advocate a closer focus on micro- and meso-level phenomena. Different forms of incremental change, so they suggest, can over time effect a change in the nature of an institution or policy.

The following section will describe the two radical change frameworks PEF and PDF and indicate their main assumptions in preparation for empirical testing. The discussion will be mindful of Thelen and Streeck’s Gradual Transformation Framework (hereafter GTF) as alternative to the two radical change frameworks. Throughout, Capano’s criteria for a well-grounded theory of change will be taken into account. This entails the following components\textsuperscript{54}:

<table>
<thead>
<tr>
<th>Criterion</th>
<th>Points to Consider</th>
</tr>
</thead>
<tbody>
<tr>
<td>Object of Change</td>
<td>• Definition of policy development/change</td>
</tr>
<tr>
<td></td>
<td>• Meaning of ‘Public Policy’ (Howlett and Cashore, 2007)</td>
</tr>
<tr>
<td></td>
<td>• Capano’s defined meanings of “policies”:</td>
</tr>
<tr>
<td></td>
<td>o Arenas of power</td>
</tr>
<tr>
<td></td>
<td>o Institutions</td>
</tr>
<tr>
<td></td>
<td>o Ideational forums</td>
</tr>
<tr>
<td></td>
<td>o Targets of the influence of political institutions</td>
</tr>
<tr>
<td></td>
<td>o Sets of networked relationships</td>
</tr>
<tr>
<td>Type of Change</td>
<td>• Measurement (Incremental or Radical)</td>
</tr>
<tr>
<td></td>
<td>• Level of Abstraction (Macro/Micro Levels)</td>
</tr>
<tr>
<td></td>
<td>• Tempo of Change</td>
</tr>
<tr>
<td></td>
<td>• Logic of Event Progression</td>
</tr>
<tr>
<td></td>
<td>• Scope of Change (Entire Policy/Subfield)</td>
</tr>
<tr>
<td>Output of Change</td>
<td>• Reversible/irreversible</td>
</tr>
<tr>
<td>Operationalisation of Change</td>
<td>• Level of Abstraction</td>
</tr>
<tr>
<td></td>
<td>• Agency versus Structure</td>
</tr>
<tr>
<td>Causal Mechanism of Change</td>
<td>• Explanatory/Independent Variables and their configuration</td>
</tr>
<tr>
<td></td>
<td>• Positivist (linear causality) versus Nomothetic (conditional causality)</td>
</tr>
<tr>
<td></td>
<td>• Endogenous/exogenous Change</td>
</tr>
</tbody>
</table>

Table 2.2.a: Theoretical Change Criteria.

2.2.1 Punctuated Equilibrium Framework

As True et al. put it, “[p]unctuated equilibrium theory seeks to explain a simple observation: political processes are generally characterized by stability and incrementalism, but occasionally they produce large-scale departures from the past.”

This seems remarkably similar to the pattern of policy change governing the law and regulation of charities. 400 years of what seemed like stability in the role of public

---


56 This refers to “possible combinations of causal conditions capable of generating a specific outcome” (Capano, 2009:17) or, as Ragin put it: “Once these combinations are identified it is possible to specify the contexts that enable or disable specific individual causes”. Ragin, C.C. Redesigning Social Inquiry: Fuzzy Sets and Beyond. Chicago: University of Chicago Press, 2006: p.640.

benefit for determining charitable status were interrupted by fundamental reforms through the Charities Act 2006. Most models of policy making can satisfactorily address either of these occurrences – rapid change or continuous stability. Yet, accounting for both is the challenge. It should be noted at this stage that the PEF model described here does not refer to what Howlett terms “‘homeostatic’ version of punctuated equilibrium”\(^{58}\) in which change is a purely exogenous concept and which does not specify the relationship of different independent variables that lead to policy change. PEF is understood in Jones and Baumgartner’s terms that stipulate a theory instead of a purely descriptive account.\(^{59}\) Howlett calls this form of punctuated equilibrium “process-tracing”\(^{60}\), and juxtaposes it to the path dependency framework as it

\[
\text{[...]} \text{ does not rely upon random or purely contingent initial conditions to set trajectories in motion and is not concerned with irreversible sequences. Instead it focuses on conjunctures or punctuations which are ‘contingent’ not in the sense that they are random, accidental or chancelike, but rather in the sense that they are conditional on circumstances arising which can upset the status quo equilibrium (Schedler 2007; Jones, Sulkin and Larsen 2003).}^{61}
\]

Through a combination of political institutional behaviour, interest mobilization and bounded rationality in individual and collective decision-making, PEF is able to analyse and explain both change and stability in relation to the other.\(^{62}\) PEF stresses the importance of issue definition and agenda setting at the subsystem and the macropolitical level.\(^{63}\) Following earlier work on bounded rationality in decision-making\(^{64}\), PEF

---

\(^{63}\) True et al. (2007): p. 156.
suggests that decision-makers are limited in their attention span, and their capacity to process several policy issues at the same time. This means, on the one hand, that issues can be kept contained within an individual subsystem for a long time, thereby creating policy stability. On the other hand, drastic change can occur if the combined attention of several subsystems brings the policy issue to the macro-level. According to PEF, issues can thus “catch fire” given the right combination of policy image change and public policy venues.

One advantage of using PEF as a conceptual and analytical framework its flexibility to allow for exogenous as well as endogenous factors leading to large-scale change. However, this flexibility may come at a price. Givel found counterevidence to PEF, i.e. cases in which exogenous shocks, despite positive feedback reinforcement, did not lead to radical and rapid bursts of policy change. He suggests that PEF only holds when the analysis focuses on the media reaction to related change, yet not when looking at policy outputs. If true, this would drastically reduce the usefulness of PEF as a tool for analysis. However, Givel’s findings themselves suffer from a shortcoming in conceptualizing and operationalizing PEF.

Prindle addresses the problem of transposing a theory originating in the hard sciences to political sciences and public policy. He concludes that, while PEF has overcome certain challenges of the incrementalist model, it loses its theoretical bite and is turned

---

65 “Decisions-makers” in this case refers to both organizations and individuals.
71 A further weakness in Givel’s findings is that he inexplicably excludes endogenous factors from PEF. Nonetheless, his observations need of course to be taken seriously.
73 In this case, the theory was imported from evolutionary biology.
into a descriptive model rather than a causal explanation. Prindle has identified the crux: “change” in evolutionary biology can be operationalized into concrete units of measurement; the same is not true of “change” in political science. In this case, the theory would be left non-falsifiable.

I will put forward the argument that analysing legal change actually does provide us with measurable units that allow us to at least differentiate major and minor change, making PEF operationalisable as a theory and thus falsifiable. In the present case, minor, incremental change manifests itself in legal change, i.e. changes in the rule or possibly even its underlying common law principle. As we will see in Chapter 8 on qualitative interview data, this account is corroborated by accounts of the reforms introduced by the Charities Act 1992 and 1993, which were seen as largely technical exercises. Fundamental change, in contrast, alters the actual policy outcome in empirically perceivable terms, i.e. it changes the way that actors within the affected policy sector as well as the respective regulator(s) operate. In other words, it leads to a change in operating strategy in response to the policy change process.

Our understanding of the 2006 Charities Act benefits greatly from PEF, which provides a close analysis of endogenous variables, such as the institutional set-up. It also conforms to the findings of prominent proponents of PEF that institutions, preferences and information together are at the source of all policy change. As Haydu suggests, PEF “provides a plausible way to represent and account for historical trajectories; it builds social actors and multiple causal timelines into explanatory accounts; and it offers a richer sense of how earlier outcomes shape later ones”. Like de Vries’s ‘policy generations’, it also takes into account shifts in media and governmental attention.

---

75 For instance, a provision that reversed a judicial decision on what counts as a religion, while leaving untouched the principle that the promotion of religion is a charitable purpose.
What PEF does not address, however, is the particular form of change; Peter Hall’s⁸⁰ differentiation into first-, second- and third-order policy change offers a helpful addition to fill this gap. Hall distinguishes between “change in the instruments of policy or the hierarchy of goals that guide their use, rather than simply change in the stringency with which pre-existing instruments are used.”⁸¹ This is complementary to Hacker’s⁸² insights of policy change through drift and conversion as first described by Thelen⁸³.

To conclude, PEF presents a good, if not flawless, theoretical fit that promises a highly illuminating theoretical account of the policy change process that is under consideration in this thesis. Its main tenets are summarised in the table below.

---


⁸³ Streeck and Thelen (2003)
<table>
<thead>
<tr>
<th>Criterion</th>
<th>PEF</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type of Change</strong></td>
<td>✚ Both incremental and radical, depending on context</td>
</tr>
<tr>
<td></td>
<td>✚ Macro analysis</td>
</tr>
<tr>
<td></td>
<td>✚ Evolutionary change with slow/rapid changes in tempo</td>
</tr>
<tr>
<td></td>
<td>✚ Focus on punctuations in agenda setting, policy image construction, legislative behaviour&lt;sup&gt;84&lt;/sup&gt;</td>
</tr>
<tr>
<td></td>
<td>✚ Structure links radical and incremental change</td>
</tr>
<tr>
<td></td>
<td>✚ Simultaneous progression of different actors possible</td>
</tr>
<tr>
<td></td>
<td>✚ Change focused narrowly on punctuations</td>
</tr>
<tr>
<td><strong>Output of Change</strong></td>
<td>✚ Change is reversible (through negative as well as positive feedback)</td>
</tr>
<tr>
<td><strong>Operationalisation of Change</strong></td>
<td>✚ Interplay of agent initiative and spread of policy issue via subfields to agenda state</td>
</tr>
<tr>
<td></td>
<td>✚ Conditioned by structure (i.e. allowing for veto player situations)&lt;sup&gt;85&lt;/sup&gt;</td>
</tr>
<tr>
<td></td>
<td>✚ Independent variables: external events, institutional arrangements, cycles of public attention, dynamics of processing information&lt;sup&gt;86&lt;/sup&gt;</td>
</tr>
<tr>
<td><strong>Causal Mechanism of Change</strong></td>
<td>✚ Nomothetic</td>
</tr>
<tr>
<td></td>
<td>✚ Allowing for both endogenous and exogenous change, with a particular focus on the role of the media/public attention and partisan change</td>
</tr>
</tbody>
</table>

<sup>Table 2.2.1</sup>: PEF criteria for policy change.

### 2.2.2 Path Dependency Framework

History matters, not just in terms of context but also because of its effect of arranging events in particular chronological sequences. As part of the historical streak within the neo-institutionalist body of theory, the path dependency framework pays particular attention to such structured sequencing of policy processes.<sup>87</sup> Institutions (including policies) are part of this structuring process by setting rules or norms that condition

---

<sup>84</sup> Capano (2009): table 2.
behaviour. This applies equally to policies as Howlett and Hacker argue. In particular, Hacker suggests that:

First, policy creates or encourages the creation of large scale organizations with substantial set-up costs; second, a policy directly or indirectly benefits sizable organized groups or constituencies; third, a policy embodies long-lived commitments upon which beneficiaries and those around them premise crucial life and organizational decisions; fourth, the institutions and expectations a policy creates are of necessity densely interwoven with the broader features of the economy and society, creating interlocking networks of complementary institutions; and fifth, features of the environment within which a policy is formulated and implemented make it harder to recognize or respond to policy outcomes that are unanticipated or undesired.

In contrast to PEF, change according to the Path Dependency Framework (PDF) is difficult to achieve and at best incremental in nature. Once a path has been set, policies (just like institutions) tend to follow historical precedent until exogenous forces break the pattern. Howlett and Rayner refer, for instance, to Mahoney’s three principles of path dependency: “(1) only early events in a sequence matter; (2) these early events are contingent; and (3) later events are inertial.” Change in this conception cannot be

88 Hall and Taylor (1996)
89 Howlett (2009)
90 Hacker (2002)
93 Howlett and Rayner (2006)
predicted and can occur with equal probability at any time. Once it does occur, however, structures, both interpersonal and institutional, will adjust so as to lock-in the new status quo and begin a renewed period of path dependency.

Pierson\textsuperscript{97} explains PDF’s remarkable stability through increasing returns, what he calls ‘positive feedback loops’, that lock a policy in; the initial institutional (or in this case, policy) design sets a particular set of incentives and ‘rules of the game’ that individual actors follow because they find it mutually beneficial.\textsuperscript{98} The sources of increasing returns are manifold. Burt\textsuperscript{99}, for instance, suggests that the impact of a group’s discourse can be more powerful in creating positive feedback loops than sheer group size and group cohesion.\textsuperscript{100}

A short-coming that PDF shares with PEF is the frequent mis- or under-specification of the dependent variable: more often than not, “policy” as a dependent variable is not defined in specific terms, so that it is not clear whether the unit of analysis is on the macro-, micro-, or meso-level.\textsuperscript{101} More importantly, it is very difficult to link contingencies in the path dependency model; short of exogenous factors (arrival of new actors, changed socio-economic conditions, economic shock, change in government, etc.), it is almost impossible to predict when change is likely to occur despite entrenched positive feedback loops that promise increasing returns.\textsuperscript{102}

\textsuperscript{97} Pierson (2000)
\textsuperscript{98} At this point, it should be noted that this dissertation will not adopt the assumption of rational actors in decision-making; while research confirms that rationality is a good “on average” assumption about individual behaviour, this dissertation is concerned with the tracing and understanding a particular event – the reform of the public benefit test in the Charities Act 2006 – rather than strict theory testing, which is the predominant epistemological outlook of RCT.
<table>
<thead>
<tr>
<th>Criterion</th>
<th>PDF</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type of Change</strong></td>
<td>⇨ Both incremental change explained (radical change at critical junctures unaccounted for without exogenous influence)</td>
</tr>
<tr>
<td></td>
<td>⇨ Micro, meso and macro analyses possible, but mostly focused on meso- or macro-level</td>
</tr>
<tr>
<td></td>
<td>⇨ Disconnected evolution through long-run through institutional stickiness</td>
</tr>
<tr>
<td></td>
<td>⇨ Simultaneous progression of different actors possible</td>
</tr>
<tr>
<td></td>
<td>⇨ Change across full policy</td>
</tr>
<tr>
<td><strong>Output of Change</strong></td>
<td>⇨ Change is irreversible as locked in through increasing returns through feedback loops</td>
</tr>
<tr>
<td><strong>Operationalisation of Change</strong></td>
<td>⇨ Reductionist</td>
</tr>
<tr>
<td></td>
<td>⇨ Structure over agency</td>
</tr>
<tr>
<td></td>
<td>⇨ Independent variables: contingency, chance, self-organised innovation</td>
</tr>
<tr>
<td><strong>Causal Mechanism of Change</strong></td>
<td>⇨ Positivist</td>
</tr>
<tr>
<td></td>
<td>⇨ Non-linearity</td>
</tr>
<tr>
<td></td>
<td>⇨ Only meaningful change is exogenous, otherwise preservation of status quo through path dependency and feedback loop that reinforce existing infrastructure</td>
</tr>
</tbody>
</table>

*Table 2.2.2: PDF criteria for policy change.*

**2.2.3 Theoretical Caveats: Gradual Transformation Frameworks**

There are certain challenges that both approaches have difficulties in addressing satisfactorily. Like Thelen and Streeck, Hacker, for instance, points out that “crucial policy changes have in fact taken place over the past three decades, despite general stability in formal policies.”

Change, so he argues, can take several forms and has generally been taking place, yet not through “large scale legislative reform, but a set of decentralised and semiautonomous processes of alteration within existing policy bounds”.

---


103 Capano (2009): table 2
105 Hacker (2004a), p.244.
Thus, Hacker concludes, ‘change’ is not a binary phenomenon that is either characterised by sudden, significant shifts or slow incremental change over time. Depending on the particular institutional set-up, Hacker argues that change can take multiple forms. These observations are particularly relevant as they target the main criticism that has been raised to both PEF and PDF and that was highlighted in the previous section: under-theorising the actual change process on a micro-level. This may be partially attributable to most authors’ failure to distinguish clearly between the different levels of change. True or Cashore and Howlett, for instance, suggest that change is a constant feature at the lower levels (sub-systemic or policy elements) while higher-level change (system-wide, entire policy fields) is far less frequent. Thus, lower level change could easily be mistaken for stability and path dependency if the focus of analysis is only directed at the macro-level.

These insights also pose interesting questions for policy strategists. One of the questions surrounding the public benefit test and its reform in the Charities Act 2006 is whether the government seized the opportunity to ‘hijack’ charity law in order to achieve their policy goals in the education sector, in particular their policy on independent schools. The different change frameworks set widely differing context in which such a scheme could be successful, a difference that may make or break a government’s policy plans.

So what does the change process look like then? A group of New Institutionalist scholars, most notably Thelen and Streeck, Hacker, Thelen, Schickler, and to a

---

107 For PEF, Givel (2000) for instance suggests that the measurement as well as the unit of change are making PEF a tricky framework outside of the environment of evolutionary biology; PDF on the other hand has been criticised for explaining mainly stability but not providing an adequate explanation of change.
108 True et al. (2000)
109 Cashore and Howlett (2006)
110 For one such argument, see Alison Dunn (2012).
111 PEF, for instance, highlights the role of the media as a crucial variable, whereas GTF suggests that low-visibility incremental policy changes may link education and charity policy.
112 Thelen and Streeck (2005)
114 Thelen (2003)
certain extent Pierson\textsuperscript{116}, suggest a more pronounced micro- and meso-level focus of change that are accompanied by distinct actor strategies that add to the understanding of policy change. These will be referred to as Gradual Transformation Frameworks (GTF). Neither of these New Institutionalist frameworks is \textit{per se} mutually exclusive with either radical or incremental change at a macro-level as described by PEF and PDF, but provides a richer – and sometimes alternative – account of potential causes on the micro-level.

The most useful New Institutionalist framework has been put forward by Kathleen Thelen and Wolfgang Streeck in their edited volume “Beyond Continuity”\textsuperscript{117}. They criticize the underspecification of the dependent variable “change” and an excessive focus on stability in both PEF and PDF. Instead, they suggest a focus on “gradual change” that is characterized by an incremental change process that leads to a discontinuity in the result of the change, or what could be termed “radical change” in terms of PEF and PDF.

<table>
<thead>
<tr>
<th>Process of Change</th>
<th>Result of Change</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Incremental</strong></td>
<td>Reproduction by Adaptation (Stability in PDF and PEF)</td>
</tr>
<tr>
<td><strong>Disruptive</strong></td>
<td>Survival and Return (Radical Change in PEF and Critical Juncture in PDF)</td>
</tr>
</tbody>
</table>

\textit{Table 2.2.3.a: Thelen and Streeck (2005) change matrix}\textsuperscript{118}

\textsuperscript{116} Pierson (2000)
\textsuperscript{117} Thelen and Streeck (2005).
Thelen and Streeck suggest an alternative New Institutionalist theory of institutional change based on a typology of five types of gradual transformation: displacement, layering, drift, conversion and exhaustion.
### Table 2.2.3.b: Gradual Change Framework Processes.

<table>
<thead>
<tr>
<th>Gradual Change Type(^{119})</th>
<th>Displacement</th>
<th>Layering</th>
<th>Drift</th>
<th>Conversion</th>
<th>Exhaustion</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Description</strong></td>
<td>Slowly rising salience of subordinate relative to dominant institutions</td>
<td>New elements attached to existing institutions gradually change their status and structure</td>
<td>Neglect of institutional maintenance in spite of external change resulting in slippage in institutional practice on the ground</td>
<td>Redeployment of old institutions to new purposes; new purposes attached to old structures</td>
<td>Gradual breakdown (withering away) of institutions over time</td>
</tr>
<tr>
<td><strong>Action</strong></td>
<td>Defection</td>
<td>Differential growth</td>
<td>Deliberate neglect</td>
<td>Redirection, reinterpretation</td>
<td>Depletion</td>
</tr>
<tr>
<td><strong>Change Process</strong></td>
<td>Institutional incoherence opening space for deviant behaviour</td>
<td>Faster growth of new institutions created on the edges of old ones</td>
<td>Change in institutional outcomes effected by (strategically) neglecting adaptation to changing circumstances</td>
<td>Gaps between rules and enactment due to: (1) Lack of foresight: limits to (unintended consequences of) institutional design (2) Intended ambiguity of institutional rules: institutions are compromises (3) Subversion: rules reinterpreted from below (4) Time: changing contextual conditions and coalitions open up space for redeployment</td>
<td>Self-consumption: the normal working of an institution undermines its external preconditions Decreasing returns: generalization changes cost-benefit relations Over-extension: limits to growth</td>
</tr>
<tr>
<td><strong>Institutional incoherence</strong></td>
<td>Active cultivation of a new “logic” of action inside an existing institutional setting</td>
<td>New fringe eats into old core</td>
<td>Enactment of institution changed, not by reform of rules, but by rules remaining unchanged in the face of evolving external conditions</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Rediscovery and activation of</strong></td>
<td>Rediscovery and activation of dormant or latent institutional resources</td>
<td>New institutional layer siphons off support for old layer</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>dormant or latent institutional resources</strong></td>
<td>“Invasion” and assimilation of foreign practices</td>
<td>Presumed “fix” destabilizing existing institutions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Compromise between old and new slowly turning into defeat of the old</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

This thesis offers a good testing ground to see in how far PEF and PDF can explain policy change on a macro-level, and in how far they stand up to closer micro-level

---

scrutiny. Therefore, the analysis will be mindful of Thelen and Streeck’s GTF. The final Chapter 10 will use the empirical evidence from previous chapters to identify which GTF change process best describes the Charities Act 2006 reforms. Possible combinations of frameworks are also explored, especially the inclusion of GTF micro- and meso-level variables into the more macro-level oriented PEF and PDF frameworks.

2.3 Methodology
Referring to Capano’s criteria for the adequate conceptualisation and operationalization of change, it is appropriate to turn to the definitional hypotheses that will inform the remaining methodology section in this chapter, and the empirical research conducted for the purpose of this thesis:

1) Conceptualisation of change as incremental or radical depending on legal change and empirically detectable change in outcome.
   - The level of abstraction is at the meso-level.
   - Tempo of change is medium-run (ca. 1996-2013).
   - Logic of event progression is based on temporal sequencing.
   - Scope of change as either incremental or radical change (see previous section) through either or both legal change or change in outcome.

2) Operationalisation of Change
   - Several factors at play.
   - Interaction of structure and agency.

2.3.1 Definitions, Conceptualisation and Operationalisation of Dependent and Independent Variables
Leaving the purely theoretical realm, the following sections of this chapter will discuss the methodology adopted for the purpose of this thesis. This entails the definition, conceptualisation and operationalization of variables, as well as research hypotheses, associated research methods and case selection justification. The following table
summarises the main thesis specifications, using Capano’s\textsuperscript{120} criteria for research design on policy change.

<table>
<thead>
<tr>
<th>Criterion</th>
<th>Thesis Specification</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Object of Change</strong></td>
<td>➜ Public Benefit as element of definition of charity and condition for charitable status as expressed in Charities Act 2006</td>
</tr>
<tr>
<td></td>
<td>➜ Policy as test to a) qualify as charity upon registration, and b) keep that status</td>
</tr>
<tr>
<td></td>
<td>➜ Policy also entails role of Charity Commission as institution in charge of this test</td>
</tr>
<tr>
<td></td>
<td>➜ “Change” defined as legal or outcome</td>
</tr>
<tr>
<td><strong>Type of Change</strong></td>
<td>➜ Hypothesising stability with incremental updates, but real policy change only through radical change</td>
</tr>
<tr>
<td></td>
<td>➜ Meso-level analysis</td>
</tr>
<tr>
<td></td>
<td>➜ Tempo of change based on electoral cycle (government’s policy making process)</td>
</tr>
<tr>
<td></td>
<td>➜ Simultaneous progression of different actors with differing outcomes in mind</td>
</tr>
<tr>
<td></td>
<td>➜ Scope of change is entire policy of charitable status</td>
</tr>
<tr>
<td><strong>Output of Change</strong></td>
<td>➜ Change is reversible</td>
</tr>
<tr>
<td><strong>Operationalisation of Change</strong></td>
<td>➜ Emergentist rather than reductionist\textsuperscript{121}</td>
</tr>
<tr>
<td></td>
<td>➜ Change is agent-driven</td>
</tr>
<tr>
<td><strong>Causal Mechanism of Change</strong></td>
<td>➜ Nomothetic</td>
</tr>
<tr>
<td></td>
<td>➜ Change is endogenously driven by positive and/or negative returns and determined through the alignment of interests up to a critical number of policy subfields, in particular through the use of discourse to influence media/public opinion</td>
</tr>
</tbody>
</table>

\textit{Table 2.3.1.a: Thesis Criteria Specification.}

\textbf{The Dependent Variable}

\textit{What} we are observing is a cornerstone in any research design, and because of the ubiquity of change on various levels and in various forms, defining, conceptualising, and operationalising the dependent variable is not straightforward. The previous theoretical discussion has yielded two insights: first, the dependent variable under investigation is the change in the public benefit test in the Charities Act 2006; and secondly, as Howlett

\textsuperscript{120} Capano (2009)

\textsuperscript{121} This means that the overall change may be greater than the combined sum of its individual variables.
suggests, both PEF and PDF can be said to consider time as a ‘dependent variable’ as they seek to “[understand] how and why sequences or trajectories of policy events occur and develop as they do.”\textsuperscript{122} The analysis does not just focus on the dependent variable in a static way but is concerned with how it responds to the combination of independent variables over time and various contextual constellations.

The Independent Variables
Both approaches include a host of independent variables that represent the complexity of the policy-making environment. Capano\textsuperscript{123} suggests potential combinations of ideas, interests, institutions, socio-economic structures, political institutions, internationalization, individual entrepreneurship, social culture and values.\textsuperscript{124} Since this analysis is exploratory and historically-empirical rather than purely concerned with theory testing, the process is inductive rather than deductive. Thus, the actual data gathering process will indicate which independent variables have in fact been (or at least have been perceived to be) influencing the particular policy outcome to be explained. Guided by the theoretical frameworks, the following set of independent variables can be suggested:

\textsuperscript{123} Capano (2009).
\textsuperscript{124} Capano (2009):8.
<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>Conceptualisation</th>
<th>Operationalisation</th>
</tr>
</thead>
</table>
| **Agency**           | Actors following the agenda that promises them the greatest pay-off (in utility rather than monetary terms) | • Incentives of actors in  
  o Charity Commission  
  o Legal Community  
  o Government  
  o Private Sector  
  o Charities |
| **Systemic factors** | Institutional set up/structure of charity law and regulation in England/Wales and Scotland | • Formal interplay between institutions/agencies/actors  
  o Legislative process  
  o Regulatory process  
  o Inter/intra-departmental lines of communication |
| **Values**           | Understanding of moral value of “charity” on various levels                        | • Public opinion polls  
  • Publications by key stakeholders (e.g. party programme, white paper, guidance, speeches, etc.) |
| **Media Attention**  | Shift in “hot issues” that are taken up by media                                   | • Newspaper reporting  
  • Charity sector publications |
| **Exogenous Shock**  | Sudden and unpredictable event that occurred independent and outside the charity arena but still affects charity policy. | • Change in Government  
  • Economic Crisis  
  o Drop in donations  
  o Drop in subsidies |
| **Endogenous Shock** | Sudden and unpredictable even that occurred within the charity arena, involving one or more sector agent. | • Scandal involving a/several charity/ies |
| **Policy Environment** | New “issue(s) of the day” in other policy arenas                               | • Influence of non-domestic policies, such as from EU or Scotland  
  • Party platform on related policies (e.g. education)  
  • Lobbying  
  • Key cases/decisions (especially Charity Tribunal) |

*Table 2.3.1.b: Research Design Summary.*
2.3.2 A Note on Epistemology in Interdisciplinary Research

Epistemological specifications are often a neglected category in research; while the effects of this oversight rarely become an issue for research within the bounds of a single discipline, interdisciplinary research brings potential tensions to the forefront. Epistemology “reflects one’s view of what can be known about the world and how it can be known.”\(^{125}\) Nothing is value neutral. Differences can reach from ethical considerations in research design (e.g. the applicability of involving vulnerable subject groups in experiments) to one’s view of metaphysical underpinnings (e.g. chaos versus order as status of the world).\(^{126}\)

The gap between political science and the law is, fortunately, not as wide as these two examples might suggest. Yet, as Maienschein\(^ {127}\) suggests, it does affect the way that the two disciplines judge “acceptable practice and how theory and practice should work together to yield legitimate scientific knowledge”\(^ {128}\). Especially the common political science practices of seeking to infer causality among multiple variables, hypothesis testing and gathering empirical evidence for or against theoretical frameworks may seem unfamiliar to legal scholars. This is particularly so in a common law tradition that relies heavily on a history of recorded decisions, made by select individuals (case law) rather than high-level principles (equity). Conversely, political scientists may find the self-imposed conventions and unwritten rules that guide English legal culture hard to grasp and tend to establish assumptions about judicial reasoning and decision making without a clear understanding of English jurisprudential traditions.

While a certain tension cannot be avoided, the following analysis will at all times remain mindful of potential misunderstandings in terminology. In a sense, this unavoidable tension can be transformed into a productive asset; it provides a further incentive to be precise in formulating definitions. The shared research tradition of socio-legal studies and empirical research in law provides a bridge that joins the two disciplines.

\(^{126}\) Repko (2012)
2.3.3 Research Hypotheses

This dissertation is opting for a predominantly thick analysis, focusing on contextual detail rather than strict theory testing. Its purpose is not to find evidence for or against any of the three theoretical frameworks (although such a test may be a necessary by-product of the analysis) but to contribute to our understanding of policy change processes in general and in the realm of the third or charitable sector in particular. The following hypotheses guide the remaining thesis rather than serve as a strict research agenda. Three hypotheses serve as benchmark for comparisons among different forms of change.

**Hypothesis 1: The changes to the public benefit test in the Charities Act 2006 mark a radical and sudden policy change after a long period of stability.**

*Testing:* There is empirical evidence for overall policy change as result of radical and sudden change. If Hypothesis 1 is confirmed, this indicates evidence in favour of PEF and PDF. Depending on whether the change is endogenous or purely exogenous, there is evidence for PEF or PDF respectively. Lack of radical and sudden policy change provide evidence for incremental change according to GTF.

*Indicators:* Qualitative evidence from legal literature (systematic review) for purely legal change; qualitative evidence from interviews, archival data, and newspapers (archival research and content analysis) for political policy change; qualitative data from interviews and survey for the evaluation of actual outcomes expected before and perceived after implementation.

**Hypothesis 2: The changes to the public benefit test in the Charities Act 2006 were introduced through endogenous variables.**

*Testing:* Accounts of interview participants as well as transcripts and other primary sources indicate agency of key actors that stems from their own motivations rather than their response to an exogenous shock. Confirmation of hypothesis 2 is evidence in favour of PEF and GTF (depending on radical or incremental nature of change, see H1), while evidence for an exogenous trigger favours PDF.

*Indicators:* Qualitative data from interviews and archival data.
Hypothesis 3: The origin of recommended change to the public benefit test in the Charities Act 2006 can be traced across policy arenas.

Testing: Accounts of interview participants as well as transcripts and other primary sources that indicate a sequential progression of events with the issue of public benefit reform spreading overtime, with a crucial boost by heightened media attention. If Confirmation of hypothesis 3 evidence in favour of PEF and certain forms of GTF (depending on radical or incremental nature of change, see H1), while lack of evidence for such a sequence favours PDF.

Indicators: Qualitative evidence from legal literature (systematic review) and interviews, archival data, and newspapers (archival research and content analysis).

2.3.4 Research Methods

To make it easier to compare the individual methods, table 2.3.4 presents an overview of the research methods used in this thesis, including their purpose, added value and role in hypothesis testing.
<table>
<thead>
<tr>
<th>Method</th>
<th>Purpose</th>
<th>Brief Description</th>
<th>Added Value to the Thesis</th>
<th>Hypothesis Testing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Systematic Review</td>
<td>To obtain a clearer picture of the state of the academic literature on public benefit in the Charities Act 2006</td>
<td>Computer-based literature search followed by hand-sorting to narrow down sample to be coded along several key indicators (e.g. description of process as political or legal; references to healthcare organisations in addition to independent schools, etc.)</td>
<td>Assessment of the level of disagreement within the legal/scholarly community and spotting of potential systematic factors that can be associated with the respective stance on the question of public benefit reform.</td>
<td>H1, H3</td>
</tr>
<tr>
<td>Comparative Legal/Archival Analysis</td>
<td>To understand the legal system and its main actors (individuals as well as institutions)</td>
<td>Intensive analysis of statutes and acts, as well as the legal history marking 400 years of charity law in England and Wales</td>
<td>Necessary grasp of the legal system and its demarcations Foundation for all future analysis, in particular selection of participants for elite interviews and social network analysis</td>
<td>H1, H2, H3</td>
</tr>
<tr>
<td>Archival Analysis</td>
<td>To gain a firm understanding of the current scholarship on the topic, as well as primary resources outside of a strictly legal context</td>
<td>Qualitative analysis of primary and secondary sources on the Charities Act 2006 and the debate regarding the public benefit condition</td>
<td>Ibid, plus identification of subsystems, as well as salience of policy image in public discourse</td>
<td>H1, H2, H3</td>
</tr>
<tr>
<td>Content Analysis</td>
<td>To find evidence for or against the PE hypothesis that policy images change in subsystems, increasing media attention until fundamental change is reached at the macro-political level.</td>
<td>Analysis of the trends in popular news outlets, following a specific word search of key terms across newspaper editorials within England and Wales.</td>
<td>Generating empirical data to test the PE assumption of trends in media attention and the policy image of charity law and regulation issues.</td>
<td>H1, H3</td>
</tr>
<tr>
<td><strong>Elite Interviews</strong></td>
<td>To understand the motivations, thought processes and decision-making processes of pivotal actors involved in the policy making process</td>
<td>Qualitative analysis of first-hand, personal accounts of the policy making process as perceived by key actors</td>
<td>Qualitative primary data representing actors' perception of the policy making process Adding additional level to analysis, capturing full richness of data not captured in comparative legal and archival analyses</td>
<td>H1, H2, H3</td>
</tr>
<tr>
<td>----------------------</td>
<td>-------------------------------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------</td>
<td>---------</td>
</tr>
<tr>
<td><strong>Survey Analysis</strong></td>
<td>To gain insights into the so far unassessed status of public benefit accounting in healthcare charities</td>
<td>Online-based multiple choice survey (with select open answer field options) based on the Sheffield Hallam University report.</td>
<td>Empirical data indicating whether or not the Charities Act 2006 and the pertaining public benefit test reform have resulted in behavioural change among fee-charging charities other than independent schools.</td>
<td>H1</td>
</tr>
</tbody>
</table>

*Table 2.3.4: Research Methods Overview.*
2.4 Case Selection

The main subject of analysis will be the Charities Act 2006 that applies to England and Wales. Over the years, there has been much controversy about the (de)merits of case study research and their role in the generation of scientific knowledge within political science and public policy. Following Eckstein\textsuperscript{129}, the approach is to adopt a ‘crucial case study’ design that will test the theoretical frameworks of PEF and PDF. Eckstein suggests that case studies are most valuable in their role of testing theories, especially on a “macrocosmic level”\textsuperscript{130}. Verba also argues that macro-level cases are “immensely complicated and cannot be accounted for by one or two simple causes”\textsuperscript{131}, thereby emphasising the necessity for close attention to multiple variables and thick analysis.

Crucial case studies seek to test theories – in this case PEF and PDF – and to move beyond the “inductive fallacy”\textsuperscript{132} that theories require a vast number of data points at the cost of detailed analysis and inspection. The Charities Act 2006 in England and Wales provides a most-likely case, i.e. a case in which the evidence for both frameworks is present and requires further investigation to evaluate their respective explanatory power. While this replicates Givel’s research agenda (albeit in another sphere of policy-making), the proposed approach calls for a more rigorous system of conceptualising and operationalising the dependent and independent variables.

Looking at the Charities Act 2006 in England and Wales as a simple “n=1” does not capture the complexity of the policy process. Analysing the specific factors that led to the Charities Act 2006 and its reform of public benefit, previous instances in the same locality but across time need to be accounted for. Instead of a simple ‘one locality, one case study’, there indeed is a strong comparative element of potential critical junctures.

\textsuperscript{132} Eckstein (2009)
and policy windows over time. Previous commissions sought wide-reaching change, yet ultimately did not achieve it.

Beyond the conceptual reasons to adopt a case study approach, there is also a clear pragmatic motivation. The multi-variable, thick analysis of the policy process at hand requires the same rigour and preparation than a comparative study focusing on a smaller number of variables. The adoption of a case study design is not only the conceptually most sound but also efficient solution.

The design is comparative in two respects: Firstly, Eckstein suggests that a “case study is generally a better choice than comparative study for testing theories in macropolitics, but the type of case study useful for this purpose requires a kind of prior knowledge for which preliminary comparative study (of a limited kind) may often be useful or even necessary”. The Statute of Elizabeth formed the foundation of charity law in all common law jurisdictions, and several other countries (notably so Canada and Australia) attempted comprehensive reform of the magnitude found in England and Wales. However, they did not materialise. Consequently, there is good reason to be concerned with establishing why this particular case occurred when it did, as well as why it happened in England in Wales, yet not elsewhere.

Secondly, the thesis contains a separate chapter on Scotland. While time and resources did not allow for the detailed process tracing of the Scottish reforms that would be required for a full comparative study, it nonetheless provides important insights into general policy lessons and idiosyncratic English factors. Scotland adopted the Charities and Trustees Investment (Scotland) Act 2005 shortly after devolution created an independent Scottish parliament and faced similar discussions in the policy-making process. Moreover, many of the actors involved fulfilled a dual role, for instance being former members of the English and Welsh Charity Commission and later becoming

---

133 Eckstein (2009).
135 Canada’s reform process came to a halt in 1998, while the change in government after the Australian Charity Act was passed in 2013 after lengthy political debate.
136 See Chapter 9.
members on the Scottish McFadden Commission on whose recommendations the 2005 Act is based.
Chapter 3. Legal Background and Policy Network

Section 3.1 provides an introduction to the legal background of the reform, in particular of public benefit. To understand the content and goal of the reform, the historical evolution of charity case law will be discussed with a particular focus on key cases, such as *Pemsel*\textsuperscript{137} and *Re Resch*\textsuperscript{138}. Of course, the legal background section will also analyse the content of the reform in the light of its historical origins. Finally, it will take a closer look at the role of the Charity Commission and the changes introduced by the Charities Act 2006.

The second part of this chapter, section 3.2, introduces the main actors that were part of the reform process. These include the state, the third sector, the legal community, and the media. Both parts together form the backdrop of the following analyses in Chapters 4 to 10.

3.1 Legal Background

3.1.1 Pre-19\textsuperscript{th} Century Foundations of English Charity Law

From Church to Crown

While most treatises on English charity law cite the Charitable Uses Act 1601 as a starting point, it only marks the entrenchment of a historical evolution in the legal treatment of charity. The beginnings of charity law date back to religiously inspired philanthropy. Under the wings of the church, charity law emerged from the decisions of

\textsuperscript{137} Section 3.1.5
\textsuperscript{138} Section 3.1.4
ecclesiastical courts\textsuperscript{139} in the 13\textsuperscript{th} century. Bromley\textsuperscript{140} refers to this period as the era of “Religious Philanthropy”. Gareth Jones\textsuperscript{141} traces its origins back to Gregory IX’s papal decretal of 1215\textsuperscript{142}. In line with church policy, the Pope actively encouraged charitable over private bequests\textsuperscript{143}. In fact, the Church suggested a list of charitable purposes close to the pre-2006 list of purposes that was set out in the preamble to the Charitable Uses Act 1601\textsuperscript{144}.

Yet, the Church’s advocacy role was not entirely a reflection of Christian devotion and charity. Rather, it allowed the Church to justify bequests to its clerics or parishes. Charity was understood as a revenue stream for the Church itself, and thus also for its social goals, primarily the relief of poverty in line with Christian ideals. However, poverty did not always figure prominently. Since ecclesiastical courts had jurisdiction over charitable bequests, there was a wide scope for abuse. It does not take much imagination to understand the Crown’s scepticism toward the pre-Reformation Church’s stake in charity. And so the formalisation of charity law took its next big step during the Tudor rule, most notably under Henry VIII.\textsuperscript{145} In 1545, Henry finally outlawed the practice of chantries to address the abuse of charitable bequests – but of course also to guide charitable bequests into a more Crown policy-friendly direction.\textsuperscript{146} Nonetheless, this does not quite mark a truly secular notion of charity yet. Reflecting the changing face of English philanthropy, charity was still perceived as a religious duty, even though it was now directed by the Crown. But as religion changed with the Reformation, so did English philanthropy,\textsuperscript{147} taking on a more pronounced secular character.\textsuperscript{148}

\textsuperscript{143} Jones (1969): p.3.
\textsuperscript{144} Jones (1969): p.4.
\textsuperscript{146} See 37 Hen Viii c 4; this evolution marks an interesting parallel to the Charities Act 2006 in so far as scandals were suggested as one possible trigger for reform.
\textsuperscript{147} Bromley hence entitles this period as “Reformation Philanthropy”, see Bromley (1993/4).
The Henrican statute lapsed with Henry’s death, and was replaced by I Edward VI c.14. Edward continued Henry’s policy of favouring charitable bequests, yet his line of argument ran closer along theological reasons.\footnote{Jones (1969): p. 12 and p.15.} His statute nonetheless bolstered the Crown’s position, and other jurisdictional changes, most importantly the shift of responsibility for charitable legacies from ecclesiastical courts to the Chancery, reflected this policy.

For the Crown, charity was a means to alleviating the most pressing social issues that could potentially provide fertile ground for the spark of discontent and revolution. It was a form of private funding for policy interests in the public sphere. As Jones suggests, the Crown had a distinct “interest in utiliz[ing] every economic asset for the relief of poverty”\footnote{Jones (1969): p.21.}. Tantamount to its interest in public funding for itself, the Crown also developed an interest in the administration of such assets. Thus, the Crown used legislation to direct public funds in desirable policy directions. Determining the legal framework for how charitable bequests could be spent, and what requirements they had to fulfil in order to be valid, was a suitable tool to do so. Especially under Elizabeth I., the idea that private funds could substitute for state spending had come to full fruition. Not only did her Charitable Uses Acts determine the course of charity law for the following 400 years; one might also be inclined to see it as one of the earliest conceptions of private-public partnerships.

The Influence of the Charitable Uses Acts of 1597 and 1601

Elizabeth I’s reign led to two Charitable Uses Acts: the Act itself in 1597\footnote{39 Elizabeth I c.6}, and a following correction in 1601\footnote{43 Elizabeth I c.4}. The quintessential part that proved to have such a long-lasting effect on charities within the jurisdiction of the common law is the Act’s preamble\footnote{While the 1601 Act addressed some of the shortcomings of its predecessor, such as the lack of jurors and the difficulty of appeal (see Jones (1969): pp.24f.), it left the preamble fully intact.}. One should also note the consultative nature of proceedings leading to the
revision to the 1597 Act\textsuperscript{154}, a first exercise in joint committees and reports that those who follow the Charity Commission nowadays will know only too well. Similar to the rounds of deliberation leading up to the Charities Act 2006, the 1601 update of the Charitable Uses Act included an entire network of stakeholders and numerous rounds of expert opinion gathering.\textsuperscript{155}

Although it carries “Charitable Uses” in its name, the Act did not, at first, have any significant impact on the relief of poverty or other forms of charity. In fact, it was considered of only minor importance among the canon of poor relief legislation passed in the late 16\textsuperscript{th} and early 17\textsuperscript{th} centuries.\textsuperscript{156} Nonetheless, the acts entrenched the cornerstones of charity administration. For instance, it introduced a system of commissioners that operated on a decentralized level.\textsuperscript{157} These commissioners could be approached to adjudicate on whether a bequest fulfilled the standards of charity, or whether it was void and its contents should be paid out to the deceased’s next of kin.

Nonetheless, the system continued to exhibit a host of inefficiencies. Due to its complexity, it heavily relied on the goodwill of all involved and a sheer endless patience for the final decision to be reached. As one charity commissioner in the mid-19\textsuperscript{th} century suggested “the persons beneficially interested under [a charitable trust] are seldom in a position to originate measures affecting their government, and the disposition of disinterested persons to undertake such measures with a single view to the benefit of their objects cannot always be relied on.”\textsuperscript{158} It seems that even over the centuries, the basic complaints directed toward charity law and its administration remain virtually unchanged.

The Civil War brought this process of charity law development to an abrupt halt; it also ended the high time of the commissions, which were officially disbanded in 1787\textsuperscript{159}. By

\textsuperscript{154} For a description, see Jones (1969), p. 25.
\textsuperscript{159} Jones (1969): p. 56.
then, however, a set of privileges in the treatment of charities had already been formed\textsuperscript{160}: the Chancellor would hear cases even without a minimum litigation value; the statute of limitations did not apply; and cy-près\textsuperscript{161} was practised.\textsuperscript{162}

It was not until the mid-18\textsuperscript{th} century that the substantive law of charity changed.\textsuperscript{163} Jones describes the main factor as the “18\textsuperscript{th} century lawyer’s concern to protect the heir and next-of-kin from the charitable caprices of their ancestors”\textsuperscript{164}. It found expression in the Mortmain Act of 1736, which made all charitable monetary income payable from land go to direct heirs.\textsuperscript{165} While most privileges of charitable trusts survived, some were removed, for instance the ability to make oral wills if a property was to be passed on to charity.\textsuperscript{166} The fulfilment of debt payments was also to be considered before charity\textsuperscript{167} and some charitable bequests were allowed to fail.\textsuperscript{168}

However, staunchly set in precedent, the case law proved already too powerful to be simply ignored, even if the spirit of the time favoured the interests of heirs over those of unrelated beneficiaries in need of charity. While the Mortmain and Charitable Uses Act of 1888 repealed the Charitable Uses Act of 1601, the preamble remained, and by the time the 1888 Act was itself repealed by the Charities Act 1960, “the somewhat ossifactory classification [of the preamble] … survive[d] in the decided cases”.\textsuperscript{169}

3.1.2 Defining “Charitable”

\begin{flushleft}
\textsuperscript{161} Under cy-près, a court is entitled, under certain circumstances, to transfer funds belonging to one charity to another that pursues similar purposes. For further information on the history of cy-près, see Mitchell, Charles. “Charities and Social Change: Cy-Près Orders and Schemes, 1830-1914”, forthcoming.
\textsuperscript{162} But note that even the 1601 Act expressively excluded specific kinds of charities from these benefits.
\textsuperscript{169} see \textit{Re Hopkins} (1965) Ch 669, 678, per Wilberforce.
\end{flushleft}
The definition of “charitable” in English law did not come about in a straightforward fashion. From its initial roots in religion, the Preamble to the Charitable Uses Act 1601 would give meaning to “charity” in English law. Interestingly, Jones argues that this was not the Preamble’s actual purpose; rather, it was narrowly intended to secure funds for the allocation to the poor.\(^{170}\) Yet, it does not amount to a full definition of “charity”, and, in fact, for the longest time this did not matter much. The period from 1532 until the 18th century only focused on distinguishing charitable from “superstitious uses”, i.e. the Preamble only separated those uses that fell within its equity from those that did not.\(^{171}\)

Only in 1804 did our modern, pre-2006 understanding of the Preamble first emerge. In *Morice v Bishop of Durham*\(^ {172}\), the Preamble was held to provide a legal definition of charity.\(^ {173}\) Until then, it had been established that the uses enumerated within the Preamble were charitable and thus under special protection.\(^ {174}\) However, some uses were held as falling within the equity of the Act, yet not the letter.\(^ {175}\) Over time, the number of uses that were deemed charitable but neither in the letter nor the equity of the Act increased, and judges began looking for a workable definition that would allow them to move with the changing face of philanthropy in England.\(^ {176}\)

It is at this stage that the understanding of charity as for the public benefit emerged, as Jones claims, largely based on Sir Francis Moore’s *Readings* of 1607.\(^ {177}\) Mostly, this was a strategic move to avoid the Mortmain Act’s implications that revenue from land would be forfeited to the heir in case a bequest was ruled “charitable”; considering it for “public uses”, i.e. public benefit, was a convenient alternative.\(^ {178}\)


\(^{172}\) 9 Ves. 399; (1805), 10 Ves. 522


\(^{175}\) *Turner v Ogden* (1787) 1 Cox Eq Cas 316; 29 ER 1183


\(^{177}\) For more details, see Jones (1969): p.121 and *Attn. Gen. v Pearce* (1740)

With the advent of the 19th century, attitudes towards charity and philanthropy changed yet again.\(^{179}\) Notable cases include *Trustees of the British Museum v White* (1826)\(^{180}\), which established that what is for the public benefit is automatically charitable, even if it is not part of one of the direct heads of charity; through this, it entrenched the charitable status of museums. *Townley v Bedwell* (1801) brought charitable status to botanical gardens, *Thornton v Howe* (1862) concerned the advancement of religion, and *Tatham v Drummond* (1864) stood out as a key decision on the status of animal charities.

Nonetheless, *Morice v Bishop of Durham*\(^{181}\) continued to have wide ranging consequences. It strengthened the role of the Preamble in defining charity as opposed to public trusts, lifting “[t]he equity, or ‘spirit’ of the preamble (…) into the Delphic oracle of legal charity.”\(^{182}\) In Jones’s words, it “bequeathed to future lawyers the thankless, often impossible task of distinguishing the charitable gift (which must be *pro bono publico*) from the gift which is merely for the public benefit.”\(^{183}\) This had important implications for the role of ‘public benefit’ in defining charity, which will be taken up in the following section.

While the Act of Elizabeth was repealed by the Mortmain and Charitable Uses Act 1888, it left the Preamble intact.\(^{184}\) It was only the Charities Act 1960 which established that “[a]ny reference in any enactment or document to a charity within the meaning, purview and interpretation of the Charitable Uses Act 1601, or of the preamble to it, shall be construed as a reference to a charity within the meaning which the word bears as a legal term according to the law of England and Wales.”\(^{185}\) However, further case law maintained the Preamble’s role in the 20th century.\(^{186}\)

---

179 Bromley (1993/94) entitles this era “Renaissance Philanthropy”.
180 Sim. and Stu. 594
181 A trust had been created that was to enable the trustee to spend on “objects of benevolence and liberality” as he saw fit. The final High Court verdict, however, ruled that such a trust could not be created for it was neither public as its uses had not been specified, neither was it private because it did not identify a clear beneficiary and the trust the trust resulted back to the direct heir.
184 Mortmain and Charitable Uses Act 1888, section 13(2).
185 Charities Act 1960, section 38(4).
186 See for instance Wilberforce J in *Re Hopkins* [1965] Ch 669 (Ch).
3.1.3 Historical Role of Public Benefit in Charity Law

Public benefit has figured prominently in the system of English charity law ever since its inception. Garton, for instance, suggests that “until the Preamble [of the Statute of Elizabeth, 1601] became fixed as central to the modern definition of charity in the nineteenth century, the public nature of charity was the common element that united a diverse range of charitable purposes.” Even then, the four heads (i.e. categories) of charity as defined in Pemsel were never the sole or even primary source of charitable status; public benefit took the role of a driving force, which is why the renewed attention in the Charities Act 2006 is of such great interest.

Case law suggests that there are two parts to public benefit: the determination of what counts as “benefit” to the public, and what constitutes said “public” itself. Interestingly, the first version of the preamble in the 1597 act had included a general definition of what ‘public’ meant; it was subsequently dropped in the 1601 version.

Moore’s Readings proposed that all endowments “for the public benefit” should be considered charitable; this meant that incidental benefits to the rich were acceptable, as long as the poor derived benefit as well. The first mention of public benefit in case law can be found in the Case of the Master and Fellows of Magdalen College dating back to 1615; here, private benefit was juxtaposed with ‘religious, pious, charitable and public uses’ of a trust. 17th century and early 18th century case law generally echoed this duality of purposes. Some confusion was introduced, at least temporarily, in the early 19th century by some judges trying to differentiate between public and private charity, with private charity not resulting in a void trust. Yet by the late 19th century, this

---

188 [1891 AC 531 (HL) 583
192 (1572-1616) 11 Co Rep 66, 75a; 77 ER 1235, 1248
194 See for instance Bishop of Rochester v AG (1721) 4 Bro PC 643, 2 ER 438; Jones v Williams (1767) Amb 651, 27 ER 422; Townley v Bedwell (1801) 6 Ves Jr 194, 31 ER 1008.
195 E.g. Waldo v Caley (1809) 16 Ves Jr 206, 33 ER 962; for a full discussion of this attempted differentiation, see Garton (2013): p.19f.
attempt hat been abandoned, and it had been established that trusts for private benefit \textit{writ large} could not be deemed charitable\textsuperscript{196}.

While \textit{Morice} rejected the synonymous use of ‘charitable’ and ‘public’ by pointing out that public benefit was not a sufficient condition for the definition of charity, some judges continued to use the two words interchangeably\textsuperscript{197}. Public benefit was properly formalised in Lord Macnaghten’s judgment in \textit{Pemsel} when describing the four heads of charity as purposes “beneficial to the community”.\textsuperscript{198} Garton points out that \textit{Re Macduff} further refined this meaning of public benefit to purposes in line with the preamble to the Statute of Elizabeth.\textsuperscript{200}

The definition of “public” attracted further attention in the 20\textsuperscript{th} century, trying to define the boundaries of just how “public” the recipients of public benefit had to be. This led to the \textit{Re Compton}\textsuperscript{201} test that excludes purposes from being for the public benefit if all recipients of said benefit are connected by a sole nexus, be it a single person\textsuperscript{202} or a company\textsuperscript{203}. \textit{IRC v Baddeley}\textsuperscript{204} even required “public” to mean “anyone”, unless benefit was restricted by what could be termed a ‘natural monopoly’ of benefit, such as the sufferers of specific disease. \textit{Oppenheim v Tobacco Securities Trust}\textsuperscript{205} takes a particularly prominent role in the development of public benefit by differentiating between a charitable \textit{purpose} and charitable \textit{status}, “the former being merely one (albeit necessary) element of the latter together with the requirement that the purpose be carried on for the benefit of a sufficient section of the community.”\textsuperscript{206}

\textsuperscript{196} E.g. \textit{Cocks v Manners} (1871) 12 Eq 574; \textit{Stewart v Green} (1870), IR 5 Eq 470; \textit{Re Delany} (1881) 9 LR Ir 226.
\textsuperscript{199} [1896] 2 Ch 451 (CA)
\textsuperscript{201} [1945] Ch 123 (CA).
\textsuperscript{202} \textit{Re Compton} [1945] 1 Ch 123; [1945] 1 All ER 198.
\textsuperscript{203} \textit{Oppenheim v Tobacco Securities Trust} [1951] AC 197 (HL).
\textsuperscript{204} [1955] AC 572 (HL).
\textsuperscript{205} [1951] AC 297.
\textsuperscript{206} Garton (2013): p.23.
One of the final pieces in the puzzle of the public benefit concept was set in *National Anti-Vivisection Society v IRC*\(^{207}\), which puts the courts in charge of determining whether sufficient public benefit has been provided on a case-by-case evidential basis that entails proof of “tangible or demonstrable nature”\(^{208}\). *National Anti-Vivisection Society* also introduced the concept of weighing a purpose’s benefits versus its disbenefits, an approach that would later be adopted in the statutory criteria of public benefit that forms part of the Scottish charity test\(^{209}\).

### 3.1.4 Charities in English Welfare: Education and Healthcare

A contextual understanding of the role that charities have been playing in the provision of social welfare in England and Wales is necessary to understand the potential reach of changes to the definition of charitable status. After all, charities and the welfare state can only be understood in relation to each other, as suggested by the Nathan Commission of 1950-1952 when noting that: ‘historically state action is voluntary action crystallised and made universal’\(^{210}\).

For the purpose of this thesis, it is in particular the education and healthcare sectors that matter. This stems from the fact that the Charity Commission had focused its initial round of reviews on the high-risk group of fee-charging charities (in particular independent schools and private hospitals).\(^{211}\) The following section will provide a short overview of the structures and history of charitable involvement in these two areas.

**Charitable Status and Education**

In education, “more than elsewhere charity, self-help, and state action mingled and interacted in a confusing fashion”\(^{212}\). Nonetheless, education is one of the original

---

\(^{207}\) [1948] AC 31 (HL).
\(^{209}\) Charities and Trustee Investment (Scotland) Act 2005
\(^{211}\) Religious organisations were also part of the target group but are not considered in this thesis since the pertaining discussion is of a more philosophical than empirical level.
charitable purposes that were part of the first definition of charitable status eventually codified in the Preamble to the Statute of Elizabeth\textsuperscript{213}. It maintained its position through the case law definitions in *Morice*\textsuperscript{214} and *Pemsel*\textsuperscript{215}, and was eventually codified in the statutory definition of charitable status in the Charities Acts 2006 and 2011\textsuperscript{216}. Yet, education has had an even more formative role for charity law: endowments to institutions of learning, in particular universities and schools, account for a large part of the early case law on charitable trusts\textsuperscript{217}.

Up to the Reformation, education was a dominion of the church and thus limited in its scope, both in terms of the intake of students as well as the curriculum.\textsuperscript{218} This changed in the mid-16\textsuperscript{th} century, which saw the foundation of a number of schools run by private individuals.\textsuperscript{219} While relief of poverty and advancement of health saw an earlier intervention through and by the state, the public provision of education was only properly initiated in the late 19\textsuperscript{th} century.\textsuperscript{220} Until then, it was expected that the members of the upper and middle classes would bear the cost of education themselves\textsuperscript{221}; this “public” education – organised for and by the public itself – is at the core of the nowadays often confusing nomenclature of “public” schools denoting independent fee-charging schools. The working/lower class was educated on an “as needed” basis and through funding that rested on private benevolence rather than state obligation.\textsuperscript{222}

\begin{footnotes}
\item \textsuperscript{213} “… schools of learning, free schools, and scholars in universities … [...] education and preferment of orphans”, see modern English version by Slade J in *McGovern v A-G* [1982] Ch 321 (Ch) 332, quoted in Garton (2013): p.1 footnote 4.
\item \textsuperscript{214} Romilly refers to education as part of the first head of charity as the “relief of the indigent … [through] education” and as a separate second head “the advancement of learning”; *Morice* [1805] 10 Ves Jr 522, 532; 32 ER 947, 952.
\item \textsuperscript{215} 2nd head of charity, “trusts for the advancement of education”, see *Pemsel*.
\item \textsuperscript{216} Charities Act 2011, s 3(1) b.
\item \textsuperscript{217} See for instance *Case of the Master and Fellows of Magdalen College* (1615).
\item \textsuperscript{218} Indeed, education was a prerogative extended to the clergy and the nobility, see Alvey (1995): p.17.
\item \textsuperscript{219} E.g. The Merchant Taylors’ School, Westminster School, Manchester Grammar School. Alvey describes the time from 1571 to 1660 as ‘a golden age for the founding of grammar schools throughout the country’, see Alvey (1995): p. 18.
\item \textsuperscript{220} Alvey (1995): p. 38.
\item \textsuperscript{221} Unless, that is, specific endowments had been set up previously.
\item \textsuperscript{222} Owen (1965): p. 247. Owen also refers to two commission reports, the Newcastle Commission of 1861 that investigated the educational status quo of the lower classes, while the Clarendon Commission of 1864 reviewed the then existing nine public schools for the upper classes; see *Report of the Commissioners Appointed to Inquire into the State of Popular Education*, (C. 2794) 6 vols., 1861 and the *Report of the HM Commissioners on ... Certain Schools and Colleges*, (C.3288), 4 vols., 1864.
\end{footnotes}
Just as was the case for hospitals and other healthcare charities, the “location [of endowed schools before the 19th century] naturally owed more to local patriotism and the special attachments of their founders than to a consideration of the country’s educational requirements”\(^{223}\) and the provision of education was spotty at best. Moreover, the peculiarity of the English trust meant that even those schools with endowments were at times “regulated” out of operation: Lord Eldon’s ruling in the Leeds Grammar School case\(^{224}\) effectively made it impossible to adapt the curriculum according to the needs of the time. Thus, he held that grammar schools were intended solely for the instruction of the “learned languages”, i.e. the classics. Neither were Latin and Greek particularly helpful assets in the 19th century labour market, nor were most endowments sufficient to fund a suitable instructor. Nonetheless, the “Eldonian straitjacket”\(^{225}\) prevented many endowed schools from adapting to a commercial education (of English, European languages and mathematics).\(^{226}\)

This changed after the Taunton Commission heralded the Endowed Schools Act\(^{227}\); the 1870 Education Act finally established the statutory obligation to provide elementary-level education across the board. Secondary education still rested firmly in the hand of religious and secular educational charities. Even after the post-World War II educational reforms, and the eventual democratisation of education\(^{228}\), this historical evolution of responsibilities within the education sector accounts for two relevant issues: Firstly, history explains the rather idiosyncratic mixture of state education and private, fee-charging schools with charitable status (‘public schools’) in the British education landscape. Secondly, it demonstrates how intricately linked education, class, and politics have been for centuries. Despite of today’s association of independent schools as prerogative of a historical elite, it is important to note that they had originally been founded, as described in the previous section, for the benefit of the poor. Only in the 19th

\(^{227}\) 32&33 Vict, c.56.
\(^{228}\) Education Act 1944 (“Butler Act”)
century did they admit fee-paying children of the wealthy and become a symbol for high quality education as much as class privilege, a feature that figures prominently in the policy process leading to the Charities Act 2006.

**Charitable Status and Healthcare**

Today, most healthcare needs in Great Britain are met by the National Health Service, which was founded in 1948. Nonetheless, the pre-NHS era has left a legacy of charitable healthcare organisations, such as hospitals and nursing homes. Recently, double-dip recessions and ever rising healthcare costs have led to a renewed interest in these charities and the pre-NHS voluntary hospital sector.\(^{229}\)

Historically, charitable hospitals, also referred to as ‘voluntary hospitals’, can be traced for centuries, with a particular surge in the 18\(^{th}\) century, when subscriber charitable hospitals were introduced.\(^{230}\) From a statutory point of view, the Poor Laws first brought the state into a position of responsibility for the provision of medical care\(^{231}\), which was fortified by the Local Government Act of 1929. Councils now had the authority to found and run municipal hospitals themselves.\(^{232}\) However, the reliance on donations and general philanthropy led to rather erratic patterns of regional and temporal variation in the quality and provision of healthcare through charitable hospitals: not only was the subscription fee for charitable hospitals not affordable for the working class\(^{233}\), the number of hospital beds was subject to wide regional variations so that a uniform level of medical care could not be guaranteed across the UK\(^{234}\).

---


\(^{231}\) For instance, local authorities had a statutory duty to provide care for tuberculosis, venereal disease and the care of mothers during childbirth. Contracting with voluntary hospitals was one option of fulfilling this duty, much like modern forms of private-public partnerships.


\(^{234}\) Mohan and Gorsky (2001): p.56f. Interestingly, it was cities that were important to the church, such as cathedral towns, that enjoyed a far better coverage than early industrial urban centres (p.56). This echoes the paramount role of the church in the provision of welfare through charities.
Some academics have referred to the interwar period as evidence that a healthcare system entirely based on charities was a viable alternative to the increasingly complex (and expensive) NHS. Nationalisation, so the argument goes, “stifled a huge wave of charitable effort which, if left unchecked, would have provided a comprehensive service”. Mohan and Gorsky quote historian Anthony Seldon as saying that the NHS “prevented the development of more spontaneous, organic, local, voluntary and sensitive services … [that would have] better reflected consumer preferences”.

In the light of the financial evidence Mohan and Gorsky present based on Burdett’s *Hospitals and Charities*, the *Hospitals Yearbooks* and the *Order of St. John’s Annual Reports on the Voluntary Hospitals of Great Britain*, a different picture emerges. They conclude that the rate of capital investment required to keep up with the demand for hospital beds and medical innovation could not have been sustained beyond the early 1940s; in fact, even in the interwar period, charitable hospitals were barely surviving. They find that especially the big London hospitals were running a deficit of almost 60% on their current accounts immediately preceding the outbreak of the war; most hospitals only survived until the introduction of the NHS in 1948 because of the “wartime emergency scheme, when state support brought the proportion in deficit down to a lower level than at any time since 1929”.

The potential success of a fully charitable healthcare sector is thus debatable, at least based on the experience from the 18th to the 20th century. Yet, charities have never relinquished their role in the provision of healthcare completely. Ever since the Conservative government’s 1991 hospital reforms, for instance, there have been further explorations of different forms of charity sector involvement.

---

238 For further information, see Mohan and Gorsky (2001): p.45.
Mohan and Gorsky find evidence that NHS hospitals have increased private fund-raising initiatives as well as the “value of assets held by NHS charitable funds from £247 million in 1982-3 to £1.07 billion in 1997-8” in England alone; charitable income revenues have also risen from £57 million in 1982-3 to £315 million by 1998-9, with some NHS trusts relying on charitable sources for almost a fifth of their total revenue. The closer collaboration with the charitable sector has also been encouraged by a policy of increased flexibility to engage in Public-Private Partnerships. Charities are often considered a more suitable partner for a public body since ‘the parameters within which the voluntary sector operates are set by the legal framework for the receipt and administration of charitable gifts’ which “blur the boundaries between the voluntary and statutory sectors”. Skocpol et al. even suggested a quasi-symbiotic relationship between the state and the charitable sector.

This is echoed in the legal development of charitable status for healthcare. Much like education, healthcare was one of the original charitable purposes that consistently applied since before the Statute of Elizabeth in the 17th century. The Preamble refers to healthcare as “the relief of aged, impotent (...) people … maintenance of sick and maimed soldiers and mariners”, which were identified as charitable purposes. In Morice, counsel Romilly cites healthcare under the “relief of the indigent” through “medical assistance”.

Although he followed Romilly closely otherwise, Lord Macnaghten did not categorise healthcare as an autonomous head of charity; instead, healthcare falls under the general

242 Such as the Great Ormond Street Hospital for Sick Children and its ‘Wishing Well’ appeal, see http://www.gosh.org/gen/about-us/our-history/, accessed online on 6th July 2014.
244 Mohan and Gorsky (2001): p.11
249 Preamble to the Charitable Uses Act 1601, better known as Statute of Elizabeth; modern translation by Slade J, see footnote 126.
250 Morice [1805] 10 Ves Jr 522, 532; 32 ER 947, 952
fourth category of “trusts for other purposes beneficial to the community, not falling under any of the preceding heads”.\(^\text{251}\) In the Charities Acts 2006 and 2011, healthcare is listed under two categories: s.2(1)(d) generally refers to “the advancement of health or the saving of lives” and s.2(1)(j) to “the relief of those in need because of […] ill-health, disability […] or other disadvantages”. These charitable purposes entail hospitals as well as nursing homes or palliative care facilities.

**Key Case: Re Resch**

Healthcare is not just part of the analyses of this thesis because fee-charging charities are operating in healthcare. Throughout the policy recommendation documents and the various consultations and debates, the Privy Council case of *Re Resch*\(^\text{252}\) emerged as key guideline for the treatment of fee-charging charities across different sectors.

The facts of *Re Resch* are as follows: Mr Edmund Richard Emil Resch left an estate of then AUD 8 million to a number of charitable organisations. Among them were the Sisters of Charity, who led St Vincent’s Private Hospital. Together with some other charities interested in the estate, Mr Resch’s only next of kin, a niece, challenged the execution of his will because they did not consider The Sisters of Charity to be a charitable organisation and the charitable bequest to them therefore null and void.

The objection was based on the hospital running both a public practice as well as a private practice. In the niece’s view, this ran against public benefit because St Vincent’s restricted access and charged for services. However, the Privy Council noted that

\[
\text{[t]he evidence shows that the reason for the establishment of the private hospital was to relieve the pressing demand of the public for admission to the General Hospital which was quite inadequate to the demand upon it. (…) The establishment of an adjacent private hospital would enable the honorary medical staff in the General}\]

\(^{251}\) *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531 (HL) 583.

\(^{252}\) *Re Resch’s Will Trusts* [1969] 1 AC 514 (PC)
Hospital to admit for treatment under their care in the private hospital patients who were reluctant to enter the General Hospital and were able and willing to pay reasonable and proper fees for admission and treatment in a private hospital. The Private hospital has 82 beds as compared with over 500 in the General Hospital.253

Based on these facts, the Lords ruled that the Sisters of Charity’s activities at St Vincent’s was charitable according to the criteria set in the case law, although St Vincent’s was charging fees and, on occasion, running a surplus in income. However, such surpluses were always used towards the hospital’s healthcare duties in accordance with the Sisters charitable mission. No commercial profit was incurred and the trust was thus validly a charitable bequest.

The second objection against the Sisters of Charity focused on the fact that St Vincent’s fee-charging practice was excluding the poor. The Lords held that: “It is not a condition of validity of a trust for the relief of the sick that it should be limited to the poor sick.”254 Following Nicolas J’s ruling in a previous New South Wales ruling on St Luke’s Hospital255, they found Mr Resch’s gift to the Sisters of Charity to be a valid charitable bequest.

The policy implications for the status of fee-charging charities that emerge from Re Resch are of particular relevance for the understanding of the charity law reform process. These will be addressed in the discussion of the Tribunal’s ruling on the Charity Commission’s public benefit guidance in Chapter 4.

Comparison between Health and Education

There are two direct comparisons to be drawn with the charitable education sector. Like in education, the responsibility for the provision of healthcare in Britain has shifted historically from the private, charitable sector to the state – a development that resulted in

---

255 Perpetual Trustee Co, (Ltd,) v, St. Luke's Hospital and others 39 S.R. (N.S.W.) 408.
an intricately interwoven system of overlapping competencies and expectations, albeit without the same element of class privilege. Because of changes in demographics, life expectancy, and advances in the medical possibility frontier, this complex system is increasingly coming under pressure. In direct opposition to the charitable status of fee-charging schools, however, it is surprising that fee-charging healthcare organisations up to this day have not been discussed with equal fervour.

3.1.5 Public Benefit pre- and post-Charities Act 2006

Legal Definition of Charity and Public Benefit

Much of the complexity of the legal debate around the definition of what is charitable stems from the inconsistent treatment that the term “public benefit” has received in case and statutory law during the last 400 odd years. As part of the test for charitable status, public benefit is a key requirement; yet nearly every author uses “public benefit” in an almost idiosyncratic way, leading to misunderstandings and a sometimes conflicting jurisprudential foundation.

The public benefit dilemma has been most appropriately described by Jonathan Garton as

an umbrella term used, variously, as the means of distinguishing between those abstract purposes that are capable of being charitable at law and those that are not; as the means of determining whether a particular purpose, as worded by a settlor or testator, falls within the scope of one of those abstract purposes; and as the means of defining the limits of its implementation.256

If the lawyers do not agree on what is “public benefit”, and consequently what “charity” means, then it is unreasonably to expect the layperson to follow the discussion. Sir William Grant MR recognised that there was a difference between the popular definition

of public benefit and its legal counterpart in 1804. In Morice v Bishop of Durham, he succinctly summarised the dual meaning of charity as:

[that word [charity] in its widest sense denotes all the good affections, men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in this Court. Here its signification is derived chiefly from the Statute of Elizabeth ... Those purposes are considered charitable, which that Statute enumerates, or which by analogies are deemed within its spirit and intendment; and to some such purpose every bequest to charity generally shall be applied.257

Charitable Status before and after 2006

Before 2006, there was no definition of “charity” in English statutory law and the charitable status test was conducted based on the Preamble to the Statute of Charitable Uses dating back to 1601. It provided a basic list of organisations that were to be considered charitable. A definition emerged from legal practice and the common law principle of precedent.258 Tyssen suggests in his textbook on Charitable Bequests259, that

[i]f the Court considered that it was for the public benefit that the property in question should be devoted for ever to fulfilling the purpose named, it held the purpose good. Thus it held good all trusts for promoting the established religion, also all trusts for keeping up schools and hospitals, and many other trusts. These trusts, for purposes which the law considers it for the public benefit to perpetuate for ever, are called charitable trusts. This is the only general definition which can be given of the word charity.

257 (1804) 9 Ves Jr 399, 405; 32 ER 656, 659-60, quoted in Garton (2013): p.3.
258 Using the Statute of Charitable Uses as a basis, further charities have been developed by analogy, see for instance Re Macduff [1896] 2 Ch 451, 467.
The reasons why it matters whether a particular point is legally charitable have changed over time. In the 18th century, it was predominantly the ownership of land that was most important. The Mortmain and Charitable Uses Acts were means to keep land in the hands of the heir rather than “losing” it to charity. This preoccupation with the regulation of land that was in the hands of charities incentivised the donation of monetary assets instead.

In the late 19th century, Lord Macnaghten followed the four-part classification that had previously been undertaken in Morice and rationalised it into a common law test in Commissioners for Special Purposes of the Income Tax v Pemsel 260. Macnaghten’s classification of charitable purposes listed the following purposes as charitable:

- Relief of poverty
- Advancement of education
- Advancement of religion
- Other purposes beneficial to the community 261.

Pemsel also introduced tax exemptions. These only became significant in the 20th century as the sources of charities’ income changed. Up to then, a charity would benefit most from property and land-based wealth, whereas the 20th century saw those charities prosper that owned shares. Tax exemptions on unearned investment now promised a tremendous financial benefit and functioned as an indirect state subsidy to those organisations that had charitable status. Therefore, the criteria for becoming a charity, and thus the public benefit test, rose to prominence.

Under common law, a charity thus has to “be confined exclusively to charitable purposes, be for the public benefit, and be independent, non-profit-distributing and non-political.” 262 This condition of public benefit matters for two reasons:

---

260 [1891] AC 531
261 The fourth category also encompasses public health and health policy; see Re Resch [1969] 1 AC 514 (PC).
a) New organisations that are required to register need to demonstrate their public benefit upon registration.

b) Organisations that have public benefit purposes as their declared mission in their constitution will consequently fall under the regulatory remit of the Charity Commission. They are required to submit a yearly report on their accounts, indicating that the activities they pursue match the mission stated in their constitution.

What changed in 2006? The Charities Act 2006, which came into effect on 1st April 2008, introduced a statutory list of charitable purposes, and defined a charity as an “institution which: (a) is established for charitable purposes only, and (b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities”. It is important to note that this does not amount to a new definition; the common law definition that had developed through case law up to 2006 remains intact, if clarified in statutory terms.

The list of charitable purposes was expanded from four to thirteen categories, and now comprises:

a) the prevention or relief of poverty;
b) the advancement of education;
c) the advancement of religion;
d) the advancement of health or the saving of lives;
e) the advancement of citizenship or community development;
f) the advancement of the arts, culture, heritage or science;
g) the advancement of amateur sport;
h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;

---

265 In addition, of course, to the catch-all category contained under the 4th head of charity and now subsection m).
266 Charities Act 2006, s.2(2).
i) the advancement of environmental protection or improvement;

j) the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;

k) the advancement of animal welfare;

l) the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services;

m) any other purposes within subsection (4).

The first three categories closely mirror the earlier Pemsel conditions. Nine additional categories have been created based on the body of case law that has developed over the last 400 years, codifying them as charitable purposes in their own right.267 Macnaghten’s “catch-all” fourth head of charity has similarly been preserved under m) “any other purposes within subsection (4)”.

Changes to the Public Benefit Test?

What does this mean for “public benefit”? As discussed in Chapter 1, the origins of the public benefit requirement largely date back to 19th century case law.268 Soon, public benefit was taken to be a separate requirement in addition to fulfilling the Pemsel conditions269 and was loosely understood as “benefit to a sufficient section of the public”.270 This demarcation has been further shaped through a number of cases in which

---

267 It should be noted that the case law precedent was not the only factor in the creation of new charitable purpose categories; the interview data highlights the role of lobbying at the parliamentary stage of the policy process; please refer to Chapter 8 for more information.

268 In the 1866 case of Hoare v Osbourne (1866) LR 1 Eq 585, for instance, a church was given a private gift with the purpose of restoring its chancel. While it did not strictly fall into the category of advancing religion per se, it was recognised as providing a ‘public benefit’ to the community, which was intrinsically linked to assisting in the advancement of religious purposes. For a more in-depth discussion on the departure from neutrality towards charitable purposes towards increased scrutiny of their public benefit element, see also Ridge, P. ‘Legal Neutrality, Public Benefit and Religious Charitable Purposes: Making Sense of Thornton v Howe’, Journal of Legal History 31, no. 2 (2010): pp. 177-203.

269 See Re Macduff [1896] 2 Ch 451 (AC).

270 Luxton, P. “A three-part invention: public benefit under the Charity Commission.” Charity Law & Practice Review 11, no.2: pp. 21. This has been set out in National Anti-Vivisection Society Ltd v IRC [1948] AC 31, 42 as per Lord Wright. See also Lord Simonds in Oppenheim v Tobacco Securities Trust Co Ltd [1951] AC 297, 305.
a gift or trust intended as charitable was deemed private (and thus non-charitable) since its benefits were limited to a restrictive class of people.271

The Charities Act 2006 did not change this understanding of ‘public benefit’. The Act presents the “Public Benefit” test in Section 3:

(1) This section applies in connection with the requirement in section 2(1)(b) that a purpose falling within section 2(2) must be for the public benefit if it is to be a charitable purpose.
(2) In determining whether that requirement is satisfied in relation to any such purpose, it is not to be presumed that a purpose of a particular description is for the public benefit.
(3) In this Part 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.
(4) Subsection (3) applies subject to subsection (2).272

The statutory definition of the test thus implies two assumptions: a) that prior to the Charities Act 2006, there indeed was a presumption of public benefit for Lord Macnaghten’s first three heads of charity under Pemsel, and b) that this presumption prevented the courts or the regulator from applying scrutiny based on public benefit.273

By removing this presumption explicitly through section 3(2), the Act introduces a new form of the public benefit test. However, that interpretation only holds if one accepts the two underlying premises above.

271 Cocks v Manners [1871] LR 12 Eq 574, 585 (donation to a Dominican convent was considered for private and not for the public benefit); Gilmour v Coats [1949] AC 426 (a trust set up for an order of nuns was not deemed to have public benefit); Ommaney v Butcher [1823] Turn & R 260 (gifts to a private charity was not deemed to be charitable in the legal sense).
272 Charities Act 2006, s.3.
273 A former Chief Charity Commissioner commented on this question in Chapter 8, suggesting that there indeed was a certain reluctance by the Charity Commission to investigate charities under the first three heads because of public benefit concerns.
To understand the concept of the presumption of public benefit, and the confusion that it brought to the policy process, it is necessary to appreciate that public benefit has different meanings in the case law. Garton differentiates between four principles of public benefit:274

1) **Conceptual Public Benefit Principle**: These “abstract purposes (...) constitute the different categories of charity”275 and establish whether an organisation is operating for the public good and therefore within the regulatory remit of the Charity Commission.

2) **Demonstrable Public Benefit Principle**: This sense asks whether a particular purpose falling within one of the charitable categories is for the public benefit. Upon registering as a charity, any organisation will have to demonstrate that its purpose or purposes are providing public benefit. The four heads of charity derived from *Morice* and *Pemsel* provided an indication of purposes that would qualify as “for the public benefit” pre-2006.276

3) **Cross-Sectional Public Benefit Principle**: This principle establishes whether the way in which an organisation carries out its mission is for the public good. For instance, Garton suggests that it establishes whether “access to the benefits of a particular charitable purpose can legitimately be restricted”.277

4) **Private Benefit Principle**278: The final principle sets out the narrow realm of private benefit that an organisation qualifying under the first three public benefit principles may generate while still maintaining charitable status.279

---

276 Note, however, that this statement needs qualification. Thus, education may be for the public benefit in general, but specific instances might not. Harman J’s famous *dicta* in *Shaw (deceased), Re [1957] 1 WLR 729 (Ch)*, for example, refers to a school for pickpockets, which obviously would not qualify as operating “for the public benefit” and thus would not be a charity.
278 Garton does not name the fourth category; the term “private benefit principle” has been chosen by the author in analogy with Garton’s previous three principles.
The presumption, however, only applied to public benefit in the second sense of “demonstrable public benefit”. As following chapters will show, the policy debate did not differentiate between these different meanings of public benefit, neither in the policy reform documents nor at the stage of the parliamentary debates in the Lords and Commons. Assumingly, this is one potential source of confusion in the policy process. The empirical evidence presented in this thesis will shed light on how decisive this legal lack of clarification was in shaping the policy and implementation process.

Despite the elusive nature of public benefit as a concept, the Charities Act 2006 does not offer a statutory definition of public benefit: Section 3(3) states instead 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.” In plain language, “for the purposes of the law relating to charities in England and Wales” refers to the existing body of case law, leaving the definition to evolve in line with the common law as determined by the courts.

Statutory Duty for the Charity Commission

Section 4 sets out how the “public benefit” test is to be implemented by the Charity Commission:

(1) The Charity Commission for England and Wales (see section 6 of this Act) must issue guidance in pursuance of its public benefit objective.

(2) That objective is to promote awareness and understanding of the operation of the requirement mentioned in section 3(1) (see section 1B(3) and (4) of the Charities Act 1993 (c. 10), as inserted by section 7 of this Act).

(3) The Commission may from time to time revise any guidance issued under this section.
(4) The Commission must carry out such public and other consultation as it considers appropriate—

(a) before issuing any guidance under this section, or

(b) (unless it considers that it is unnecessary to do so) before revising any such guidance.

(5) The Commission must publish any guidance issued or revised under this section in such manner as it considers appropriate.

(6) The charity trustees of a charity must have regard to any such guidance when exercising any powers or duties to which the guidance is relevant.\textsuperscript{280}

The Charities Act 2006 thus created a new statutory duty for the Charity Commission to be the arbiter of the public benefit test by providing guidance as for its content\textsuperscript{281} and raising awareness of its operation.\textsuperscript{282} Inevitably, this means that the Charity Commission must provide an authoritative interpretation of section 3 (2) and “the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales”, albeit after public consultation.\textsuperscript{283} Charity trustees, in turn, have a new statutory duty to “have regard” to the Charity Commission’s guidance.\textsuperscript{284}

As straightforward as it seems \textit{prima facia}, this statutory duty to provide guidance on the existing understanding of public benefit under English law is a legal minefield. As has been explained above, the jurisprudential foundation of English charity law is not straightforward, with sometimes contradictory rulings and dicta.\textsuperscript{285}

\begin{flushleft}
\textsuperscript{280} Charities Act 2006, Section 4, “Guidance as to operation of public benefit requirement”.
\textsuperscript{281} Charities Act 2006, s.4 (1).
\textsuperscript{282} Charities Act 2006, s 4 (2).
\textsuperscript{283} Charities Act 2006, s. 4 (4).
\textsuperscript{284} Charities Act 2006, s. 4(6).
\textsuperscript{285} In addition, most charities do not have the financial resources to afford legal counsel and pursue litigation, and those that do rarely follow the route to the courts. Given recent outcries over the RSPCA’s legal fees (e.g. “Investigate RSPCA's 'Staggering' Legal Costs For Fox Hunting Trial, Says MPs”},
\end{flushleft}
The legal community is split on what the case law says about public benefit, especially in the case of fee-charging charities. Some argue that the law as it stands today under the Charities Act 2006 does not justify any change in implemented policy. For those who subscribe to this notion, the Charity Commission has given in to governmental pressure and became an instrument for New Labour’s education policy agenda. Others, such as Francesca Quint, vehemently disagree with this interpretation, and see the Charity Commission as a neutral arbiter that was thrown under the bus by the Labour government during the politically charged parliamentary debate. Section 3.2.6 will analyse the new role of the Charity Commission in more detail.

Public Benefit in Policy Practice
Following its new statutory duty, the Charity Commission issued separate guidance documents on public benefit. These documents resulted in tangible policy changes: As prior to the Charities Act 2006, any organisation who is applying to be registered with the Charity Commission as a charity will have to address its mission and activities in regard to public benefit. However, the Charity Commission’s registration form now contains an additional section specifically dedicated to public benefit. The form asks trustees to

---

286 The legal debate and controversy around public benefit will be discussed in detail in Chapter 6 on the legal community.
288 Previously, theses were “Charities and Public Benefit” and the supplementary guidance on “Public Benefit and Fee Charging”, “The prevention or relief of poverty for the public benefit”, “The advancement of religion for the public benefit”, and “The Advancement of Education for the Public Benefit”. The general guidance was replaced on 16th September 2013 by four new guidance reports, “Public Benefit: an Overview”, “Public Benefit: the Public Benefit Requirement” (PB1), “Public Benefit: Running a Charity” (PB2) and “Public Benefit: Reporting” (PB3). The supplementary guidance on fee-charging was removed completely after the Tribunal ruling while the remaining three documents are still intact with slight amendments resulting from the ISC case decision.
289 On its website, the Commission dedicates Part 3 of the registration process to public benefit: “When you register a charity, you need to be able to show for each of your charity’s purposes that it: a) is beneficial, b) benefits a sufficient section - or the whole - of the public”, see http://www.charitycommission.gov.uk/start-up-a-charity/registering-your-charity/demonstrating-public-benefit/, accessed on 6th July 2014.
detail “how your charity's purposes meet the public benefit requirement” and “how the trustees run the charity for the public benefit”.

Secondly, the Commission conducted 20 assessments into the provision of public benefit by registered charities, including four recreation and leisure charities, four arts charities, four charities for the advancement of religion, five independent schools, and three care home charities. In addition to the assessment itself, the Charity Commission found that in July 2009, two independent schools and two care homes failed the public benefit test under its then interpretation. All four charities enacted a public benefit plan and managed to pass the test in June the following year. At least these twenty charities – or if one wants to adopt a more pessimistic view, at the very least the four organisations that did not pass the test in 2009 – enacted pragmatic changes to their practices as a result of the Charities Act 2006 and its new provisions on public benefit.

Finally, the Act had consequences even before it was enacted: in particular independent schools proved keen to gear up their public benefit provision in preparation for the Act. In hard numbers, this led to a rise in needs-based bursaries and links between independent and state schools. For instance, the increase in students receiving their main fee contribution from independent schools increased by 2.1% from 2003 to 2004.

---

291 These are Tintagel Memorial Playing Fields Association, Wigan Leisure and Culture Trust, Birmingham City Football Club Community Trust, and the Radlett Lawn Tennis and Squash Club (February 2011).
292 These are the Royal Opera House (Covent Garden Limited), the Castle Players, Gwent Ballet Theatre Limited, and the Young Concert Artists Trust (July 2010).
294 These are the Manchester Grammar School Foundation, Highfield Priory School Limited, Pangbourne College Limited, Manor House School Trust Limited, and S. Anselm’s School Trust Limited (July 2009/July 2010).
295 These are Cornwall Old People’s Housing Society (also known as Perran Bay Home for the Elderly), Penylan House Jewish Retirement & Nursing Home Cardiff, and the Rest Bay Convalescent Hotel (July 2009/June 2010/January 2012).
297 For a list of collaborations, see http://www.isc.co.uk/research/Publications/fact-sheets/links-between-independent-and-state-schools, accessed online on 6th July 2014.
compared to a year-by-year increase of 3.4% from 2006 to 2007. The Charity Commission is unlikely to conduct further assessments due to funding cuts, and so it remains to be seen how long this enthusiasm can be sustained. The sector body ISC at least is up to this date eager to point out the manifold public benefit provisions of the independent schools it represents.

The main focus of this thesis is set on the origins and content of the public benefit provision in the Charities Act 2006 rather than its consequences; nonetheless, subsequent chapters will at times refer to the two independent reviews of the public benefit provision published in 2012 and 2013, one conducted by Lord Hodgson, the other by the PAC, that will provide more information on the consequences of the Charities Act 2006. For now, it is sufficient to note that while the Act might not have provided a clear legal change on public benefit itself, it certainly did have somewhat of a policy impact on independent schools and the Charity Commission. The latter’s role will be considered in the following section.

### 3.1.6 Implications for the Charity Commission

The public benefit debate was a key aspect of the Charities Act 2006 and is the focus of this doctoral thesis. However, other aspects had the potential for thorough policy change, too. It is particularly instructive to consider the Charity Commission’s role before and after the 2006 Act.

---

300 Officially, the Charity Commission will henceforth conduct public benefit assessments based on risk potential, much like the Office of the Scottish Charity Regulator (OSCR) in Scotland; see the Commission’s statement on its regulatory approach at [https://www.charitycommission.gov.uk/Our_regulatory_activity/Our_approach/Risk_framework.aspx](https://www.charitycommission.gov.uk/Our_regulatory_activity/Our_approach/Risk_framework.aspx), accessed online on 15th January 2014.
302 This 5-year legislative review was, in true New Public Management fashion, part of the stipulations of the Charities Act 2006 itself.
Charity regulation in England and Wales is predominantly in the hands of the Charity Commission. In addition to the Charity Commission, the charity sector’s activities are also being monitored by the House of Commons’ Public Accounts Committee and the Office of the Third Sector, since 2010 renamed to the Office for Civil Society.\(^3\) According to the government’s publications, “[t]he Minister for Civil Society works with the Minister for the Cabinet Office on public sector efficiency and reform, including transparency and fraud, error and debt. The minister is also responsible for:

- volunteering, the Big Society agenda and charities
- social investment and enterprises
- reforming public bodies.”\(^4\)

In addition to the Chair of the Charity Commission, the Minister for Civil Society also appoints the Charity Commissioners with the approval of the Parliamentary Accounts Committee.\(^5\)

The Charity Commission is a non-ministerial government department that was founded through the Charitable Trusts Act 1853. A quasi-autonomous non-governmental organisation (Quango), the Charity Commission is accountable directly to Parliament.\(^6\) Its role has never been uncontroversial: Tompson, for instance, described the Board of Commissioners in the 19\(^{th}\) century as “innocuous (…) permanently understaffed, ignored, and isolated” but nonetheless “proceed[ing] to chip away at its task while it dutifully

\(^3\)“The Office for Civil Society holds responsibility for charities, social enterprises and voluntary organisations in the Cabinet Office. It replaced the Office of the Third Sector following the general election in 2010. Nick Hurd is the minister for civil society, the first to take the title. On its launch, Hurd, alongside the minister for the Cabinet Office Francis Maude, said that government policy would focus on three fundamental issues: Making it easier to run a charity, social enterprise or voluntary organisation; getting more resources into the sector; strengthening its independence and resilience; making it easier for sector organisations to work with the state.” Official governmental website of the Office for Civil Society, accessed online on 4\(^{th}\) of December 2013 at http://www.civilsociety.co.uk/directory/company/2765/office_for_civil_society.


evolved a bureaucratic barony”. However, his assessment underestimates the magnitude of work the early Commission performed during the period.

The Charities Acts 1960 and 1993 equipped the Commission with further regulatory powers. Charity Commissioners have since 1960 been appointed by the Home Secretary and fulfil “a quasi-judicial authority – by empowering them to make charitable schemes, for example, and more significantly for present purposes, by empowering them to determine charitable status pursuant to their task of maintaining the new Register of Charities”. Since the Charities Act 2006, appeals from decisions of the Charity Commission fall to the Upper Tribunal, sometimes referred to as the Charity Tribunal, which is part of the General Regulatory Chamber amidst Her Majesty’s Courts and Tribunal Services.

Changing Role of the Commission

The role of the Charity Commission is as complex as the sector it seeks to regulate and is itself the subject of great debate. Recent criticism includes a report published by the National Audit Office (NAO) that concluded that the Charity Commission “is not meeting its statutory objective of increasing public trust and confidence in charities and is not delivering value for money.”

In order to maintain trust in the charitable sector, the Commission’s tasks are two-fold: on the one hand, it is the sector regulator in charge of registering charities and overseeing...
their conduct and business. Since the coming into effect of the Charities Act 2006, public benefit accounting has expressly become part of this supervisory function. On the other hand, the Charity Commission is also a buffer between the sector and the various institutional actors that would otherwise have to deal with charities directly.\textsuperscript{313} The Charity Commission is thus at the same time meant to be a regulator and protector that enables charities to go about their activities without an undue burden in terms of accounting and the managing of a myriad of different public sector stakeholders.

The Charities Act 1960 created a statutory duty for the Charity Commission to maintain a register of all official charities. Mitchell argues that this duty “empower[ed] [the Commission] to determine charitable status pursuant to their task of maintaining the new Register of Charities”.\textsuperscript{314} While registration with the Charity Commission is not a necessary condition to receive charitable status and thus tax exemptions, it is very unlikely that HMRC would grant such privileges to any organisation that did not satisfy the requirements of the Charity Commission first.\textsuperscript{315} \textit{De facto}, this means that the Commission has also been developing the law relating to charitable status from the Charities Act 1960 up to the Charities Act 2006.\textsuperscript{316}

When registering a charity, the Commission’s task is to consider the purpose for which a charity is operating (conceptual public benefit) and whether this will produce the desired outcome (demonstrable public benefit). Intriguingly, the Charities Act 1993 added a duty to review the register on an on-going basis. This shifted the focus of regulatory attention at least partially from a charity’s purpose or mission to its activities.\textsuperscript{317} The Charities Act 2006 picks up on this idea of the Charity Commission “policing” charities on an on-going basis. However, before 2006, investigations were being conducted based on hints by whistle-blowers or concrete evidence arising from a charity’s account reports. With the 2006 Act, it became a statutory duty for the Commission to \textit{actively} identify and

\textsuperscript{313} Given the wide field of activity, this would be a rather large group, including the obvious HMRC, formerly known as the Inland Revenue, but also medical authorities or (as currently making headlines) anti-terrorism branches amidst security and intelligence services.


\textsuperscript{315} Mitchell (2000): p.182.


\textsuperscript{317} Mitchell (2000): p.185
scrutinise sectors in which problems might occur. As Chapter 4 will argue, this change in policy reflects New Labour’s philosophy of New Public Management.

The Review of the Register seems to suggest that the Commission was more of a “policeman” of the charity sector. This was not perceived to be the case at the time, however. During an interview, former Charity Commissioner Richard Fries who had headed the Review of the Register in 1993, suggested that the Commission’s role as advisor to charities was of particular importance: for Fries, the Charity Commission needed to be recognised as a partner in a common effort of philanthropic work. Only through partnership, so he argued, could charities be motivated to follow best practices and regulations without undue (and unproductive) coercion. In the light of substantial budget cuts, the cost of pressuring the sector into obedience would simply be too prohibitive. Yet, William Shawcross, the Charity Commission’s current Chair at the time of writing, departed markedly from this partnership strategy. In his speech to the Charity Law Association in October 2013, Shawcross announced that the Charity Commission was “the policemen of the charity sector but not its ‘Stasi’”. Is this shift in attitude correlated with the public benefit reform of the Charities Act 2006? The concluding Chapter 10 will revisit this question in the light of the empirical evidence analysed over the course of the thesis.

3.2 Policy Network, Nodes and Actors

3.2.1 Definition of Policy Network and Policy Process

Policy networks in this thesis will denote “communities of practice”, i.e. groups of actors that entertain a regular exchange on a specific policy issue. Interaction can occur in

---

318 Charities Act 2006, s. 4, in particular s.4(6).
319 Even Gordon Brown’s New Labour premiership saw the Charity Commission’s budget cut by 30% as part of the “Bonfire of the Quangos”. The Conservative administration under David Cameron has not been much kinder to the Commission since 2010. Interestingly, it is in particular the legal staff that has been drastically reduced.
320 Shawcross, William. Unpublished speech to the Charity Law Association in London on 3rd October 2013; recorded by the author at the event.
various forms, both direct (i.e. face-to-face meetings) and indirect (i.e. influencing one another through publications or other contributions to a popular debate). Frequency of interaction can equally vary in intensity; thus, it is more likely for the legal community to interact directly with both the charity sector and the state than it is for the two latter actors to engage in continuous direct dialogue. Nonetheless, charity law policy change involves all actors at different stages of the policy process.

As Wayne Parsons summarises, the policy process can be divided into different stages, depending on the level and subject of analysis.322 For the purpose of the present analysis, Jenkins323 description of the policy process is most apt because its focus on the locus of information allows for a closer engagement with the media-focus of PEF. Jenkins divides the policy process into seven stages:

1. Initiation
2. Information
3. Consideration
4. Decision
5. Implementation
6. Evaluation
7. Termination

Levels and modes of influence (e.g. political, ideological, technical, etc.) vary across actors and policy stages. This means that a single actor is likely to have different forms of influence at different stages of the policy process and may choose to exercise this potential influence through different means. As mentioned beforehand, the media is most likely to affect the policy process at the stage of information and consideration, whereas its influence is unlikely to be strong at the stage of decision-making and implementation. Similarly, the sector may be heavily involved in the first two stages, but shunned from

the consideration and decision stages, which are ultimately in the hand of the state (i.e. Parliament in the form of legislation) and its legal team.

So far, theories of change have not been matched with the different stages of the policy process. Based on the empirical evidence, this thesis endeavours to analyse in how far different policy change frameworks interact with the various stages of the policy process. The results will be discussed in Chapter 10.

3.2.2 Variables highlighted by the Theoretical Frameworks

Chapter 2 identified the following set of independent variables based on the theoretical frameworks of Punctured Equilibrium and Path Dependency: agency, systemic factors, values, media attention, external shocks, and policy environment. The remainder of the thesis will provide empirical data on these variables from the four nodes within the charity law and policy network, with an open eye to uncovering further independent variables in the process. These data will then be used to test the three hypotheses defined in Chapter 2. Before embarking on the empirical analysis, the following section will engage in some final definitions, introducing the structure for the remaining thesis, and, most importantly, identifying the four policy networks that the theoretical frameworks pinpoint as driving policy reform: the state, the charitable sector, the legal community, and the media.

3.2.2 Definition of Concepts

Endogenous and Exogenous Variables

When broken down to their operationalization level, the variables can be classified into groups of endogenous and exogenous variables. The meaning of both terms directly refers to the definition of policy network adopted for the purpose of this thesis, which is set out in section 3.2.1.

Endogenous denotes those changes to charity law policy that originate from one or several of the charity law policy network actors described in this chapter, and have been
purposefully initiated to target charity law. On the contrary, exogenous stands for change that is triggered from an actor or event that is outside the charity law policy network and/or is primarily focusing on a goal other than changing charity law policy. The latter may stem from an actor within the charity policy network. Thus, a change in general trust law can be considered as exogenous change, although it emanated from the legal community and the state, both of which are part of the charity law policy network.

**Incremental Change versus Radical Change**

Change is hard to pinpoint as it can come in various shapes and guises. Wilfred Hodges, for instance, illustrates the difficulty of defining and expressing change with the example of the “fat man”: a man is gaining weight over time, as captured in several pictures; it is clear that he has gained weight in every pictures, but at what point precisely would we call him fat? As Hodges concludes, once the man is depicted as very fat, onlookers agree, but there is no consensus on the specific point at which he should be called fat.

Considering the difficulty such a *prima facie* simple example poses, it is not surprising that policy change is even harder to pinpoint. The literature suggests a simplification of change into incremental change and radical change. For the purpose of this thesis, incremental change stands for a continuous build up of separate steps that individually do not change the defining character, content, or underlying values of a policy. They can accumulate in quick sequence or over a longer period of time. Radical change, on the other hand, denotes greater leaps in policy. These can occur very quickly, seemingly out of the blue, but equally with long gaps in between such radical, character altering policy changes. In fact, the main difference between PDF and PEF is the time in between episodes of radical change.

---

325 See for instance Streeck and Thelen (2003).
3.2.3 The State

The “state” is a concept but not a singular actor. For the purpose of this analysis, the policy node “state” will be divided into legislative actors and implementing actors. Legislative actors carry the first stage of policy making, choosing which issues to address and shaping the policy formulation of a Bill up to the passage of an Act. Implementing actors take over the task of translating legislation into applied policies, carrying them out or overseeing their implementation.

<table>
<thead>
<tr>
<th>Legislative Actor</th>
<th>Implementing Actor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parliamentary Committees (Joint Committee on the Charity Bill, PACS)</td>
<td>Courts and Tribunals</td>
</tr>
<tr>
<td>Political Leadership (PM and Cabinet)</td>
<td></td>
</tr>
<tr>
<td>Prime Minister’s Strategy Unit</td>
<td>Civil Service (Charity Commission)</td>
</tr>
<tr>
<td>Home Office</td>
<td></td>
</tr>
<tr>
<td>Charity Commission</td>
<td></td>
</tr>
</tbody>
</table>

*Table 3.2.2: The State Node Actors.*

Two things stand out: first of all, there is a clear imbalance between the state actors involved in the policy formulation process and those involved in the implementation of the policy. Secondly, the Charity Commission, while mainly tasked with the translation from Act to regulation, was also involved in the policy formulation phase. The categories are thus not mutually exclusive; especially at the stages of debate on the Charities Bill, the two spheres partially merge\(^{326}\). Nonetheless, the differentiation will help address the initial puzzle how the Act could be described as a great change and a missed opportunity at the same time.

One difference between the two stages concerns the role that values play: New Labour’s ideology, in particular its advocacy of New Public Management and a closer relationship

---

\(^{326}\) For instance, the Charity Commission was asked to issue a reply to the Prime Minister’s Strategy Unit’s 2001 report.
with the voluntary sector, are likely to be a driver of the legislative actors in formulating the public benefit policy change. The Charity Commission and the courts as implementing actors, on the other hand, are by their very status as unelected bodies technically not allowed to let values influence their work.\textsuperscript{327} Chapter 4 will address the two groups of state actors through an analysis of the written evidence and reports.

\textbf{3.2.3 The Charitable Sector}

The charitable sector comprises over 180,000 charities, from the infamous donkey sanctuary\textsuperscript{328} to large-scale organisations such as Barnardo’s or the British Heart Foundation. It can thus safely be described as diverse. But most charities are too small to be involved in the policy making process. Their views are represented by such umbrella bodies as the National Council for Voluntary Organisations (NCVO) and the Association of Chief Executives of Voluntary Organisations (ACEVO). Because of the prominent role of independent schools in the public benefit debate, a specialised sector umbrella body, the Independent Schools Council (ISC), will also be analysed. The ISC shaped the development of public benefit jurisprudence through its successful appeal to the Charity Tribunal, resulting in the 2011 case \textit{Attorney-General (Independent Schools Council) v Charity Commission for England and Wales.}

\textsuperscript{327} However, see Patterson, A. \textit{Final Judgment}. Oxford: Hart Publishing, 2014, for an account of judicial decision-making in England and Wales.

\textsuperscript{328} See for instance the oral evidence before the Joint Committee on the Draft Charities Bill discussed in Chapter 5. The example of the “donkey charity” stems from a New Philanthropy Capital study (see for instance \url{http://www.theguardian.com/money/2008/apr/23/charitablegiving.childprotection}, accessed online on 5th December 2013). It revealed that charities that target the abused women reach over 7 million recipients per year and receive a combined total of £17 million per annum. By contrast, British donkey charities care for just under 12,000 animals, yet receive more than £20 million per year – each abused woman thus receives £2.43 of donations, whereas each donkey enjoys an impressive £1,666.67. For a more humorous treatment, see a Mitchell and Webb Show sketch (\url{http://www.youtube.com/watch?v=8KMyBnFyI3I}) in which fictional character Captain Todger explains his decision to donate £3 billion to donkeys in the following way: “Amnesty International? Trouble-makers, forget it! Alzheimer’s? No, they’re in a world of their own, they won’t notice. Cancer? No! 3 billion quid for cancer?! It’s like pissing in the wind. Deaf? No, no … angry people; they wouldn’t like it. The blind? Nah, I don’t really care. Dolphins? No, they look smug. Eton College? Uppingham School? No. I don’t think it’s appropriate that public schools have charity status. Junkies, gypsies, hobos – that whole crowd? Hmm no, not keen. So donkeys – I’d like it all to go to donkeys. What? What have you all against donkeys? They’re lovely.”
In turn, Chapter 5 will present an analysis of the reports published by these sector bodies, as well as the evidence that they provided to the Joint Committee on the Charities Bill in 2003 and 2004.

### 3.2.4 The Legal Community

Just as diverse in opinion is the legal community, especially because of the lack of a firm jurisprudential foundation of charity law. Generally, the legal community consists of practicing charity lawyers (barristers and solicitors) and academic charity lawyers.

Chapter 6 will analyse their agenda and contribution to the public benefit reform through a systematic review of academic and practitioner’s journals, as well as the evidence given by leading charity lawyers before the Joint Committee on the Charities Bill. Publications by the Charity Law Association, the community’s professional association, will also be taken into account.

### 3.2.5 The Media

Finally, PEF attributes great importance to the role of the media as a facilitator of policy alliance formation across separate policy networks, and, even more importantly, as a spotlight that can bring a certain policy issue into the government’s field of vision, increasing its momentum and the likelihood that the policy will be formulated in the form of legislation.

Chapter 7 undertakes a content analysis of national newspapers from 1996 to 2012 to analyse the role of the media. Givel cautions that PEF overstates its role because media attention does not necessarily produce empirical change; rather, it can distort or inflate a policy issue. The content analysis will be mindful of this potential problem, and will refer to the analysis in previous chapters as well as Chapter 8 on the interview account to put the role of the media into perspective.

---

329 See section 3.2.
3.2.6 Personal Accounts - Interview Data

Face-to-face interviews will contextualise the preceding analyses through the personal insights of key policy actors from all four policy nodes within the network, i.e. the state, charity sector, legal community, and media. 18 interviewees provided over 25 hours of valuable first-hand accounts that put the contribution of the various independent variables into perspective.
Chapter 4. The State and Parliamentary Actors

4.1 Introduction

The so-called Compact, initiated as a response to the Deakin Report in 1997, was supposed to mark a new era in the relationship between the state and the voluntary sector. In the case of the public benefit reform in the Charities Act 2006, the policy node “state” can be divided into six key actors with two functions: legislating and implementing. At times, the boundary between these two functions can be blurred. The actors include the Prime Minister’s Strategy Unit (PMSU), the Home Office, the Joint Committee on the Draft Charity Bill, and Parliament (the House of Lords and House of Commons). Moreover, the Charity Commission was involved in the formulation of policy through its implementation in regulation. The same applies to the courts, which shape policy through case law and the interpretation of statutory rules.

In the chapter that follows, the primary data from the various state and parliamentary actors will be analysed with a view to identifying relevant evidence regarding the independent variables singled out by the theoretical framework and, of course, the three hypotheses presented in Chapter 2. Values can, as specified by PEF, contribute to policy change. Therefore, the chapter will conclude with a discussion of secondary sources on New Labour and its ideology, and the possible effects on the public benefit reform process. This theme will be taken up throughout the following chapters.

4.2 PMSU: “Private Action, Public Benefit”

Throughout the parliamentary debate, the PMSU’s report “Private Action, Public Benefit” has been referred to as the origin of the policy impetus to reform charity law around the concept of public benefit. It is also the first time that the New Labour
government officially engaged with the topic. Founded by Tony Blair on 28th July 1998, first as the Performance and Innovation Unit (PIU)\textsuperscript{331}, the team around public policy expert and founder of Demos\textsuperscript{332} Geoff Mulgan served as New Labour’s internal think tank\textsuperscript{333}. It was the PMSU’s tasks to generate new policy ideas, set the Prime Minister’s policy priorities, and make innovative suggestions to improve on them outside of the strict confines of party politics.\textsuperscript{334}

In his foreword to the report, then Prime Minister Tony Blair acknowledged the crucial role of charities for British society – and for his vision of a Britain under New Labour in which social services are largely drawn from Public-Private-Partnerships (PPPs) with the voluntary sector. He wrote:

\begin{quote}
Wise governments respect the crucial independence of the sector. But government has an important role to play in providing support. We have already taken steps to help the sector, including (...) the introduction of the Compact on relations between government and voluntary organisations, (...). Most recently, the cross-cutting review has sought ways to overcome the barriers that make it hard for not-for-profit organisations in the sector to deliver high-quality public services and engage in partnership with the public sector. But more needs to be done. Much of the legal context for charity and voluntary action is now outdated.\textsuperscript{335}
\end{quote}

\textsuperscript{332} Demos is a UK-wide cross-party think tank. For more information, see \url{http://demos.co.uk/about}, accessed online on 24th September 2013.
\textsuperscript{334} Fawcett and Rhodes (2007): p. 84.
This could lead to the “risk undermining public confidence”\textsuperscript{336} in charities, a reason that prompted him to “as[k] the Strategy Unit to take a look at the law and the regulatory structures which govern the whole sector”\textsuperscript{337} on 3\textsuperscript{rd} July 2001\textsuperscript{338}. The Prime Minister emphasised the centrality of public benefit right from the beginning, noting that the “current law is unclear, has not evolved in a way which best meets the needs of contemporary communities, and does not reflect the diversity of organisations which operate for the public benefit”\textsuperscript{339}.

Goals
The report’s goals were to “improve the range of available legal forms, enabling organisations to be more effective and entrepreneurial; to develop greater accountability and transparency to build public trust and confidence; and to ensure independent, fair and proportionate regulation”\textsuperscript{340}. But the very first goal that the Strategy Unit listed was to “modernise charity law and status to provide greater clarity and a stronger emphasis on the delivery of public benefit”\textsuperscript{341}. Public benefit was seen as the glue that holds together the fabric of the charitable sector, at least in the Strategy Unit’s proposal. According to the PMSU, it also was the key to addressing the difficult question of fee-charging charities, such as independent schools and private hospitals. Thus:

\begin{quote}
[t]here should be a clearer focus on public benefit. In particular charities which charge large fees for their services, thereby excluding a substantial part of the population, will need to demonstrate how their activities have a public character. The Charity Commission
\end{quote}

\textsuperscript{337} PMSU (2002): p.5.
\textsuperscript{338} The Strategy Review Report was part of a threefold review that also included “a review of access to government regeneration funding, undertaken by the Regional Co-ordination Unit of the Office of the Deputy Prime Minister; and a crosscutting review of public service delivery by the voluntary sector, led by the Treasury. Their findings were reported in September 2002 – ‘The Role of the Voluntary and Community Sector in Service Delivery’”, see PMSU (2002): p. 12.
\textsuperscript{339} Emphasis added; PMSU (2002): p. 5f.
should have an on-going programme to review the public character of charities.\textsuperscript{342}

\textbf{View on Charity Sector}

As a mixed-method study conducted by a diverse team of charity law and public policy experts,\textsuperscript{343} the report is based on the assumption that the defining character of the charitable sector is its generation of almost exclusively public benefit on a continuum of public to private benefit.\textsuperscript{344} Given this initial premise, it is hardly surprising that public benefit occupied a central place in the document and is one of its crucial guiding principles, embodied in paragraph 3.8 “Supporting the delivery of public benefit”.\textsuperscript{345} Thus, the report identifies “[t]he current approach to determining charitable status” as a main challenge for the sector because it “does not always ensure that benefits attach to objectives that society sees as having public benefit” and does not provide an “adequate mechanism for updating charitable status mak[ing] it harder for the law to keep pace with economic and social developments”\textsuperscript{346}

\textbf{View on Public Benefit}

The report is notably silent on what public benefit really means; it only refers to the Charity Commissions guidance “RR8: The Public Character of Charity”\textsuperscript{347}. At the same time, it is rather liberal in its choice of terminology, mentioning “public character” and “public benefit” at times almost interchangeably.\textsuperscript{348} It does note, however, that public

\footnotesize{\textsuperscript{342} Emphasis added; PMSU (2002): p. 8.}
\footnotesize{\textsuperscript{343} For a full specification of the report’s methodology, see PMSU (2002): p. 12.}
\footnotesize{\textsuperscript{344} PMSU (2002): p. 15.}
\footnotesize{\textsuperscript{345} PMSU (2002): p. 30.}
\footnotesize{\textsuperscript{346} PMSU (2002): p. 29.}
\footnotesize{\textsuperscript{347} According to the list cited, public benefit is present when: “The organisation benefits the public as a whole or a sufficient section of it; [t]he beneficiaries are not defined in terms of a personal or contractual relationship; [t]he beneficiaries should not be defined by an inappropriate or capricious link; [m]embership and benefits should be available to all those who fall within the class of beneficiaries; [a]ny private benefit arises directly out of the pursuit of the charity’s objects or is legitimately incidental to them; [t]he amount of private benefit should be reasonable, ; [c]harges should be reasonable and should not exclude a substantial proportion of the beneficiary class; [t]he service provided should not cater only for the financially well off; [i]t should in principle be open to all potential beneficiaries.”, PMSU (2002): p. 37.}
\footnotesize{\textsuperscript{348} Even the initial definition of public benefit makes reference to “public character”: There should be a clearer focus on public benefit. In particular charities which charge large fees for their services, thereby excluding a substantial part of the population, will need to demonstrate how their activities have a public
benefit derives its true meaning on a case-by-case basis that should not be determined by the government of the day for fear of political bias\textsuperscript{349}, but by an independent organisation.

Charity law, so the report suggests, is too complex and despite a 400-year evolution has not kept pace with modern socio-economic framework of English and Welsh society. The Strategy Unit’s recommendations to modernise charity law are based on a two-fold legal reform: a) the enlargement of the list of charitable purposes that had so far been defined in \textit{Pemsel}, and b) the removal of the presumption of public benefit for all heads of charity.\textsuperscript{350} While this issue would later on become a bone of contention, the Strategy Unit is very specific on the latter point. It recognises that while public benefit has been established to be present in the case of the first three heads of charity, “it is not the case that the presumption means that some charities are wholly exonerated from the public benefit requirement. All institutions must, in order to be charities, be demonstrably established for the public benefit. \textit{The presumption is of limited practical significance.}”\textsuperscript{351}

Although the Strategy Unit report thus purports that the presumption does not make a significant practical difference, it nonetheless recommends its removal.\textsuperscript{352} It is not clear what difference the Strategy Unit expected from this change. The report remains equally ambiguous on the nature of the public benefit test, stressing the advantage of a purpose-
based test but pointing out that, technically speaking, “the tax reliefs associated with charitable status already depend on funds being applied to charitable purposes”\textsuperscript{353}.

Reference to Other Policy Documents

The Strategy Unit refers to Scotland and its parallel policy making process under devolution\textsuperscript{354}, in particular the treatment of public benefit in the MacFadden Report of 2001\textsuperscript{355}. Most important for the basis of the Strategy Unit’s report, however, is the NCVO’s report on charitable status “For the Public Benefit? A Consultation Document on Charity Law reform”.\textsuperscript{356} An extension of the list of charitable purposes is chosen over the complete reliance on public benefit as the sole qualifying features of charitable status because “it is in practice difficult to devise a workable definition which would not need extensive secondary legislation and guidelines, which could be more complex than a definition using categories”\textsuperscript{357}. Also, it would risk too much scope for the government of the day to exert undue influence on which organisations qualify as charitable and which do not.\textsuperscript{358}

Fee-Charging Charities

Crucially, the report notes that the case law approach to defining public benefit might be flexible in principle, but not in practice because of its uncertainty and the lack of cases reaching the courts to update its meaning; at the same time, a statutory definition of public benefit is seen as too restrictive.\textsuperscript{359}

One of the “anomalies” resulting from the case law was the charitable status of fee-charging organisations. This is were “public character” comes into play, again undefined in its relationship with “public benefit”: the Strategy Unit recommends that the Charity Commission conduct on-going assessments of fee-charging charities’ “public character” in order to “ensure (...) that they provide access for those who would be excluded

because of the fees. For example, to maintain their charitable status, independent schools which charge high fees have to make significant provision for those who cannot pay full fees and the majority probably do so already.\textsuperscript{360}

The Strategy Unit’s overall recommendation on public benefit reform is four-fold: the report advocates the extension of the list of charitable purposes, the removal of the presumption of public benefit, the continuation of a case law-based approach while equally considering alternatives\textsuperscript{361}, and for the Charity Commission to consult with the sector and those fee-charging charities most concerned to develop a “public character” test with as little administrative red-tape as possible.\textsuperscript{362}


It is somewhat ironic that the Government would formulate a response to its own report. But sure enough, the Home Office under David Blunkett published a reply report, “Charities and Not-for-Profits: A Modern Legal Framework”\textsuperscript{363} in July 2003. It incorporated a public consultation that entailed 1,087 written submissions by organisations and individuals that had followed the Strategy Unit report.\textsuperscript{364}

**View on Public Benefit**

---

\textsuperscript{361} PSU (2002): p.40f. For instance: “Although in some areas anomalies have arisen under the current law, there is also a body of helpful case law that has considered specific questions, such as in the scope and meaning of education in the context of charity law. It is not the aim of this reform to do away with existing case law. Removing all reference to existing case law would create significant uncertainty for existing charities, and would mean that many of the same points would have to be unnecessarily explored again by the courts.”
\textsuperscript{364} “The consultation period ran from 25 September to 31 December 2002. The Review was distributed in hard copy and was placed on the Strategy Unit’s website. Members of the Review team and the Home Office’s Active Community Unit (ACU) took part in some 50 consultation events around the country to publicise the Review and to invite responses to it. Responses to the Review have been analysed by ACU.” Home Office Report (2003): p.4f.
The Home Office response notes the extraordinary interest in the public benefit test, with almost half of all submissions focusing partially or entirely on the reform of the definition of charitable status based on public benefit and more than 95% agreed.\(^{365}\) Only 4% reported that the existing case-law definition of charitable status and public benefit was sufficient.\(^{366}\) Intriguingly, the status of independent schools as charitable was only challenged by a few respondents, despite the politicised debate that would ensue.\(^{367}\) This provides further evidence that education began to dominate the actual reform agenda only once the debate entered Parliament and turned political. Only 2% of respondents favoured a statutory definition of public benefit, while the rest agreed with the Strategy Unit’s recommendation of keeping a case-law based and therefore flexible definition.\(^{368}\) The removal of the presumption of public benefit for the first three heads of charity, in contrast, resulted in protest from independent schools and religious charities.\(^{369}\)

**Definition of Charity in Common Law**

The Home Office report largely accepts and confirms the Strategy Unit recommendations on charitable status and public benefit with one subtle, yet notable difference. It offers a slightly different take on the causal nexus between mitigating the mismatch between the technical-legal definition of charity and the public understanding of the term, suggesting that:

> The legal definition of charity sets the scope for all charitable endeavour. At present the definition is largely inaccessible to the lay person, because of its foundation in the common law. The public cannot readily see the great range and diversity of charity or fully appreciate the central role that charities play as a force for good in national life.\(^{370}\)

---


\(^{368}\) Home Office Report (2003): paragraph 3.7, p.8. The report further notes in paragraph 3.8 that especially those respondents who represented independent schools “strongly opposed a statutory definition of public benefit”.


The Home Office thus implies that not understanding the definition of charity in law would make it impossible for the public to appreciate charities’ role in civil society. This is taking the Strategy Unit’s reasoning based on transparency and accountability one step further.

Summarising the new public benefit test, the Home Office proposed a codification of the existing case law:

_The new definition, like the current nonstatutory one, would operate in practice as a two-stage test. To qualify as charitable, an organisation would have to show, first, that its purposes, as set out in its constitution, fell within one or more of those in the new list; and, second, that it was established for the public benefit. This would rule out organisations which, although they had purposes falling within the list, were not demonstrably for the public benefit (e.g. because the services or benefits they provided were not open to a wide enough section of the population, or because they were run for private benefit)._\(^{371}\)

**Removal of the Presumption**

Moreover, the Home Office agrees with a case-law over a statutory definition of public benefit “for reasons [of] flexibility, certainty, and its capacity to accommodate the diversity of the sector”\(^{372}\) and the removal of the presumption of public benefit. Unlike the Strategy Unit, the Home Office is less careful in its recapturing of the presumption debate: it advocates its removal but states in the same sentence that it “has in any case been of limited benefit to charities since the Charity Commission, at the point of registration, examines the public benefit credentials of all applicants, without distinction between those pursuing purposes said to enjoy the presumption and those pursuing other

---


purposes”\textsuperscript{373}. If the presumption made no difference in practice, then the purposes of removing it in the first place is unclear. Yet the report does not address this question.

Finally, about 10\% of respondents\textsuperscript{374} also commented on the “public character checks” to be conducted by the Charity Commission on an on-going basis, effectively extending the public benefit requirement from registration to a charity’s entire lifetime. A majority of respondents on this point is reported to be independent schools, a “great majority” of whom are described as agreeing with the “concerns behind this recommendation (…) “express[ing] themselves willing to cooperate with the Charity Commission”\textsuperscript{375}

\textbf{View on Fee-Charging Charities}

There were three indications at this early stage that foreshadowed the heated and controversial debate on the public benefit test that would ensue: Firstly, some respondents referred to the recommendation as “an assault on independent schools.”\textsuperscript{376} Secondly, the legal community cautioned that the Strategy Unit report did not address in sufficient clarity the worst-case scenario of a charity losing charitable status; in particular, they commented on the lack of guidance on what would happen with its assets.\textsuperscript{377} Finally, independent schools were the single largest sector group to respond and (by a mere difference of one submission) the second largest group of respondents overall, accounting for 16\% of all submissions.\textsuperscript{378}

\textbf{4.4 The Joint Committee on the Draft Charity Bill}

Based on the Strategy Unit report and the Home Office’s reply, a draft Charity Bill was announced in the Queen’s speech in November 2003. The Bill’s content followed the Government’s recommendations on public benefit and charitable status.

\textsuperscript{373} 151 respondents commented on this point see Home Office Report (2003): paragraph 3.20, p. 10.
On 6th April 2004, the House of Lords minute recorded that Baroness Amos, the Lord President, proposed a motion that a Joint Committee on the Draft Charities Bill be created, which was approved on the same day. Six weeks later, on 12th May 2004, the Joint Committee on the Draft Charities Bill was appointed. Formed by six members from the Commons and six members from the Lords, the Committee was asked to present its report on the draft bill by 30th September 2004. Alan Milburn assumed the Chairmanship. All members declared interests based on their own experience as charity trustees. Professor Jean Warburton, a law professor from the University of Liverpool and the founder of the University’s Charity Law and Policy Unit, and Margaret Bolton, a former Director of Policy and Research at the National Council of Voluntary Organisations, served as Specialist Advisers to the Committee.

379 Mr Alan Campbell (Labour); Rt Hon George Foulkes (Labour); Rt Hon Alan Milburn (Labour); Mr Andrew Mitchell (Conservative); Bob Russell (Liberal Democrats); Ms Sally Keeble (Labour).
380 Lord Best; Lord Campbell-Savours; Earl of Caithness; Baroness McIntosh of Hudnall; Lord Phillips of Sudbury; Lord Sainsbury of Preston Candover.
381 Lord Best: Director (Chief Executive) of the Joseph Rowntree Foundation and the Joseph Rowntree Housing Trust (both bodies are charities), member of the Foundation Forum, the Advisory Council of the National Council of Voluntary Organisations and the Council for Charitable Support; the Earl of Caithness (Trustee and Chief Executive, Clan Sinclair Trust, Trustee, Castle of Mey Trust and Chairman, Caithness Archaeological Trust; Baroness McIntosh of Hudnall (Trustee - National Endowment for Science, Technology and the Arts (NESTA), Theatres Trust, South Bank Sinfonia, Art Inter-Romania, Peggy Ramsay Foundation; Board Member - The Roundhouse Trust, Almeida Theatre, Welsh National Opera, Foundation for Sports and the Arts; Chairman and Trustee, Royal National Theatre Foundation); Lord Phillips of Sudbury (self-employed partner in Bates, Wells and Braithwaite (London) Solicitors representing charities; Gainsborough's House, Sudbury, Suffolk; President, Citizenship Foundation (a charity); President, Solicitors Pro Bono Group (a charity); Trustee, Phillips Fund (a charity); Trustee, ICNL Trust (a charity); President, Sudbury Society (a charity); Committee, Council for Charitable Support; Trustee, Me-Too (a charity); a few client trusts and client executorships/trusteeships in relation to wills; Age Concern Funeral Trust); Lord Sainsbury of Preston Candover (Chairman of the Trustees of The Royal Opera House Endowment Fund; Trustee of: the Linbury Trust (a grant-giving charitable trust founded in 1970's), the Ashmolean and the Rambert School of Ballet and Contemporary Dance), Rt Hon George Foulkes (Trustee of Burns House; former Director of Age Concern (Scotland)); Rt Hon Alan Milburn (Member of Amnesty International; Honorary President of Darlington YMCA, Darlington Mencap and Darlington Arthritis Care); Mr Andrew Mitchell (Trustee of GAP (Gap Activity Projects); Management Committee SOS SAHEL; ESU International Debate Committee; Vice Chairman of Alexandra Rose Day; President Norman Laud Association (all charities)); Bob Russell (Secretary of the all-party Scout Group and trustee of the St Mary Magdalen Almshouses Charity); Ms Sally Keeble (member of a commission of inquiry for the Association of Chief Executives of Voluntary Organisations, membership of the management committee of a young persons charity and Patron of the Friends of the Lakes).
4.4.1 The Report

In its report, the Committee acknowledged the PMSU’s “Private Action, Public Benefit” as the origin of the policy making process and lauds the unit for its innovative impulse. Its overall appraisal of the draft Bill, however, is less favourable. There are four overarching issues the Committee takes with the draft Bill: unclear objectives that are not measurable, unnecessary complication of charity law, lack of clarity about the Charity Commission’s role and the required funding for it, and the uniformity of charity law across Great Britain given that Scotland was undergoing its own devolved charity policy reform.

In particular, it criticises the lack of clarity on the Bill’s objectives and the resulting difficulty in evaluating its effectiveness. The Committee noted that:

\[\textit{w}e \textit{remain concerned that the Government's case for the draft Bill will be compromised unless there is greater clarity about the objectives against which its success can be gauged. In order to be meaningful the effect of legislation must - insofar as is practicable - be measurable; in order to be measurable it must have clear objectives.}\]

Goals

Governmental objectives varied by publication and individual, the Committee critically remarked, summarising the declared goals of the Charities Bill as ranging from modernising charity law, to scrutinising charities more closely, protecting the “charity brand” from decline in the face of a drop in public trust, and finally even to raising the visibility and increase the public’s confidence in charities. The Joint Committee expressed its puzzlement upon learning about the final goal because empirical evidence seemed to suggest a very different environment for charities: two nfpSynergy reports

\[\text{383 Joint Committee (2004): paragraph 16, quoting from Home Office Minister Fiona Mactaggart’s oral evidence.}\]
\[\text{384 Joint Committee (2004): paragraph 15ff.}\]
from 2002 and 2003 indicate that public confidence had “actually risen by a substantial 25% since the 1990s” and that 70% of respondents found charities to be the most trustworthy organisations; insights that have been confirmed by NCVO research. In short, the Joint Committee agreed with the Charity Law Association’s conclusion that “the notion that more regulation will increase public confidence and trust in charities is, I think, erroneous” and "what the Bill is seeking to do is to give statutory force to the practice the Charity Commission has adopted in an enlightened way over the last ten years".

However, the Joint Committee expressed concern that the layering of the Bill across the Charities Acts 1992 and 1993 made it inaccessible for trustees and unnecessarily complicated. In this context, the Joint Committee notably also refers to the (at that stage) draft charities Bill in Scotland. In contrast to the English approach set out in the draft Bill, the Joint Committee applauds the Scottish decision to “repeal all its existing provisions and bring forward a new consolidated Act” instead of fiddling around with the existing legislation. Referring to a Philanthropy UK study, the Joint Committee instead “calls for the Charity Commission to continue its programme of simplification of guidelines and procedure, promote a simplified form of charitable trust and encourage the use of foundations”.

Role of Charity Commission

The role of the Charity Commission is linked with the public benefit test in so far as the draft Bill envisions the Commission as implementing actor. According to a Charity Law Association estimate, these “public character checks” would add a further £250,000

386 Joint Committee (2004): paragraph 19.
387 “[…] 35 of the 48 clauses in the draft Bill amend or add to the existing Charities Act of 1992 and 1993. This makes it difficult to understand the draft Bill on its own, as charity law would be contained in a number of different statutes, rather than one consolidated version.” Joint Committee (2004): paragraph 20.
390 Joint Committee (2004): paragraph 25.
391 See Chapter 3 for a more detailed discussion of the changes affecting the Charity Commission’s role.
in Charity Commission cost per year.\textsuperscript{392} Despite the substantial bill, the Charity Commission itself did not request further funding. The Home Office admitted that the public policy reform and on-going character checks would “involve one-off costs for the Commission of £1.7 million and annual recurring costs of £1.02 million, but [it] assumes that the Commission will absorb the effects of the implementation of the Bill by reallocating resources internally”.\textsuperscript{393} Rightfully, the Joint Committee had its doubts about these diverging estimates and the Home Office’s ambitions plan for the Charity Commission.

Reference to Scotland

Finally, the Joint Committee on the draft Charities Bill emphasised the need for a unified approach to charity law across the UK.\textsuperscript{394} The Committee did not question the devolved legislative authority and recognised that Scotland had always had a different legal system; yet its “main concern is to ensure that the many charities operating across Britain do not face an onerous regulatory burden under two very different systems, and that the two Bills do not contradict each other by creating different definitions of a charity”.\textsuperscript{395} Therefore, the Joint Committee requested that further consultation be undertaken to streamline the law of charitable status as far as possible across the two jurisdictions.

4.4.2 The Appraisal of Public Benefit

It became apparent already at the Joint Committee scrutiny stage that public benefit was one of the main challenges for the draft Bill. In its report, the Joint Committee adopted almost \textit{verbatim} the Strategy Unit treatment of the legal foundations for public benefit, which in turn was based on a Charity Commission guidance document.\textsuperscript{396} As for the

\textsuperscript{392} “The Charity Law Association estimated that an additional £250,000 per annum would be needed for the Commission to carry out its rolling public character review.” Joint Committee (2004): paragraph 30.
\textsuperscript{393} Joint Committee (2004): paragraph 31.
\textsuperscript{394} Joint Committee (2004): paragraph 14.
\textsuperscript{395} Joint Committee (2004): paragraph 37.
\textsuperscript{396} Joint Committee, paragraph 62: “‘Public benefit' is not defined in statute law and its legal meaning is derived from a series of court cases over many years. There is no straightforward definition in case law. According to the Government's Strategy Unit, public benefit means that a charity's purposes must: confer benefit, as opposed to harm; benefit either the whole community or a 'significant' section of it; and confer only incidental private benefit.”
presumption of public benefit for the first three heads of charity, the report noted that there were no major changes to the way the test was to be carried out and that “[m]uch of our inquiry has been taken up in trying to establish what the consequences of [the removal of the presumption] will be”\(^{397}\).

It concluded that “[o]n the basis of the evidence we have received, the main difficulty which arises in this area is how schools and hospitals which charge high fees demonstrate adequate public benefit when access to the services they provide is limited in this way.”\(^{398}\) Already in the 1970s, the Committee pointed out, had the then Education, Arts and Home Office Sub-Committee of the Expenditure Committee expressed its intention to implement a “test of ‘purposes beneficial to the community’” in the area of education, “admitting to charitable status those institutions which manifestly devote the education they provide towards meeting a range of clear educational needs throughout the whole community.”\(^{399}\)

Addressing the status of fee-charging charities, so the Committee, was “not necessarily the most important issue facing the charity sector” but the Committee still criticised the draft legislation’s vagueness on the topic. The Committee also noted that fee-charging charities had

“also been the subject of much controversy over many years with some arguing strongly that the fact that wealthy independent schools enjoy charitable status - and the tax advantages it confers - is incompatible with any common sense view of what it means to be a charity. Since the purpose of the Bill, according to the Minister, is to protect the charity brand, it is important that any new law on charity must properly deal with the issue of public benefit”\(^{400, 401}\)

\(^{397}\) Joint Committee, paragraph 63
\(^{398}\) Joint Committee, paragraph 64
\(^{399}\) quoted in Joint Committee, paragraph 85
\(^{400}\) Joint Committee (2004): paragraph 64.
\(^{401}\) The Joint Committee points out that of over 180,000 registered charities, there were only about 1,000 independent schools with charitable status and even less private charitable hospitals; see Joint Committee (2004): paragraph 92

95
View on Fee-Charging Charities

As this indicates, fee-charging charities in general, and independent schools in particular, already surfaced as the bone of contention at the scrutiny stage. The Committee cited Dr Anthony Seldon’s evidence in which he distinguished between a “small minority which are very wealthy (…), a self-perpetuating oligarchy (…) and not the least creative and innovative” and the remaining “95 per cent (…) [who] are passionate about being involved in the local community” in an attempt to “break down this notion of a monolithic independent sector”. 402 There was concern about schools losing their charitable status, especially since the criteria for public benefit in the area of fee-charging charities had not been developed in the Bill. Similarly, the hospital sector would risk to be shaken up, as “Nuffield Hospitals struggled to make any convincing case for being a charity or receiving the tax advantages that go with it” 403. In case a charity did not pass the public benefit test, the Committee asked the Charity Commission to provide guidance as for what ought to be done to remedy the lack of public benefit. Loss of status was thus not a goal the Committee wanted to pursue 404, but rather an encouragement for fee-charging charities to demonstrate wider contributions, a point echoed by Home Office Minister Fiona Mactaggart 405.

The independent school discussion and mixed evidence led the Joint Committee to two suggestions: Firstly, the Committee offered an alternative if more radical solution according to which independent schools would continue to receive tax exemptions but would generally lose their charitable status. 406 This would entail further definitional questions, but rid the draft Charities Bill of a problem that might be more efficiently dealt with through different means.

---

403 Joint Committee (2004): paragraph 90.
404 Joint Committee (2004): paragraph 93.
405 Joint Committee (2004): paragraph 91.
406 Joint Committee (2004): paragraph 95.
Secondly, and more importantly, the Committee demanded a clearer formulation of the public benefit test and its administration. It volunteered a possible definition407 drafted by specialist adviser Professor Jean Warburton, yet also pointed out that a statutory definition would inevitably lead to a loss of flexibility.408 The Charity Commission thought the definition workable but the Home Office rejected the suggestion, favouring guidance by the Charity Commission or even statutory guidance.409 The Home Office did not provide specific evidence on such statutory guidance, and so the Committee speculated that it would be provided by ministers, possibly subject to a vote in Parliament. The Committee acknowledged that this would offer more clarity while retaining flexibility, yet it rejected the option after all since “it carries the risk of leaving the way open to periodic interference by the government in the definition of what is charitable.”410

The Joint Committee concluded that – following the Strategy Unit recommendation and the Government’s endorsement411 – the only substantive change in the draft Bill would be the removal of the presumption, with public benefit itself still defined through the existing case law.412 It worried that the explanatory notes on the draft Bill did not give any “clue about the intended consequences” but that the Home Office Minister had informed the Committee that “the removal of the presumption is intended to have an impact.”413 Minister Fiona Mactaggart confirmed this during her oral evidence.414

407 The “illustrative definition” reads: “(1) The section applies in connection with the requirement in section 2(1)(b) that a purpose falling within section 2(2) must be for the public benefit if it is to be a charitable purpose. (2) The requirement is satisfied if, and only if, the following three conditions are complied with: a) the purpose is intended to provide benefit [in the sense of common good or social value]; and b) the purpose is directed to the public or a sufficient section of it; and c) any private benefit is incidental to the purpose and reasonable. (3) In determining whether the requirement is satisfied in relation to any such purpose, it is not to be presumed that a purpose of a particular description is for the public benefit. (4) Subject to subsection (3), the three separate conditions in subsection (2) are to be interpreted in the context of the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales.” Joint Committee (2004): paragraph 97.

408 Joint Committee (2004): paragraph 97.
409 Joint Committee (2004): paragraph 98.
410 Joint Committee (2004): paragraph 99.
412 Joint Committee (2004): paragraph 72.
413 Joint Committee (2004): paragraph 100.
414 “If the Government did not intend the removal of the presumption of public benefit to particular classes of charities to have no impact at all, if that had been the intention of the Government, we would not have
Relations between Policy Actors

However, the public evidence session brought to light a severe disagreement between the Charity Commission and the Home Office. On independent schools, the Charity Commission cautioned that the removal of the presumption would not have any effects whatsoever because their status was settled by the courts in case law, which still defined public benefit even under the Bill.415

The Joint Committee called the potential consequences of this reading a “ludicrous position of promising to bite on the public benefit bullet without having any teeth to do so”416. Even worse, not just the experts disagreed on this matter, notably so charity law experts Professor Peter Luxton and Hubert Picarda, QC, on the side of the Commission, and the Charity Law Association on the opposing end – so did the Home Office. Given the usually rather clinical tone of scrutiny committees, the Joint Committee’s reaction to the disagreement between the Charity Commission and the Home Office stands out even more:

This is deeply unsatisfactory. For a matter of such public importance and interest to produce such total confusion at the heart of the draft Bill is nothing short of farcical.417 (...) The work of the Committee was compromised by the failure on the part of the Home Office and the Charity Commission to sort out their differences on this key point during the course of our evidence sessions. The process of pre-legislative scrutiny of this draft Bill has revealed a schism between the two bodies most closely involved which goes to the heart of the purpose of the Bill.418

bothered to do it. We believe that it is necessary for it to have an impact.” Joint Committee (2004): paragraph 74.

415 Joint Committee (2004): paragraph 75.
416 Joint Committee (2004): paragraph 76.
417 Joint Committee (2004): paragraph 76.
418 Joint Committee (2004): paragraph 79.
After this very explicit criticism of both the Home Office and the Charity Commission, the two departments issued a supplementary memorandum\(^{419}\) to the Joint Committee proposing a common agreement. Not surprisingly, the compromise submitted to the Committee was somewhat unsatisfactory and did not reach the clarity on the question of public benefit that the Committee had called for. In short, the letter sets out that the case law\(^{420}\) would continue to define public benefit, allowing for sufficient flexibility for the definition of “charity” to adapt to changes in social and economic circumstances.

**Case Law and Re Resch**

Even so, the case law on independent schools would not prevent the Charity Commission from using the removal of the presumption to “provide a basis for further development of the law.”\(^{421}\) In applying the public benefit test to fee-charging charities, the Australian Privy Council case *Re Resch*\(^{422}\) was accepted as setting out three guiding principles:

1. “both direct and indirect benefits to the public or a sufficient section of the public may be taken into account in deciding whether an organisation does, or can, operate for the public benefit;
2. 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 the organisation does not operate for the public benefit; and
3. an organisation which wholly excluded poor people from any benefits, direct or indirect, would not be established and operate for the public benefit and therefore would not be a charity.”\(^{423}\)

---

\(^{419}\) Supplementary memorandum from the Home Office and the Charity Commission (DCH 356), 2003/4.

\(^{420}\) The cases cited in the supplementary memorandum specifically concern independent schools: *A-G v The Earl of Lonsdale* [1827] 1 Sim 105; 57 ER 518; *Brighton College v Marriott* 10 TC 213, [1925] 1 KB 312, [1926] AC 192; and *The Abbey Malvern Wells Ltd v Ministry of Local Government and Planning* [1951] 1 Ch 728.

\(^{421}\) Quoted from “Extract from a letter to the Committee from the Home Office and the Charity Commission” reprinted in Joint Committee (2004).

\(^{422}\) For a detailed summary of the facts in *Re Resch*, refer to Chapter 3.

\(^{423}\) Joint Committee (2004): paragraph 94.
As Chapter 6 will demonstrate in further detail, this interpretation of Re Resch has been debated and criticised among legal experts. The final conclusion reached by the Home Office and the Charity Commission did nothing to hide the thinness of the compromise, referring in all vagueness to future changes and adaptation and an implication that the final say in all matters public benefit were in the hands of the courts.\textsuperscript{424}

In the light of the further submissions of evidence, the Joint Committee recommended:

\textit{[t]hat the basic principles for a definition of public benefit should be those set out in the recent concordant between the Home Office and the Charity Commission (...) and that those principles should be replicated either in non-exclusive criteria included in the Bill or in non-binding statutory guidance issued by the Secretary of State.}\textsuperscript{425}

This might have been a final, but certainly not a satisfactory recommendation, and the Committee did not hide its dissatisfaction with the Home Office and the Charity Commission.

\subsection*{4.5 The Home Office}

\subsubsection*{4.5.1 Written Evidence}

The Home Office submitted an extensive amount of evidence to the Joint Committee; it included an initial memorandum to the Joint Committee\textsuperscript{426} as well as five further memoranda\textsuperscript{427}, one further memorandum submitted together with the Charity

\textsuperscript{424}“Finally, we agree that fundamental to all this is the fact that the law on public benefit will evolve and develop over time. This evolution will have regard to both the particular charitable purposes and the social and economic changes in society. It is in this context that the Commission will, in considering the application of the principles which apply to fee-charging charities, including independent schools, be mirroring the court's approach and encouraging the law to develop as appropriate in pace with modern society.” Quoted from “Extract from a letter to the Committee from the Home Office and the Charity Commission” reprinted in Joint Committee (2004).

\textsuperscript{425}Joint Committee (2004): paragraph 102.

\textsuperscript{426}Memorandum from The Home Office (DCH 15) Ev 283, “Public Views and Perceptions of Charities”.

\textsuperscript{427}Further memorandum from the Home Office (DCH 16) Ev 284; Further memorandum from the Home Office (DCH 17) Ev 287; Further memorandum from the Home Office (DCH 18) Ev 291; Further
Commission\textsuperscript{428}, five items of supplementary evidence\textsuperscript{429} and finally a joint submission together with the Charity Commission. So what kind of evidence did the Home Office provide regarding the public benefit test, its administration, and the relevance for the definition of charitable status?

Reference to Other Policy Documents

In its initial memorandum\textsuperscript{430}, the Home Office focused on the status and perception of charities among the population. It cited a number of studies from the NCVO and nfpSynergy that all confirmed that charities were held in extraordinarily high esteem\textsuperscript{431}. However, it also emphasised evidence from the March 2004 edition of nfpSynergy’s Charity Awareness Monitor\textsuperscript{432} that there was some confusion regarding charitable status: more than 90% were able to identify the traditional and big charities (such as the NSPCC, RSPCA, Macmillan Cancer Relief, etc.), but half of the respondents wrongly thought of Amnesty International as a charity while failing to recognise the Church of England and its organisations as charities and less than a quarter were aware that the British Museum (24%) and Eton College (13%) had charitable status\textsuperscript{433}. The implication would later be iterated by Home Office Minister Fiona Mactaggart, suggesting that the mismatch

\begin{footnotesize}
\textsuperscript{428} Further memorandum from the Home Office and Charity Commission (DCH 19) Ev 295.
\textsuperscript{429} Supplementary memorandum from the Home Office (DCH 350); Supplementary memorandum from the Home Office (DCH 351); Supplementary memorandum from the Home Office (DCH 352); Supplementary memorandum from the Home Office (DCH 353); Supplementary memorandum from the Home Office (DCH 358).
\textsuperscript{430} DCH 15.
\textsuperscript{431} "Blurred Vision: Public trust in charities", National Council for Voluntary Organisations Research Quarterly 1 (January 1998); "Trusted but misunderstood; public and political attitudes to charities, fundraising and regulation", nfp Synergy Bulletin (November 2002); "Disgusted or delighted: What does concern the public about charities?", nfp Synergy Bulletin (March 2004).
\textsuperscript{432} Memorandum from The Home Office (DCH 15) Ev 283, “Public Views and Perceptions of Charities”, paragraph 7.
\textsuperscript{433} This was not a new insight; Which? Magazine had already come to a similar conclusion in 1984, when it found that “only 19% of respondents were aware of the fact that Eton College was a charity”, September 1984, p. 390, quoted in Graham Moffat’s 1989 article ‘Independent schools, charity and government’ published in Ware, A. (ed.) Charities and Government. Manchester: University of Manchester Press, 1989: p.191.
\end{footnotesize}
between public understanding and legal definition that the survey data unearthed needed to be addressed while charities were still held in high esteem.\textsuperscript{434}

**View on Fee-Charging Charities**

Further to this memorandum, the Home Office submitted a joint supplementary memorandum with the Charity Commission on a “unified position regarding the particularly complex legal point (…) of the application of the public benefit principles for fee-charging charities to independent schools”.\textsuperscript{435} The content of this supplementary memorandum has been set out in the previous section 4.4.2 and deals with the removal of the presumption with the assurance that the Charity Commission will continue the courts’ approach of determining public benefit on a case-by-case basis, taking into account social and economic circumstances, the specific nature of the charitable purpose under consideration, as well as possible disbenefit; the guiding principles were set out following the Charity Commission’s interpretation of *Re Resch*.

\textbf{4.5.2 Oral Evidence}

**Goals**

On Wednesday, 21\textsuperscript{st} July 2004, the Joint Committee on the Draft Charities Bill examined Home Office minister Fiona Mactaggart (Labour) and Home Office official and Bill Manager Richard Cordon. Mactaggart described the goal of the proposed legislation as bringing “substantial benefit to all charities about achieving a more robust protection of the concept of charity”, referring to the public opinion surveys discussed in the Home Office’s written memorandum.\textsuperscript{436} Chairman Alan Milburn further pushed Mactaggart to specify what concrete consequences the Home Office foresaw as resulting from the Bill; the minister’s answer seemed at first contradictory, but was ultimately specified through Milburn’s probing as an expectation for more new charities but an overall lower number

\textsuperscript{434} “The best time to protect a brand is when it is still all right, not when it is seriously at risk, and the charity brand is a good brand.” Fiona Mactaggart (MP), Examination of Witnesses, 21\textsuperscript{st} July 2004, Question 967.

\textsuperscript{435} Supplementary memorandum from the Home Office and the Charity Commission (DCH 356).


102
of registered charities due to a simplification of the merger process and the widening of the exempt charities category.\footnote{Mactaggart, Questions 968-971.}

The debate soon turned directly to public benefit and its role in achieving its goals. Foulkes asked Mactaggart to explain how the Bill could succeed in its objectives “without including a statutory definition of ‘public benefit’”.\footnote{Foulkes, Question 1052.} In her answer, Mactaggart referred to the \textit{National Anti-Vivisection Society v IRC}\footnote{[1948] AC 31} case to demonstrate the complexity of defining public benefit across such a diverse sector and the impracticability of a statutory definition of public benefit.\footnote{Mactaggart, Question 1052.} Yet, Foulkes disagreed, suggesting that “[t]here will be confusion anyway and it is how that confusion is resolved that we are talking about. (…) it might be clearer to have some criteria to enable the Charity Commission to resolve the confusion that you have described. If the criteria come from Parliament representing the people then they have some validity and some credibility, whereas if these criteria are decided by the Charity Commissioners themselves they would not have the same degree of credibility and validity.”\footnote{Foulkes, Question 1053.}

**View on Fee-Charging Charities**

At this stage, Mactaggart explicitly acknowledged the politically charged nature that had already set in and the singular focus on the issue of independent schools:

\begin{quote}
I think that there is a risk, and we can see that in the discourse about this Bill. One of the very depressing things about the public discourse about this Bill has been that it has all been about a particular kind of charity, fee-paying schools. Not in every single respect but the vast majority of the coverage has been about that and I think that is very disappointing. I think that is a product partly of people seeing this as a political party's attempt to define charity and they think that the Labour Party believes that education should be free, as we do, and
\end{quote}
that, therefore, maybe we are trying to manipulate charity in order to exclude certain kinds of education. I do not think that is the case. I think it is proper to say that public benefit should be a requirement of every charity, that that should be interpreted in the normal and natural meaning of the term—(...). It means that it benefits the public, the purpose benefits the public and the people to whom it is accessible benefits the public.\footnote{Mactaggart, Question 1053f.}

However, the same issue, Foulkes suggested, emerged in the case of private charitable hospitals; referring to the Nuffield Hospitals and the evidence they provided, Foulkes stated that

[looking at it completely objectively, forgetting about my party political background, I could not understand the logic that this group of hospitals providing private health care for relatively rich people has charitable status, like the NSPCC and Oxfam and so on, it strains credibility, whereas other groups of hospitals do not, they are either industrial and provident societies or limited companies. Does that not seem strange to you? (...)} What I am saying is that rather than rely on the current position under English case law, would it not be better for us, as a Parliament, to try and take on the responsibility of describing what you mean by "public benefit"?\footnote{Foulkes, Question 1055f.}

Definition of Charity in Law

Mactaggart rejected a statutory definition more firmly, citing three reasons:

\textit{first, because you would freeze in 2004-05 a definition which would have to last for generations; secondly, that the independent nature of charities is potentially threatened by a Parliament deciding what is public benefit and it is probably better in the tradition of charity to have the court, common law rule; thirdly, the diversity of charities,}
something that we talked about the value of, means that you could not write a single definition which is properly applied in every case, that you need to use a case-by-case approach which can do that to determine these matters. 444

Role of the Charity Commission
The Home Office minister also rejected Foulkes suggestion to formulate criteria for the Charity Commission to follow rather than a full definition. 445 Since this would make the removal of the presumption the only change to the current case law approach, the Committee’s Chairman Milburn focused on the disagreement between the Home Office and the Charity Commission that had emerged during the consultation process. Milburn cited Kenneth Dibble’s evidence 446 on behalf of the Charity Commission that:

(...) because independent schools and hospitals are already protected under case law and are deemed to be charitable, the lack of a definition of public benefit test means that they will continue to enjoy special privileges. 447 (...) The Charity Commission, as we heard earlier, are in an extremely powerful position. They are not like any other group of lawyers and, with respect, they are not like the Home Office either because the Minister has confirmed to us that they are a non-ministerial department, they are wholly independent. They will operate the law, will they not? (...) They will have free discretion to interpret the law. Their interpretation of the law counts more than anybody else's, does it not? 448

---

444 Mactaggart, Question 1056.
445 Mactaggart, Question 1057.
446 Milburn, Questions 635 to 806.
447 Milburn, Question 1059.
448 Milburn, Question 1060
The Home Office’s Cordon confirmed the powers of the Charity Commission in applying public benefit under the draft Charities Bill, but disagreed with the Charity Commission’s view.\textsuperscript{449} Mactaggart proposed the alternative view that

\begin{quote}
(...) in common with the large majority of practitioners in the field, is that (...) the Commission has the power to carry out public character checks, that it has full scope to apply the same public benefit criteria to all charities which charge fees and that the cases which have been cited, of which I think the most recent one is older than me, would not have a determinative effect if brought before the courts today.\textsuperscript{450}
\end{quote}

While there currently was “confusion” (unbound by political constraints, one might even call it open disagreement) among the Home Office and the Charity Commission, the minister assured the Committee that the Home Office’s interpretation was correct and that a resolution with the Charity Commission would be reached.\textsuperscript{451}

This led Milburn to the famous and highly publicised exclamation that the Bill

\begin{quote}
(...) at the moment, to be frank, (...) is a dog’s breakfast” and that “[a]lmost the very first thing [the Minister] said was that this Bill was intended to clarify the law, instil confidence and sort out what had become anomalies over the course of 400 years and here we are at a core part of the Bill and there is absolute confusion.\textsuperscript{452}
\end{quote}

Having rejected a definition of codified criteria as proposed by Foulkes, Milburn demanded to know how the Home Office planned on clarifying the draft Bill’s section on public benefit.

\textsuperscript{449} Cordon, Question 1060.
\textsuperscript{450} Mactaggart, Question 1063
\textsuperscript{451} Mactaggart, Question 1068
\textsuperscript{452} Milburn, Question 1069
Mactaggart assured the Committee that an agreement would be reached between the two bodies and that

[i]f the Government did not intend the removal of the presumption of public benefit to particular classes of charities to have no impact at all, (...) we would not have bothered to do it. We believe that it is necessary for it to have an impact. We are confident in our information as it is and we will expect the Charity Commission to be able to conduct public character checks on the whole range of types of charity, including those who previously benefited from a presumption of public benefit.453

A final decision would ultimately be reached by the courts in any case – a resolution that Lord Phillips of Sudbury found to be “[u]tterly impractical”.454 Keeble drew the logical conclusion that if the Home Office was to insist on its standpoint and intention for the Bill, something would have to give – either the legislation or the regulator; Mactaggart emphasised that the legislation was not the part to be changed.

Reference to Scotland
As a final point on public benefit and the Home Office’s refusal to consider a statutory definition or at least statutory criteria to clarify the public benefit test, the Committee confronted the Home Office representatives with the difference in law that would emerge between Scotland and England and Wales. Scotland was at the time in favour of statutory criteria for public benefit; Mactaggart stated she was “content with what the Scottish Executive decide for Scotland, it is their job.”455

In conclusion, the tone of the examination was tense and the Committee showed its disapproval of the disagreement between the Home Office and the Charity Commission as well as the Home Office Minister’s plans to resolve it. The two bodies ultimately

453 Mactaggart, Question 1071.
454 Mactaggart, Question 1072.
455 Earl of Caithness and Mactaggart, Questions 1075ff.
submitted joint Supplementary Evidence. Whether the process that led to this agreement included “arms being twisted up backs”, as Milburn suggested and Mactaggart denied\(^{456}\), cannot be established from the written accounts. The interview evidence in Chapter 8 sheds more light on this matter. Milburn could not have known at the time, but his evaluation of the situation should prove prophetic for the entire public benefit reform when he concluded that “there is a gap between intent and effect.”\(^{457}\)

4.6 The Charity Commission

4.6.1 Written Evidence

The Charity Commission submitted a memorandum\(^{458}\), three further memoranda\(^{459}\), one further memorandum jointly with the Home Office\(^{460}\), five supplementary memoranda\(^{461}\) and finally one supplementary memorandum jointly with the Home Office\(^{462}\) that has already been discussed.

In its first and principal memorandum submission, the Charity Commission sets out its understanding of

\[\text{the current law as regards public benefit; the Commission's existing practice when examining public benefit in charities; the effect of the proposed legislation on public benefit and how the Commission envisages case law on public benefit might develop following}\]

\(^{456}\) Milburn and Mactaggart, Question 1070.

\(^{457}\) Milburn, Question 1073.

\(^{458}\) Memorandum from the Charity Commission (DCH 13) Ev 190.

\(^{459}\) Further memorandum from the Charity Commission (DCH 14) Ev 195; Further memorandum from the Charity Commission (DCH 71) Ev 196; Further memorandum from the Charity Commission (DCH 192) Ev 198.

\(^{460}\) Further memorandum from the Home Office and Charity Commission (DCH 19) Ev 295.

\(^{461}\) Supplementary memorandum from the Charity Commission (DCH 357) Ev 198; Supplementary memorandum from the Charity Commission (DCH 299) Ev 223; Supplementary memorandum from the Charity Commission (DCH 300) Ev 224; Supplementary memorandum from the Charity Commission (DCH 301) Ev 227; Supplementary memorandum from the Charity Commission (DCH 302) Ev 229.

\(^{462}\) Supplementary memorandum from the Home Office and the Charity Commission (DCH 356) 197.
enactment of the proposed legislation; how tests for public benefit will be applied in the future by the Commission, especially to those charities whose purposes are educational or for the relief of poverty.  

View on Public Benefit and Re Resch

The Commission saw the pre-draft Bill status quo as described in Chapter 3, the general principles of public benefit being that the “number of those eligible to benefit must not be negligible, they must constitute a group or class which can be considered to be a public class and any defining connecting link must not be a personal relationship such as family or employer/ee”. Further to these criteria, the Commission and the courts can take into account accidental benefit to individuals other than the primary beneficiaries, membership restrictions, physical access to the services if applicable, fees and their consequences on access, as well as indirect benefits to the state.

According to the Commission, the presumption did exist but only shifted the onus of proof to the Commission rather than the charities as had always been the case for those under the fourth head of charity. Education and the relief of poverty furthermore were subject to some particular rules developed by the case law over the centuries. In summary, the Commission referred to Re Resch on the principles for fee-charging charities, also stating that disbenefits as well as indirect benefits may be taken into account. Independent fee-charging schools with charitable status were subject to a common law foundation based on three main cases Attorney General v The Earl of

---

463 DCH 13, paragraph 1.
464 DCH 13, paragraph 2.
465 DCH 13, paragraph 3.
466 DCH 13, paragraph 4.
467 DCH 13, paragraphs 5-14; for further detail, refer to DCH 13, Annex A parts B and C.
470 DCH 13, Annex A, paragraph 10: “But it is not the case that fees which are set at a level which have the effect of excluding the less well off will automatically negate public benefit. Public benefit may still arise by the provision of access to charitable services to the less well off in other ways and by indirect public benefit (…)”. 

Lonsdale\textsuperscript{471}, Brighton College \textit{v} Marriott\textsuperscript{472}, and Malvern Wells \textit{v} Ministry of Local Government and Planning \textsuperscript{473}, which establish that “an educational institution is charitable, even if its facilities and services are confined to the relatively well off”\textsuperscript{474}. The Commission also acknowledges that in \textit{Re Resch}, Counsel cited the education cases but the analogy to a hospital case was rejected since “the educational cases stand on their own. To apply the logic of those educational cases to other cases would open the door too far”\textsuperscript{475}. It is interesting that the reverse conclusion – a hospital case setting out the principles for all fee-charging charities – is any more intelligible.

\textbf{Removal of Presumption}

Unlike the Home Office, the Charity Commission had a different perspective on the likely consequences of the draft Charities Bill: in its view, the removal of the presumption would not affect the status of independent schools and charities for the relief of poverty since “[t]he Commission would not be able simply to over-ride these exceptions given that they have been specifically addressed by the court and allowed to stand.”\textsuperscript{476}

In terms of substantive changes, the Commission referred to its registration practice: the removal of the presumption would lead to a change in the Commission’s guidance material that would henceforth make it a general requirement to demonstrate public benefit\textsuperscript{477}. In some cases, however, public benefit might remain “self-evident”\textsuperscript{478}. Those most affected by the change would be organisations applying for charitable status under novel purposes; any other type of organisation was not expected to see much difference in procedures.\textsuperscript{479} The Commission also saw it as its task to be an adviser on public benefit

\begin{itemize}
  \item \textsuperscript{471} [1827] 1 Sim 105.
  \item \textsuperscript{472} [1926] AC 192.
  \item \textsuperscript{473} [1951] Ch 728.
  \item \textsuperscript{474} DCH 13, Annex A, paragraph 12.
  \item \textsuperscript{475} DCH 13, Annex A, paragraph 12.
  \item \textsuperscript{476} DCH 13, paragraph 19.
  \item \textsuperscript{477} DCH 13, paragraph 21.
  \item \textsuperscript{478} DCH 13, paragraph 22.
  \item \textsuperscript{479} DCH 13, paragraph 24.
\end{itemize}
rather than a strict regulator, pointing out that an organisation that failed to show public benefit would be informed and assisted in establishing its public benefit contribution.\textsuperscript{480}

On-going regulatory activity on public benefit would also change through the Bill. Before the 2006 Act, the Commission relied on complaints and evidence gathered during review visits to flag charities that did not provide public benefit; the Commission perceived public benefit regulation as part of its advisory duty and only in case this endeavour failed would a specialised group within the Commission deliberate potential consequences, such as for instance the removal of trustees.\textsuperscript{481} Rather than waiting for concrete complaints or evidence that an organisation failed to provide public benefit, “the Commission proposes to carry out scoping exercises on fee charging and other relevant areas for groups of charities where charging is a feature” in close consultation with “professional and umbrella bodies”, yielding regulatory reports that would serve as a further source of guidance on public benefit.\textsuperscript{482} Those organisations that already were registered under the presumption would be reviewed according to a risk-based approach or individual complaints.\textsuperscript{483} Should a charity fail to pass the test even after consultation and a further review, i.e. only in the most extreme cases, the Commission planned to apply \textit{cy-près} to redistribute said charity’s assets to another charity with similar purposes.\textsuperscript{484}

The most important point about the Charity Commission guidance is its insistence that the new approach would only “bite” where there was no previous case law since the draft Bill referred back to the existing case law as basis for public benefit. This understanding would exclude precisely the one charity segment that received most attention: independent schools. Instead of direct regulation, the Commission suggested to rely on “the development of a self regulatory approach owned by the particular sub sector”\textsuperscript{485}:

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{480} DCH 13, paragraph 24.
\item \textsuperscript{481} DCH 13, Annex B; note also that “[t]he Charity Commission currently makes over 600 review visits each year to medium and large charities to encourage better methods of administration, to identify good and poor practice, and to recognise and improve badly-run charities.”
\item \textsuperscript{482} DCH 13, paragraph 26.
\item \textsuperscript{483} DCH 13, paragraph 27.
\item \textsuperscript{484} DCH 13, paragraph 30.
\item \textsuperscript{485} DCH 13, paragraph 32.
\end{itemize}
\end{footnotesize}
The Commission would encourage such groups of charities, and their representative bodies, to develop sector owned guidance and best practice standards which are relevant to the circumstances of that particular group of charities (i.e. a self-regulatory approach). This guidance might include, for example, a best practice view on what represents a level of access which is appropriate to the group of charities' particular circumstances.486

Role of the Charity Commission

Finally, the Commission’s concern about its own rule shines through somewhat in between the lines: its assistance in a “self regulatory” approach for schools, so the Commission, presupposed that its existing advisory role would be preserved by the Bill.487 Given the draft Bill’s particular focus on the regulatory functions of the Charity Commission – stemming from the cacophony of objectives to be pursued by the Bill – this reminder of the Charity Commission’s 1990s image as partner to the sector seems very much justified. Yet again, Charity Commission’s concern foreshadowed the negative press backlash that it would face after the eventual introduction of the Act in 2006.

View on Fee-Charging Charities

In addition to the general memorandum, the Charity Commission also submitted a further memorandum specifically on independent schools, private hospitals, and other fee-charging charities currently registered.488 It did not provide any further insights except that most of the information pertinent to the status of independent school and private hospitals did not, in fact, rest with the Charity Commission but with HMRC and the Healthcare Commission. Furthermore, the memo explained that state schools and hospitals at the time did not register as charities because of either their exempt status or,

---

486 DCH 13, paragraph 33.
487 DCH 13, paragraph 34.
488 DCH 71.
in the case of hospitals, their status as government controlled organisations, which automatically prevented NHS hospitals from applying for charitable status.

In another further memorandum, the Charity Commission also took the opportunity to respond to the Joint Committee’s concerns in more detail: On the note of flexibility versus accountability of the sector, the Commission saw the draft Bill in line with its own approach of increasing confidence in and support for the sector:

*We aim to provide the freedom to make decisions and the tools which enable the sector to develop and achieve their aspirations. We act in a way that is proportionate to the issue and to the risk of harm involved and we take account of the capacity of organisations to comply with requirements for change. The draft Bill takes the same approach.*

The Commission also agreed with the Government in its view that the term “public benefit” should remain undefined and thus flexible as expressed in the draft Bill. Overall cost resulting from the draft Bill were estimated to be £1,700,000 in the first year and a further £1,020,000 per annum in the following years; the Commission noted that a further £390,000 would be met from its existing budget.

In the light of the witness examination, the Joint Committee had asked for further evidence from the Commission on two specific issues: firstly, the suggestion by one Christopher McCall, QC; and secondly, a specification of the Commission’s approach to public benefit and the implementation of the test for fee-charging charities.

---

489 “Comments on the Themes Identified by the Joint Commission”, DCH 71.
490 DCH 71, Comments, paragraph 1.
491 DCH 71, Comments, paragraph 3.
492 DCH 71, Comments, paragraph 6.
493 Supplementary memorandum from the Charity Commission (DCH 301).
494 Supplementary memorandum from the Charity Commission (DCH 357).
McCall had proposed the inclusion of two clauses on public benefit to the draft Bill that were intended to a) enshrine the need to have regard to “changes in social and other relevant circumstances” when determining public benefit, and b) to establish a statutory duty for trustees to maximise the public benefit provision by their respective charities. The Commission’s reply was rather short, although it provided extensive legal justification for it: in the Commission’s view, McCall’s suggestions would not have any positive effect whatsoever, neither on the existing case law on independent schools, nor on the further framework of public benefit; however, it would likely result in further unnecessary pressures on trustees.

Definition of Charity in Law

Finally, the Commission’s further explanation of its public benefit approach restates the principles it had already outlined in the first memorandum to the Joint Committee. As an important addition, however, the Commission signalled its willingness to defer to “statutory, non-exclusive, high level criteria to be taken into account in assessing public benefit, which applied across all charitable purposes” as defined by the Joint Committee; while their formulation would warrant great care, the Commission also welcomed this alternative as an opportunity to “enhance the future development of the law on public benefit by the Commission, the proposed Tribunal and the court in the context of modern society”. It seems likely that the Charity Commission had recognised that it would find itself in a “lose-lose” situation if it was forced to define the ‘new’ public benefit guidance itself. Its only way out was to shift the burden of definition to either the Joint Committee and Parliament or the Home Office.

---

495 2.1 to be inserted at the end of clause 3(2): "and in the application of precedent and otherwise in determining whether the requirement of public benefit is satisfied full account shall be taken of changes in social and other relevant circumstances"; and 2.2 to be inserted as a new sub-section 3(5): "It shall be the duty of any charity trustee so to execute the trusts of his charity as to secure the fullest public benefit consistent with the terms of his trust and furthermore to seek a scheme for the modification of any term which may reasonably be regarded as preventing him from securing that public benefit to a material degree".
496 DCH 301, paragraph 2.
497 DCH 301, paragraph 3.
498 Supplementary memorandum from the Charity Commission (DCH 357).
499 DCH 357, paragraph 13.
4.6.2 Oral Evidence

On Wednesday 7th July 2004, the Charity Commission was represented by three of its members, Chief Charity Commissioner Geraldine Peacock, Director of Policy and Strategy Rosie Chapman, and Director of Legal Services for the Charity Commission Kenneth Dibble. The Charity Commission had already given evidence in a private session earlier on. Unfortunately, there are no records of this meeting.

Goals

Chairman Alan Milburn confronted Peacock rather bluntly with statements she made in two national newspapers, the Guardian and the Times. He opened the public examination of the Charity Commission witnesses by referring to a Guardian interview on Peacocks’ appointment in which she allegedly referred to the legislative scrutiny as “fiddling around the edges”. In her evidence, Peacock hastily described the policy reform process as “crucial” since

(...) the way in which this draft Bill has been formulated has been pretty unique in that, for the first time, the sector feels really involved, committed and consulted by Government in the process of formulating this legislation. So, I think there is the legal need for modern workable legislation and the cultural psychological need for the sector to see its joint activity with Government reflected in a really good, robust legal framework which plays out well in practice.

This is particularly noteworthy because the theoretical frameworks of PEF and GTF stress the importance of collaboration and the spread of policy issues across individual nodes. Clearly, the process played an important role in the making of the Charities Act

500 Joint Committee on the Charities Bill. Volume II: Oral and Written Evidence. Examination of Witnesses on 7th July 2004, Question 635.
501 “One of the things you have said, I think in today's Guardian newspaper, which interested me was that what is in and what is out of the legislation is fiddling around the edges, which has been of great comfort to all Committee members!” Alan Milburn, Question 636.
502 Milburn, Question 636.
503 Peacock, Question 637.
504 Peacock, Question 636.
2006. The collaboration of policy nodes is scrutinised more closely in the individual analyses.

Role of the Charity Commission
Peacock saw her view of the Charity Commission’s role strengthened by the draft Charity Bill; she stated that:

*The role of the Regulator is to try and empower and enable people to be accountable for themselves. So, what I see is the benefit of this legislation is that it gives much better clarity to the scope of charitable activity and it gives the Regulator a chance to work with people and do things with the public and with charities themselves to establish what is good practice within the pre-legislatory framework and that involves public consultation perhaps much more than we have had in the past.*

Despite the disagreement on individual interpretations, especially on public benefit, Peacock expressed her satisfaction “that what is drafted gives an adequate cornerstone of a legal framework within which there is the freedom to play out these difficulties, differences, whatever.”

Relationship with Other Policy Actors
Not sharing the Charity Commission’s confidence that difference would be sorted out through regulation, the Joint Committee pushed for more concrete statements. An exchange between Keeble and Peacock illustrates the differences in perspective between public policy and legal actors. Whereas Keeble cautioned that “[i]f this legislation has to last another 400 years then we will have to get it right this time”\(^{507}\), Peacock emphasised that even ‘getting it right’ now would not mean that the legislation on public benefit would continue to be right in 400 years’ time, seeing that public benefit was “a situation

\(^{505}\) Peacock, Question 639.
\(^{506}\) Peacock, Question 660.
\(^{507}\) Keeble, Question 666.
that [was] moving faster than the legislation.” ⁵⁰⁸ Throughout the examination, Peacock referred to this difference in legalese and policy speak.⁵⁰⁹

Removal of Presumption

Lord Phillips of Sudbury described public benefit and the removal of the presumption as “the greatest novelty” presented in the draft Bill and as a potential “contentious issue.” ⁵¹⁰ He pointed out that a significant number of witnesses, among them legal experts and the Charity Law Association, disagreed with the Charity Commission’s interpretation of public benefit set out in its initial memorandum.⁵¹¹ Peacock suggested that the Charity Commission never intended to trigger controversy but described the law of public benefit as it was, but realised the backlash it had received over it. Thus she felt “that the Commission has seen itself and sees itself as a neutral body so what it has stated in its evidence here—and paragraph 19 has become notorious, I have got it in yellow highlighter pen because it is being flung at me from every angle—is the situation as it is”.⁵¹² Nonetheless, both Peacock and Dibble stood by paragraph 19, which stated that the draft Bill and the removal of the presumption would not change the case law position on “anomalies” such as independent schools and the public benefit test.⁵¹³ Dibble also informed the Commission that the memorandum had been authored by the Commission’s legal department and approved by its Board of Directors.⁵¹⁴

Yet again, the particular features of the common law – for instance, its tendency for multiple interpretations on any given issue until a question has been settled by the courts – caused for further discontent among policy actors: Milburn challenged the Commission, asking whether the Commission “disagree[d] with the Charity Law Association and the

⁵⁰⁸ Peacock, Question 666.
⁵⁰⁹ “We are trying to explain how we think that will play out in practice. There is fact on one side and there is practice and what you do with it on the other side. To my mind—and that is not a legal mind, it is a managerial mind—that is where the difference lies. I also think that sometimes the interpretation that has been put on this in dialogue extraneous to this Committee has not perhaps understood what the position is here, that this is a factual statement.” Peacock, Question 736.
⁵¹⁰ Phillips, Question 722.
⁵¹¹ DCH 13.
⁵¹² Peacock, Question 726.
⁵¹³ Peacock, Question 732, Dibble, Question 733.
⁵¹⁴ Dibble, Question 731.
very learned opinions that we are hearing from very many lawyers now that you are wrong?"\textsuperscript{515} The Commission’s view was of particular importance since it would be the organ of state implementing the public benefit test.\textsuperscript{516} Lord Phillips of Sudbury attempted to assuage the situation, admitting that “this is a lawyers' field day but it is no-one else's field day”.\textsuperscript{517} However, he juxtaposed this with the government’s initial goal of transparency and allowing the public to understand what constitutes a charity in the eyes of the law (and thus the state):

\textit{That is to say the day this Bill becomes law, the great British public will have an absolute lack of clarity as to what the public interest means for their charity. They will be bogged down—if all we have is the Bill as it stands—in dispute between expensive lawyers and the Commission and that is going to help no-one.}\textsuperscript{518}

Moreover, he cautioned that high legal cost would prevent the case law from developing through challenges before the courts; the draft Bill would thus not serve its purpose as a “challenge” to develop the law.\textsuperscript{519}

**View on Fee-Charging Charities**

Lord Campbell-Savours found stronger words, accusing the Charity Commission of “making a complete mockery of charity law” through its attitude toward independent schools, citing as evidence the reactions he had witnessed during the examinations of sector leaders.\textsuperscript{520} His own alternative suggestion would later find its way into the Joint Committee’s report: removing charitable status from independent schools and granting them tax exemptions under separate treatment.

\textsuperscript{515} Milburn, Question 738.
\textsuperscript{516} Milburn, Question 739.
\textsuperscript{517} Phillips, Question 742.
\textsuperscript{518} Phillips, Question 742.
\textsuperscript{519} Phillips, Question 744; Dibble suggested that the Attorney General would take such a case up and air it before the court without any charity incurring high legal costs (Question 745).
\textsuperscript{520} Campbell-Savours, Question 746.
Clearly, this would be a political rather than a legal position to take, and thus a rather unusual task for the Charity Commission. Kenneth Dibble declined to comment on the matter, explaining yet again that the Charity Commission was not in charge of policy-making but followed the case law approach set out by the courts; due to the case law on education charities, he pointed out, independent schools had been registering as charities “for about 150 years” creating a “legitimate expectation to remain accepted as charities unless there is a clear indication that they should no longer be charities”. 521 This is also the common law perspective on the matter.

Instead, Dibble proposed the Commission adopt – should the Bill be enacted – a measured approach “in line with modern social conditions”; however, the Commission could not challenge

\[\text{(...) a collection of school institutions, about 1,000 probably, who have had rights under the existing law and the Commission as a public authority of course has to be very cautious about upsetting those rights unless there is clear legislative backing or common law backing for it to do so.}\] 522

It is apparent that the Commission had realised the politically charged situation and again sought to remove itself from the unthankful position of implementing a policy on public benefit and independent schools that it did not see within its remit to advocate.

Foulkes raised the issue of charitable private hospitals, referring to the Nuffield Hospitals evidence. 523 Trying to explain the decision to accept Nuffield Hospitals as a charity, Dibble suggested “that their purposes fell within those heads of charity which attract the presumption of public benefit.” 524 He refused to answer Foulkes and Lord Phillips

\[\text{521 Dibble, Question 748.}\]
\[\text{522 Dibble, Question 749.}\]
\[\text{523 Foulkes, Question 750. The evidence was provided by Jack Jones, Finance Director, Nuffield Hospitals, on Wednesday, 30th June 2004, Questions 441-634.}\]
\[\text{524 Dibble, Question 750.}\]
question\textsuperscript{525} whether Nuffield Hospitals would still have charitable status if the draft Bill was enacted as it stood at the time because the public benefit test would continue to be applied on a case-by-case and contextualised basis.\textsuperscript{526} Chief Charity Commissioner Geraldine Peacock at this stage intervened and pointed out that she feared “for this debate really that public schools or Nuffield as you are talking about will detract from the overall aim of what this legislation is about” namely “[t]he power that the onus of the draft Bill gives us is to consult much more widely with the public themselves” on such matters, and thus bring the definition of public benefit and charitable status more in line with the public expectation.\textsuperscript{527}

Chapman went on to explain that such consultation with umbrella bodies and the sector at large was necessary to specify the criteria for public benefit for each field, be it independent schools or hospitals.\textsuperscript{528} The Commission was on balance against an incorporation of such criteria in the Bill.\textsuperscript{529} Dibble observed “that in those other common law jurisdictions that have a statutory formulation of charitable purpose, only one country [Barbados] has opted to go for a public benefit definition and that definition is very high level.”\textsuperscript{530}

Chairman Alan Milburn at this stage touched upon the crux of the later politicisation of the Charities Act 2006 and the backlash against the Charity Commission. He warned:

\begin{quote}
Geraldine [Peacock] rails against the fact that the public schools are an issue. That is not because this Committee has made them an issue. They are an issue, whether we like it or not. Therefore you are going to be taken into terrible difficult terrain, I should have thought,
\end{quote}

\textsuperscript{525} Foulkes, Question 752
\textsuperscript{526} Dibble, Question 754
\textsuperscript{527} Peacock, Question 754
\textsuperscript{528} Chapman, Question 762
\textsuperscript{529} Chapman, Question 763
\textsuperscript{530} Dibble, Question 764
because you are going to have to apply judgment because of lack of clarity in the proposed legislation.\textsuperscript{531}

Peacock and Dibble rejected the possibility that a statutory definition of public benefit or even criteria for the application of benefit would help in this regard.\textsuperscript{532} She advocated a definition of public benefit that was based on extensive public consultation with the sector and the public as well as regularly updates by the Charity Commission, calling it “a real definition, a living definition, not a fossilised definition”.\textsuperscript{533}

Definition of Charity in Law

As a final compromise, Lord Phillips suggested the inclusion of a list of “non-exclusive criteria”\textsuperscript{534} similar to the extended list of charitable purposes included in the draft Bill and based on the Charity Commission’s own criteria for assessing public benefit,\textsuperscript{535} a solution similar to what would be adopted in Scotland. Dibble did not oppose this suggestion.\textsuperscript{536} This, however, would neither be adopted in the final Committee report nor the eventual Charities Act 2006.

Compared to the other examinations, be it with government officials (such as the Home Office) or sector bodies, the tone adopted in the Charity Commission’s examination was markedly charged and harsh. Thus Alan Milburn at one time described the Charity Commission as “overbearing, over-weening and over-regulating” and potentially “breathing down [the] necks” of small charities after the Bill had been implemented.\textsuperscript{537} Furthermore, he showed that the Joint Committee’s patience with the Commission was running thin:

\footnotesize
\textsuperscript{531} Milburn, Question 766
\textsuperscript{532} Peacock: “(…) I think whatever definition you have incorporated into the Bill it would cause controversy. It is bound to because there is no absolute definition. We cannot even get the lawyers agreeing, let alone anybody else.” Question 767
\textsuperscript{533} Peacock, Question 767
\textsuperscript{534} Lord Phillips of Sudbury, Question 770
\textsuperscript{535} See Memorandum by the Charity Commission, DCH 13, paragraph 3
\textsuperscript{536} Dibble, Question 771
\textsuperscript{537} Milburn, Question 639
With respect, your whole plea here this morning has been on the one hand to say, as you have just said, there is a problem and on the other hand to say, "Trust us to put it right because in future we will behave more flexibly and more proportionately, but we don't want the legislation changed because we want flexibility. (...) Frankly, there is no good saying to us we should just trust you and you will get on with it and you will consult with the sector. You cannot have your cake and eat it on this." 538

More examples of this dismissive tone abounded throughout the examination. 539

4.7 The Parliamentary Debate

After the Joint Committee had submitted its report on 30th September 2004 540 and the Government had responded by accepting more than 75% of the recommendations in December 2004 541, the Bill was introduced by the Minister of State, Baroness Scotland of Ashtal to the Lords on 20th December 2004 and published the following day. What were the opinions voiced and the agenda pursued at the parliamentary stage of the policy making process?

538 Milburn, Question 683.
539 E.g. Milburn’s reply to Dibble’s comment on paragraph 19 of the Charity Commission’s memorandum: “If you want to come along and say actually you disagree with your own evidence and you now want to caveat it with ifs and buts, that is a matter for you but it is not exactly conducive, is it, to the trust that you are asking the Committee to place in the Charity Commission because that is what we have heard from you: "trust us"?”, Milburn, Question 736.
540 Over 75% of its recommendations were accepted, see Baroness Scotland of Ashtal, 20 Jan 2005: Column 884.
4.7.1 The Lords

Goals

In the Bill’s second reading before the Lords, Baroness Scotland of Asthal summarised the Government’s objectives for the Bill as threefold:

First, to provide a legal and regulatory environment that will enable all charities, however they work, to realise their potential as a force for good in society; secondly, to encourage a vibrant and diverse sector independent of government; and thirdly, to sustain high levels of public confidence in charities through effective regulation.

The redefinition of charity based on a strengthened public benefit requirement was introduced as the most important innovation in the Bill.

Reference to Other Policy Documents

Significantly, the House of Lords was the only governmental body to name the NCVO and its consultation work of the mid-1990s as the origin of the Bill, not the PMSU. Thus, Lord Phillips of Sudbury applauded the NCVO:

I turn to the only potentially partisan issue in the Bill, which I note that others, rather gingerly, have walked around: that is, public benefit. The genesis of that was the NCVO report of 2001. The NCVO deserves much credit for getting the Bill to this point. The report

---

542 It is worth noting that many members of the House of Lords declared their interest and involvement in charities, such as for instance Lord Hodgson of Astley Abbotts who is an honorary fellow of St Peter's College, Oxford, and chairman of the college's foundation, as well as a governor of Shrewsbury School, Lord MacGregor of Pulham Market who was deputy chairman of AGBIS, the Association of Governing Bodies of Independent Schools, or Baroness Rawlings who was then President of the NCVO. The Hansard report indicates that the Lords were very forthcoming in their declarations of interest, yet there seems to have been a double standard: members of the Charity Commission were scrutinised regarding their involvement in independent schools, excluding Charity Commissioner Dame Suzi Leather from participating in discussions on public benefit and independent schools because her children were enrolled at public schools.


recommended, as we know, the removal of the presumption of public benefit from charities under the poverty, education and religious heads—otherwise, there would have been no point in such a recommendation—on the basis that that would address longstanding concern that certain types of charity deliver far too little public benefit to warrant their charitable status.\textsuperscript{546}

The House of Lords also recognises the need for close consultation with the Scottish Parliament, which had introduced the Charities and Trustees Investment (Scotland) Bill in late 2004.\textsuperscript{547}

Baroness Scotland reiterated the removal of the presumption of public benefit through Clause 3, and highlighted that Clause 4 had been added in response to the Joint Committee’s report, giving the Charity Commission a statutory duty to provide guidance on public benefit after conducting consultations with the sector and the public. Notably, the Government did not agree with the Committee’s recommendation to either include criteria in the Bill or have guidance issued by the Secretary of State. Instead, it favoured the non-ministerial and thus independent Charity Commission.\textsuperscript{548} The Charity Commission published its draft guidance on public benefit on the same day so that it could be taken into account as evidence before the Lords.

Goals

On behalf of the Lords, Lord Hodgson welcomed the Bill “in principle” and supported its policy objectives, yet also announced that substantive consultation with the voluntary sector had led the Lords to suggest a host of improvements.\textsuperscript{549} On public benefit, he welcomed the flexible nature of the provision remaining in common law rather than statutory form, albeit Lord Hodgson also noted the strain that the statutory duty to issue

\textsuperscript{546} HL Deb, 20 January 2005, vol 668, col 906. This was confirmed by Baroness Howe of Idlicote who suggested that the NCVO as an “organisation has played an invaluable role in facilitating this important Bill”, see col 910.
\textsuperscript{547} HL Deb, 20 January 2005, vol 668, col 906.
\textsuperscript{549} HL Deb, 20 January 2005, vol 668, col 889.
guidance would put on the Charity Commission and its relation with the Government and the Home Office.\textsuperscript{550}

Lord Dahrendorf offered an alternative account, discussing what he called the “growing functionalisation of civil society”\textsuperscript{551} that is expressed by the Compact of 1997 and that opened up the danger of splitting the voluntary sector into traditional charities and “a semi-governmental sector of public life”.\textsuperscript{552} Quoting a Home Office press release related to the Charities Bill, Lord Dahrendorf worried about the description of the voluntary sector as playing a “complementary rol[e] (…) in the development and delivery of public services”\textsuperscript{553}. He warned that the “para-governmental third sector” would always find public benefit to demonstrate through its involvement in public service provision and delivery, while the traditional “non-governmental third sector”, such as associations and foundations, would not contribute to any “government-led public policy” and thus not be able to prove public benefit:

\textit{They are useless in the narrow terms of public benefit and yet they are the lifeblood of a free society. My friends in the third sector have tried to persuade me that whatever an association does, one can always construct a case for their "public benefit". Maybe so, but then the test begins to lose its meaning.}\textsuperscript{554}

**Role of Charity Commission**

\textsuperscript{550} Lord Hodgson, HL Deb, 20 January 2005, vol 668 col 892; Lord Sainsbury of Preston Candover (HL Deb, 20 January 2005, vol 668 col 902) confirmed this fear, stating that: “Part of the problem of bureaucracy and inefficiency is that I believe the commission is under-resourced and is not able to attract sufficiently qualified staff, particularly on the legal side. It is not that the commission needs more staff, but it needs more qualified and capable ones. It is quite understandable that the most able and ambitious civil servants cannot be greatly attracted to the world of charity in a non-ministerial government department as opposed to a main government department where the variety of career opportunities is obviously bound to be greater. In considering this we must bear in mind that the Bill before us very significantly increases the work and responsibilities of the commission. But the important point is that the success of this Bill and the development of charity law in decades ahead depends greatly on how well the Charity Commission carries out its tasks.” Emphasis added.
\textsuperscript{551} HL Deb, 20 January 2005, vol 668, col 937
\textsuperscript{552} HL Deb, 20 January 2005, vol 668, col 938
\textsuperscript{553} HL Deb, 20 January 2005, vol 668, col 938
\textsuperscript{554} HL Deb, 20 January 2005, vol 668, col 938
The position of the Charity Commission was another topic that was frequently commented upon by the Lords. Rejecting both of the Joint Committee’s suggestions to either give the Secretary of State the power to issue guidance on public benefit or to include more concrete public benefit criteria in the Bill, the Government had instead created a statutory duty for the Charity Commission to issue guidance upon consultation, as Baroness Scotland had pointed out in her description of Clause 4. Overall, the Lords’ comments were balanced, cautioning that the Charity Commission would be overburdened\footnote{e.g. Lord Hodgson, HL Deb, 20 January 2005, vol 668, col 892; Lord Sainsbury of Preston Candover HL Deb, 20 January 2005, vol 668, col 902.} as well as asking for further checks on its guidance powers\footnote{e.g Lord Swinfen “I agree wholeheartedly with my noble friend Lord Sainsbury of Preston Candover and the noble Lord, Lord Phillips of Sudbury, that we need a statutory obligation on the Charity Commission to use its powers proportionately, fairly and reasonably.” HL Deb, 20 January 2005, vol 668, col 945.}.

**View on Public Benefit**

Most importantly, the Lords debate also touched on the very heart of this thesis: why public benefit and why now? Several members of the House of Lords cautioned against the politicisation of the Charities Bill and any potential hidden agenda from the side of the government. Thus, Lord Phillip of Sudbury stated:

> I say that as one who has always been against undermining the independent schools, but who devoutly wishes them to stride more purposefully and charitably into the 21st century to spread their undoubted virtues to a far, far wider cross-section of the public. The Bill does not ensure that, notwithstanding the addition of Clause 4 which requires the Charity Commission to issue guidance in pursuance of its public benefit objective. Some think that that is precisely what the Government intend; that they want the appearance of change without the substance and that they want to satisfy critics of the status quo without arousing the middle classes. In short, they want the credit without any opprobrium. The Joint Committee reached a unanimous compromise on all this; namely, that non-exclusive
criteria of public benefit should be on the face of the Bill, or that the Home Secretary should be charged with issuing non-binding statutory guidance. Neither was adopted.\textsuperscript{557}

Similarly, Baroness Howe of Idlicote expressed her hope “that this is not a covert return to old Labour policies to curtail—even to abolish—the role of independent education.”\textsuperscript{558}

The Baroness Howe of Idlicote also mentioned the tension between the goal to support charities, especially smaller ones, by reducing unnecessary bureaucracy, yet at the same time increasing the reporting requirements through public benefit, for instance at the time of registration.\textsuperscript{559}

Lord MacGregor of Pulham Market also pointed to time as an independent variable.\textsuperscript{560}

He lauded the overall Bill, but criticised the timing of its introduction:

\textit{To have the Second Reading after Christmas, bearing in mind—as everyone seems to be commenting—that we may well have an election this spring, gives us very little time indeed. (...) This is the kind of Bill that, in the first Session of a new Parliament, finds itself crowded out because of the new government’s need to get on with all sorts of important political Bills. For that reason, I want to see this Bill go through in this Session, if at all possible.}\textsuperscript{561}


\textsuperscript{558} HL Deb, 20 January 2005, vol 668 col 911. Baroness Howe hinted at New Labour’s promises later on, quoting Tony Blair’s policy priorities: “If "education, education, education" is genuinely to remain a top priority—and not the destruction of quality, however inadvertently—then it would indeed be folly to risk throwing away the advantages [of independent schools] that I have tried to describe.” HL Deb, 20 January 2005, vol 668, col 912.

\textsuperscript{559} “I have already come across one example which worries me. It comes from an article in the \textit{Whitehall & Westminster World} of 9 November last year by Rosie Chapman, Director of Policy and Strategy at the Charity Commission. It will, she says, "be revising the application forms for registration so that all charities give details of how they will provide public benefit. Then we will use the information . . . to make sure they provide sufficient public benefit". Note the two little words "details" and "ensure". I find that quite worrying. One can all too easily imagine potentially valuable new charities being frightened off at birth because of the prospect of a complex and daunting entrance exam.” HL Deb, 20 January 2005, vol 668 col 911.

\textsuperscript{560} So did Baroness Pitkeathley, HL Deb, 20 January 2005, vol 668, col 947.

\textsuperscript{561} HL Deb, 20 January 2005, vol 668, col 935.
As we know in hindsight, the Bill did not make it in time and had to be reintroduced in the 2005-2006 parliamentary session after the General Election in May 2005. Upon the consideration of the Commons amendments, Lord Hodgson lamented the “dilatory behaviour” of the House of Commons and the lengthy process of passing the Bill.\textsuperscript{562} This question of timing and its consequences on the public benefit requirement in the Charities Act 2006 emerges prominently in the interview evidence.

Hospitals were consistently brought up by the Lords, yet only as a side comment\textsuperscript{563}; even Baroness Seccombe who used to be deputy chairman of the trustees of Nuffield Hospitals (yet not at the time the Bill was discussed) did not expand on the consequences of the Bill for hospitals in particular. The discussion remained mostly focused on public schools.\textsuperscript{564}

The Bill thereafter moved on to the Grand Committee stage with eight sessions between 3\textsuperscript{rd} February 2005 and 21\textsuperscript{st} March 2005 chaired by Deputy Chairman of Committees, Lord Ampthill.\textsuperscript{565} Lord Hodgson of Astley Abbotts echoed Lord Phillips of Sudbury’s enthusiasm that “[i]t is not often that one can say a Bill is without enemies, but that really is true of the Charities Bill”\textsuperscript{566} by emphasising how great the overall support for the Bill was in the Lords, yet also how extensive the responses regarding its detailed working had been, leading to an equally extensive list of amendments.\textsuperscript{567}

\begin{flushright}
\textsuperscript{562} “Given (…) the fine words that the Government use about the voluntary sector, the subsequent progress of the Bill—or lack of it—is very surprising. After that Second Reading in June 2005, there were a couple of days in Committee and on Report, in July and October respectively, with Third Reading on 8 November last year. Since that date—one year less one day—we have heard nothing. The Bill has disappeared into some legislative black hole. It has only now emerged, with two days to go before the end of the Session if we are to avoid the extraordinary spectacle of the Bill failing and falling for a second time. The Government owe the House and the charitable and voluntary sector an explanation of why their behaviour on the passage of the Bill has been so dilatory.” HL Deb, 7 November 2006, vol 686, col 690.

\textsuperscript{563} Lord Phillips for instance mentioned that the evidence of Nuffield Hospitals was largely unconvincing HL Deb, 20 January 2005, vol 668, col 907. Lord Best pointed out that BUPA was a mutual society while Nuffield Hospitals were a charity and should thus justify the tax benefits they received through public benefit (HL Deb, 28 June 2005, vol 673, col 164).

\textsuperscript{564} E.g. the example of “rural preparatory schools” raised by Lord Brooke of Sutton Mandeville and Baroness Seccombe (HL Deb, 20 January 2005, vol 668, col 963).

\textsuperscript{565} HL Deb, 3 February 2005, vol 669, col GC1.

\textsuperscript{566} Second Reading, HL Deb, 20 January 2005, vol 668, col 905.

\textsuperscript{567} HL Deb, 3 February 2005, vol 669, col GC1: “Winding up the Second Reading debate on the Bill for the Government, the noble Lord, Lord Bassam of Brighton, said: "I cannot remember a time when legislation that the Government have brought forward has attracted so much support from so many corners of your Lordships' House”.—[ HL Deb, 20 January 2005, vol 668, col 958.] He was right. There was almost
Reference to Scotland
As was to be expected, public benefit was one of the main topics of discussion, particularly in the context of the on-going charity law reform in Scotland. Thus, Lord Phillips of Sudbury pointed out that:

*Clause 8 of the Scottish Bill does not talk about guidance; it gives a definition of public benefit—admittedly an extraordinarily broad and unhelpful one—which lends credence to what the noble Lord, Lord Hodgson of Astley Abbots, said. In a very different way to Clause 4, it concentrates on the disbenefits of an institution compared with its benefits. That is the way in which they choose to deal with it.*

Overall, however, Clause 3 on the public benefit test only received one proposed amendment by Lord Phillips of Sudbury. It was a probing amendment regarding the frequency of updating and consulting on the guidance on public benefit and withdrawn upon assurance by Baroness Scotland of Ashtal that this was, indeed, the case. Clause 3 was otherwise agreed to.

Public Benefit Test and Role of Charity Commission
Clause 4 on the operation of the public benefit test attracted considerably more attention. However, Lord Hodgson of Astley Abbots discouraged the Lords from any amendments:

*(...) we are very conscious of the delicate balance that has been struck on the issue of public benefit, which comprises the four elements of: first, removing presumption on the four great tests; secondly, handing the public benefit definition over to the Charity Commission; thirdly, allowing for the Charity Commission to make

unanimous support in principle for the purposes behind the Bill. However, I have been surprised by the volume of representations that we have received about the implications of the details of the Bill.”

568 Lord Phillips of Sudbury, HL Deb, 3 February 2005, vol 669, col GC6
569 Amendment 20
revisions; and, fourthly, requiring continuous compliance with the public benefit test monitored by the Charity Commission. Therefore, adding anything to this very delicate balance seems to us undesirable unless there are very strong arguments for it.

Except for Amendment 28, all other amendments dealt with the precise wording determining frequency and audience of the consultations the Charity Commission was under a statutory obligation to conduct in regard to its public benefit guidance; upon clarification by the Minister of State, all of them were withdrawn.

Amendment 28, proposed by Lord Phillips of Sudbury, suggested the inclusion of a specific reference to fee-charging charities that would give the Charity Commission a duty to explicitly consider restricted access through high fees and its effects on public benefit provision. Lord Phillips referred to his alternative interpretation of Re Resch and to Hubert Picarda’s, QC, evidence to the Joint Committee, adding that

\[ \text{[t]he declared law is not changed by Clause 4, which is merely about guidance. Without the amendment [28] I believe that there is a real danger that what all Members of the Committee want to see could be frustrated, not as regards the better schools and hospitals but as regards that minority which basically wants to do little or nothing.} \]

Although Baroness Scotland suggested that the amendment would not actually add to the Bill, she cited an ISC publication that reasoned along similar lines and

---

572 “(...) In carrying out any such consultation in relation to charities which charge for their services the Commission shall consider the extent to which access thereto is restricted and the public benefit consequences thereof.” HL Deb, 9 February 2005, vol 669, col GCGC111.
573 “I am convinced that it does not provide anything like adequate, clear support for the proposition to which we are all adhering.” (HL Deb, 9 February 2005, vol 669, col GCGC118) and “(...)Re Resch is a blancmange. It is a foundation for nothing but a sinking feeling.” (HL Deb, 9 February 2005, vol 669, col GCGC120).
(...) rejoice[ed] in the fact that there seems to have been a meeting of minds of those who have looked at the Bill in both the independent school sector (...) and the commission. It is now absolutely clear that we have unity of purpose and understanding in the way in which the matter will be viewed in future.\textsuperscript{575}

Lord Phillips was not content with this description of the situation and expressed concern that

(...) when the dust settles and the Bill is passed, things will change. Policy and personnel can change. In any event, the ISC does not have control over its large membership, many of which are not charities at all. (...) That is why I want the Charity Commission at least to have confidence when it is faced—I will not say if—(...) when it is faced with a legal challenge. (...) When that challenge comes, as it will, I do not want us then to say, "My goodness, I never realised that we went to war with a straw lance".\textsuperscript{576} The developments of the Charities Act 2006, in particular after Attorney General (ex parte ISC) v Charity Commission, turned out to be prescient. Baroness Scotland indicated the Government would review the amendment again.\textsuperscript{577}

View on Fee-Charging Charities

Lord Wedderburn of Charlton referred back to the questionable advantages of the public benefit test if it was left without teeth to bite in the case of independent schools; he expressed his puzzlement “why [it is] necessary to maintain the existing charities forever when the plan to check the public character of charities, and especially the public benefit, is the most important recommendation in this Home Office document, which I understand represents the Government's policy?”\textsuperscript{578}

\textsuperscript{575} HL Deb, 9 February 2005, vol 669, col GCGC118.
\textsuperscript{576} HL Deb, 9 February 2005, vol 669, col GCGC119f.
\textsuperscript{577} HL Deb, 9 February 2005, vol 669, col GCGC120.
\textsuperscript{578} HL Deb, 3 February 2005, vol 669, col GC17.
The Lords also debated alternative means of addressing the vexing issue of independent schools. Thus, Lord Wedderburn of Charlton suggested in Amendment No. 9A that “education” under Clause 2 would be specified “not [to] include education in an elite institution”\(^{579}\). Lord Campbell-Savours reminded the Minister that the contentious issue of independent schools, which had already plagued the Joint Committee, better be fully addressed in the Lords since “this is rebellion material in the House of Commons”\(^{580}\).

After the General Election, the Lords reintroduced the Bill on 18\(^{th}\) May 2005. Lord Borrie launched a further attempt to specify public benefit criteria for independent schools through Amendment 8\(^{581}\) on Clause 3, but withdrew his amendment after a lengthy discussion on the role of public schools in British society amongst the Lords who finally accepted Clause 3 without amendments.\(^{582}\)

**Removal of Presumption**

On Clause 4 and the operation of the public benefit test, Lord Phillips reintroduced what used to be Amendment 28 as Amendment 10.\(^{583}\) The House was split on the point whether the removal of the presumption was powerful enough a tool to deal with the anomalies of independent schools in an adequate manner and fault lines emerged between

---

579 HL Deb, 9 February 2005, vol 669, col GGC63; he also criticised the Government for shying away from the removal of fee-paying schools from the list of charities and expressed his ideological views that [i]t is not their fault, but today's financial subsidy for public schools sits squarely with the new business elite allied to the ancien regime; the new rich and the old toffs, as some people say.” HL Deb, 9 February 2005, vol 669, col GGC66.


581 "(…) and, where the charitable purpose is claimed to be the advancement of education, the Commission shall, in determining the public benefit—
(a) have regard to the need to provide significant and continuing benefits to the educational, cultural, social or economic needs of the national or local community;
(b) consult relevant central or local interests before framing guidance in relation to paragraph (a) above;
(c) review the public benefit provided at regular intervals; and
(d) ensure that every such charity registered by the Commission shall publish annual reports on the public benefit it provides.” HL Deb, 28 June 2005, vol 673, col 151.

582 “My amendment would simply give the Charity Commission guidance, which would otherwise have no parliamentary guidance at all. I take the simple view that it is rather odd that Parliament, which is debating charities for the first time in a long time—apart from the immediate period before the election—has no role in determining what kinds of things should be provided by schools, in this instance, to demonstrate public benefit, but that that should be left to the discretion of the ladies and gentlemen of the Charity Commission.” HL Deb, 28 June 2005, vol 673, col 159.

Lord Phillips and Lord Campbell-Savours on one side and Lord Hodgson on the other. The latter expressed the view opposing Amendment 10 as follows:

_We have had some expert, persuasive and honeyed words from the noble Lord, Lord Phillips, in introducing this amendment. From the noble Lord, Lord Campbell-Savours, we had equally persuasive words, with perhaps just a hint of menace underlying them. However, I remain unconvinced of the appropriateness and value of this amendment. (...) In my view, we have made the Charity Commission responsible for the public benefit definition. We have made it responsible for its revision; we have given it independence; we have told it that it must ensure compliance. It seems to me that if we have said that we should adopt a hands-off policy and we pass it over to the Charity Commission, it should be left as uncomplicated as possible. It is as if we were saying, "Yes, we wish to create a level playing field (...) as far as concerns all charities and public benefit but, by the way, we would like you to tip the playing field a little when you consider the public benefit as it affects charities which charge for their services". I therefore believe that the Government should resist this amendment._

Requesting an opinion by the Attorney-General, Lord Phillips withdrew Amendment 10 and Clause 4 was passed, a decision confirmed by a Lords vote on 12th October 2005 that. 585 Similarly, Lord Campbell-Savours’s final attempt at introducing statutory guidance criteria for independent schools in Clause 3 failed at the stage of the Third Reading in the Lords. 586 His withdrawal was accompanied by a nod to the political nature of the decision and that the role of independent schools was fought in the wrong arena, implying it should not have been discussed under the banner of charity law:

585 The Lords voted 139 to 60 against the inclusion of Lord Phillips amendment; HL Deb, 2 October 2005, vol 674, col 319.
586 HL Deb, 8 November 2005, vol 675, col 567.
One day a Labour government will have to sort it out. (...) A political decision has been made. That is why nothing is changing. The political decision is to be found in the debate that surrounds the introduction of the Education Act 1973, which transferred the entire responsibility in these areas from the Secretary of State to the [Charity] Commission. That was a political decision taken to avoid interference by government in this area of education. (...) I hope that [Lord Phillips of Sudbury’s] views on the effectiveness of the [Charity] Commission in education stand the test of time. He believes that they will. I do not.587

4.7.2 The House of Commons

As was to be expected, the discussion in the Commons harped on the issue of public benefit and fee-charging charities quickly and with a specific focus on independent schools. Hilary Armstrong summarised the Commons debate in the Bill’s Second Reading before the Commons, remarking that some MPs had already turned to discussing their views with the press:

I am aware of considerable discussion among right hon. and hon. Members and the media about that matter, particularly with regard to the independent schools sector. Until now, owing to a presumption built up through case law, independent schools have automatically been granted charitable status if they requested it. Previous legislation, including the Charities Act 1992, did not deal with the problem, but the Bill before Parliament today will abolish the presumption that independent schools can be charitable simply because they provide educational services. For the first time, they will have to demonstrate public benefit in order to gain charitable status.

587 HC Deb, 8 November 2005, vol 439, col 567
That same principle will apply to all fee-charging charities in whatever sector they operate. (...) Several of my hon. Friends have already suggested that they would prefer an amendment to specify more clearly in the Bill what the public benefits should be. I remain to be convinced of the necessity of that and am anxious about the downsides. By trying to be more specific, we do not want to exclude organisations that should not be excluded. I hope that hon. Members, especially my hon. Friends, understand that we are determined that there will be a test of public benefit, which we expect to be meaningful, but that trying to identify matters too clearly frequently brings disbenefits that nobody anticipated.588

Definition of Charity in Law

A proposed amendment to clarify public benefit and Clause 3 (very similar to Lord Phillips’s attempts in the Lords) was thoroughly discussed and ultimately rejected by a majority of Labour MPs on the grounds of the danger of unintended consequences and a lack of flexibility.589 Alun Michael (Labour) defended the decision:

*The trouble is that it is always possible that the courts—or, in future, the charity tribunal—will be limp in how they interpret the intentions of Parliament. Our experience is that case law in the field of charity is sparse. For that reason, MPs (...) understandably ask what the point is of removing the old presumption and requiring that public benefit be demonstrated clearly by charities, particularly those that charge significant fees for entrance, participation or services, if the requirement does not bite until a judgment is reached in a test case in 158 years’ time. Either we must be sure that the law and Parliament’s intentions are crystal clear, or we must be sure that those intentions will be given effect robustly and effectively by the Charity*

589 The Conservative argument seemed to favour retaining the presumption of public benefit and a complete abandonment of charity law reform.
Commission, which must work sensibly and progressively but without undue delay. The real downside of choosing to include a more stringent definition is that it would create a risk of unintended consequences.  

Difference to Lords
While almost all of the issues raised in the Commons debate had already been addressed in one form or another before the Lords and don’t require specific mention, there is a notable difference in tone and attention to detail: while the Lords debate was careful to treat legal and political matters separately, the Commons debate paid little attention to legal subtleties. This is already apparent from Armstrong’s aforementioned summary, which glosses over the fact that the presumption never precluded any organisation to be investigated for public benefit when there were doubts as to its purposes.

Role of Charity Commission
The treatment of the Charity Commission, while equally important in the Lords debate, took a sharper tone as well; thus Sir Patrick Cormack asked Fiona Mactaggart to follow Parliament’s debate on the question of public benefit as “[i]t is important that it knows that Parliament is passing it great power, and is not asking it to nit-pick, ride hobby-horses or have agendas, but to consider, in the broadest way, what can deliver benefit and good to the public, and interpret matters accordingly.” Such comments sometimes took on an intimidating tone; there are no acknowledgements of the difficult position in which the Charity Commission found itself for the sake of flexibility. However, Conservative MPs emphasised the regulatory burden for charities and the Commission that would result from the removal of the presumption and the renewed focus on public benefit proposed in the Bill.

---

592 HC Deb, 26 June 2006, vol 448, col 41.
Party political lines dominated the debate from the first minute onwards. Conservative MP Andrew Turner (Isle of Wight) provides an illustrative summary of the party political currents:

*Three groups seem to want to the public benefit test to become more onerous. The first is represented by the Charity Commission, the NCVO and, rather surprisingly, the British Red Cross. The second is a group of lawyers and others who think that although the law on charities has never been the same in England as in Scotland, there should be a post-devolution situation in which Scotland drives England. (...) The third group is the few Government Back Benchers who are chaffing at their failure to maintain the iron grip of mediocrity on Britain’s state schools, with the support, for some reason, of the illiberal democrats to my left. Their motive is essentially to strike down independent schools, which have shown that pupils can get a better education than they could have done from the state. They ignore the damage done to voluntary hospitals and to charitable retirement homes. They do not seem to have thought of the effect on universities, all of which have always charged fees.*

This prompted Alan Milburn, the former Chairman of the Joint Committee on the draft Charity Bill, to laud the “pre-legislative process. (...) That process is far less partisan and far more open to analysis and debate, and, as a consequence, makes, where it is possible, for far better law.” He also asked the Conservative opposition to clarify its opinion on public benefit; it is true that despite substantial criticism, there is little to be discerned

---

593 HC Deb, 26 June 2006, vol 448, col 36f.; these statements are in part factually incorrect since public benefit was to be administered on a case-by-case basis (thus hospitals would not suffer from rulings on independent schools), neither were universities in the same category as independent schools; while they must refer to the public benefit guidance as charities, their main regulator is the Higher Education Funding Council for England. Labour MP David Taylor retaliated in turn by “thank[ing] the hon. Gentleman for releasing his iron grip on what is a mediocre speech.”


595 “I have to say, with all due respect to the hon. Member for Isle of Wight (Mr Turner), that I am at a loss to understand what the Opposition’s position is on public benefit, having listened at length—I also listened to him at length on Second Reading—to his somewhat tortuous and occasionally toe-curlingly
from the debate about what the Conservative alternative would have been except for a complete abandonment of the public benefit test and a continued application of the presumption as it operated until 2006.

Even the Lords did not refrain from commenting on the party political turn of the discussion in the Commons and lamented the wasted time, calling the Bill as Lord Bassam suggested “one of the most scrutinised non-controversial Bills of all time.”

Like Turner, some Conservative MPs suggested that the resources that would flow into public benefit reporting would outweigh the benefits the new test could bring by diverting resources away from philanthropy to administration. Equally, MP Widdecombe (Maidstone and The Weald, Conservative) argued in favour of the status quo, challenging that “[i]f anybody can show me one good reason for abolishing something that has always worked, and which nobody was worried about until the Charity Commission started waffling on about modern conditions, I might change my mind.”

In contrast, Milburn referred back to the use of charity law reform for Labour’s education policy by suggesting that “the public benefit test could drive forward partnerships between the private and the public sectors and, in particular, between private and state schools. (...) [T]he new public benefit test will accelerate the trend for the rest to follow the lead of the best.”

embarrassing attempt to avoid the question of whether the Opposition support the concept. If he gets an opportunity to do so, perhaps he will clarify the Opposition’s position. If I may, I shall offer a small piece of political advice. I should have expected a party that nowadays seeks to claim that mantle of modernity—notwithstanding the concerns of the right hon. Member for Maidstone and The Weald about the modern world—to welcome with no ambiguity what most people think is a long overdue modernisation of charity law.”

Lord Bassam of Brighton (HC Deb, 7 November 2006, vol. 451, col 691): “We thought it was uncontroversial legislation. We had given it a thorough bout of House of Lords scrutiny and we thought that our colleagues at the other end, just prior to the 2005 general election, would happily see it through. Then, when the opportunity was presented to have a definitive piece of charity law on the statute book, the Conservatives in another place, for reasons best known to themselves—perhaps they saw some controversy in it that we at this end did not see—decided to knock it on the head and kill it off.”


4.8 The Courts

Since the courts can rule on a case only once controversy has arisen, their effects take several years after the completion of the policy process to become observable. At present, there is little to say regarding the courts’ view at this stage. Two points shall briefly be noted.

Firstly, the Attorney General, Lord Goldsmith, QC, agreed to pursue “cases of public interest at public expense” before the Charity Tribunal, hoping to spur the growth of charity case law and jurisprudence. The most important post-2006 decision stems from the Upper Tribunal in *R (Independent Schools Council) v Charity Commission for England and Wales*. In this case, the Independent Schools Council (ISC) challenged the Charity Commission’s guidance on public-benefit and fee-charging.

Recall from Chapter 3 that the state of the case law on fee-charging charities is confusing and in certain regards contradictory. The Charity Commission, and various other stakeholders, followed the Privy Council decision in *Re Resch* for the drafting of its guidance. The central tenet was that “[p]eople in poverty must not be excluded from the opportunity to benefit” which affected the way independent schools had to provide evidence for their accommodation of “the poor” through bursaries and other means. On

---

600 Lord Phillips of Sudbury, HL Deb, 20 January 2005, vol 668, col 909: “Also important is the agreement of the Attorney-General, now written into the Bill, to take over cases of public interest at public expense so that the issues can be properly argued before the tribunal and if necessary in the High Court. That will begin to make a reality of the virtues of a common law definition, because, frankly, without being able to take the Charity Commission to the tribunal or the court, it is an empty and unachievable virtue.”

601 [2011] UKUT 421 (TCC)


603 Garton (2013): p. 130. To illustrate, compare for instance the rulings in *Re Macduff* [1896] 2 Ch 451 (CA) and *Re Estlin* [1903] All ER Rep Ext 1060 (Ch): In the former, the Lindley LJ stated that a trust that “purposes indicating goodwill to rich men to the exclusion of poor men” would be philanthropic but not charitable. In *Re Estlin*, however, Kekewich J found the testatrix’s bequest for the foundation of a teacher rest home charitable, despite the fact that fees were set in the express intent of excluding the poor.

this point, the Upper Tribunal agreed with the Charity Commission. However, as Garton points out, the Upper Tribunal does not differentiated between the conscious and deliberate exclusion of the poor, as in *Re Estlin* and the purely incidental exclusion of the poor, as in *Re Macduff*. The Upper Tribunal further qualified the definition of “poor” as referring to those with “modest means” rather than the absolutely destitute. In other words, it is possible that some of the very poorest members of society could be excluded from a service that was provided for the public benefit, but such a service could never be provided solely for the rich, i.e. at the *express* exclusion of the poor. As Garton concludes “[w]hen financial and related operational constraints require a charity to set fees at a level that does in fact exclude the poor (...) then, according to the tribunal, the trustees must ensure that despite this there is adequate provision of its services for the poor, although the steps necessarily to meet this requirement will vary from case to case.”

The Charity Commission was thus wrong in law in so far as its guidance had over-emphasised the role of a hard “checklist” on the provision of public benefit. The tribunal decided that it was not for the Charity Commission to set such a rigid list of criteria, e.g. the provision of bursaries rather than scholarships in the case of independent schools. Rather, the Charities Act 2006 had put the Commission in a position to formulate guidance that would have to be assessed on a case-by-case basis by the trustees. The Tribunal also found that the public benefit presumption had in fact never been a true presumption but a “predisposition”. Its removal was thus of limited importance and effect.

---

606 [1903] All ER Rep Ext 1060 (Ch)
607 [1896] 2 Ch 451 (CA)
An alternative appraisal of the decision is offered by Mary Synge. Synge concludes that, “[w]hilst [the Tribunal decision] may have paved the way for a compromise between the parties’ respective positions, it does not justify a re-interpretation of the law which bears a greater resemblance to policy than the case law on which it purports to be based.”

Synge suggest that the tribunal has introduced “[another] sense of public benefit, which is significantly closer to the popular meaning of charity than the legal or technical meaning repeatedly emphasised in case law and referred to by the Tribunal” namely “[a] duty to carry out the charity’s purposes in a way which is for the public benefit.” This overlaps with Garton’s demonstrable public benefit principle, but stresses the activity element (i.e. carrying out the charity’s purposes) rather than the assessment of the underlying purpose.

Both the ISC and the Charity Commission celebrated the ruling for essentially confirming their key objectives – in their respective views, independent schools received more freedom in choosing the type of evidence for the provision of public benefit they wanted to provide, and the Charity Commission felt confirmed in its policy that schools must consider access for the poor in more than just a tokenistic way.

4.9 A Note on New Labour

Ironically, Labour had historically not been a friend of the voluntary sector, so it seems rather surprising that the most important reform attempt in 400 years should happen under the auspices of a Labour government, and according to the findings in this chapter, even based on a Labour Prime Minister’s initiative.

---

Traditionally, Labour was the party of the trade unions, not the voluntary sector. The Tories were more open to the idea of voluntarism. In true Hayekian fashion, anyone that would help to relieve the state of its welfare burden was a welcome ally, even private action based on civil society ideals. Baroness Thatcher encouraged this self-help approach with her (in)famous “There is no such thing as society”, a remark she made during an interview with Douglas Keay in Women’s Own in 1988. In a later clarifying statement issued by No. 10 and published in the Sunday Times, the Conservative party specified:

All too often the ills of this country are passed off as those of society. Similarly, when action is required, society is called upon to act. But society as such does not exist except as a concept. Society is made up of people. It is people who have duties and beliefs and resolve. It is people who get things done. [Margaret Thatcher] prefers to think in terms of the acts of individuals and families as the real sinews of society rather than of society as an abstract concept. Her approach to society reflects her fundamental belief in personal responsibility and choice. To leave things to ‘society’ is to run away from the real decisions, practical responsibility and effective action.

Yet, by the General Election of 1997, New Labour had rid itself of Clause IV and this had a profound impact on charities. Before, unpaid volunteers used to be seen as a threat to the job security of union members. Now, charities had been placed at the centre of the

---

617 “Since 1979 Conservative governments have sought to reduce state expenditures in various ways, and to transfer some responsibility for the provision of services to private organisations. (…) this policy has involved charities (…).” Ware, A. “Introduction: The changing relations between charities and the state”, in Ware (1989): p.1.
620 Clause IV of the British Labour Party constitution set out the party’s values. Before Blair’s reform in 1994, Clause IV was still in its 1918 form and had as its goal the nationalisation of the British economy. The Blairite version confirms the party as democratically socialist but does not specify the means how socialist aims are to be achieved. This marks the change from Old to New Labour. See for instance White, M. “Blair defines the new Labour”, The Guardian, 5th October 1994, accessed online on 22nd January 2014 at http://www.theguardian.com/politics/1994/oct/05/labour.uk.
government’s public service strategy. New Labour’s poster child Tony Blair even proclaimed that “[t]he grievous 20th century error of the fundamentalist left was the belief that the state could replace civil society and thereby advance freedom (…) a key challenge of progressive politics is to use the state as an enabling force, protecting effective communities and voluntary organisations.”

In 2004, the Guardian lauded New Labour for its dedication to the voluntary sector, gracing NCVO annual meetings with keynote addresses by the likes of Tony Blair, Gordon Brown (twice) and David Blunkett. The Guardian announced:

> It was the prime minister who neatly divided the 20th century into two: in the first half the country learned it could not achieve its aims without the help of government; in the second, that government could not achieve the nation's aims without the help of the voluntary movement.  

At least from the point of view of the voluntary sector, this may well be true. However, the newspaper also pointed out that “History shows that the people who pay the pipers pick the tunes”, cautioning the voluntary sector from too strong a reliance on the partnership established through the Compact in 1999 and the increase in government contracts that ensued thereafter.

Even during the parliamentary debate of the Charities Bill, several Lords commented on a marked shift in Labour’s attitudes towards charities and charity law and policy that had enabled the Bill to reach Parliament in the first place. Lord Hodgson described the Conservative attitude as well as the shift in Labour’s attitude the following way:

---

Conservatives believe passionately in the charitable sector. We believe that it combines, inter alia, three important strands. The first is the ability to extend support beyond that which is or can be provided by the state. The second is the ability to react flexibly and responsibly to local circumstances in a way that state provision finds difficult, if not impossible. Finally, it provides a means for individuals to "put something back" into society. As a party, we want a thriving charitable sector. It is good that a Labour Government appear to want that, too. It was not always thus. I remember my days in the other place in the 1970s when Left-wing Labour Members of Parliament regarded charitable activity with a mixture of scorn and derision. For them it was only government, and big government at that, who knew what was best for people. I very much hope that those old-fashioned and outdated attitudes will not resurface when the Bill goes to the other end of the Palace. That is why we shall want to be reassured that the new structure of the Charity Commission really will be insulated from political pressures of every kind—not just in the short term, but well into the future when all those responsible for the Bill so far have long left the stage.623

Similarly, Baroness Howe of Idlicote recalled from her experience as

(...) a care committee worker in the 1960s for a partially sighted school in Stepney, many old Labour supporters regarded that kind of voluntary activity as taking paid jobs from workers—in other words, "scab" labour. The new Labour approach, I am glad to say, is indeed quite the reverse. It now understands the positive value of partnership with the independent charitable sector. However, even the partnership approach can have a downside, with the risk that a charity can become far too dependent on public sector funding, and

correspondingly less innovative and less likely to criticise the hand that feeds it.624

Like the Guardian article, these two descriptions indicate the shift as a two-edged sword; it opened up new possibilities but it also introduced the potential danger of reinforcing the trend of “contracting out” that had shaped the voluntary sector since the 1980s625. Either way, charities remain on the fault line between the public and the private sector, so their status is inevitably a political issue. In the case of education – and independent schools – the merely political has always quickly turned into the proverbial political hot potato626. It still does627.

However, Anthony Seldon described that once in office, Blair’s passionate approval of the voluntary sector did not immediately translate into the action he had so fervently called for. The New Labour attitude was first declared in the Compact of 1999 that resulted from the 1997 Deakin report628. Labour had also adopted an ambitious goal of public service reform, especially in education and health.629 Seldon sees an overlap between New Labour’s voluntary sector promise and its public service ambition. He describes Blair’s charity policy endeavour as a tool to reinforce his education policy:

At first, Blair appeared to do little to bridge the independent/state divide other than making available a small amount of funding for partnerships. But as his term drew to a close it became clear that he

626 See for instance Graham Moffat’s 1989 article ‘Independent schools, charity and government’ published in Ware (1989): pp.190-221. Moffat raised the question of independent schools with charitable status long before the NCVO sought to address the “anomalies” arising under charity case law.
628 This will be discussed in more detail in Chapter 5 on the charitable sector policy node.
was coming at it from both directions: seeking to open up independent schools through a new Charities Act which required them to demonstrate their public benefit; and creating more free-standing schools in the maintained sector.\textsuperscript{630}

There are two elements of New Labour ideology and practice that tie these pieces of sometimes anecdotal evidence together and deserve specific mention: first, New Labour’s strategy of public opinion based government and its allegiance to the practices of New Public Management.

**Government by Focus Group**

Under New Labour, No. 10 staff increased from eight to 28 and exhibited an overall stronger political ambition.\textsuperscript{631} This growth introduced new units that focused on innovation in policy making – one such example is the Prime Minister’s Strategy Unit under Geoff Mulgan, which was discussed in detail in this chapter. Like the PMSU, these new units were meant to set the governmental policy agenda rather than “broker between departments and overseeing the smooth working of the cabinet system”.\textsuperscript{632} They also brought with them a focus on evidence-based policy based on modern research techniques, especially surveys and focus groups. The expression “Government by Focus Group” was born, and while Tony Blair denied any such strategy, his comparison of governing the UK with running a Marks and Spencer supermarket store did nothing to convince his critics otherwise.\textsuperscript{633} In short, ditching Clause IV had replaced the policy dictate of the unions by a dictate of public opinion.

Kavanagh criticises this new agenda setting strategy, suggesting that the Blair government focused more on “headline-catching initiatives” than substance\textsuperscript{634}: “In the

\begin{flushleft}
\textsuperscript{630} Seldon (1997): p.449. \\
\textsuperscript{631} Seldon (1997): p.6. \\
\textsuperscript{632} Seldon (1997): p.6. \\
\textsuperscript{633} Hattersley, R. “Blair denies focus group rule.” The Independent, 30\textsuperscript{th} July 2007, accessed online on 22\textsuperscript{nd} January 2014 at http://www.independent.co.uk/news/blair-denies-focus-group-rule-1253246.html. \\
\end{flushleft}
first twelve months, ministers created nearly 200 task forces, inquiries and Royal Commissions; most proved to be substitutes for action.”

New Labour also emphasised the importance of communications and media strategy, especially under Tony Blair, who created the “Strategic Communications Unit” and the “Research and Intelligence Unit”. This led to catchy one-line description of the New Labour government as choosing “spin” over substance. The media did not embrace this new strategy and “found itself in a Mexican standoff with the government”, leading to a perception gap between the government’s agenda, its actual achievement and the media’s portrayal thereof. This is particularly significant given PEF’s emphasis of the role of the media in the spread of a policy issue across policy nodes. It is likely that New Labour would have been most receptive.

New Public Management

Throughout the analysis of the written evidence from within the state policy node, the terms ‘transparency’ and ‘accountability’ take centre stage, together with constant references to performance indicators and measurement. These are all central tenets of New Public Management, a combination of “rational choice and classical microeconomics to public management, sometimes by transferring the recipes of private management to public management”. Neither were these principles new (in fact, they had already set in during the 1980s under the Thatcher Conservative government), nor were they uncontroversial within the Labour party itself, especially because they

---

640 The Joint Committee on the draft Charities Bill was particularly critical of the Home Office’s suggestions to actually implement the measurement and post-legislative scrutiny that it had announced it would conduct. Moreover, the Prime Minister made Regulatory Impact Assessments (RIAs) mandatory; the Home Office provided an entire guidance on the RIA measures for the Charities Bill in its evidence to the Joint Committee (DCH 352).
642 The term ‘New Public Management’ had first been formalised in an article by Christopher Hood in 1991; see Hood, C. “A Public Management for All Seasons.” Public Administration, 69 (Spring 1991): pp.3-19.
entailed a redistribution of power toward the political centre around the Prime Minister and his cabinet. New Public Management under Blair has been summarised in six principles:

1. “Indicators for good public management extending beyond performance were developed for the precise piloting of public action.

2. According to the social model of neoclassical economists, individuals respond to stimulation.

3. The delivery of public policy combined public and private partners in flexible ways.

4. Priority was given to delivery and the definition of objectives.

5. Power was centralised in order to initiate reforms, monitor delivery, and make government action coherent.

6. The inspiration for reforms no longer derived from the senior civil service, but from think tanks, experts, consultants, academics, and foreign experience (essentially the United States).”

All of these have been applied to the policy making process on the public benefit reform. Whether they have contributed to its initial formulation, led to its ultimately failure, or possibly both at the same time is an important question to investigate.

Finally, it is worth pointing out that – as the surveys presented in the various state policy node reports have already indicated – charities did not suffer from a loss in confidence. In fact, it was the government that was struggling with a crisis in public confidence. Creating a more transparent and accountable sector could thus also be seen as an attempt by the New Labour government to use New Public Management techniques to increase trust and confidence in its policies (and ultimately itself) rather than the voluntary sector.

---

4.9 Conclusions

The policy debate conducted within and among the state actors was marked by great attention to detail and expertise as much as political backgrounds. The precise dynamics can only be inferred from the written account, but first-hand empirical evidence in the interviews of Chapter 8 complement the picture.

The analysis presented in this chapter provides important insights for testing the hypotheses regarding the theoretical account of the policy change process set out in Chapter 2.

*Hypothesis 1: The changes to the public benefit test in the Charities Act 2006 mark a radical and sudden policy change after a long period of stability.*

- The evidence varies across the different documents: the Strategy Unit report appreciates the complexity of charity law, in particular the presumption of public benefit. However, it clearly suggests that the envisioned reform would be a radical policy change from the status quo. The same applies to the Home Office report.

- The Charity Commission report differentiates the legal and the public policy change, suggesting that there would not be a radical or even substantial legal change as the removal of the presumption would not lead to the consequences the government had in mind (i.e. a true threat to apply pressure on independent schools). Peacock’s evidence to the Joint Committee emphasises that from a policy point of view, the Act and the public benefit test were indeed radical innovations, for entirely different reasons: Peacock emphasised the Act as the first time that the sector and the public were visibly consulted in the policy making process (on the Act and the guidance on public benefit). In short, the Charity Commission proposed a policy change in its public benefit policy but not a legal change.

- On the contrary, the Joint Committee on the draft Charities Bill seems to have been more receptive to the legal debate. Lord Phillips of Sudbury stands out in his role as solicitor and member of the legislative scrutiny committee, pushing for a statutory definition or at least statutory criteria to clarify public benefit and take
pressure off the Charity Commission. From the point of view of the Joint Committee, the Charities Act 2006 was thus not a radical departure but at best a half-way house compromise that did not go the full way to radical reform.

**Hypothesis 2: The changes to the public benefit test in the Charities Act 2006 were introduced through endogenous variables.**

- The evidence seems to point towards some rather strong exogenous influence. Firstly, the New Labour government introduced New Public Management values, such as transparency and accountability. These were taken on board by the Strategy Unit. Strengthening charities was also encouraged through New Labour’s willingness to use them for Public-Private-Partnerships and the delivery of public services.

- There seems to have been a much stronger endogenous sector impetus. The Strategy Unit and the House of Lords debates indicate the paramount role of the NCVO in pushing for the reform and preparing its formulation. The evidence before the Joint Committee further confirm the sector’s support, a fact that is mentioned time and time again during the Lords and the Commons debates.

- Education policy might be seen as an exogenous influence. New Labour’s insistence on the importance of “education, education, education” and its attempt to incorporate independent schools closer into the state system were mentioned in the Lords and the Commons debates as a hidden agenda that was driving Labour’s public benefit reform. That inference is open to further qualification.

- There is no evidence that financial pressure due to the economic downturn was driving the reforms other than tangentially.

**Hypothesis 3: The origin of change to the public benefit test in the Charities Act 2006 can be traced across policy arenas.**

- The written reports provide extensive evidence of cross-cutting nodes and the ascent of public policy reform across policy nodes. This seems to have proceeded in a piecemeal fashion.
The NCVO is key, and seemed to initiate the reform process, first with the Deakin report and the Compact, and later with its report on public benefit and the removal of the presumption.

Consultations are a recurring theme in the reports, from the Strategy Unit to the Home Office; the Joint Committee is the most visible nexus of policy nodes. They brought together legal community, state actors, and the voluntary sector.

The spread across nodes seems to have been largely driven by state actors, most importantly by Geoff Mulgan and his staff at the PMSU and later the Joint Committee, whose members (in particular Alan Milburn and Lord Phillips of Sudbury) also drove it across both Houses of Parliament.

Judging from the written evidence from the state policy node, the public benefit reform promised to be a radical change up to its introduction as a Bill. Hereafter, rifts between the Home Office and the Charity Commission as well as party political and ideological disputes on the status of independent schools appear to have prevented a radical legal reform (or even any reform of existing law at all). Nonetheless, the policy changes on public benefit are at least sizeable. Further evidence is needed to come to a conclusion regarding the evaluation of pure policy changes.

In the light of this evidence, the policy makers should have, perhaps, taken to heart Lord Hodgson’s kind words of warning that he volunteered on 20th January 2005 upon the second reading of the Bill:

My final general point is to warn the noble Baroness [Scotland of Ashtal, Minister of State, Home Office] of the law of unintended consequences. That operates with particular unpredictability and, indeed, savagery when regulatory systems are changed. Several noble Lords in the House today were involved in the Committee stage of what is now the Licensing Act. That Act was presented by the Government as having many of the same characteristics as the Bill—updating, flexibility, transparency, public responsibility and, above
all, "light government regulatory touch". The effects have proved rather different. The detail has proved difficult to work out and, as a result, individuals, venues and events are being swept into the Act in a way that I do not think any of us (...) envisaged at the time. We have to make sure that that does not happen with the Bill.646

Unfortunately, the law of unintended consequences did not seem to spare the Charities Act 2006 any more than the Licensing Act.

---

Chapter 5. The Sector

5.1 Introduction

By the time the public benefit reform had reached the legislative stage as (draft) Charities Bill 2005, it had already garnered the support of the “Coalition for a Charities Act”, an alliance formed by more than 30 charities and driven by the National Council for Voluntary Organisations (NCVO) and the Association of Chief Executives of Voluntary Organisations (ACEVO). As the previous chapter on the state policy node has demonstrated, the Bill and with it the general idea of public benefit reform enjoyed wide approval among the sector, including the Independent Schools Council that would later take the Charity Commission before the Upper Tier Tribunal. The initial approval and support was short lived.

This chapter will trace the sector policy node’s attitude toward public benefit reform and identify a) which actors supported it b) at what point in time and c) what agenda they sought to pursue through public benefit in the first place. The sector policy node embraces a diverse set of individual charities, from schools to hospitals, churches and animal shelters. However, there are certain ‘markers’ that have historically and politically been key drivers of the field of charity and have shaped the case law. As discussed in Chapter 1, the thesis focuses specifically on fee-charging charities using the example of independent schools and hospitals with charitable status.

An overview of what role public benefit played in the relevant sector reports from the 1950s onwards places the origin and the timing of the public benefit reform in the Charities Act 2006 in context. Reports on the voluntary sector have been commissioned

---

647 Graham Moffat argued for instance that independent schools have been one of the main forces that have driven the case law on charity in general; see Moffat, G. ‘Independent schools, charity and government’, in Ware (1989): pp.190-221.

648 Religious charities, political activism organisations, and other charities pose challenges in their own right. They are outside the scope of this thesis and it is hoped that further research will shed more light on their specific role in the future.
by different sources, mostly from within the sector but some also by government actors.

Charities also submitted valuable evidence – both written and oral – to the Joint Committee on the draft Charity Bill. Following the ‘marker’ approach of concentrating on the main stakeholders, the submissions and contributions of the umbrella bodies as well as independent schools and hospitals provide a useful window for exploring the research hypotheses.

Furthermore, a survey has been conducted among charitable independent schools and hospitals to gain further insights into how the sector prepared for the Charities Act 2006 and its changes to the public benefit practice. The sample size is too small to draw any robust conclusions but it nonetheless provides insights from a “best practice” perspective.

5.2 Relevant Sector Reports

5.2.1 Committee of Enquiry into the Law and Practice Relating to Charitable Trusts – Nathan Report (1952)

The Nathan report addressed the newly emerging welfare state and the rapid changes that were affecting charities just after World War II. Thus, the Committee attested that “[t]he statute law of charitable trusts (…) now presents to lay trustees and, we may add, to not a few of their professional advisers, and impenetrable jungle”. A similar motivation –

649 Such as the Deakin report which had been commissioned and funded by the NCVO, although the Deakin commission itself was independent and made use of its position by criticising the NCVO as well. Similarly, the Goodman report had been commissioned by the National Council of Social Sciences.
650 Such as the Nathan report of 1952.
652 See for instance the following passages and its striking similarities to the remit of the Strategy Unit’s report: “(…) the community stood in as much need of voluntary service as ever it did in the past though, clearly, there was a need of new powers to enable charities to use their resources with greater advantage to meet the changed needs of the present.” Nathan Report (1952): p. 345; “[Charities] must, naturally, continue to fill gaps in the social services provided by the State. They should also continue to fulfil their historic role of pioneering.” p. 351; “(…) how, in a period when the State is extending its activities more and more, the worth, and indeed the necessity, of voluntary effort can be effectively demonstrated.” p. 352.
clarification – yielded a surprisingly similar recommendation: the Committee suggested to remove the reference to the preamble of the Statute of Elizabeth and instead create a statutory definition of charity that followed Lord Macnaghten’s four heads of charity under *Pemsel*\(^{653}\), thus keeping the case law basis but providing it with a firmer foundation.\(^{654}\) However, this recommendation regarding the definition of “charity” was not adopted. The line of argumentation was remarkably similar to the discussions in the Joint Committee and Parliament: it was feared that a statutory definition might be too restrictive and not provide sufficient flexibility for the case law to evolve along with social and economic circumstances. Yet, it is strikingly similar to the actual legal change that was introduced through the Charities Act 2006. While the Nathan report did not directly touch on public benefit, it did single out the special treatment of education charities, which were in many cases both subject to the Charity Commission and the Ministry of Education.


The Goodman report is one of the first sector commissioned reviews of charity law and the charitable sector. Triggered by a National Council of Social Sciences conference in 1974, the report specifically focuses on the existing legal framework for charities. Most relevant for present purposes are two points: first of all, the Goodman report already proposed a statutory definition based on a widened list of charitable purposes. Secondly, the report also emphasised the central role of public benefit and the relating test for the definition of charitable status. For instance, it was proposed to widen the test to charities that fell under the “poor relations” or “poor employees” cases beforehand, moreover, the Goodman report also suggested a less stringent application of the public benefit test to contemplative religious orders. However, it is the minority report by Labour MP Ben

\(^{653}\) They recommended, however, that there should be a statutory definition based on Lord Macnaghten’s classification, preserving the case law, both prior to and later than the *Pemsel* Case, as it stands.” Nathan report (1952): p.345.

\(^{654}\) Nathan’s wonderful remark on the reliance of the common law approach to growing legal principles is too astute to be omitted at this point: “The glory and the weakness of the legal mind is its natural devotion to precedent and yet its fear of precedent-a fear which Portia expressed: ‘Twill be recorded for a precedent, /And many an error by the same example/Will rush into the state.’” Nathan report (1952): p. 347.
Whitaker that first raised similar policy proposals on public benefit that would later be addressed in the Charities Act 2006.


Chaired by former social policy professor and sector veteran Nicholas Deakin, the Independent Commission on the Future of the Voluntary Sector had been commissioned and funded by the NCVO. Much like the overall policy process on charity reform, the Commission consulted at the same time as the Kemp Commission North of the border in Scotland.

The Deakin Commission noted a number of areas for reform of which charity law was but one sub-topic and not the main focus. In its report, the Deakin Commission emphasised that the socio-economic environment in which charities operate had dramatically changed; charities were no longer the ‘traditional’ lay volunteer organisations that live off public donations but had evolved into sophisticated organisations that provide important social and welfare functions.\(^{655}\) It calls this new situation a “mixed economy of welfare”.\(^{656}\) Funding was increasingly dependent on government contracts or grants.\(^{657}\) Charities, the report concluded, had least more business-like, taking on-board monitoring and efficiency metrics.\(^{658}\) Because of these changed circumstances, the Deakin Report recommended a “concordat between central government and (…) the sector”\(^ {659}\), which would become the Compact of 1999.

One necessary area for reform that would support charities in this new environment was a modernisation of charity law. The Deakin Commission suggested a reform driven by the Law Commission and based on “establishing the new legal definition [of charity] itself;


and rethinking current mechanisms for coping with the consequences of relevant social changes”.⁶⁶⁰ Significantly, the Commission emphasised that it saw the Law Commission as a driving force, not the Charity Commission; the Deakin report even proposed the foundation of a “Voluntary Sector Commissioner”⁶⁶¹ appointed at the Law Commission to keep aspects of charity and voluntary sector law under review, together with an independent expert Charity Appeal Tribunal to review decisions of the Charity Commission about the charitable status of organisations”.⁶⁶² One may wonder how the policy reform process would have differed had the controversial elements of charity law reform been conducted by the Law Commission instead of the Charity Commission.

The Deakin Report also renewed the focus on the concept of public benefit and its centrality for charity law and charity policy: “the whole notion of charity and the rights and privileges attached to it hinges on the concept of providing public benefit. So voluntary organisations need public understanding and support in order to make their full contribution.”⁶⁶³ Thus, it issued Recommendation 10 which stated that “[t]he definition of charity should be reformed with a single definition based on a new concept of public benefit”.⁶⁶⁴ The Deakin Commission did not see it within its remit to specify what such a new definition should look like or even how public benefit should be defined; this was clearly perceived as the task of the Law Commission in its role as legal expert. The Law Commission notably does not resurface in any of the state or sector policy node documents or debates after the Deakin report. In fact, it would not get involved in charity law reform until the purely technical consolidation process of the Charities Act 2011.

Referring back to the theoretical frameworks of PEF and PDF, the Commission report explained the timing of the reform impetus by the 400th anniversary of the Statute of Elisabeth and the impending turn of the millennium.⁶⁶⁵ It also emphasised the cooperative

---

nature of the enterprise, including many different sector organisations and experts, the legal community and the state.\footnote{Deakin Report (1996): section 1.2.7f., p. 17f.}


Main Report
The most central document and the first to properly flesh out the renewed public benefit focus, was the NCVO report with the indicative title “For the Public Benefit?”. It is based on the research and advisory work conducted by the Charity Law Reform Advisory Group\footnote{The group was kick started by a conference at King’s College London entitled ‘The Foundations of Charity’ in September 1998; NCVO. For the Public Benefit? A Consultation Document on Charity Law Reform. London: NCVO, 2005: p.2.} that was set up by the NCVO’s late Chairwoman Winifred Tumim in 1998.\footnote{NCVO (2001): p.i.}

In her foreword, Tumim stressed the value of keeping with a common law definition and providing incremental reform on the basis of the existing case law. This solution, according to Tumim, would balance “tougher regulation and (…) a framework within which charities can operate with an appropriate degree of freedom”\footnote{NCVO (2001): foreword.}. She emphasized the great importance of the consultative nature of the report but also noted the outstanding input of Francesca Quint, QC, one of, if not the, leading charity practitioner in England. Her opinion to the NCVO was added to the report in its full length.\footnote{See Chapter 6 on the Legal Community.}

As an overall finding, the NCVO confirmed the set of main policy nodes that have been identified through the theoretical framework in Chapter 3; it suggested the following strategies:

\begin{quote}
When we were collecting evidence to inform this report a number of interesting trends emerged. Media commentators and policy pundits
\end{quote}
advocated radical reform of charity law, many suggesting that nothing short of abolition would do. The charity lawyers were predictably more conservative, with some more conservative than others. Some supported the basic framework but considered that changes should be made to the law at the margins. Others suggested that attempting even minor change would be contentious and difficult relative to the likely gain. Some argued that the system that we have at the moment is sound, requiring only small administrative changes.\textsuperscript{671} (...) It demonstrated considerable confusion amongst non-lawyers about the law and a strong feeling amongst the policy experts and media commentators that the law required fundamental change, though this was not shared by the sector itself.\textsuperscript{672}

Many other sources within the state policy node referred to the NCVO report as the origins of the reform; the document itself refers to the anniversary of the Preamble to the Statute of Elizabeth\textsuperscript{673}, the Deakin Commission’s findings\textsuperscript{674}, the media coverage\textsuperscript{675}, the Charity Commission’s recent Review of the Register\textsuperscript{676}, and finally, the Goodman Report of 1976 whose recommendations had been regrettably ignored up till then\textsuperscript{677}. This last comment, including a subtle quip at the Conservative governments since the late 1970s,
also points to the role of New Labour and the promises it held for the voluntary sector through a change in its general policy outlook.678

The report’s narrative regarded the gap between the popular definition of charity and the legal concept that had evolved over 400 years of common law development as a threat to the reputation and trustworthiness of the sector.679 This mismatch became the main concern of the report680, much like it would later be presented in the Strategy Unit report and the Home Office response681. Unlike these following reports, however, the NCVO also investigated whether it would actually make any difference if this mismatch of “charity” definitions continued. The NCVO concluded that it did, explaining that:

\[
\text{(\ldots) the link between charities and enlightened public attitudes might be regarded as particularly important in this area of law because, historically, one of the objectives of the legal category was to promote the giving of time and money for public benefit purposes. However there is some concern about a growing gulf between what people think should be charitable and what actually is charitable in law and whether this undermines the credibility of the category, leading, as one commentator puts it, to the ‘absurdities of what we call charities’ \text{\textsuperscript{682, 683}}} .}
\]

678 “Given a different political environment and greater interest in the charitable sector and its contribution to society, NCVO decided to look again at the issue.” NCVO (2001): Section 1.1.3, p.1; but compare this with the reference to Geoff Mulgan’s early Strategy Unit proposition: “Geoff Mulgan, in an article in The Independent in 1998, argued that the root of the problem with charitable tax incentives is that: ‘they are targeted to a category of organisations rather than to activities which are deemed useful. A far saner approach would be to provide incentives for useful activities, regardless of the type of organisation that engaged in the activity’. (\ldots) The view that tax reliefs are targeted to organisations is inaccurate. Tax reliefs do not follow a particular organisational form, rather they attach to the pursuit of charitable objectives. (\ldots)” This was rejected as “it is in any case a mistake to think that all the worth in charitable activities can be understood in terms of the outcomes of those activities as opposed to their intrinsic value as expressions of public moral concern.” NCVO (2001): Section 2.5.5-2.5.8, pp. 16f.

679 “As a charity lawyer put it during our oral evidence sessions: ‘The public has an emotional understanding of charity’”, NCVO (2001): section 1.3.1, p.2.

680 Further areas of concern included the independence of charities (NCVO (2001): sections 2.2.1-4), their campaigning activities (NCVO (2001): sections 2.2.5-7), charities as entrepreneurial organisations (NCVO (2001): sections 2.2.8-10), and charities’ tax treatment (NCVO (2001): section 2.2.11-17).

681 See Chapter 4 for a detailed discussion on the state policy node reports.

682 Parris M., “Uncharitable Thoughts.” The Times, 12\textsuperscript{th} December 1997.

683 NCVO (2001): section 2.3.1, p.11.
Unlike the reports discussed in Chapter 4, the NCVO painted a more differentiated picture of this definitional mismatch – it emphasized that it was not just about the public gaining full command of the legal definition of ‘charity’, but that “inconsistencies in legal treatment” ought to be addressed: “This argument tends to arise when an organisation the commentator considers self-evidently worthy is denied charitable status, while one that they consider undeserving is a charity.” Such “inconsistencies” or “anomalies” have been referred to repeatedly in Chapter 4, the most prominent being the difference in treatment between Amnesty International and the Royal Opera House. At the same time, the NCVO is the only one to pinpoint the problem to the common law development of the definition of charity. As one expert witness suggested: “The case for radical reform comes from the fact that lawyers have tied the definition of charity into knots…what is needed is a legal description of charity that means something in common parlance.”

The NCVO identified the tension between this wish for clarity, even for a lay person, and the need to uphold a flexible system that can adapt to changes in social and economic conditions:

*The sector wants a system which is both easy to grasp and predict, with apparent anomalies and inconsistencies in the legal treatment of similar objects ironed out (some of which are discussed below). But the charitable sector also praises charity law for its flexibility which means that each application is assessed on its individual merits, on the basis of how it measures up to charity law principles as expressed in case law precedent.*

---

684 “It is not always possible to have legal simplicity without damaging the very thing which the law is supposed to protect and promote. This said, and accepting the fact that views on this issue differ, we were reassured by Charity Commission research from 1997 which demonstrates that the public, while obviously not having a grasp of the detail, understand some of the basics about the legal category and support its diversity. In other words, while they might argue with the determination of particular cases, they appear broadly in tune with the overall structure or rationale of the law. In this case, perhaps as with all law, this is as much as could be hoped for.” *For the Public Benefit?, Section 4.1.5, p.29*

685 *For the Public Benefit?* section 2.3.7, p.12

686 Ian Hargreaves, oral evidence session, 1999; *For the Public Benefit?* p.12.

687 *For the Public Benefit?* Section 3.3.3, p.21
Lord Phillips of Sudbury even called a lay-friendly and clarified version of charitable status “the legal equivalent of ‘fools gold’”.

The NCVO report formulated 7 proposals that range from radical to more incremental reform. Ultimately, the group of experts decided that proposal 5, based on Francesca Quint’s opinion, was the best option:

We are recommending this option because we believe that it deals with most of the major difficulties of the present system by placing the concept of public benefit firmly at the centre. Some would argue this would realign charity with principles which have over the years been partially eroded. This change would make the law more intelligible and give it greater unity. It would not eradicate some of the underlying conflicts and complexity but we could see no way of removing this complexity without too great a loss in flexibility.

Proposal 5 seeks to address the aforementioned “anomalies”, which the NCVO report identifies as the presumption of public benefit for education and religious bodies (under Macnaghten’s second and third head of charity), fee-charging charities (such as independent schools and private hospitals), contemplative religious orders, and trusts for the relief of poor relations. Quint’s proposal entails the equal application of the public benefit test for all charities on a case-by-case basis rather than under the established

---

690 NCVO (2001): 3.5 Proposal 5: Introduce the same public benefit test across the four heads of charity.
691 NCVO (2001): section 4.1.6, p.29.
presumption; the proposal calls this the “strong test” that previously only applied to the fourth head of charity.\textsuperscript{693} Thus, she argued:

\textit{the basic justification for charity is public benefit. Legislation on charitable status should merely require positive proof of public benefit for all charities, removing the present anomalies and disparities. This would improve public perception of charities, as well as countering some of the opposition to tax concessions.}\textsuperscript{694}

As in the final legislation, the proposal suggested minimal legal change with great policy impact and a continued reliance on the existing case-law and its definition of public benefit.\textsuperscript{695} Thereby, it effectively rejects the Deakin Commission’s proposal of introducing a “statutory re-definition of public benefit”;\textsuperscript{696} the reasoning behind this decision was evidence from leading charity lawyers that pointed out the need for flexibility and the uncertainty that would at first arise under a statutory definition until a sufficient case law basis had evolved again to determine its “shape and tenor”.\textsuperscript{697} A statutory definition of public benefit was thus seen as “likely to have unforeseen negative results and was in fact unnecessary”.\textsuperscript{698}

The “strong” public benefit test that Quint had described would keep with the previous charity test and would also perpetuate some of its problems.\textsuperscript{699} As before, the best solution for its operation would be for the Charity Commission and the courts to decide applications on their individual merit and without any presumption as to its public benefit.\textsuperscript{700} This would inevitably put a greater strain on the Charity Commission but

\begin{itemize}
  \item \textsuperscript{693} NCVO (2001): section 4.2.1, p.30.
  \item \textsuperscript{694} Oral evidence to the Charity Law Reform Advisory Group, quoted in NCVO (2001): section 3.5.1, p.23.
  \item \textsuperscript{695} NCVO (2001): section 4.2.1, p.30.
  \item \textsuperscript{696} NCVO (2001): section 4.2.1, p.30.
  \item \textsuperscript{697} NCVO (2001): section 4.2.3, p.30.
  \item \textsuperscript{698} NCVO (2001): section 4.2.3, p.30.
  \item \textsuperscript{699} “(...) the problem of determining a sufficient ‘section of the public’, the problem of weighing indirect public benefit against direct private benefit, and the problem of the well off continuing to benefit from charitable projects (...).” NCVO (2001): section 4.2.5, pp. 30f.
  \item \textsuperscript{700} NCVO (2001): section 4.2.5, p.31.
\end{itemize}
could deliver the desired result of addressing “anomalies” from the case law, even if some controversial organisations might keep their charitable status\textsuperscript{701} - or some popular charities lose it.\textsuperscript{702}

On this final point, the NCVO report also touched on the heated debate about the status of independent schools.\textsuperscript{703} In its evaluation of the consequences of the “strong” public benefit test, the NCVO went a step beyond legal reform and suggested active policy measures according to which those schools that “are benefiting a ‘private’ or artificially limited class” would have to demonstrate public benefit through a number of activities:

\textit{Obviously this is not to argue that charities should not be allowed to charge fees but merely that those that do so should be serving the public benefit. So far as direct benefits are concerned, a school could satisfy this requirement by providing sufficiently wide access to its educational facilities. This claim could be based on a number of factors which might include: the number of bursaries or scholarships offered; the access provided to other local schools and the wider community to facilities including sports fields, gyms and swimming pools. Meanwhile the indirect public benefit of education – which is not to be disregarded – must also be balanced in each case, under our proposed test, against the possible public disbenefits of educational segregation and thus social divisiveness. In other words, the indirect public benefit of education would no longer be treated as a trump card.}\textsuperscript{704}

\textsuperscript{701} NCVO (2001): section 4.2.6, p.31.
\textsuperscript{702} “If our main recommendation is implemented some organisations that are charitable under the existing law might well cease to be charitable”, NCVO (2001): section 4.4.1, p.34.
\textsuperscript{703} “The issue on which a spotlight inevitably falls, under this heading, is the charitable status of public schools. Whether it makes sense for such organisations to have charitable status has been questioned on the basis that entry is often restricted, with few exceptions, to people from affluent families.” NCVO (2001): section 4.3.8, p.33.
\textsuperscript{704} NCVO (2001): section 4.3.8, p.33.
All of these indicators were adopted, albeit sometimes in a slightly different form, by the Charity Commission in its guidance on public benefit.

5.3 Evidence before Parliament: Umbrella Bodies

The Joint Committee on the draft Charities Bill accepted submissions and heard witnesses from a wide range of voluntary organisations. Two of the most important umbrella bodies that have been consistently mentioned across the Strategy Unit report and the parliamentary debate, are the National Council for Voluntary Organisations (NCVO) and the Association of Chief Executives of Voluntary Organisations (ACEVO). Due to their larger administrative structures and own legal departments, these two organisations have submitted some of the most thorough evidence and will therefore be discussed below. The general themes they discussed also reflected the overall sector; a renewed focus on public benefit was generally well received, yet most organisations requested further clarification regarding the application of the test, the fate of charities that would not pass it, and the role of the Charity Commission. Some also stated that they would welcome a set of criteria to be set out in the Bill itself. Overall, however, the general agreement was that a statutory definition would not provide sufficient flexibility.

5.3.1 Written Evidence

Four pieces of written evidence submitted to the Joint Committee by the sector stand out in the lucidity of their analysis; these were drafted by the NCVO, the ACEVO, Volunteering England and Governance Works and represent the general sector sentiments that are reiterated in the hundreds of submissions received by the Joint Committee.

---

705 Stuart Etherington of the NCVO for instance pointed out that there might emerge a dual charity sector between charities that had been granted charitable status under the “old” system and the presumption, and those charities that had to illustrate public benefit before being able to register; see Joint Committee (2004): paragraph 80.

706 Joint Committee (2004): for instance paragraph 73, paragraph 80.

707 For instance, Governance Works: "As it stands, it feels as if there could be some confusion out there in practice. We are talking about quite a wide sector, particularly those organisations that are newly established charities might feel that they are unclear about how they are going to be measured up against this test." (Joint Committee (2004): paragraph 80).
NCVO
The NCVO had already submitted evidence on the Strategy Unit paper and the Home Office’s response prior to the drafting of the Bill; much of it refers to the NCVO’s original recommendations from its own 2-year charity law review that resulted in “For the Public Benefit?” discussed in the previous section. With its evidence, the NCVO represents the “Coalition for a Charities Act” that “want[s] to see a universal public benefit test; a clearer role for the Charity Commission, with a stronger focus on regulation and limits on their general advice-giving role; and an independent appeals tribunal to hear appeals against decisions of the Charity Commission”\(^{708}\).

Like the Strategy Unit and the Home Office, the NCVO seems to equate public understanding of what qualifies an organisation to be a charity, i.e. its legal definition, with public confidence.\(^{709}\) Therefore, it “particularly welcome[s] the introduction of a universal public benefit test”\(^{710}\), as suggested by Francesca Quint and endorsed in the NCVO’s working paper. The NCVO also supported the PMSU suggestion to introduce on-going “public character checks” where organisations were charging “high fees”.\(^{711}\)

Agreeing with the case law-based definition of public benefit, the NCVO strongly disagrees with the Bill’s statutory duty for the Charity Commission “to enable and encourage charities to maximise their social and economic impact”, which is seen as an attempt at defining public benefit after all:\(^{712}\)

\[\text{Such terminology is currently in vogue, but whilst most charities will be able to show they have a social impact, for many organisations any}\]

\(^{708}\) Memorandum from the NCVO, (DCH 2) Ev 1, paragraph 1.3.
\(^{709}\) “There is a real need to bring charity law into the 21st Century and to create a modern, effective, legal and regulatory framework that will enhance public understanding of, and confidence in charity.” DCH 2, paragraph 1.4.
\(^{710}\) DCH 2, paragraph 1.4.
\(^{711}\) DCH 2, paragraph 2.5.
\(^{712}\) DCH 2, paragraph 2.7.
economic impact they have is likely to be incidental to their work: this is not, nor should it be a primary purpose of charitable activity.\textsuperscript{713}

Related to this is the NCVO’s concern regarding the role of the Charity Commission: through the removal the presumption of public benefit, both its regulatory and advisory roles had been increased; yet, “[t]he blurring of the boundary between the two means that, in practice, advice given by the regulator becomes de facto regulation, thereby extending the regulation of charities beyond that required of other sectors”.\textsuperscript{714}

\textbf{ACEVO}

The evidence of ACEVO is stronger in its support, but also less differentiated in its views; it does not go into the same detail as the NCVO’s evidence, but emphasises repeatedly that it “strongly welcomes (…) the draft Charities Bill” and in particular its focus on public benefit as defined by the existing case law as well as the removal of the presumption.\textsuperscript{715}

\textbf{Volunteering England}

Volunteering England provided further written evidence\textsuperscript{716} after it gave evidence before the Joint Committee; its main recommendations centred around two points:

a) Volunteering England pointed to the diversity of organisations within the education and the healthcare sector, warning the Committee to focus entirely on individual organisations such as independent schools and hospitals; the public benefit test should apply equally to all organisations on a case-by-case basis;\textsuperscript{717}

\textsuperscript{713} DCH 2, paragraph 2.8.
\textsuperscript{714} DCH 2, paragraph 2.14.
\textsuperscript{715} Memorandum from Association of Chief Executives of Voluntary Organisations (ACEVO) (DCH 3), paragraph 2.1-2.3.
\textsuperscript{716} Supplementary memorandum from Volunteering England (DCH 228).
\textsuperscript{717} DCH 228, paragraph 1.
b) they endorsed the Strategy Unit recommendation to conduct regular “public character checks” after registration but rejected any attempt to define criteria for the test in the Bill itself.718

**Governance Works**

Finally, Governance Works raised two further issues in its written evidence719: Firstly, it questioned whether public character checks would be a feasible policy at all and how they would be conducted.720 This concern was never fully addressed and proved largely accurate in hindsight. Secondly, they requested a distinction be drawn between traditional charities and “bodies that have charitable status that are to all intents and purpose a trading entity, albeit non profit distributing and retaining all surplus for charitable purpose” as it was not clear to Governance Works “what separates these from a great many non profit distributing social enterprises that exist in the country and do not have charitable status.”721 This addressed Volunteering England’s concern that especially the controversial fee-charging sectors education and health were far more diverse than immediately apparent from the draft Bill and its discussion. Therefore, they also showed support for Lord Phillips suggestion that such organisations could be granted tax benefits under different regulation and give up their charitable status instead.

### 5.3.2 Oral Evidence

The NCVO and ACEVO were, together with the National Society for the Prevention of Cruelty to Children (NSPCC) and the Royal National Institute for Deaf People (RNID), the first witnesses to appear before the Joint Committee on 9th June 2004.722 A week later, on 16th June 2004, representatives of Volunteering England, the Association of Charitable

---

718 DCH 228, paragraph 2 (reply to Q160).
719 Supplementary memorandum from Governance Works (DCH 239).
720 DCH 239.
721 DCH 239.
722 The NCVO was represented by Mr Stuart Etherington, while Mr Stephen Bubb, represented the Association of Chief Executives of Voluntary Organisations (ACEVO). Ms Mary Marsh appeared for the National Society for the Prevention of Cruelty to Children (NSPCC) and Dr John Low, for the Royal National Institute for Deaf People (RNID). All witnesses acted as Chief Executives for their respective organisation.
Foundations, and Governance Works were examined.\textsuperscript{723} Across these two witness examination sessions, several themes emerged that will be discussed below.

**Trigger for Reform: Mismatch of ‘Charity’ Definitions**

The NCVO’s Sir Stuart Etherington identified “a disconnection in the public’s mind between what is charitable and what actually is charitable”\textsuperscript{724} as the main issue facing the sector at the time of the draft Charity Bill. He suggested that the underlying reasons were that people did not understand the legal definition of ‘charity’ and that the first three heads of charity were presumed to be charitable based on centuries of complex case law.\textsuperscript{725} His sector body counterparts agreed with his assessment and recommendation that the Bill would increase “long-term trust and public confidence in the sector”.\textsuperscript{726} All acknowledged that charities enjoyed incredibly high esteem among the public, but as Mary Marsh from the NSPCC described this phenomenon, “public confidence is almost confidence which comes from ignorance rather than real understanding of what they are confident about”.\textsuperscript{727} Reform was perceived as necessary to keep the public’s trust in charities alive in the future, which was to be the goal of the Bill.\textsuperscript{728}

Stuart Etherington provided a more compelling justification for why public trust was so important for charities, referring to the increasing trends of contracting out and Public-Private Partnerships. He explained that the redesign of the welfare state in the 1980s had fundamentally changed charities; now, Etherington stated:

\begin{quote}
[t]he sector is more engaged in public service delivery and it is going to be subject to public scrutiny as a result of that and it is more engaged in high-profile fund-raising activity and it may well be
\end{quote}

---

\textsuperscript{723} The organisations were represented by Christopher Spence (Chief Executive, Volunteering England), David Emerson (Chief Executive, Association of Charitable Foundations), and Rhona Howarth (Director, Governance Works).


\textsuperscript{725} Etherington, Question 2

\textsuperscript{726} Etherington, Question 2

\textsuperscript{727} Marsh, Question 3

\textsuperscript{728} Etherington, Question 4: “A growing sector, growing levels of public confidence, as measured, I think, by growing levels of fund-raising income and growing levels of volunteer engagement.”
subject to more scrutiny as a result of that. If it cannot defend itself in terms of the robust regulatory framework and legal framework, then I think it may well be difficult down the line.\footnote{Etherington, Question 5}

Trigger for Reform: Scandals

Previously suggested as an alternative trigger of reform, Labour MP George Foulkes questioned the sector bodies about recent high-profile scandals\footnote{These were Moonbeam and Breast Cancer Research (Scotland) in 2003.} in Scotland\footnote{See Chapter 9 for a thorough discussion about Scotland.} and whether similar events had been plaguing the sector in England and Wales.\footnote{Foulkes, Question 103} Stuart Etherington stated that he was not aware of similar cases South of the border and thereby rejected the idea that scandals might have triggered the reform process.\footnote{Etherington, Question 103}

Public Benefit Definition

All sector bodies were “appalled”\footnote{Low, Question 41} at the formulation of the Charity Commission’s remit under the draft Bill to “maximise social and economic impact”\footnote{Phillips, Question 41}; as the NCVO had stated in its memorandum\footnote{See DCH 2.}, the inclusion of this phrase could lead the Charity Commission to use it as definition of public benefit. Low of the RNID pointed out that some environmental organisations might provide public benefit and positive social impact through conservation projects that would at the same time lead to negative economic impact. Many charities’ contributions could per definitionem not be expressed in economic terms at all.\footnote{Low, Question 41} Foulkes challenged that the sector bodies to provide an alternative definition, a demand that Etherington firmly rejected, backed by the other sector body chief executives, “[b]ecause there is an established common-law definition of public benefit in relation to the four existing heads of charity”.\footnote{Etherington, Question 42} None of them considered this case law-based definition as “discredited” through the passage of time.\footnote{Etherington, Question 43}
The NCVO explicitly demanded that the Bill give assurance that the Charity Commission would apply this established common law definition when conducting their rolling “public character checks”.740 The NCVO favoured a test that would continuously sift out organisations that were no longer charitable741, also to avoid “two classes of charities” with some charities maintaining charitable status since they had been registered under the presumption whereas similar new organisations would possibly not be able to register unless they demonstrated public benefit.742

This also led the sector bodies to reject the suggestion of a statutory definition; all perceived case law to be a better and more flexible solution. A statutory definition of public benefit “may well become sclerotic fairly quickly”743. Chairman Alan Milburn pointed out at this stage that this common law definition, at least in the Charity Commission’s understanding, would maintain the presumption for certain fee-charging charities.744 Again, Etherington spoke for the other sector bodies as well when he retorted that, if the Charity Commission’s reading was to stand, “there would be no point in having the Bill”.745

740 Etherington, Question 59.
741 One might think of rifle clubs that the Charity Commission had stripped of their charitable status in 1993, see City of London Rifle and Pistol Club and Burnley Rifle Club (1993). See also Etherington, Question 75: (…) [the Charity Commission] also needs a mechanism to remove those from the register where the activities have ceased to be of public benefit and therefore you do need a rolling programme exercised in this case by the Commission.”
742 Etherington, Question 59.
743 Etherington, Question 60; Etherington referred to admittedly questionable reasoning in the Canadian case Vancouver Regional FreeNet Association v Minister of National Revenue ([1996] 3 FC 880) in which a community IT project providing free internet access was held charitable. The reasoning was analogous to the maintenance of highways (a purpose for the public benefit) as the internet could be seen as an ‘information highway’ ([1996] 3 FC 880 [20], [23] (Hugessen JA, Pratte JA concurring); for a more detailed discussion, see Garton (2013): p.15.
744 Milburn, Question 63, followed up by Lord Phillips, referring to the Charity Commission statement: “The exceptions to general public benefit principles”—such as education and poverty—"are part of the current case law and organisations have been recognised as charities on that basis over significant periods of time. The removal of the presumption of public benefit as proposed by the legislation would probably not change this. The Commission would not be able simply to override these exceptions given that they have been specifically addressed by the courts and allowed to stand." Question 64.
745 Etherington, Question 66.
Lack of Clarity in Case Law

At the same time, the sector bodies also recognised the downside of a common law definition: due to a lack of clarity arising from the case law, charity law was not updating itself quickly enough to be in tune with ever changing times. As Stuart Etherington suggested: “Why this legislation is necessary is the point that you have identified, that actually charity law has become sclerotic and nobody takes cases because it costs you thousands and thousands of pounds to do that.” Lord Phillips pointed out that relying on a common-law definition would perpetuate this problem, even with a new Charity Tribunal.

Role of Charity Commission

Despite his disagreement with the Charity Commission’s understanding of the case law, Etherington did not agree with Campbell’s who asked whether it was not after all a task for Parliament to define public benefit rather than leaving it in the hands of the Charity Commission.

Rhona Howarth of Governance Works seemed to echo the trust in the Charity Commission; she lauded the Commission as different from “other types of regulatory bodies” describing “a much closer relationship between the Charity Commission and the charitable sector” with “a lot more dialogue”; nonetheless, she suggested there be safeguards that would allow the sector to give feedback on whether the Commission was applying its “wide-ranging powers” adequately.

Politicisation of Charity Reform

On two occasions, sector representatives openly admitted that certain aspects of the reform process might be too political to pass. Thus, Stuart Etherington of the NCVO suggested that a clarification of how the public benefit test was to be conducted would

746 Etherington, Question 69.
747 Lord Phillips of Sudbury, Question 69: “(…) nobody can afford to take the Charity Commission to the wretched court. Now we say we are going to have this tribunal, a wonderful new thing, but I am not convinced that the cost of taking a refusal of charitable status to the tribunal (…) will be any different to taking it straight to the High Court.”
748 Etherington, Question 67.
749 Howarth, Question 161.
not be particularly difficult to add as an amendment but he was unsure “how difficult it would be in political terms”. Ringing in a similar tune, Lord Campbell-Savours bluntly asked the sector representatives whether it presented a difficulty to them that the reform, especially public benefit, was touching upon “a highly politicised area”. Their reply was cautious, but they admitted that the politicisation of the issue was part of the problem.

5.4 Independent Schools and Hospitals

Independent schools and their sector body, the Independent Schools Council (ISC), were among the most prolific contributors to the Joint Committee. Because of their prominent role in the public benefit reform, representatives from independent schools and charitable hospitals were invited to provide evidence on 30th June 2004; three headmasters of independent schools provided evidence together with Jonathan Shepherd, the General Secretary of the ISC and the Nuffield Hospitals’ Finance Director Jack Jones.

---

750 Etherington, Question 78; Sir Stuart Etherington was assured by Chair Alan Milburn that the Joint Committee would be dealing with the political aspects and advised Etherington to “keep away from all of that”; Milburn, Question 79
751 Lord Campbell-Savours, Question 152
752 Emerson, Question 152; Spence, Question 153
753 Further healthcare sector organisations submitted evidence, such as medical research bodies (e.g. Memorandum from the Association of Medical Research Charities, DCH 230); their concerns do not fall in the category of fee-charging charities and is hence beyond the scope of this dissertation.
754 “The Independent Schools Council (ISC) represents the seven leading independent schools associations in the United Kingdom, collectively educating 508,000 children in 1,278 schools.” Memorandum from the Independent Schools Council (DCH 9), section 1.
755 Catherine Rustomji found that 119 submissions were received by or on behalf of educational organisations compared to a mere 35 by lawyers and legal bodies, and 31 by charity sector bodies; this was only topped by the 524 submissions from religious charities or those interested in their status; see Rustomji, C. “Serving the Public” New Law Journal 91 (Autumn/Winter 2007): p.28.
756 The Committee examined Dr Martin Stephen (High Master, Manchester Grammar School, Chairman of Head Masters' and Mistresses' Conference (HMC)), Dr Anthony Seldon (Headmaster, Brighton College), Sir Ewan Harper (Chief Executive, Church Schools Council), Mr Jonathan Shephard, (General Secretary, Independent Schools Council (ISC)) and Mr Jack Jones (Finance Director, Nuffield Hospitals).
5.4.1 Written Evidence

The ISC submitted an initial\(^\text{757}\) and a further memorandum\(^\text{758}\), as well as two supplementary memoranda\(^\text{759}\). The Church Schools Company also submitted a supplementary memorandum\(^\text{760}\). Nuffield hospitals seemed to largely represent the sector and submitted a memorandum\(^\text{761}\) and a supplementary memorandum\(^\text{762}\).

Most arguments submitted by the schools and hospital overlap with the evidence suggested by the sector bodies: they generally welcome more transparency and policy reform for the charity sector\(^\text{763}\). Differences occurred, rather starkly, on their view of the Charity Commission and its approach as well as their mode of argument – the ISC started on a defensive note and followed this line throughout their evidence.

Thus, the ISC cautioned that while it is the Etons and Winchesters of the world that the public and political debate focus on, a majority of its members “have little or nothing in the way of endowments, and are dependent for most of their income on fees”\(^\text{764}\). From here on, most of the ISC evidence through the various documents painstakingly tried to provide evidence of the abundant public benefit that independent schools provide from the point of view of the ISC\(^\text{765}\). Arguments ranged from the education as \textit{per se} a public benefit to the savings that independent schools provide for the public sector\(^\text{766}\). Some monetary arguments were more convincing\(^\text{767}\) whereas other qualitative suggestions seemed far-fetched\(^\text{768, 769}\).

---

\(^{757}\) Memorandum from the Independent Schools Council (DCH 9).
\(^{758}\) Further memorandum from the Independent Schools Council (DCH 47).
\(^{759}\) Supplementary memorandum from the Independent Schools Council (DCH 277); Supplementary memorandum from the Independent Schools Council (DCH 278).
\(^{760}\) Supplementary memorandum from the Church Schools Company (DCH 324).
\(^{761}\) Memorandum from Nuffield Hospitals (Charity No 205533) (DCH 81).
\(^{762}\) Supplementary memorandum from Nuffield Hospitals (DCH 333).
\(^{763}\) DCH 9, paragraph 4
\(^{764}\) DCH 9, paragraph 5
\(^{765}\) DCH 9, sections 7-23
\(^{766}\) The ISC claims that the state saves £22.50 for every £1 of charitable status; DCH 9, paragraphs 11 and 24.
\(^{767}\) For instance, the ISC points out that for every £1 saved through charitable status its schools spend £2.30 on financial assistance, DCH 9, paragraph 13.
\(^{768}\) Such as the “argument” that “[t]he excellence of the education in ISC schools, at many different levels of ability, is in itself a public good. The OECD Programme for International Student Assessment (PISA)
On the issue of defining public benefit in the Bill, the ISC in its first memorandum still agreed with the overall feedback provided by the umbrella bodies and the way the public benefit test was set out in the Bill, namely, continuing the existing case-law based test through the Charity Commission. This approval of the Charity Commission’s role was not too last, however, and in the further memorandum provided by the ISC, the Charity Commission’s interpretation of the case law was sharply criticised. Putting forward a highly sophisticated legal analysis based on the early 19th century Earl of Lonsdale’s case, the ISC fervently argued for a flexible, case-law based definition and against a statutory definition of public benefit that would have to be added in case the Charity Commission’s interpretation was accepted as correct. Overall, the policy reform proposed through the NCVO and the PMSU reports was supported by the ISC.

What was striking, here, was the heated tone that the sector officials faced, especially on an ideological level; the ISC even submitted another supplementary memorandum to the Joint Committee in which it explained in detail the admission criteria to independent schools in an attempt to fight the image of independent schools as “a small, self-perpetuating privileged class”, formulations very much reminiscent of Campbell-Savours and Foulkes opinions in the Commons and Lords debates.

---

770 More evidence on the tax advantages of charitable status are presented in Supplementary memorandum from the Independent Schools Council (DCH 277) but are not relevant for this analysis.

771 DCH 9, paragraphs 30-33

772 “The Charity Commission argument is flimsy in the extreme.” DCH 47

773 “It is in the highest degree unlikely that dicta from the Lonsdale case would stand against the Privy Council judgment in Re Resch. Lord Wilberforce gave the judgment of the court (i.e. there is a single judgment expressing the decision of all the judges). His judgment carefully reviews charitable law, including the requirement of public benefit, and makes it clear that limiting benefits solely to a narrow class would not be charitable. Resch is the leading case on this area of charity law and there no real doubt that Resch would beat Lonsdale, not on a points decision but by a walkover.” DCH 47

774 [1827] 1 Sim 105

775 DCH 47

776 Supplementary memorandum from the Independent Schools Council (DCH 278)

777 ibid

778 See Chapter 4
The supplementary memorandum \(^{779}\) submitted by the Church Schools Company explicitly referred to the political dimension of the debate and addressed New Labour’s education policy, warning of the consequences that a failed Charities Bill would have for the new emphasis on collaboration between independent and state schools:

\[
This\,\text{Government}\,\text{is}\,\text{beginning}\,\text{to}\,\text{forge}\,\text{links}\,\text{between}\,Independent\,Schools\,and\,the\,maintained\,sector.\,This\,is\,coming\,after\,a\,long\,period\,of\,suspicion\,and\,in\,some\,cases\,hostility\,between\,independent\,schools\,and\,Labour\,governments.\,It\,illustrates\,the\,way\,in\,which\,this\,government\,is\,straddling\,central\,ground\,in\,politics\,and\,is\,beginning\,to\,bear\,fruit,\,even\,if\,this\,is\,still\,at\,an\,early\,stage.\,It\,is\,important\,that\,this\,Bill\,does\,not\,sour\,relations\,between\,it\,and\,the\,Independent\,sector.\,I\,have\,immense\,respect\,for\,the\,way\,the\,Government\,has\,moved\,in\,this\,direction\,and\,it\,has\,certainly\,challenged\,rather\,than\,helped\,us\,to\,transform\,the\,nature\,of\,our\,charity.\,This\,is\,why\,I\,would\,urge\,that\,the\,Act\,contains\,a\,broad\,interpretation\,of\,public\,benefit\,rather\,than\,one\,that\,is\,too\,narrow.\(^{780}\)\]

Nuffield Hospitals’ evidence to the Committee strikes a less enthusiastic tone regarding the planned charity reform, in particular the public benefit test. Unlike the independent schools, the Nuffield Hospitals opposed any changes to prior policy based on any potential threats to their status.\(^{781}\) Naturally, the evidence provided by Nuffield coincides with the ISC’s in so far as it advocates a flexible common-law rather than a statutory

---

\(^{779}\) Supplementary memorandum from the Church Schools Company (DCH 324).

\(^{780}\) Supplementary memorandum from the Church Schools Company (DCH 324), Section 5.

\(^{781}\) “However, we are concerned about indications from some influential quarters that charities such as ourselves, which charge for services that are expensive to provide, may not in future satisfy the test of public benefit. We would strongly resist any suggestion that our services do not provide sufficient public benefit. The fact that the "profits" made by a charity go back into improving services which by definition are for the public benefit, rather than being paid out as dividends, is the fundamental distinction between the charity and profit making sectors, and so it is right that those profits are not subject to taxation. If the Government is serious about allowing the charity sector to become a vehicle for public service delivery then any reform of charity law that effectively prohibits charities such as Nuffield Hospitals from charging reasonable fees for the provision of services ought to be resisted.” Memorandum from Nuffield Hospitals (Charity No 205533) (DCH 81), section 1.
definition of public benefit. In contrast, however, Nuffield did not go to the same lengths to provide evidence for its public benefit provision, relying on their services per se to be of public benefit. They even state that:

*With regard to Nuffield Hospitals’ own position, we would strongly resist any attempt by the Charity Commission to challenge the proposition that our services do not display the requisite degree of public character. Whilst the fees charged for some of Nuffield Hospitals’ services are high, they do no more than reflect the cost of the service plus a reasonable margin to generate cash for reinvestment. The Bill should make explicit that charging for services is not a bar to charitable status. With the availability of health insurance to spread the cost of treatment over time, and our very significant contracts with the NHS, we believe that Nuffield Hospitals’ services are both affordable and accessible to a sufficiently broad cross section of the public (who are given a choice in how they obtain their healthcare that is itself of value) that our charitable status ought not to be called into question. If the Government is serious about allowing the voluntary sector to become a vehicle for public service delivery then any reform of charity law that effectively prohibits charities such as Nuffield Hospitals from charging reasonable fees for the provision of services ought to be resisted.*

It is not surprising that vague statements such as “reasonable margin to generate cash for reinvestment” and a reference to the patient’s freedom of choice did meet substantial criticism during the oral evidence session, however it still did not compare to that of the independent schools sector, although the latter had already in its initial memorandum

---

782 “We agree with the decision not to include a statutory definition of public benefit in the Bill, and would urge the Committee not to attempt to do so. We feel that there are significant advantages in keeping public benefit as a concept derived from case law rather than statute, in order to render it flexible enough to accommodate the whole diversity of the charity sector, and to give it the scope to evolve over time.” DCH 81, section 4.

783 Emphasis added; DCH 81, section 4.
gone above and beyond to provide hard, numerical evidence for its public benefit provision. This may be a strong indicator for the role of ideology (or self-interest) in the politicisation of the public benefit debate and will be investigated more closely in the interviews discussed in Chapter 8.

Nuffield presented a stronger argument in the following supplementary memorandum written by its Chief Executive David Mobbs in response to the oral evidence session before the Joint Committee. Unlike the ISC, Nuffield made it clear that it did not specifically seek charitable status but was forced by its non-distribution of profits clause to register as such, lacking an alternative form of organisation. Referring to the Bill’s declared objective, Nuffield remarked that if all the Bill was trying to achieve was to “bring the concept of charity in English law into line with the public perception, which centres around the giving away of value rather than the provision of services using property ring fenced for the public good”, they would themselves

\[
\text{(...) acknowledge that Nuffield might well not be labelled as a charity under such a regime. We think it would be very difficult to draw the line between organisations such as Nuffield which charges for the great majority of the services it provides and charities that charge for only some of theirs services. If that genuinely is the ultimate objective the alternative would be better to say so clearly.} \]

Accordingly, Nuffield posited itself as open to the possibility of fee-charging charities as an alternative category altogether, with tax benefits but without charitable status, and invited the Government to consult on this matter.

---

784 Supplementary memorandum from Nuffield Hospitals (DCH 333).
785 “Nuffield does not particularly seek charitable status as such. We set out to benefit the public by providing a hospital service. A privately run commercial hospital could say the same. However, we also say that we will not distribute surpluses in dividends or any other private profit and this is fixed in our constitution. At that point, as the law stands, Parliament insists that our property be protected by registration as a charity.” Supplementary memorandum from Nuffield Hospitals (DCH 333).
786 Emphasis added. Supplementary memorandum from Nuffield Hospitals (DCH 333).
787 Supplementary memorandum from Nuffield Hospitals (DCH 333).
5.4.2 Oral Evidence

Much of the oral evidence provided by the witnesses reiterated the themes touched on in the written evidence. The majority of the debate focused on why independent schools and non-profit hospitals should have charitable status and how the balance of public benefit provided actually ranked against the tax benefits received. There are three noteworthy features of the discussion: firstly, the ideologically heightened atmosphere that also translated into a sharper and at times very challenging tone. Secondly, the predominant view of the independent schools representatives who strongly supported the removal of the presumption as long as the public benefit test was still going to be conducted on the basis of its established common-law basis. Finally, Nuffield Hospitals’ lack of support for the change in policy, although it indicated its willingness to explore options beyond the label of being a charity. Independent schools did not agree and firmly believed that their sector needed the advantages conveyed by the “charity brand”.

Ideology

Ideological camps clearly emerged from the transcripts: Labour MPs George Foulkes and Bob Russell as well as Lord Campbell-Savours mark the more extreme leftist advocates of stripping charitable status from independent schools. This is best illustrated by Foulkes statement regarding the Nuffield Hospitals:

As my colleague Bob Russell said, charitable status is principally designed for voluntary organisations raising money from the public for good causes. Do you not think it is strange that a multi-million

---

788 In fact, 80% of the exchange tried to establish just what that tax benefit was and whether it mattered at all.
789 E.g. Question 479: “Well, we come to whether or not there is a public benefit later, as the Chairman said, but do you not, as educated men, see some paradox in schools which provide privileged education for rich people being called charities and having charitable status? Do you not see some sort of strange aspect about that?
790 E.g. Question 525: “I can understand that when the state did not provide education the independent sector was there, the Church sector, but the state brought in the Education Act in the 1880s and thus funded education for all, so why, 120 or 125 years later, do we need to have charitable status for those schools that were around at that time?”
pound private health care organisation has charitable status? Does that not suddenly create some question mark in your mind?  

Conservative MP Andrew Mitchell more often than not came to the schools’ defence. Alan Milburn and Lord Phillips of Sudbury adopted an overall critical view but from a more technical-legal side. Sometimes, the tone took the sharpness of *ad homines*.  

Not surprisingly, the independent school sector vehemently disagreed and enumerated the different forms of public benefit provided repeatedly; in addition to the forms already illustrated in the written memoranda, it was also suggested that “the key contributions that the independent sector makes to Education UK plc is (...) this combination of being able to innovate, to be daring, to push the envelope and to challenge on the one hand, but at the same time to be totally linked to parents.”  

Seldon also pointed out that the public-private divide that the Joint Committee was trying to reinforce was misguided, suggesting instead that “[w]e no longer have a free education system in this country for the middle classes, that is a myth”. Moreover, he stressed that the independent schools sector was far more diverse than the token names of Eton and Winchester; the public benefit test in his view “would help sift out the sheep from the goats”. In all this, the independent schools favourably commented on the education  

---

791 Question 539.
792 Question 483: “I want to ask a specific question relating to the figures to Jonathan Shephard, but just following Martin Stephen's comments, I have read the annex to the ISC's evidence about the Manchester schools and the variety and difference of what the Manchester schools provide, and I think it is probably available on our website. I think it is extremely moving and I would like to congratulate all of those involved in providing the outstanding opportunities for disadvantaged children which is so clear from the evidence which you have provided.”
793 See for instance Foulkes’s quip at political scientist and academic writer Dr Anthony Seldon (Question 480): “You keep writing your biographies and I will ask the questions!” He also unusually probed Mr Jones of the Nuffield Hospitals to disclose the annual salary of its CEO, David Mobbs, who was on holiday at the time of the hearing. Foulkes replied, “I am sure he will be enjoying his holiday wherever he is. I doubt if it is on the Clyde coast.” (Question 536f.).
794 Seldon Question 526: “Can there be any greater good for the public good than education and health?”
795 Stephen, Question 485.
796 Seldon, Question 525: “We talk about a free education system in Britain. There is no free education system in Britain, it is a myth. The middle classes pay for their education either by fees, mostly at schools like mine which are indistinguishable in social make up from grammar schools and elite comprehensives, or they pay by going to those schools through their house prices, through tuition etc.”
797 Seldon, Question 526.
policy pursued by Tony Blair’s New Labour government.798 Significantly, when asked whether their own children had attended state or independent schools, none of the Joint Committee members chose to answer.799

Support for the Removal of the Presumption and a Common Law Definition of Public Benefit

The ISC strongly emphasised that it approved of the public benefit test as “a mechanism for the Charity Commission to come in as regulator and get tough on schools that are not performing. We are right behind that”800. In fact, Shephard boldly proclaimed that “[w]e want schools to provide public benefit. We are very confident that the vast majority of ISC schools do, and to a great extent. If there are schools that do not then they should pull their socks up.”801

This support crucially depended on the absence of a statutory definition that was seen as too inflexible and, given the fervour with which the ISC and other independent schools leaders rejected the suggestion, might also have been perceived as threatening to the schools sector.802 A trained lawyer himself803, Shephard insisted that a statutory definition or even statutory criteria was not necessary as “the Charity Commission view is plainly

---

798 “As Martin Stephen said, there are a number of partnerships all the way round. The whole ethos of the leaders of the independent sector is to reach out and engage in more and more partnership activities so that we are seen as part of a single system. What we are desperately keen to avoid is being put back, if you like, into the box into an exclusive sector. Yes, the more partnership the better. ISC is entirely in favour of that and so are all the heads that I know”, Shephard, Question 579.
799 Seldon: “Can I just ask you a question? Do you use the private education system?” – Chairman: “Well, the normal convention is that we ask you the questions!” – Mr Foulkes: “You keep writing your biographies and I will ask the questions!” – Dr Seldon: “Assuming that you do not, I just wonder why my parents should subsidise you when the majority of my parents are not earning your annual salary.” – Mr Foulkes: “Well, I will leave you to wonder that.” – Dr Seldon: “It is a very pertinent question.” (Questions 479ff.).
800 Shephard, Question 601.
801 Question 602.
802 Foulkes: “You have become more agitated about this than almost anything so far. You seem to be more worried about it being incorporated on the face of the Bill than anything?” (Question 620) and “I get the feeling you feel it is going to be easier for schools to get away with it, as it were, if it is not included in the Bill?” (Question 623).
803 Interestingly, this mattered and Alan Milburn at one point asked Shephard whether he was in fact a lawyer to judge how to evaluate his evidence, implying that only a lawyer could make sense of the situation (see Question 626).
wrong.” He insisted that the Charity Commission’s argument was “in legal terms is a dead parrot” and that “[t]o the extent that argument was ever a live parrot, then the leading case of Re Resch which was in 1967 (if I can use an appalling metaphor) cooked its goose.” Shephard’s argument turned on the fact that the Charity Commission was relying too much on and obiter from Lonsdale rather than following Re Resch as the leading case, which they had wrongly interpreted in his opinion. The latter part arguably may be true, but it is clear from the Charity Commission’s evidence (oral and written) that just like Shephard, it considered the reasoning of Re Resch central guidance for the treatment of fee-charging charities.

Alternative Forms Other than Charitable Status

Lord Phillips of Sudbury confronted ISC CEO Shephard about a comment in the ISC’s memorandum that suggested charitable status was not making any difference to independent schools. Shephard rejected this notion, pointing out that the report had been composed before he joined the ISC, which was less than three months ago at the time of the examination.

The Nuffield Hospitals’ Jones differed on this point, and suggested that charitable status was not necessarily the only form to be considered, referring to BUPA and other organisations that operated as provident associations and he promised he would “do further research to determine whether there are alternative legal forms that we could employ that would allow us to operate in a not-for-profit environment without being a charity.” For him, and presumably the Nuffield Hospitals, the principle of a not-for-profit philosophy mattered more than charitable status, although he noted that any lost tax benefits would have to be shifted to the patient.

---

804 Question 624.
805 Question 625.
806 Question 626.
807 This was pointed out by Lord Phillips (Question 627).
808 Questions 568-570.
809 Question 531.
810 Question 531.
5.5 Survey Among Independent Schools and Hospitals with Charitable Status

Based on the findings of a Charity Commission report\(^{811}\) by the Institute for Voluntary Action Research (IVAR) in association with Sheffield Hallam University, a survey was constructed that specifically addressed independent schools and voluntary hospitals with charitable status. This survey was circulated among all independent schools with charitable status registered with the Independent Schools Council as well to charitable hospitals. Given the nature of the question, and the fact that most of the relevant information requires an institutional memory far better documented than is the case for most organisations, it is not surprising that the response rate has been very low (5%).

This rather disappointing response rate most likely reflects the underwhelming sector response and lack of consequences stemming from the Charities Act 2006 and its allegedly new take on public benefit. Either way, the empirical data presented in this section allow at least a partial glimpse into the reality of public benefit reporting in charitable schools and hospitals across England, Wales and Scotland.

**Study Design**

A web-based survey\(^{812}\) was circulated via email invitation among a total of 1,029 independent schools with charitable status and 204 healthcare organisations with charitable status in England, Wales and Scotland. The contact information for schools was drawn from the online database of the Independent Schools Council\(^{813}\). Of these 1,029 schools, 68 had not updated their contact information, resulting in bounced emails and an overall sample of 961 schools. Charitable hospital contact information for 242

---


812 The survey was hosted via SurveyMonkey.com and did not track IP addresses. A full list of questions is reproduced in Appendix A.

813 To access the database, see [www.isc.co.uk](http://www.isc.co.uk), accessed online on 4th August 2013.
hospitals was kindly provided by Laing & Buisson\textsuperscript{814}. Of these, 38 invitations bounced back, leaving a total of 204 hospital details.

The Institute for Voluntary Action Research report identified the following changes as key consequences of the public benefit redefinition in 2006\textsuperscript{815}:

1. The public benefit test had limited impact so far as public benefit had already been provided beforehand, either through financial assistance or in other ways.
2. The impact so far resulted in the introduction of new services and extended financial assistance, either through the introduction of new free services or the adjustments of the target beneficiary group. Facility sharing was mentioned as well. Some charities also reported that they had transferred services into trading subsidiaries as a result of the public benefit test.
3. In the case of schools, it was reported that financial aid was increased through a higher number of bursaries and scholarships; overall budgets for financial aid was also reported to have increased. Moreover, schools suggested that they had engaged in more professional cross-sector partnerships with state schools, such as shared facilities and curricular access.

The IVAR/Sheffield Hallam report should be interpreted cautiously; its sample size is limited and methodologically not sufficiently robust to allow for the extrapolation of conclusions for the entire fee-charging charity sector. Yet, the criteria set out in the report provide at least a benchmark against which to measure actual developments among charitable organisations, in particular those who have been most affected by the public benefit reform.

\textsuperscript{814} The author would like to express special thanks to Peta Barret and Clair Lapper for their kind support; for more information on Laing & Buisson, see \url{http://www.laingbuisson.co.uk/Home.aspx} accessed online on 6th January 2013.

\textsuperscript{815} IVAR and Sheffield-Hallam University (2012): Part 4, pp.6ff.
**Analysis**

55 respondents answered the invitation to complete the short 10-minute survey. As a first step, they were given the option of giving or refusing consent for the use of the data; 53 agreed while 3 did not give their consent, which terminated the survey for them. The remaining 52 respondent organisations were asked to provide information regarding their location; over 85% of respondents were based in England while fewer than 15% came from Scotland. According to SCVO and NCVO numbers, Scotland’s charity sector is far smaller in size, amounting to about 10% of the English sector.

![Chart showing location of organisations](image)

**Table 5.5.a: Question 2.**

<table>
<thead>
<tr>
<th>Answer Choices</th>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>England</td>
<td>86.27%</td>
</tr>
<tr>
<td>Scotland</td>
<td>13.73%</td>
</tr>
<tr>
<td>Wales</td>
<td>0%</td>
</tr>
<tr>
<td>Total</td>
<td>51</td>
</tr>
</tbody>
</table>

Secondly, organisations were asked whether they were an independent school or a healthcare organisation, a choice that would ascertain they were only receiving relevant questions in their survey. The high number of independent schools in the sample translated into an almost equally high proportion in school respondents (84% schools to just under 16% healthcare organisations).
Table 5.5.b: Question 3.

Those organisations that did reply receive a vast majority of their income from fees (83%, Q26). Not a single organisation declared to possess any form of endowment or government grant.
Table 5.5.c: Question 4.

Public benefit reporting was mostly the trustees’ responsibility; however, almost 50% of respondents did not know who was in charge of the reports (Other category with 45%, Q24). Again, the low number of respondents and the relatively high number of respondents who skipped the question suggest that the data are not representative.
Table 5.5.d: Question 5.

Finally, all respondents were asked to rank a number of priorities, assigning values from 1 (highest priority) to 7 (lowest priority); overall, seeking funding was seen as most important (from government grants and public or private contracts), while different forms of regulatory compliance made the bottom three. Public benefit reporting was ranked as a far higher priority compared to these other regulatory activities. In the light of the previous responses, this ranking corresponds with expectations and the findings of the IVAR/Sheffield-Hallam report.
Table 5.5.e: Question 6: Ranking from 1 to 7 with 1 as highest priority and 7 as lowest priority.

<table>
<thead>
<tr>
<th>Activity</th>
<th>Average Ranking*</th>
<th>Aggregated Ranking*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Seeking Governmental Grants</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Seeking Contracts</td>
<td>2.72</td>
<td>2</td>
</tr>
<tr>
<td>Public Benefit Reporting</td>
<td>3.6</td>
<td>3</td>
</tr>
<tr>
<td>Seeking Funding</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Report to Trustees or Board</td>
<td>4.83</td>
<td>5</td>
</tr>
<tr>
<td>Comply with Charity Commission and/or OSCR</td>
<td>5.16</td>
<td>6</td>
</tr>
<tr>
<td>Comply with Charity Law</td>
<td>5.84</td>
<td>7</td>
</tr>
</tbody>
</table>

Healthcare Organisations

The following set of questions focused on healthcare organisations only. One of the suggestions of the IVAR report was that new services had been introduced in response to the Charities Act 2006. Respondents were more or less equally split, with 43% stating they had introduced new services after 2006 while 57% had not. Of course, the extremely small respondent size does not allow for any inferences for the sector as a whole. New services that were reported (Q5) included day care and community care, an “extension of what our core business is”, and a “hospice at home” service.
Table 5.5.f: Question 7.

But the report did not just indicate that new services were introduced; financial assistance in the form of free services was also referred to as public benefit. Two questions arise: were those free services already in place before 2006 or where they introduced as a consequence of the Act? All organisations stated that they were providing free services (Q6), either to their patients or to other organisations (such as NHS hospitals). They were again almost evenly split on the question whether these free provisions were related to the 2006 Act (see Q9).
Table 5.5.g: Question 8.

Q6 Does your organisation provide any services free of charge (to patients or other organisations)?

Answered: 6  Skipped: 49

<table>
<thead>
<tr>
<th>Answer Choices</th>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>100%</td>
</tr>
<tr>
<td>No</td>
<td>0%</td>
</tr>
<tr>
<td>Total</td>
<td>6</td>
</tr>
</tbody>
</table>

Table 5.5.h: Question 9.

Q9 Are there any new free services (that were not free before 2005/2006 or that were newly introduced after 2005/2006)?

Answered: 5  Skipped: 50

<table>
<thead>
<tr>
<th>Answer Choices</th>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>40%</td>
</tr>
<tr>
<td>No</td>
<td>60%</td>
</tr>
<tr>
<td>Total</td>
<td>5</td>
</tr>
</tbody>
</table>
Examples of pre-2006 free services ranged from “all our services”\textsuperscript{816}, hospice/palliative care services (inpatient case, outpatient services, day therapy, bereavement and family support), and community care services (Q7). These were provided for either all adults or, in the case of hospices, anyone in the community with a terminal illness. Services were also provided for the patients’ families (Q8). Newly introduced services included the provision of “Hospice at Home” services\textsuperscript{817} (Q10) and were offered to those that requested it (Q11).

Not a single healthcare charity reported having shifted services into a subsidiary (Q12). Again, the low response does not allow for any wider extrapolation and all results have to be seen in this light. The same applies to the sharing of facilities with NHS or other organisations (Q13), which 2 charities answered in the positive and two in the negative. According to the responses, these facilities had been shared beforehand and access had not changed through the charity policy reforms (Q14).

A specific question on public benefit reporting was answered by only a single healthcare organisation, which indicated that it measured public benefit by the number of patients treated free of charge (Q15). In the IVAR/Sheffield-Hallam report, many organisations admitted to a lack of understanding of public benefit and felt confused by the Charity Commission guidance.\textsuperscript{818} Even among the small number of respondents, it is surprising that only a single organisation could provide information about their public benefit accounting, even though all other questions were answered, often in significant detail.

\textbf{Independent Schools}

A slightly different list of questions was circulated among independent schools. Parallel to the healthcare organisations, independent schools were asked whether they were providing additional bursaries and/or scholarships since the 2006 Act; this had been reported as one of the visible changes in the IVAR/Sheffield-Hallam report. As Question

\textsuperscript{816} Three organisations provided all of their services for free.
\textsuperscript{817} Only two organisations indicated new services and both referred to “Hospice at Home”.
\textsuperscript{818} IVAR and Sheffield-Hallam University (2012): Part 4, p.6.
16 shows, most independent schools provided additional bursaries and scholarships. Only 17% had not increased either. On average, schools stated that they had provided an additional £300,000 in bursaries and £3,300 in scholarships per annum since the introduction of the Charities Act 2006. The total amount of additional bursaries amounted to £6,418,000 per annum and £30,000 in scholarships (Q17). Judging from the numbers, it seems that some respondents either misunderstood the measurement used in the question (£ per annum) or the sample skewed the total number; especially the sum spent on scholarships seems too low.

![Graph and Table]

Table 5.5.i: Question 10.
Table 5.5.j: Question 11.

95% of schools had been providing either bursaries or scholarships or both before the 2006 Act (Q18).
Table 5.5.k: Question 12.

Quite intuitively, bursaries were almost entirely provided on the basis of financial need while scholarships were offered for academic merit (Q20).
Table 5.5.1: Question 13.

Confirming the IVAR/Sheffield-Hallam report, over 70% of respondents stated that they had already been sharing their facilities or teaching resources with local schools or their community (Q21), a practice that pre-dates the 2006 reform (Q22).
Table 5.5.m: Question 14.

Table 5.5.n: Question 15.
Significantly, schools seemed to be more aware than hospitals of the public benefit test and the way they accounted for it. Most schools were reporting the number of students with a full or partial bursary or scholarship (student numbers or overall sum) (Q23). Slightly fewer also listed non-monetary public benefit, such as facility or teaching resource sharing. Other forms of public benefit reporting included for instance the percentage of concessions against the school’s fee income and an annual report on community benefit derived from the use of the school’s facilities, but also a number of questionable factors: one school indicated that it was not measuring any public benefit since “an educational establishment is automatically for the public benefit”, obviously unaware of the 2006 policy change. Two others reported that they included “fundraising for other charities” and “support for local and international charitable organisations” as public benefit, two activities that were in no way included irrelevant to the Charity Commission’s guidance. This seems to confirm the IVAR report’s finding that many charities found the new public benefit policy and the published guidance confusing.
Table 5.5.o: Question 16.

Caveats
It is both plausible and possible that only those schools responded that a) are aware of the public benefit debate, and b) think of themselves as always having had a good public benefit record or at least having established a good record ever since 2008. If that is the case then the results are probably biased in favour of thorough public benefit reporting and are not representative of the sector at large.

The aforementioned findings are nonetheless intriguing from one particular standpoint: out over 1,000 schools and 300-odd hospitals, only 55 were prepared to comment on their public benefit record and shared it for academic purposes, despite the completely anonymous nature of the study. Generally, those who chose to respond indicated a very
high-level of public benefit offered. Given self-selection bias, the data might be seen as a sample of “top of the class” performers.

**Findings**

Even if those data are not generalizable, they nonetheless yield insights that are useful:

- Some, if not many organisations do not seem to either have read or understood the Charity Commission guidance and are not aware what constitutes public benefit.
- Public benefit was still a concern to all organisations that replied and each claimed to provide further services that would support their patients or students. Whether these services would satisfy the regulator is a different question.
- Schools seem generally better informed than hospitals about the public benefit debate.

**5.6 Conclusions**

*Hypothesis 1: The changes to the public benefit test in the Charities Act 2006 mark a radical and sudden policy change after a long period of stability.*

- At the policy formulation stage, the change certainly seemed to be radical. Independent schools in particular geared up to prepare for the much debated public benefit test which they saw to fundamentally alter the nature of charity regulation and their actions. Ironically, it seems that the reform had its biggest impact on the behaviour of charities (or at least a small subsection of charities) before it was even finalised and implemented.

- Post-implementation policy outcomes, however, do not seem to reflect this initial wave of action. At best, the outcomes can be described as a statutory clarification of the pre-2006 status quo and it appears that already six years after the coming into force of the Charities Act 2006, fee-charging charities have reverted their attention away from public benefit. Despite of the removal of the public benefit presumption, the policy outcomes do appear gradual rather than radical.

- This incremental change is reflected in the non-representative survey data as much as in the sector accounts and parliamentary evidence provided by sector
bodies. It is striking that most sector actors (especially those without a legal background) did not fully understand what consequences, if any, the Act would have. Even six years into the reform, there still is great confusion as for what constitutes public benefit and how a charity can demonstrate it. Empirically, no charity has been deregistered, which is a final indication that the policy reform outcome should not be seen as a radical change post-implementation.

**Hypothesis 2:** The changes to the public benefit test in the Charities Act 2006 were introduced through endogenous variables.

- The NCVO’s role cannot be overstated. It emerges as the single most focused actor that channelled the impetus across the sector node and consistently pushed for policy reform. It is also the source of most policy allegiances, including with the state node (through the Deakin Commission and its later close work with the PMSU).
- No scandals or other endogenous shocks to speak off were referred to by stakeholders. Nor were they presented as arguments for change in the sector. Rather, the state policy node’s argument about solidifying the sector’s position through more transparency and accountability was carried through the sector account.
- However, the change in government acted as marked exogenous shock. New Labour’s advent to power seems to have fundamentally altered the policy environment, especially among state actors. This may constitute a “window of opportunity” that opened and made policy change possible. This would be in line with the radical change theories, in particular PDF.

**Hypothesis 3:** The origins of change to the public benefit test in the Charities Act 2006 can be traced across policy arenas.

- The evidence presented has the characteristics of an organic development and growing policy allegiance group (for instance the Coalition for a Charities Act formed by more than thirty major charities). It began within the sector and was then carried by the NCVO.
In addition to intra-sector collaboration, the evidence also confirmed that there were strong ties between the sector policy node, the state, and legal community nodes.
Chapter 6. The Legal Community

6.1 Introduction

“Chairman: (...) forget about the lawyers—
Bob Russell:—Yes, let's!
Lord Phillips of Sudbury:—Hear, hear!” 819

“Mr Foulkes: Not being a lawyer is a distinct advantage in giving evidence to us! [The reform] is not a legal issue, it is a wider issue.” 820

“Lord Phillips of Sudbury: (...) There is no way that whatever you do or we do you will get lawyers around the charity sector agreeing on what the public interest is now.
Fiona Mactaggart: That is lawyers.” 821

~

“The first thing we do, let's kill all the lawyers.” 822

The legal community is far from homogenous, as the three quotes from the Joint Committee on the draft Charity Bill and one slightly facetious addition from William Shakespeare’s Henry VI demonstrate. 823 Charity law rests on rather shaky jurisprudential foundations, not necessarily because of a lack of cases, as some have argued 824, but rather because of their contradictory nature. Most adaptations to new forms of organisations, or

---

819 Witness Examination of the Charity Commission before the Joint Committee on the draft Charity Bill on 7th July 2004, Question 765; interchange between Chairman Mr Alan Milburn (MP), Bob Russell (MP) and Lord Phillips of Sudbury.
820 Foulkes, Question 154.
821 Question 1098.
823 For further evidence of this frustration with the legal profession, see Chapter 4.
824 See the interview account in Chapter 8.
issues, have had to rely on obiter dicta and reasoning by analogy. It is thus not surprising that the Charities Act 2006 sparked a lively debate. After all, it attempted to bring the state of the case law into statutory form, an exercise that inevitably had to culminate in a single interpretation. However, this enterprise failed at a parliamentary level, and the Charity Commission received the statutory duty to determine the ever-elusive meaning of the case law instead.

The place to begin is with the main legal opinions that shaped the public benefit reform process; these are based on the written and oral evidence submitted to the Joint Committee. The three main proponents in this case were, on one side, Francesca Quint, QC. She authored the evidence that formed the basis of the NCVO report. On the other side, Peter Luxton and Hubert Picarda, QC, fervently argued against the removal of the presumption and its effectiveness as a policy tool.

With that foundation, the analysis turns to a systematic review of legal academic and practitioners’ journals. The review provides a meta-analysis of this body of evidence and seeks to address the question whether the legal community saw the public benefit test as new and whether its role in the Charities Act 2006 was a legal or political reform.

6.2 Legal Community View in Written Accounts

6.2.1 Removal of the Presumption of Public Benefit: Pro
The main proponent and in fact the source of NCVO’s suggestion to remove the presumption of public benefit for the first three heads of charity was leading charity practitioner Francesca Quint, QC. Her suggestion aimed at addressing the “anomalies” that led to the observed difference between the legal definition of what constitutes a
charity and the public’s view\textsuperscript{825} and was the technical background to the NCVO’s “For the Public Benefit?”.\textsuperscript{826} Irrespective of what the (mostly lay) audience in Parliament and across the press made of it, Quint’s straightforward and lucidly argued case is intriguing from a variety of standpoints.

Legally, Quint provided the technical background to “the Committee’s recommendation that charity law should be reformed by requiring all charitable purposes to pass a single test for public benefit, being the ‘strong’ test currently applicable to charities within the fourth head in the Pemsel classification”. Quint clearly emphasised that primary legislation was required to achieve the desired reform outcome. In fact, she cautioned that “the alteration to the substantive law is kept to a minimum, and no attempt is made to change the meaning of ‘public benefit’ or the test by which a purpose is assessed as being either for the public benefit or not for the public benefit”, thus keeping with the NCVO’s recommendation to refer to the existing case law for the public benefit definition\textsuperscript{827}.

Quint also noted that the current position on public benefit may well be “further clarified or developed by case if necessary”, arguing in favour of flexibility. However, Quint did

\textsuperscript{825} This refers to the Amnesty International versus the Eton and the Royal Opera House comparison based on an nfpSynergy survey that was mentioned repeatedly in the media and during the parliamentary debate; see discussion in Chapters 4, 5 and in particular 7.

\textsuperscript{826} See NCVO (2001): Appendix 3.

\textsuperscript{827} Quint summarises the case law view on public benefit as follows: “A purpose is currently treated as being for the public benefit under charity law if the financial assistance, items, services, facilities or other, less tangible, benefits which are provided to people in furtherance of the purpose are accessible to (i) the population at large, (ii) taxpayers, (iii) people born, living, studying or working in a particular content, country, region, city, town or area (iii) the female population (e.g. in the case of charities within the Recreational Charities Act 1958) or (iv) a section of the public, a numerically significant group defined by nationality, age, sex (if either young, old and/or female), medical condition or disability, occupation, vocation, educational or technical qualification, or those connected with one another by some other link which is ‘objective’ rather than ‘subjective’. By ‘subjective’ I mean qualifications (i) which are either arbitrary and capricious (e.g. people with red hair or black skin - although in the later case the qualification would in any case be censored out of any governing document by s 34(1)(a) of the Race Relations Act 1976) or (ii) which specify contractual or personal link or ‘nexus’ between the beneficiaries. Such a link may be specified through common employment by a particular company or group of companies, by common membership of an association, church, masonic lodge, trade union or firm, or by their belonging to the same family, having the same ancestor, or (whether or expressly or by implication) by enjoying above average income or wealth (see Jones v Williams (1767) Amb 651.)”, Appendix 3, p.37
not recommend any changes in the actual operation of the test beyond its extension to all charities.\footnote{828} Thus, Quint came to the following conclusion:

\begin{quote}
The simplest way of providing a level playing field for charities would be to remove the anomaly which favours charities for the relief of poverty, to remove the legal presumption which favours charities for the advancement of religion and for good measure to remove any doubt about the requirement that the direct recipients of education in an educational charity must be the public or a section of it.\footnote{829}
\end{quote}

Quint expected that this would support the Charity Commission and the Inland Revenue in navigating the murky waters of the case law on education and religion and provide them with more freedom to reject applications from charities who formerly found themselves covered by the presumption but whose public benefit the Commission doubted.\footnote{830} Unlike what was made of the public benefit in the test and in politics, Quint is careful to emphasise that the change she foresaw would not lead to independent schools losing their status, but merely to ascertain that all “institutions which charge high fees” would be pushed to demonstrate “substantial provision for scholarships or bursaries for those with few financial resources”.\footnote{831} This was all in keeping with current Charity Commission practice under the Review of the Register as introduced by Richard Fries. If

\footnote{828} “On the other hand, benefit to the public is presumed (subject to being rebutted) in the case of charities for the advancement of religion: \textit{Re White} [1893] 2 Ch 41; and see \textit{National Anti-Vivisection Society v IRC} [1941] AC 31, at p 65 (HL). (…) There is also a strand of opinion to the effect that education is beneficial to the whole of society even if those receiving instruction are not a section of the public. (…) the modern view of education as the entitlement of all, now enshrined in the Human Rights Act 1998, necessitates holding that the advancement of education (as opposed to the provision of educational services to a private group) cannot consist of providing educational services either to a private class, as in \textit{Oppenheim v Tobacco Securities Trust Co Ltd} [1951] AC 297 (HL), or exclusively to the well-off.” Appendix 3, p. 38
\footnote{829} NCVO (2001): Appendix 3, p. 38.
\footnote{830} In fact, as the interview data in Chapter 8 will show, a former Chief Charity Commissioner suggested that the Charity Commission often felt impeded in its attempts to enforce the public benefit requirement in the areas that benefited from an initial presumption.
In addition to important legal insights, Quint was very attuned to the political challenges of the policy reform she detailed. Foreseeing the challenges that would occur during the reform’s progress from a draft to the final legislation, Quint:

- acknowledged that the legislation would have to address what happened to existing charities that lost their status;³³³;
- stressed that the legal community was split on the definition and interpretation of public benefit in the case law;³³⁴;
- warned that the regulators (i.e. the Charity Commission and the Inland Revenue) were likely to shy away from applying the “strong” public benefit test to charities that previously had enjoyed the presumption;³³⁵;
- was aware of the probable break in continuity between the legal draft and the actual implementation of the legislation;³³⁶;
- identified the Review of the Register as trigger for the reform since it was based on the concept of public benefit and already considered public benefit

---

³²² “The Charity Commission in their consultations on the Review of the Register have stressed in almost every paper the need to show public benefit (originally paraphrased as ‘social value’), and their practice in assessing application for registration is to place very great importance on this feature when examining (as they so often do) the existing and proposed activities of the applicant body.” NCVO (2001): Appendix 3, p. 42.
³³⁴ “There is more than one way of analysing the present law.” NCVO (2001): Appendix 3, p. 37.
³³⁵ “Nevertheless, it is undeniably true that the staff of the Inland Revenue and the Commission are very likely to regard all the well-known and well-established religious bodies as charitable without seeking further information about the activities of particular local churches.” NCVO (2001): Appendix 3, p. 41.
³³⁶ “Of course it is impossible to judge precisely how a reform of this nature would work, or foresee all the possible difficulties which would be thrown up for those administering the system.” NCVO (2001): Annex 3, p. 42.
³³⁷ “Generally, however, it seems to me that now is an opportune time for a reform of this nature. The Charity Commission in their consultations on the Review of the Register have stressed in almost every paper the need to show public benefit (originally paraphrased as ‘social value’), and their practice in assessing application for registration is to place very great importance on this feature when examining (as they so often do) the existing and proposed activities of the applicant body.” NCVO (2001): Annex 3, p.42.
“when examining (as they so often do) the existing and proposed activities of the applicant body”\(^{838}\) at registration.

- Quint also warned that the effects of the reform might not be substantial if the new heads of charity still showed bias in favour of the former first three heads of charity relief of poverty, religion and education.\(^{839}\)

Quint summed up with considerable foresight that “the likely effect of the reform would not be revolutionary, but would strengthen current trends in charity policy and practice and help to harmonise charity law with the European Convention on Human Rights.”\(^{840}\)

This represented incremental change, rather than the radical departure from previous principles that the policy reform proposal received by means of “spin”\(^{841}\) in the political arena.

### 6.2.2 Removal of the Presumption of Public Benefit: Contra

A more conservative stream within the legal community voiced concerns over the proposal to remove the presumption of public benefit, mostly for fear of the additional powers the Charity Commission could “gain” as a result.\(^{842}\) The most vocal proponents of this view were Professor Peter Luxton of the Universities of Sheffield and then Cardiff, as well as one of the other leading charity law practitioners, Hubert Picarda, QC. Both gave written evidence to the Joint Committee.\(^{843}\)

Luxton does not per se disagree with Quint’s account of the law. With the advantage of being able to comment on an actual draft Bill, he chose to set his emphasis on a different aspect: In Luxton’s opinion, the draft Bill would not achieve the goals set out by the

---

\(^{838}\) NCVO (2001): Annex 3, p.42

\(^{839}\) “Nevertheless, the difference may not be very great if in practice the newly defined objects clauses include a preference for the original class of beneficiaries.” NCVO (2001): Annex 3, p. 42


\(^{841}\) See Chapter 3 on New Labour’s ideology.


\(^{843}\) Memorandum from Peter Luxton, Professor of Property Law at the University of Sheffield (DCH 270); Memorandum from Hubert Picarda QC (DCH 297).
PMSU, in particular to stress the “public character” of charities through transparency based on a ‘new’ public benefit test. Instead, he stated, “[a]s it stands, clause 3 of the draft Bill is likely to lead to much confusion and uncertainty”.  

Luxton suggests that even charities applying under the fourth head of charity, the catch-all category, are covered by the presumption of public benefit once their specific purpose has been established by precedent. Citing the example of relief of unemployment, Luxton argues that once one charity for the purpose of relieving unemployment had been recognised under the fourth head, other charities needed only had to prove that they fell into the same category rather than demonstrating public benefit over again. His disagreement with Quint is thus that Luxton sees public benefit as pertaining to a purpose in the abstract (conceptual public benefit) rather than directly to specific activities of a charity (demonstrable public benefit).

Emphasising the ‘public’ element of public benefit, Luxton refers to the “nexus test” according to which “the class of persons capable of benefiting from the purpose must be sufficient” and not artificially limited by a personal nexus. Luxton concludes that the political hot potato independent schools would not be affected by the test: “The charging of fees by independent schools does not (…) comprise a contractual nexus; rather it is merely the means by which the benefit is conferred.”

---

844 Memorandum from Peter Luxton, Professor of Property Law at the University of Sheffield (DCH 270), section 1.
845 IRC v Oldham TEC [1996] STC 1218
846 DCH 270, section 2.
847 Recall the differentiation of Garton’s different meanings of public benefit in Chapter 3. To pick a political-science friendly analogy, Quint’s and Luxton’s disagreement can be illustrated with Plato’s ideal forms and their shadows: according to Quint’s reading public benefit attaches to each shadow of a charitable purpose (i.e. the specific purpose and activities pursued by an individual charity); Luxton’s view is that public benefit is an attribute of the form and once the link has been established, all that individual charities need to prove is the connection between their shadow and the ideal form.
848 DCH 270, section 3.
849 DCH 270, section 3. On this, Luxton also points out the underlying historical foundation: “This is the present position, but it has not always been so. Many of the older public schools were initially founded for the free education of local boys, and the admission of fee-paying boarders to share in the benefits of the foundation was a later development. It seems that initially the admission of fee-paying boarders (mostly in the early years of the nineteenth century, and sanctioned by the Court of Chancery) was intended to supplement the income of the foundation, and the boarders were not treated as "beneficiaries". Later, however, they were often admitted (again with the approval of the Court of Chancery) to all the benefits of
The draft Bill (and later Act) maintained the reference to the existing case law in section 3(3) except for the removal of the presumption in clause 3(2). Section 3(2), so Luxton, would be ineffective in forcing independent schools to “provide a wider benefit to the public” as even without the presumption, “the public benefit of the advancement of education could easily be found in domestic legislation, including the Human Rights Act 1998, which enshrines as a human right the right to education in Article 2 of the First Protocol of the European Convention of Human Rights.”

Therefore, Luxton warns that public benefit would have to be defined in statutory form in order to have the desired effect. In its current form, it would provide an almost impossible regulatory task for the Charity Commission and the courts. Luxton concludes:

If the aim of legislating in the area of public benefit is to ensure that a fee-paying school, to be charitable, must reach out to the community, either by providing free or subsidised places, or by making its facilities sufficiently available to the public, this object would be attained only by a more specific provision than clause 3 of the Draft Bill.

the foundation (including, for instance, scholarships to the ancient universities). It can be argued that this development was a move away from the broader Elizabethan notion of charity that, where direct benefits were conferred on individuals, this was on the basis of financial need. See Jones, (1969) at p. 27, referring to the Statute of Elizabeth 1601: "Public benefit was the key to the statute, and the relief of poverty its principal manifestation." See also my earlier paper, "Giving the go-by to cy-près: an Anglo-American perspective", (1987) New Law Journal Christmas Appeals Supplement viii-xi. This development is an aspect of the changing view of the legal nature of charity under which the advancement of education was treated as a charitable purpose in its own right. This changing attitude to charity is evident in the four-fold classification of charitable purposes proposed at the time by Sir Samuel (then Mr) Romilly in argument in Morice v Bishop of Durham (1805) 10 Ves Jun 522, 532. Romilly's second category was the advancement of learning. This categorisation appears to have been the basis for Lord Macnaghten's four heads of charity in Pemsel's case towards the end of the nineteenth century.

850 DCH 270, sections 4 and 5, see also section 7: “On this footing, the charitable status of independent schools that currently enjoyable charitable status would not be affected because such schools satisfy the two aspects of public benefit: namely, their purposes are for the advancement of education, and the potential beneficiaries are a sufficient section of the community.”

851 DCH 270, section 8.

852 DCH 270, section 11.
In the aftermath of the Act, Luxton chose even stronger words. Looking at the empirical evidence of how the Charity Commission had applied the test when it came to the registration of charities, he claimed to have found evidence since the late 1990s that the Commission had actively developed the law.\textsuperscript{853} Luxton notes that the Commission was using its statutory duty to keep a register of all charities\textsuperscript{854} and to ensure that all legal principles are compatible with the rights set through the European Convention on Human Rights in order to introduce a public benefit test that actively “scrutinise[es] activities”\textsuperscript{855}. According to Luxton, charities no longer just have to fulfil the public benefit test at the point of their registration\textsuperscript{856}; they have to provide clear descriptions of their organisation’s activities and their public benefit in their annual statement. Thus, Luxton accuses the Charity Commission of having created an activity-based approach, as compared to the purpose-based approach that had been used by the courts since the 17th century.

Hubert Picarda followed a slightly different line of argument to come to the same conclusion as Luxton: as drafted, he warned that the public benefit test would not achieve its intended goal; a new statutory definition would be required\textsuperscript{857}. Moreover, the Commission would receive undue power\textsuperscript{858} and all the reform would achieve in the end

\textsuperscript{853} Luxton (2008): page 15
\textsuperscript{854} Registration is a precondition for recognition as a charity, and the ensuing tax and organisational benefits.
\textsuperscript{856} E.g. through a statement of mission. This shows clear similarities to the German process of registration as a charitable organization.
\textsuperscript{857} “Demonstration of public benefit in the case of education within the formal structure of schools and colleges not run for profit is not required according to the common law since it is self evident. The undoctrinaire common law accepts that the benefit element in public benefit can be a direct or an indirect benefit. If demonstration or proof of the provision of public benefit is intended to be replaced the common law decisions on this area (schools having a public character) as a matter of law it would require a new explicit definition which overrides the common law decisions affecting existing charities and would-be charities falling within the governing decisions.” Memorandum from Hubert Picarda QC (DCH 297), section 8; see also section 9: “Mere reversal of the "presumption" of public benefit cannot change the declared law on this point. Public benefit has a consistent meaning throughout the Commonwealth and is not synonymous with the malleable word "public interest" "social value" or a benefit having the necessary "social and economic impact" fulfilling "social justice" .”
\textsuperscript{858} “To leave the Commissioners in charge of administering a novel generalised public character test would run counter to well established principle (...) at any rate in relation to registered and registrable independent schools and educational institutions.” DCH 297, section 11 and “Debasement of jurisprudence
would be “to benefit ingenious lawyers rather than advance the interests of charity”\textsuperscript{859}. In contrast to Luxton, Picarda pointed more openly to the party political undertone of the reform. According to Picarda, the public benefit reform under the Charities Act 2006 was an attempt to strip independent schools of their charitable status.\textsuperscript{860} The reform would turn the Charity Commission into “an instrument of policy”.\textsuperscript{861} In a section Picarda entitled “Enforced contribution by independent sector to state sector”, he clearly identified the reforms as a policy tool for the attainment of New Labour’s education policy, openly criticising the Coalition for a Charities Act\textsuperscript{862}:

\begin{quote}
The advancement of literacy has escaped the attention of ad hoc caucuses (or "focus groups") and "coalitions" advocating reform of public benefit. Increasing deplorable illiteracy and plummeting academic standards in the ailing state sector should not through the engine of charity law and re-definition enable a stealth tax to replace the abandoned assisted places scheme, in the form of enforced levies and compulsory contributions from the independent sector. This seems to be envisaged by some of the hostile questions raised by certain members of the Joint Parliamentary Committee and read by me on the internet. My concern as a charity lawyer is for the integrity of charity law.\textsuperscript{863}
\end{quote}

\textsuperscript{859} DCH 297, section 16
\textsuperscript{860} “The position of fee paying schools, not run for profit has been misdescribed as an anomaly (a "thorn in the side of the law" as one recent hyperbolist put it). (…) The new statutory requirement of demonstrating public benefit is to override any previously accepted and acceptable indirect benefit which was compared derisively to a "trump card" whose trumping quality should be removed or diluted by the ingenious "presumption reversal" dodge and a newly blessed but unenacted public character test.” DCH 297, section 5.
\textsuperscript{861} DCH 297, section 12.
\textsuperscript{862} “(…)’coalitions’ advocating reform of public benefit”, DCH 207, section 14.
\textsuperscript{863} Emphasis added. DCH 297, section 14
The Charity Law Association (CLA) submitted a host of memoranda on the question of public benefit. In its initial memorandum, the CLA put its finger on the difference between Quint’s and Luxton’s reading of the public benefit test and consequently requested clarifications in the wording of the Bill. A further memorandum analysed the Charity Commission’s reading of the case law, and rejected the Commission’s conclusion that without a statutory definition of public benefit, it could not apply the public benefit test to independent schools. Like most of the legal community, the CLA saw Re Resch as the leading case in this context and understood it to provide “clear authority on the requirement for public benefit in the sense of benefit to a wider section of the community rather than just the relatively well-off.” Thus, “the necessary public benefit tests are present within the existing case law and that the case law cited by the Charity Commission does not prevent the tests being applied to independent schools in the same way as they will be applied to all other charities. There is therefore no need for any further provisions on this matter to be included in the Bill.”

Finally, the CLA suggested a number of more or less technical corrections or clarifications to the draft Bill. Welcoming the policy reform overall, the CLA among other things warned of the potential discrepancies between the Scottish list of purposes and that proposed in the English bill; it also supported Christopher McCall’s, QC,

864 DCH 32.
865 “In Clause 2(1) of the Bill, the public benefit test is to be applied to the charitable purposes, rather than to the way the organisation furthers those purposes. We are not sure that this is what was intended.” DCH 34, section 4.
867 DCH 175, section 15.
868 DCH 175, section 16.
869 Supplementary memorandum from the Charity Law Association (DCH 282)
870 “First of all, we would like to say that we welcome the Bill and what it is seeking to do. In this (and our other) reports, we are aiming to highlight what we think is missing from the Bill or what is required to make it consistent with charity law generally and with other branches of law. This should not be seen as detracting from our general appreciation of the Bill, its contents and the open consultation process that has led to its publication.” DCH 282, section 3.
871 DCH 282, section 5.
suggested addenda to Clause 3. Finally, it strongly cautioned the Joint Committee to stay clear of a statutory definition of public benefit.

6.3 Legal Community View in Oral Evidence

The Charity Law Association also represented the legal community as witnesses before the Joint Committee on the draft Charities Bill. In addition to the evidence provided in its written submissions, the two CLA representatives, Chairman Stephen Lloyd and Judith Hill, raised a number of further points that largely coincided with the evidence presented in the previous chapters.

First of all, the CLA evidence agreed that it would be beneficial for the charity sector to address the mismatch in definition and make the law easier to navigate, if not least of all for the benefit of trustees. Stephen Lloyd further added that this was essentially codifying the Charity Commission’s practices that had developed over the 1990s.

The CLA representatives quickly pointed out to the Joint Committee that in many respects it was addressing political rather than legal questions and recommended it treat these as such. Thus Keeble asked Lloyd to confirm whether or not “there are organisations that should get charitable status which currently are not because of the definition which is contained in the Bill, or are too many organisations getting charitable...

---

872 DCH 282, section 10; see Chapter 4; these changes were proposed by Lord Phillips of Sudbury and eventually rejected the Bill’s final reading.
873 “We consider it to be vital that the Bill does not attempt to codify the public benefit test”, DCH 282, section 12.
875 Hill, Question 230: “What is really broken is that the general public do not understand what charity law is. We understand it because we are lawyers and we spend a lot of time working in it, but that is not really the point. It is more important that the public should understand what charity law is and this Bill does that.”
876 Lloyd Question 229, see also Hill, Question 229 “(...) what the Bill is seeking to do is to give statutory force to the practice that the Charity Commission has adopted in an enlightened way over the last ten year (...). I think it is absolutely right that the Bill simply confirms that the Charity Commission are approaching it in the right way.”
status and therefore the definition should be changed"? Lloyd replied that this was “a political question to a degree, which is where do you draw the lines of charity and non-charity because with charitable status come major tax reliefs”.  

Foulkes later tried to push the same issue, inquiring about the by then infamous “anomalies” under English case law on charities, specifically referring to “fee paying schools and some private hospitals”. Just like her Chairman, Hill rejected this idea:

\[ I \text{ do not think I do accept that. There are one or two anomalies, there must be, like the fact that it would be charitable to set up a trust to relieve your poor relations, that is clearly an anomaly, but I do not think that the body of law as a whole which has evolved over the last four hundred years is anomalous, I think it does hang together and I think trying to unpick it is going to be very, very complicated and possibly even disastrous (...). Again, I think [charitable status] is not an issue of law. (...) Clearly it is a political issue. It may well be the case that there is a public perception that is different but I am not sure it is an issue of law.}\]

The CLA welcomed the reform, but made it clear that they did not consider it a radical departure from the previous status quo, much as Francesca Quint had recommended in her opinion. They described the Bill as “a sensible piece of mainly deregulation”. Unsurprisingly, the Joint Committee was not enthused by this rather modest evaluation. Lord Phillips asked for clarification what the experts of the Charity Law Association expected would happen to “Eton and the London Clinic”. Hill suggested that the public benefit test already existed under present case law, and as long as either organisation

---

877 Keeble, Question 232.
878 Lloyd, Question 232, emphasis added.
879 Foulkes, Question 233.
880 Hill, Questions 234 and 235
881 See previous section.
882 Lloyd, Question 237.
883 Phillips, Question 253.
could provide evidence for its public benefit, it was likely to keep its charitable status.\(^{884}\) However, the on-going nature of the public benefit checks were a defining feature that differentiated the new policy from the pre-reform status quo\(^ {885}\) and that should possibly be further specified in the Bill itself.\(^ {886}\) Just like in the supplementary memorandum, Hill and Lloyd strongly advised against a statutory definition of public benefit as part of the Bill.\(^ {887}\)

The greatest differences between the state and sector evidence (and certainly to the position advocated by Luxton and Picarda) are twofold: firstly, the Charity Law Association commended the Charity Commission for its reforms of the 1990s, especially the Review of the Register that Richard Fries had initiated. And secondly, the Joint Committee treated the expert witnesses in a far more jovial and polite manner than any of the other witnesses from the sector and the state policy nodes, possibly because of their technical expert status or their political neutrality.

### 6.3 Systematic Review

Systematic reviews have so far mainly been used in the areas of medicine and public health in order to synthesise the existing findings on particular interventions and their outcomes.\(^ {888}\) Unlike ordinary literature reviews, systematic reviews pursue a specific research question; they provide empirical evidence on a meta-level.\(^ {889}\) Thus, it is the ideal tool to assess the legal community’s overall treatment of the public benefit test.

---

\(^ {884}\) Hill, Questions 253 and 255.

\(^ {885}\) Lloyd, Question 258 (note also that Lloyd emphasizes that the Charity Commission would need further resources for this task); Hill, Question 259: “The introduction of the rolling review is a very major change. It means that the Charity Commission is going to have to go back with the tests that are already there in the law and reassess charities over a period of time. That is the important difference here.”

\(^ {886}\) Lloyd, Question 261.

\(^ {887}\) Hill, Question 257.


6.3.1 Study Design

Research Question
The systematic review sought to address five questions:

1. Did the legal community think of the public benefit reform in the Charities Act 2006 as a new test or the further application of the existing “strong” public benefit test?
2. Did the legal community see the reform as a legal reform or a political reform?
3. Did the legal community focus mainly on independent schools or was there also a discussion of hospitals?
4. Did the legal community refer to the parallel Scottish reform?
5. Did the legal community perceive of a trigger of the public benefit reform?

Set-Up
The study follows the Cochrane protocol for systematic reviews in its procedures. It spans the time period from the 1st of January 1996 until the 31st of December 2012 and was conducted via the EBSCO Host database. The search is limited to peer-reviewed journal articles in English. Peer-reviewed status in first-tier journals was taken as a quality assurance criterion. A Boolean search using the terms “public benefit” and “charit*” in the title and the full text of articles yielded a first result of 619 articles published during this time period. As a second step, the results were further narrowed through geographical restrictions to “Great Britain”, “England”, and “Scotland”; the results were thus narrowed from 619 to 221 articles.

Inclusion Criteria
No further electronic filters were deemed suitable at this stage and the 221 articles were hand searched as a third step according to their titles and abstracts and, when necessary, the content of the article in its entirety. Articles were included in the study if they directly addressed public benefit reform in charity law, either in relations to the 2006 Act, or on

---

890 See, Higgins and Green (2011)
891 The search was last updated on the 18th of May 2013.
892 The Boolean search term “charit*” searches for all words with this root, i.e. covering all permutations from charity, charities, to charitable etc.
an abstract theoretical level. Those articles that had their primary focus on other issues (e.g. religion and charity, the Big Society and its consequences on charity) while dealing with public benefit as an incidental side matter were excluded. The hand search also excluded articles that did not entail any discussion but were written as purely informational and non-analytical news updates for practicing charity lawyers. Finally, the hand search excluded articles that did not address England and Wales in their analysis. The third screen yielded a final list of 84 articles that proceeded to the analysis stage.

Coding
The remaining 84 articles were retrieved in full, analysed and coded by hand. Since the main goal of the systematic review was to uncover commonalities and patterns across the body of scholarly literature, the coding categories were chosen to crystallise any such potential patterns based on the archival research of the preceding chapters. The coding categories included:

893 Those that only addressed Scotland were recorded separately but not included in the systematic review.
<table>
<thead>
<tr>
<th>Code Category</th>
<th>Meaning</th>
<th>Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reference to Scotland</td>
<td>The author makes a reference to the Scottish charity law reform and its treatment of public benefit.</td>
<td>Does the article contain a form of analysis (i.e. more than just a name-dropping reference), either of the Scottish case by itself or in comparison to the English case?</td>
</tr>
<tr>
<td>Reference to Healthcare Organisations</td>
<td>The article refers not just to independent schools but also to healthcare organisations.</td>
<td>Healthcare organisations are mentioned at all in the article.</td>
</tr>
<tr>
<td>Public Benefit Test: New or Old</td>
<td>The author suggests a view on whether the public benefit is a newly created test or has always existed.</td>
<td>New: (A) A public test did not exist before the Charities Act 2006. (B) The removal of the presumption for the first three heads of charity under <em>Pemsel</em> constitutes a new legal test. Old: (A) Public benefit has always been a test that was applied – explicitly or implicitly – as a part of charitable status. (B) The removal of the presumption does not constitute a new test in itself since public benefit has always been a condition for the fourth head of charity under <em>Pemsel</em>.</td>
</tr>
<tr>
<td>Nature of Change: Political or Legal</td>
<td>The author takes a view on whether the reform has been of political or of merely legal nature.</td>
<td>Political: The public benefit reform has been initiated to achieve a political goal, i.e. it is a policy change that constitutes a change in doctrine, not just regulation. Legal: The public benefit reform is a purely technical-legal clarification of an existing policy, codifying or updating regulation but leaving existing doctrine intact.</td>
</tr>
<tr>
<td>Identification of Trigger for Reform</td>
<td>The article refers to a specific trigger that set the reform in motion.</td>
<td>The author identifies a clear starting point, such as a report, a commission, a publication, or a scandal.</td>
</tr>
</tbody>
</table>

*Table 6.3.1: Systematic Review Coding*

### 6.3.2 Quantitative Analysis

1. *Did the legal community think of the public benefit reform in the Charities Act 2006 as a new test or the further application of the existing “strong” public benefit test?*
The systematic review showed that 58.3%\(^{894}\) of authors held the test to be new, while 41.7%\(^{895}\) evaluated it as an extension of the test that existed pre-2006. Judging from the previous analysis of written evidence submitted to the Joint Committee, this close split in the systematic review seems to confirm the disagreement about the state of the case law that Francesca Quint had warned of: the legal community was (and remains) split on the issue.

2. **Did the legal community see the reform as a legal reform or a political reform?**

A majority of the legal community perceived of the reform as political in nature with 53.6%\(^{896}\) of articles identifying it as such. 29.8%\(^{897}\) considered the public benefit reform a technical-legal update and 16.6%\(^{898}\) did not offer any evaluation. This is a surprising outcome given that the articles are in peer-reviewed legal journals and the evidence provided by the CLA that the reform is a legal clarification of the existing law of charity.

3. **Did the legal community focus mainly on independent schools or was there also a discussion of hospitals?**

Only 34.5%\(^{899}\) of authors made a reference to hospitals or any other form of fee-charging healthcare organisation with charitable status. The overwhelming focus was set on independent schools. This is because legal journals are predominantly used by practitioners. Their main concern is to find information that will prove useful for prospective and current clients. Generally, there is a far higher number of independent schools compared to hospitals or other fee-charging charities. Moreover, the Charity Commission focused its initial review exclusively on independent schools. Therefore, practitioners’ interest was also mainly set on the independent school sector.

\(^{894}\) 49 of 84 articles
\(^{895}\) 35 of 84 articles
\(^{896}\) 45 of 84 articles
\(^{897}\) 25 of 84 articles
\(^{898}\) 14 of 84 articles
\(^{899}\) 29 of 84 articles
4. **Did the legal community refer to the parallel Scottish reform?**

A mere $11.9\%^{900}$ of articles referred to the Scottish reform in relation or comparison with the English Charities Act 2006 or the English public benefit reform process. This is not so surprising given that Scotland is a separate jurisdiction and its decisions only of academic interest for practitioners in England and Wales.\textsuperscript{901} Articles focusing exclusively on the Scottish reform were not included in the review. Most of the articles referring to Scotland did so in the early stages of the English reform as a means of illustration what an English public benefit test could look like post-reform.

5. **Did the legal community identify a trigger of the public benefit reform?**

The systematic review did not yield much evidence on identified triggers. Most articles were concerned with the consequences of the public benefit reform rather than its origins. Slightly more than a quarter made a reference to a trigger, a role exclusively attributed to law reform reports. The vast majority mentioned the most recent PMSU report “Private Action, Public Benefit”. No references were made to scandals or other triggers.

<table>
<thead>
<tr>
<th>Trigger</th>
<th>Woodfield</th>
<th>Deakin</th>
<th>NCVO</th>
<th>PMSU</th>
<th>n/a</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage</td>
<td>1.2%</td>
<td>2.4%</td>
<td>1.2%</td>
<td>23.8%</td>
<td>71.4%</td>
</tr>
<tr>
<td>Articles (of 84)</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>20</td>
<td>60</td>
</tr>
</tbody>
</table>

*Table 6.3.2: Origin of Reform.*

6. **Is there any discernable pattern between the evaluation of the public benefit reform and its nature?**

\textsuperscript{900} 10 of 84 articles

\textsuperscript{901} While Scottish examples can certainly prove to be instructive, English and Welsh lawyers are not bound by decisions of the Scottish Parliament or other Scottish statutory provisions.
An additional category was added based on the meta-data collected through the systematic review: it sought to find patterns of interaction between the evaluation variables “new/old” “political/legal”. Based on the data, it seems that there is a relationship between the perception of the test as new and judging it a political reform, and, conversely, considering it old and of legal nature. Of those that saw the test as new, 65.3%\(^{902}\) thought of the reform as political and 14.3%\(^{903}\) as legal. 37.1%\(^{904}\) Of those who thought of the test as old saw it as political; 51.4%\(^{905}\) considered it a legal reform under these circumstances. Given the small sample size, the relationship should be cautiously evaluated by statistical standards. In terms of substantive relevance, however, the relationship seems intelligible: a technical-legal reform is more likely to be seen as incremental, without changing the overall test. A political reform – especially from the vantage point of the legal community – seems more likely to be described as departure from the old status quo.

6.3.3 Qualitative Analysis

Beyond the research questions addressed by the systematic review, there were a number of themes that the articles emphasised. These are explored briefly below.

- **General Appraisal of the Reform:** Just like most other written sources across the state and the sector policy nodes, the legal community largely welcomed the initiative for reform.\(^{906}\) One author for instance lauded the Commission for having “provided a much welcome rationalisation of the law as to charity, and in particular of public benefit” based on Lord Cross of Chelsea’s\(^{907}\) “purposive approach to public benefit, which is both general and flexible enough to apply to all categories of charitable purposes.”\(^{908}\)

\(^{902}\) 32 of 49 articles  
\(^{903}\) 7 of 49 articles  
\(^{904}\) 13 of 35 articles  
\(^{905}\) 18 of 35 articles  
\(^{906}\) The contrary view was presented by a discussion of Professor Peter Luxton’s and Hubert Picarda’s evidence.  
\(^{907}\) See *Dingle v Turner* [1972] A.C. 601  
• **Public Understanding of Charity:** As the articles were directed at professionals, it is not surprising that the mismatch between the popular and the legal definition of charity was not one of the main priorities. On balance, those authors that did address the definitional mismatch pointed out how it was the popular definition that had not updated itself to the 21st century while the legal common law definition had stepped up to the task, enabling a whole host of new charity categories to emerge.

• **Charity Commission’s Reading of Case Law:** More disagreement was voiced with the Charity Commission’s specific interpretation of the case law, especially on *Re Resch*. Due to the lack of case law, most authors however pointed out that the Charity Commission had found itself in a most difficult situation of “damned if you do, damned if you don’t”.

• **Expected Consequences:** The legal community seemed somewhat reluctant to speculate about the consequences of the reform with so much substantive content open to the implementing regulators, above all the Charity Commission. Most practitioner’s journals seem to suggest that it was best to prepare for the worst; they provided guidance on how to navigate the new landscape and make sure that charity clients could “justify annually to the Charity Commission how they spend...”

---

909 One might facetiously point out that, after all, this gap was the bread and butter of any practicing charity lawyer.
910 “The Charity Commission was wrong to have manipulated and distorted the case of *Re Resch* in support of its stand alone principle (that people in poverty must not be excluded from the opportunity to benefit) in the draft guidance. It was a move that constituted a complete abuse of position on the part of the Charity Commission, in flagrant disregard of the intention of the case law on public benefit provided for in the Act. Although the mistake now stands corrected it cannot be assumed that the Charity Commission will endeavour to put these positive changes into practice. Consequently charities that charge high fees might find they are open to challenge and refused or stripped of their charitable status solely on account of their activities.” Buckley (2008), p.42.
911 See for instance Powell, T. “New Wine in Old Bottles?” *New Law Journal*, Charities Supplement no 92. (Spring/Summer 2008): p.4: “The Charity Commission’s brief under the Charities Act 2006 is to promote the understanding of the public benefit objective and to publish guidance on it. Therefore the commission’s duty is to state accurately the current law on public benefit and not to create a new legal definition of public benefit. Arguably this is quite a difficult task. Because of the old presumption of public benefit that most charities enjoyed until 2006, the case law on public benefit is relatively undeveloped.”
their money, in accordance with copious guidance setting out what constitutes a public benefit”; in line with the preceding political debate, this was seen as particularly problematic for “fee-charging schools and hospitals”.912 One 2008 article cited Odstock Private Care Ltd913 as example: the Charity Commission had refused to register the NHD foundation trust from Salisbury which was “using facilities when not required for NHS treatments, any profit being directed to benefit the NHS patients”, based on the lack of public benefit.914

- **A Political Reform?:** Those articles that attempted an evaluation of the origins of the Act questioned the legal extent of the reform and stressed that it was after all addressing the political question of “the relationship between the traditional functions of charities as providers of public benefit and the role of the state as the default provider of public services such as health and education”915. They acknowledged the political and media attention devoted to the public benefit test.916 Many authors critically pointed out that they considered it Parliament’s duty to provide criteria for public benefit rather than shirking its responsibility and shifting it to the Charity Commission.917 After 2011 and the Tribunal decision, many pointed to Warren J’s observation that the decision on the definition of charity is “not really capable of judicial, rather than political

916 “[…] the debate turned to the more political question of public benefit. Much of the Parliamentary time – and column inches in the press – devoted to the Charities bill involved the question of the public benefit of fee-charging charities and, in particular, of independent schools and hospitals, the level of whose fees often preclude all but the richest members of our society – and many from overseas – from partaking in their services.” Piper, A.M. and J. Coleman, “Who benefits?” New Law Journal 90 (Spring/Summer 2007): p.4.
917 “Perhaps what will come to be seen as the most significant change in this area is the fact that Parliament has effectively abdicated its exclusive role in determining public benefit in favour of the Charity Commission, the new Charities Tribunal and the courts. By s 7 the commission is charged with promoting awareness and understanding of the public benefit requirement. It is also charged, by s 4, with issuing guidance on the subject and, significantly, charity trustees must have regard to that guidance.” Piper and Coleman (2007): p.4.
resolution. The ISC decision was criticised for its vagueness but lauded for its attempt to remove politics from the public benefit question. Naturally, the strongest accusation of political tinkering was put forward by Hubert Picarda who warned of the “gradual overshadowing, if not invasion, of charity law by policy over the last decade.”

- **Evaluation of the Public Benefit Reform post-Charities Act 2006**: Most articles dealt with the practical consequences of the Act rather than an evaluation of its substantive content. The best attempt at the latter was argued by Charlotte Buckley who concluded that:

---

918 R (Independent Schools Council) v Charity Commission [2012] Ch 214 at [109], per Warren J.
919 “(...) the Tribunal was plainly determined to ensure that intensified concern with public benefit (in the form of the Charity Commission's guidance and assessments) did not result in charitable activity becoming a means by which to advance the agenda of the welfare state”, Mullender, R. “Charity Law, Education, and Public Benefit: an Oakshottian Analysis”, *Law Quarterly Review*, 2012
920 He expands this assertion by explaining that: “The gradual overshadowing, if not invasion, of charity law by policy over the last decade is little chronicled. Yet its outlines can be quickly sketched. Comprehension of the influence of policy is vital to the debate. The culture within the Home Office, and evident in New Labour policy of making initiatives bent on involving the voluntary sector with government, has been increasingly drawn to and expressed in the sociological vocabulary of ‘social administration’, ‘social capital’, ‘social and economic impact’ and ‘social value’. The culture has a ‘newspeak’ of its own. The language abounds in speech figures alleging that in the necessary reform ‘for the 21st century’ all manner of virtues or aspirations of vibrancy, transparency, accountability, accessibility and proportionality are needed. These ‘modern’ features all require supervision, intervention and, where necessary, policing through regulation. All griot to a younger generation of civil servants, special advisers, and focus and hub operatives reared on such a diet and educated in this dialect. We can single out defining moments in the new ascendancy of policy over the law. There was the ‘front-running’ Deakin report in 1996. That, in turn, inspired a proactive NCVO conference at King’s College London, at which there were political calls from activists saying that a new definition of charities must put independent schools beyond the pale of charity. By one means or another, it was suggested, a new definition of charity must exclude independent schools. In fact, for the time being, unless the extremists prevail, the points will turn independent schools onto a new track, progress along which cannot satisfactorily be explained. Suffice it to say that the journey for independent schools may no be a smooth ride. In turn, Tony Blair’s compact with the voluntary sector surfaced in, and was transmogrified by, the NCVO report. The torch the NCVO carried against schools charging high fees has always been a puzzle, not the least because independent schools fell outside the council’s perception of a voluntary organisation and were not even canvassed by the NCVO. In the resultant strategy unit report, a ‘level playing field’ approach for public benefit – to be achieved by reversal of alleged ‘presumptions’ – was the true centrepiece. Some fear that all this inevitably heralds an increasingly statist agenda for charity and the voluntary sector. Will the common law tradition of charity and the paramountcy of independent voluntary endeavour succumb to the natural consequences of increasingly ambitious policy aims and objectives?” Picarda, H. “Inching Closer to a new Act” *New Law Journal* 86 (Spring/Summer 2005): p.10.
It is difficult to reach a definite conclusion as to the question of how far, if at all, the Act has changed the law as to charity since it is not clear what the case-law actually stood for in the first place. The Act with one hand retains the case-law on public benefit, but with the other removes the so-called presumption of public benefit previously enjoyed by the first three Pemsel heads of charity. However the removal of the presumption serves only to give expression to the extant practice of the Charity Commission, whereby all charities have been required to demonstrate public benefit in order to be registered as a charity.

On this note, the French “plus ça change, plus c’est la même chose”\(^{922}\) might come to mind.

### 6.3.4 Caveats

Most research tools are accompanied by possible biases and the Cochrane protocol is no exception. The social science application of systematic reviews operates in different – and fortunately slightly less stringent – circumstances than the Cochrane protocol’s original application in the medical sciences. First of all, there is no right or wrong answer in the sense that a treatment in large-scale trials might be more or less effective in its application to different patients. The parameters in the present analysis are not as strict. they deal with a matter of professional opinion. What judges, or possibly the legislator, will decide in the future will become the “right” answer at that point in time. Finally, whatever the potential bias, the findings presented in this section are embedded in a wider analysis; they are but one piece of the puzzle in the answer to the overall research question.

---

Single Coder Bias

Coding by a single investigator without second or third verification due to limited resources for this project is a possible bias, one imposed by limited resources. But care has been taken to make the reasoning process and the inclusion and exclusion criteria as transparent as possible.\textsuperscript{923} The potential bias only sets in from stage 3, i.e. the hand search of articles after the initial electronic literature search. As a countermeasure, the quantitative results of the systematic review have furthermore been vetted against the qualitative, i.e. substantive content of the articles and the additional analyses conducted in the preceding chapters. A copy of the complete data set is available from the author upon request.

Bias in Data (Publication, Time Law, Language, Multiple Publication)

According to the Cochrane protocol, there are some data biases that can diminish the reliability of the systematic review findings:

- **Publication Bias:** One possibility is that not all studies on a topic have been published, or that important studies have been published in more obscure journals that are not part of the electronic data base. Certainly, practicing lawyers do not tend to publish their opinion in journals. Which is why practitioner’s journals have been specifically included. They are intended to update the legal community on reforms, and it seems that publication bias is unlikely to occur. The exception, concerns the evaluation of the Act as well as opinions on its origins. These questions are not relevant for practitioners, so it is possible that evaluations are relatively speaking underreported. Therefore, the systematic review data has been set in the context of the written and oral evidence provided to the Joint Committee on the draft Charities Bill.

- **Time Lag Bias:** There is a risk that the meta-analysis becomes outdated before its conclusion. In the specific case of the public benefit test, the question deals with a temporally limited phenomenon at and around the time of the Charities Act 2006. Therefore, this form of bias can be ruled out.

\textsuperscript{923} See Chapter 6, Section 6.3.1.
• **Language Bias:** Due to the focus of the study on the English and Welsh Charities Act 2006, there is a clear focus on the publication of articles in English. It is highly unlikely that any articles have been published on this topic in any other language, and even if so, the bias would be minimal.

• **Multiple Publication Bias:** This bias has been ruled out at the stage of the electronic literature search that would have sorted out duplicate articles.

### 6.4 Conclusions

The legal community might have been split in its evaluation of the legal foundation of public benefit – before and after the Charities Act 2006. But at the same time, it is at least a network of experts that know, for the most part, what they are disagreeing on.

**Hypothesis 1:** *The changes to the public benefit test in the Charities Act 2006 mark a radical and sudden policy change after a long period of stability.*

- Unlike any of the other groups, the legal community never seemed to perceive of the public benefit reform as a radical legal change. Indeed, the very first technical opinion on the removal of the presumption, by Francesca Quint, strongly recommended against any such radical change.

- Notice that even those that opposed the reform argued that there was no *de facto* legal change whatsoever. What they complained about was a radical policy change that would be triggered by political considerations and the consequences it would have on the sector.

**Hypothesis 2:** *The changes to the public benefit test in the Charities Act 2006 were introduced through endogenous variables.*

- The legal community *per se* did not seem as interested in the origins of the reform, at least not as much as to the other policy nodes.

- Nonetheless, the legal community welcomed the general impetus for reform. In their submissions to the Joint Committee, the legal community stressed its approval for the organic development of the reform drive from within the sector.
Hypothesis 3: The origins of change to the public benefit test in the Charities Act 2006 can be traced across policy arenas.

- Independent members of the legal community were essential contributors of all reports, from the Deakin to the NCVO report. In a way, the legal community bridged between the state and the sector policy nodes, providing the legal prism for both nodes.

- It seems as though the legal community was involved in a different level of reform that concerned itself with the overall role of public benefit in the legal system. It warned of the consequences that might ensue upon implementation, singling out political aspects that could not be satisfactorily settled through legal means. The legal community largely stayed clear of the political debate itself. This sets the legal community apart from the sector and state policy nodes.
Chapter 7. The Media View

7.1 Introduction

The Punctuated Equilibrium Framework emphasises the role of the media as a key facilitator in bringing a reform agenda to the public; often, it can help to tip the balance of attention in favour of a reform endeavour and help it gain momentum on a governmental policy-making level. As Chapter 8 will show, individual interview accounts also referred to the media, in particular the print media, as an important actor in the reform process.

What was the view put forward by the print media? And what role did it play in the public benefit reform that was part of the Charities Act 2006? Two questions are central: Firstly, what can the media account tell us about the potential origins of the reform? Do the media corroborate the written accounts from the sector and the state? Or do they the point to a different sequence of events? The media account in particular will address the question whether there where any scandals involving charities that could have served as a exogenous shocks triggering the reforms.

Secondly, this chapter also endeavours to capture a sense of the actual content of the media account, in particular a sense of how the public benefit test was being presented and discussed. Was its technical-legal nature being understood? Was the media focus on independent schools to the exclusion of the legal issues at hand? What also needs to be explored is the perception and portrayal of the main nodes state, charity sector and legal community.

7.2 Data – Content Analysis of Newspapers

7.2.1 Study Design

To assess the role of the media, a content search was conducted via ProQuest across four major newspapers from 1997 to 2012. These included The Guardian, The Times, The Independent and The Financial Times. These papers were chosen because of their period
of coverage (including sufficient time before and after the Charities Act 2006), their different political ideology, and their style of reporting. Because the analysis is concerned with elite opinion rather than the *vox populi* on the public benefit debate, so-called tabloids were specifically excluded.924

**Descriptive Statistics**

First, several key word searches were conducted via ProQuest. They yielded a total of 9,345 articles with “Charit*” in the headline or in any part of the article.

![Charit* in the Headlines](image)

*Number of articles including "Charity" in Headline*

Table 7.2.1.a: Number of “Charit*” in Headlines.

Of these 9,345 articles, only 262 contained the words transparency or accountability either in their headlines or the main body of the article. Despite the emphasis on these two key words in the government and sector reports, “charities” do not seem to have received much attention in the printed press. A hand search yielded insufficient articles that related accountability and transparency to charity rather than mentioning the terms in a different, unrelated context.

---

924 More on the selection criteria and potential bias can be found in the section 7.5.Caveats.

925 Charit* in a Boolean search entails all words with the root “Charit-”, i.e. charity, charitable, charities, etc.
The same is true for public benefit, which was mentioned in 271 of the articles on charity, at any point in the written account or headline. While there was hardly any reporting on charities that entailed public benefit in the late 1990s and early 2000s. There is evidence of several significant spikes in articles on charities: Firstly, in 2004 which coincides with the proceedings of the Joint Committee on the Charity Bill. Secondly the time span between 2007 to 2009 that surrounds the implementation of the Charities Act 2006 on 1\textsuperscript{st} January 2008. And finally the years 2011 and (to a certain extent) 2012, in which there are recurring reports on the Upper Tier Tribunal proceedings Attorney General (Independent Schools Council) v Charity Commission.

![Table 7.2.1.b: Mentions of “public benefit” in selected newspapers.](image)

The frequency distribution across the different newspapers shows the Times and the Guardian to be the most prolific with 119 and 94 articles respectively. The Financial Times (32) and the Independent (26) have significantly fewer mentions of the public benefit test debate in their reporting. This is not a surprise because the Guardian offers a separate topical section on charities.
Table 7.2.1.c: Articles mentioning “public benefit” by newspaper.

**Coding**

As a second step, the 271 articles generated by the ProQuest Boolean keyword search were hand searched. The retrieved articles were read in their entirety to filter out articles that contained the key words but had a focus other than public benefit. 62 articles were not relevant according to this criterion, yielding a total of 209 articles reporting on the public benefit reform from 1997 until the end of 2012. 10 of these 209 articles specifically focused on Scotland and were kept separate from the English and Welsh analysis. The remaining articles were coded using the following categories.

<table>
<thead>
<tr>
<th>Code Category</th>
<th>Meaning</th>
<th>Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scandal</td>
<td>The article mentions any form of scandal involving a/several charity/ies that are associated with the public benefit reform.</td>
<td>Direct link between charity scandal and call for public benefit reform</td>
</tr>
<tr>
<td>Independent Schools</td>
<td>The article refers to the issue of fee-charging independent schools with charitable status.</td>
<td>Reference to charitable independent schools as main subject of the article; public benefit is seen through lens of independent schools</td>
</tr>
<tr>
<td><strong>Healthcare</strong></td>
<td>The article refers to the issue of fee-charging healthcare organisations with charitable status.</td>
<td>Reference to charitable healthcare organisations in any form (main subject or mere mention).</td>
</tr>
<tr>
<td>---------------</td>
<td>-------------------------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Reporting Type</strong></td>
<td>The form of the article.</td>
<td>Article, Letter, Commentary, Editorial, Interview</td>
</tr>
<tr>
<td><strong>Placement</strong></td>
<td>The part of the newspaper in which the article appeared as indicator of its relevance in the news of the day.</td>
<td>Page numbers coded into Front Page (page 1), front section (2-10) mid section (pages 11-50) and back (51 upwards).</td>
</tr>
<tr>
<td><strong>New</strong></td>
<td>The article’s description of the public benefit test.</td>
<td>New: Public benefit test has been “introduced” or “created” without any reference to previous test; public benefit test is described as “new”; this includes removal or presumption under the assumption that presumption was effectively exempting the first 3 heads of charity from public benefit test. Old: Article refers to previous public benefit conditions as part of charitable status test; suggests that presumption never existed or did not have any effect. N/A: No clear evaluation of the public benefit test’s origin in either direction.</td>
</tr>
<tr>
<td><strong>Evaluation</strong></td>
<td>The article’s overall evaluation of the public benefit test.</td>
<td>Positive: Article lauds public benefit test as necessary or socially desirable (directly or by quotations) or implies that it will make sure only “deserving” charities will receive tax benefits. Negative: Article refers to public benefit test as either inconsequential or harmful to any charity in particular or to charities in general (directly or by quotations); article describes the public benefit test as failed in theory and/or practice. N/A: No clear evaluation of the public benefit test in either direction.</td>
</tr>
<tr>
<td><strong>View of Charity Commission</strong></td>
<td>The article’s overall evaluation of the Charity Commission.</td>
<td>Positive: Article lauds Charity Commission as providing good guidance on public benefit (directly or by quotations) or implies that the Charity Commission is pursuing</td>
</tr>
</tbody>
</table>
socially desirable goals. Negative: Article refers to Charity Commission as either ineffective or wrong in law and/or politically biased (directly or by quotations). N/A: No clear evaluation of the Charity Commission in either direction.

Table 7.2.1.d: Coding criteria for content analysis.

7.3 Quantitative Analysis

The remaining total of 209 articles was distributed across the four newspapers following the same pattern as before the hand-search. Almost 40% of articles were published in the Guardian, with almost the same number of publications in the Times, only 13% in the Financial Times, and less than 10% in the Independent. Of the 10 articles focusing on Scotland, 8 were in the Times and 2 in the Guardian. The remaining two papers did not publish specifically on the public benefit reform in Scotland.

<table>
<thead>
<tr>
<th>Newspaper</th>
<th>Percentage of Total Coverage</th>
<th>Number of Publications</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Guardian</td>
<td>39.7%</td>
<td>83</td>
</tr>
<tr>
<td>The Times</td>
<td>38.8%</td>
<td>81</td>
</tr>
<tr>
<td>Financial Times</td>
<td>13.4%</td>
<td>28</td>
</tr>
<tr>
<td>The Independent</td>
<td>8.1%</td>
<td>17</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>100%</strong></td>
<td><strong>209</strong></td>
</tr>
</tbody>
</table>

Table 7.3.a: Coverage of “public benefit” by newspaper.

The articles retrieved through this search were predominantly news articles reporting on the policy reform and its progress. There were also a number of letters to the editor and opinion pieces, as well as interviews with key stakeholders from the Charity Commission.

---

\[^92e\] Deviations from 100% are due to one-decimal rounding.
and from within the sector. Neither ministers nor other government officials were interviewed.

<table>
<thead>
<tr>
<th>Article Type</th>
<th>Percentage of Total Coverage</th>
<th>Number of Publications (n=209)</th>
</tr>
</thead>
<tbody>
<tr>
<td>News Articles</td>
<td>72.2%</td>
<td>151</td>
</tr>
<tr>
<td>Letters to the Editor</td>
<td>17.2%</td>
<td>36</td>
</tr>
<tr>
<td>Comments/Opinions</td>
<td>7.7%</td>
<td>16</td>
</tr>
<tr>
<td>Interviews</td>
<td>2.4%</td>
<td>5</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>0.5%</td>
<td>1</td>
</tr>
</tbody>
</table>

Table 7.3.b: Types of articles on “public benefit”.

Predictably, the letter submissions were predominantly authored by key stakeholders involved in the process. These included David Lyscom (then Chief Executive of the Independent Schools Council), Andrew Hind (Chief Executive of the Charity Commission, 2004-2010), Dame Suzie Leather (Chair of the Charity Commission, 2006-2012) and Sir Stuart Etherington (Chief Executive of the NCVO since 1994). The remaining letter contributions came from other stakeholders, such as registrars of independent schools. The commentaries and opinion pieces were dominated by legal experts and key stakeholders (Sir Stuart Etherington authored three commentaries while Dame Suzie Leather, Lord Phillips, and then Headmaster of the Manchester Grammar School, Christopher Ray, published one each). With the exception of Lord Phillip’s commentary “Second Thoughts: On public schools, this charities bill changes nothing” which appeared in the Guardian, all commentaries present the public benefit test as a new test in its own right. Mirroring the general pattern of publications, two-thirds of commentaries were published during the time of the Charities Bill between 2004 and 2006.

927 Deviations from 100% are due to one-decimal rounding.
Timing and Priority

The number of articles published over time is one indication that media attention was highest during the time of the parliamentary scrutiny through the Joint Committee on the Charities Bill. It also coincides with the politicisation of the debate with a predominant focus on the role of independent schools. The distribution of the data also provides some insight into the relative priority of the public benefit reform across time. One of the articles was removed from the sample because its location was not indicated beyond a reference to the live link to the Financial Times Online. Thus the total number of remaining articles is 208.

<table>
<thead>
<tr>
<th>Article Location</th>
<th>Percentage of Total Coverage 929</th>
<th>Number of Publications (n=208)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Front Page (p.1)</td>
<td>6.3%</td>
<td>13</td>
</tr>
<tr>
<td>Front Section (pp. 2-10)</td>
<td>44.2%</td>
<td>92</td>
</tr>
<tr>
<td>Mid Section (pp. 11-50)</td>
<td>45.7%</td>
<td>95</td>
</tr>
<tr>
<td>Back (pp. 51ff.)</td>
<td>3.8%</td>
<td>8</td>
</tr>
</tbody>
</table>

Table 7.3.c: Location of articles in newspapers.

Front and mid-section articles are spread across the entire time frame, with the median in 2004. The back section articles were all published after 2008 and all in the Times. Front page articles provide the most telling insights because they are most likely to reach a wider audience. First of all, it is apparent that only the Guardian and the Times published front page articles on the public benefit reform.930

929 Deviations from 100% are due to one-decimal rounding.
930 The low number seems intuitive given the general news influx at the time; for a discussion on generalizability and representativeness, please refer to section 7.5 on Caveats.
Table 7.3.d: Titles of Front Page Articles on Public Benefit.

38.5% of the front page articles refer to scandals; conversely, 71% of all articles referring to charity scandals made the front page. One inference might be that scandals exerted a certain push for the reform. Independent schools were the main subject of 46% of the front-page articles on public benefit, while 38.5% reported on public benefit and charitable status in general. The remaining 15.4% addressed the status of religion. Most front page articles coincide with the timing of the Charities Bill discussion between 2003 and 2004. The most public benefit articles appeared in 2007.

The frequency and priority level of articles mirrors the debate on public benefit. News articles peak at the time of the parliamentary debate and the discussion within the Joint Committee. Regular contributors and the main subjects of the articles are all part of the

---

*Of course, scandals on any subject have a certain media appeal and pull in readership numbers.*
policy node. The media likely was a factor that spurred the public benefit debate, in particular in relation to education.

Trigger of Reforms I (Endogenous): Scandals
Reference has been made to scandals throughout the written evidence. However, there is no evidence or even mention of a particular scandal in England and Wales that could have triggered the reform. The media content analysis does not suggest that there was any scandal working as an endogenous shock. Only 3.3% of articles make any mention of scandals at all. And the earliest article referring to a scandal was published in 2004, much too late to qualify as a trigger of the reform. Two articles from 2011 reported on the Universal Church of the Kingdom of God that allegedly wrongfully claimed over £7 million in Gift Aid. 932 Another article from 2007 reported that investigations on independent schools and public benefit had been conducted, but all 14 institutions passed without any problems. That article, however, refers Scotland, namely to “bogus charities such as the high-profile Moonbeams organisation” which was “set up in 1992 but was suspended in December 2003 after it was discovered that only £70,000 of £3 million raised had gone to cancer victims and their families as intended”. 933 The remaining articles refer to “a number of scandals involving breast and children’s cancer charities” in Scotland 934. One article cautions that local councils might be too careless in their choices of charitable trusts running their leisure and culture services. 935

Overall, no clear timing or trigger emerges in the case of English charities, and there is altogether far too little evidence to corroborate the hypothesis that a scandal served as endogenous shock that set into motion the public benefit reform. There seems to be more and clearer information on Scotland, yet this should be taken with a grain of salt because they very few in number and are all written by the same author.

932 Bridge, M. “Church that coaxes people into debt received £8 million in public subsidy.” The Times, 2nd April 2011; Ellson, A. “Religious charities need more scrutiny.” The Times, 2nd April 2011.
935 Seddon, N. “Exercising Caution: Councils have been keen to allow ‘charitable’ trusts to run leisure and culture services, but are some charities in name only?” The Guardian, 11th April 2007.
External Trigger of Reforms II (Exogenous): Independent Schools and Education Policy

There seems to be more evidence concerning the dominance of the independent school question. Almost half of the articles (47%) focus specifically on independent schools and their charitable status based on the public benefit they do (not) provide. 45.5% of articles refer to public benefit itself as the main topic. Just 24.4% of articles that even mention healthcare and not a single article focused on the question of charitable healthcare organisations. The evidence neither confirms nor disconfirms the possibility that education policy served as an external influence (or “shock”) that set the reform process into motion properly. But it does support the conclusion that independent school debate dominated the media account.

Public Benefit Test – New or Old, Good or Bad News?

To assess how the media portrayed the public benefit test, the articles on Scotland were excluded from the analysis; the sample or articles was thus reduced to 199. Of these, a massive 79.4% report that the public benefit test was an entirely new test. Recollect from Chapter 3, this is not entirely accurately portrayed but the nuances and complexities of this issue are not addressed in the media account. Only 6.5% specifically mention public benefit as a part of the charitable status test even before 2006. Significantly, all of these articles referred either to the Charity Commission or a charity law firm as the source of this assessment. Sources claiming that the public benefit test was a new invention were predominantly attributed to either independent school organisations or voluntary sector organisations, such as the NCVO. 14.1% made no mention of whether the public benefit test was new or not.

---

936 Articles that predate the public benefit test introduced in the Charities Bill 2005 and the Charities Act 2006 were coded according to whether they make explicit reference to a public benefit test or not; i.e. an article that refers to “the public benefit test” in 1999 was coded as “old”.

240
<table>
<thead>
<tr>
<th>View on Public Benefit Test</th>
<th>Percentage of Articles</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newly introduced in 2006</td>
<td>79.4%</td>
</tr>
<tr>
<td>Existed pre-2006</td>
<td>6.5%</td>
</tr>
<tr>
<td>No comment on origin of PB test</td>
<td>14.1%</td>
</tr>
</tbody>
</table>

*Table 7.3.e: Opinion put forward on public benefit test.*

The articles were also analysed according to how they evaluated the public benefit test. A majority made no normative assessment of the public benefit test at all (40%). A largely similar number of articles (37.2%) welcomed the public benefit test as a positive step towards better monitoring of the charitable sector. They suggested that the public benefit test would ascertain that only those charities that deserved tax and other benefits would receive them. About one fifth (22.6%) criticised the public benefit test, either as badly drafted pre-2008 or without effect after its implementation in 2008. Two-thirds of negative evaluations were published after the Charities Act 2006 was passed. A clear majority of positive comments predated 2006. Equally unsurprising, almost 70% of those articles that criticised the public benefit test were referred to, or were authored by, an independent school or the Independent Schools Council.

<table>
<thead>
<tr>
<th>Evaluation of Public Benefit Test</th>
<th>Percentage of Articles</th>
</tr>
</thead>
<tbody>
<tr>
<td>Positive Evaluation</td>
<td>37.2%</td>
</tr>
<tr>
<td>Negative Evaluation</td>
<td>22.6%</td>
</tr>
<tr>
<td>No Evaluation</td>
<td>40.2%</td>
</tr>
</tbody>
</table>

*Table 7.3.f.: Evaluation of Public Benefit Test in Newspapers.*

The quantitative evidence provides one insight into the media views about the public benefit test: the majority of articles refers to it as a new test, and its effects vary from initially positive evaluations to more negative reviews roughly from the time of the Joint Committee report onwards. Qualitative extracts from the articles provide additional
context to this finding: they confirm the intuition that authors or sources, or sources, with a legal background with a legal background tended to see the public benefit test as pre-dating 2006. They were generally were more critical of its success while the Charity Commission and its representatives are assigned more positive evaluations.937

### A) Public Benefit Test: Old or New?

<table>
<thead>
<tr>
<th>Comment: NEW Public Benefit Test</th>
<th>Newspaper Reference</th>
<th>Background of Author/Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Before 2006, under charities legislation, the provision of education was automatically presumed to be an aim that was for the public benefit. Under the Charities Act 2006, however, that presumption was removed, and each charity now has to demonstrate and report on the public benefit that it provides.”</td>
<td>“Fee-charging schools fight to keep their charitable status” Burrows, Nick. The Times [London (UK)] 10 June 2011: 67.</td>
<td>Nick Burrows, Partner, Commercial &amp; Charity Law, Blandy &amp; Blandy LLP</td>
</tr>
<tr>
<td>“This week's story has centred on an odd-sounding term -- &quot;public benefit&quot;. This is an essential ingredient of what it means to be a charity. (...) Charities have always had to exist for the public benefit but some were presumed to do so -- religious and education charities and those that relieve poverty. Changes to charity law made in 2006 removed this presumption, creating a level playing field for all charities.”</td>
<td>Charities must be transparent about their public benefit Dame Suzi Leather. The Times [London (UK)] 17 July 2009: 65.</td>
<td>Dame Suzi Leather, Chief Charity Commissioner</td>
</tr>
<tr>
<td>“The guidance represents the latest stage in the commission's effort to change charity rules following the 2006 Charities Act. According to the commission's interpretation of the act, for the first time charities will have to show they are benefiting the public through their activities. (...)”</td>
<td>'Public benefits' test for charities: [LONDON 1ST EDITION] Turner, David. Financial Times [London (UK)] 16 Jan 2008: 5.</td>
<td>David Turner, Education Correspondent (Financial Times)</td>
</tr>
<tr>
<td>“Phil Hope, the charities minister, said: &quot;Providing public benefit is at the heart of charitable activity, and now all charities without exception will have to demonstrate their public benefit in return for”</td>
<td>Do more for poorer children or lose your charitable status, private schools are told: Sector must prove it has public benefits: pounds 100m a year in tax breaks at</td>
<td>Phil Hope, Charities Minister</td>
</tr>
</tbody>
</table>

---

937 Emphasis added by the investigator.
charitable status."

---

<table>
<thead>
<tr>
<th>Comment: OLD Public Benefit Test</th>
<th>Publication and Background of Author/Source</th>
<th>Background of Author/Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;In 2001 he was quoted as saying: &quot;If a cranky church or a public school, donkey sanctuary or playing field doesn't satisfy the general test of public benefit, then it is out.&quot; His comments pre-date a change in thinking that led to the public benefit test being introduced&quot;</td>
<td>Charity Awards' Outstanding Achievement award Ford, Emily. The Times [London (UK)] 12 June 2009: 60.</td>
<td>Michael Brophy, Chief Executive of Charities Aid Foundation</td>
</tr>
<tr>
<td>&quot;The 2006 Charities Act puts a new onus on charities, including 80% of private schools, to prove they are benefiting the public.&quot;</td>
<td>Private schools prepare to face tests on keeping their charity tax breaks: Bursaries and classes for local students demanded: Watchdog says rules likely to be in force next year Curtis, Polly. The Guardian [London (UK)] 29 Oct 2007: 13.</td>
<td>Polly Curtis, Education Editor (Guardian)</td>
</tr>
<tr>
<td>&quot;(...) the Charities Act 2006 seeks to address this concern and enhance the accountability of charities to the public. For the first time, the law will require each and every charity to demonstrate explicitly how it delivers public benefit.&quot;</td>
<td>Charities should be accountable to everyone for what they do: [LONDON 1ST EDITION] Leather, Suzi. Financial Times [London (UK)] 19 Feb 2007: 16</td>
<td>Dame Suzi Leather, Chief Charity Commissioner</td>
</tr>
<tr>
<td>&quot;&quot;Don't forget, we are taking away the presumption that has always been in place that education automatically confers public benefit, and therefore charitable status. That is a massive change from what was there before: every private school in Britain is going to have to justify public benefit for the first time.&quot;&quot;</td>
<td>Society: Marking out the territory: Ed Miliband, 'Brownite' third sector minister, insists that the idea of charities being major public service providers has been overplayed. He clarifies Labour's vision to David Brindle Brindle, David. The Guardian [London (UK)] 20 Sep 2006: 1.</td>
<td>David Brindle</td>
</tr>
</tbody>
</table>

Table 7.3.g: Newspapers comments indicating public benefit test as new.
“The Charity Act of November 2006 removed the presumption that charities relieving poverty or advancing education or religion are of benefit to the Public (…). The chairman of the Charity Commission, Dame Suzi Leather, and the chief executive, Andrew Hind, say: "All charities must have charitable aims (or 'purposes') which benefit the public. This is known as the 'public benefit requirement'. The Charities Act 2006 reinforces this requirement by explicitly including public benefit in the definition of a charitable purpose."

“The Charities Act 2006 has not altered the position. A charity must, of course, be established for the public benefit; but the Act itself provides that any reference to the public benefit is a reference to the public benefit as that term was understood in charity law before the Act.”

<table>
<thead>
<tr>
<th>Publication</th>
<th>Background of Author/Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>The history of charitable status: Letters to the Editor Edward Nugee. The Times [London (UK)] 02 Oct 2010: 23.</td>
<td>Edward Nugee, Queen’s Counsel at Lincoln's Inn</td>
</tr>
</tbody>
</table>

Table 7.3.h: Table indicating public benefit test as existing prior to 2006.

B) Public Benefit Test: Good or Bad?

<table>
<thead>
<tr>
<th>Comment: POSITIVE EVALUATION Public Benefit Test</th>
<th>Publication and Background of Author/Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>“The publication yesterday of the charities bill, which will deprive public schools of their charitable status unless they can show they are a &quot;public benefit&quot;, (…) was welcomed by the voluntary sector as &quot;the best Christmas present we could have hoped for&quot;. Stuart Etherington, chief executive of the National Council for Voluntary Organisations, said: &quot;We are particularly pleased that it retains a non-statutory definition of public benefit which will continue to be based on case”</td>
<td>Charities bill gets a warm welcome Rebecca Smithers and John Carvel. The Guardian [London (UK)] 22 Dec 2004: 9. Sir Stuart Etherington, CEO of the NCVO; Geraldine Peacock, Chief Charity Commissioner</td>
</tr>
</tbody>
</table>
The chairwoman of the Charity Commission, Geraldine Peacock, said: "This is the beginning of a new era for charitable action, one which releases potential and increases effectiveness."

“But she stands firmly by the commission’s guidance overall, going so far as to describe its effect on the charity sector as a "game-changer" in the way it has obliged trustees to define the public benefit of their organisations by reflecting on their essential mission. "I think it may be no coincidence that this has been at a time of increasing public trust and confidence in charities," she says.”

"What I hope is now clear for the public is that all charities are in the same boat and they will all have to be transparent about the public benefit they provide. I am confident that the British people will continue to support a charity sector that they have long valued but this support will now be based on evidence rather than assumption.”

“Charities may charge fees (even high fees) for the services or facilities they provide, but in order to demonstrate that they are operating for the public benefit they need to ensure that the opportunity to benefit from the work they do is available to those who cannot afford to pay. (…) We have said consistently that charities, including independent charitable schools, should have nothing to fear from the public benefit test. It is an opportunity for all charities to show the public the good work they do in return for the considerable tax breaks and advantages they receive.”

“Ms Chapman said that the new public benefit test would amount to a shift in the cultural divide between private and state schools. "What is new and will cause a shift in culture is that now trustees need to think about essentially why they are there, and what is it that organisation is".

<table>
<thead>
<tr>
<th>Law:</th>
<th>&quot;The chairwoman of the Charity Commission, Geraldine Peacock, said: This is the beginning of a new era for charitable action, one which releases potential and increases effectiveness.&quot;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Society: Interview Suzi Leather: Standing her ground: As the chair of the Charity Commission prepares to step down, she reflects on the hostility she has encountered.</td>
<td></td>
</tr>
<tr>
<td>Dame Suzi Leather, Chief Charity Commissioner</td>
<td></td>
</tr>
<tr>
<td>&quot;What I hope is now clear for the public is that all charities are in the same boat and they will all have to be transparent about the public benefit they provide. I am confident that the British people will continue to support a charity sector that they have long valued but this support will now be based on evidence rather than assumption.”</td>
<td></td>
</tr>
<tr>
<td>Charities must be transparent about their public benefit.</td>
<td></td>
</tr>
<tr>
<td>Dame Suzi Leather, Chief Charity Commissioner</td>
<td></td>
</tr>
<tr>
<td>&quot;Charities may charge fees (even high fees) for the services or facilities they provide, but in order to demonstrate that they are operating for the public benefit they need to ensure that the opportunity to benefit from the work they do is available to those who cannot afford to pay. (…) We have said consistently that charities, including independent charitable schools, should have nothing to fear from the public benefit test. It is an opportunity for all charities to show the public the good work they do in return for the considerable tax breaks and advantages they receive.”</td>
<td></td>
</tr>
<tr>
<td>Charitable schools should not fear public benefit test.</td>
<td></td>
</tr>
<tr>
<td>Andrew Hind, Chief Executive Charity Commission</td>
<td></td>
</tr>
<tr>
<td>“Ms Chapman said that the new public benefit test would amount to a shift in the cultural divide between private and state schools. &quot;What is new and will cause a shift in culture is that now trustees need to think about essentially why they are there, and what is it that organisation is&quot;.</td>
<td></td>
</tr>
<tr>
<td>Private schools prepare to face tests on keeping their charity tax breaks: Bursaries and classes for local students demanded: Watchdog says rules likely to be in force next year</td>
<td></td>
</tr>
<tr>
<td>Rosie Chapman, Director of Policy and Effectiveness at the Charity Commission</td>
<td></td>
</tr>
<tr>
<td>Comment: NEGATIVE EVALUATION Public Benefit Test</td>
<td>Publication and Background of Author/Source</td>
</tr>
<tr>
<td>-------------------------------------------------</td>
<td>------------------------------------------</td>
</tr>
<tr>
<td>&quot;Peacock could be in for a grilling. Ministers have promised that all charities - including those that charge high fees, such as private schools and hospitals - will face a public benefit test. But the commission, charged with carrying out the checks, has submitted evidence suggesting that it would not be able to override private schools' charitable status because the bill would not alter decisions based on case law - a position that would make the public benefit test pointless.&quot;</td>
<td>Society: Interview: A head for heights: Geraldine Peacock says she plans to bring creativity to the Charity Commission and, as its new chair, promises she won't be pushed around by ministers. Tash Shifrin believes her Shifrin, Tash. The Guardian [London (UK)] 07 July 2004: 6.</td>
</tr>
</tbody>
</table>

Table 7.3.i: Positive evaluations of public benefit test.
was needed to resolve the issue. (…) The report noted the definition of public benefit in a statement agreed by the Home Office and the Charity Commission.”

“The Government's law-making is deeply unsatisfactory (…).”

What does 'charity' mean? No one wants to say…:

[Final 1 Edition]


Stephen Lloyd, Senior Partner and Head of Charity and Social Enterprise at Bates Wells & Braithwaite

“Campaigners, led by the British Red Cross, among others, say that this does not go far enough. In a joint letter to Charles Clarke, the Home Secretary, they say that the public benefit test will have "minimal impact" on charities that charge high fees unless a more robust definition is drawn up.”

Fee-paying schools face challenge to charity tax break: [Final 3 Edition]


British Red Cross

“One influential charity, the Lawyer's Christian Fellowship, welcomed the reforms but also raised some concerns: "Overall, we are of the view that there should not be undue focus on the public benefit criterion...Charities do not 'produce' public benefit. They have purposes that are for the public benefit. Public benefit must be present in all charities, but where the advancement of religion is the purpose of the charity, the focus should be upon fulfilling this purpose rather than the production of public benefit.””

Faith, hope and the Charity Commission: [Final 1 Edition]


Lawyer's Christian Fellowship

“By making plain that charitable status will only be withdrawn in "exceptional circumstances" the commission's chair, Suzi Leather, has arguably weakened her hand in pushing private schools to go further. But it wasn't realistic to expect the commission to close the educational gap on its own (…). (…). The public benefit test may have a useful role, but that is a task it cannot do.”

Leading article: Charitable status: Two worlds collide

The Guardian [London (UK)] 17 Jan 2008: 34.

Dame Suzi Leather, Chief Charity Commissioner

“What these statements reflect is a broader tendency to regard charities as intrinsically good, and not needing further investigation. But this lack of scrutiny is bad, and results in worse performance of charities. (…)

Society: Measures of success: We give billions to good causes, but know little about whether our donations make a difference. It's time to start

Martin Brookes, Chief Executive of New Philanthropy Capital

---

Charity Commission, as official regulator, asks only if a charity is "for the public benefit", in the language of the new Charity Act. In other words, is it legitimately a charity? The commission does not ask - or assess - how much public benefit a charity provides."

""After all this do we have a magnificent piece of legislation? Hardly. (...) The real innovation is the definition of charity. Since 1601 the meaning has developed through case law. (...) The big change was supposed to be about public benefit. (...) Only charities with purposes beneficial to the community had to prove that they delivered public benefit. The Act changes this. It requires all charities to demonstrate that they deliver public benefit. Yet having gone so far the Government bottled out. It refused to define what public benefit means. It has left it to the Charity Commission to do this, based on the existing case law. That case law is, to put it mildly, problematic."

"Miliband is not encouraging. The bill, he says, is "robust" on the issue of public benefit, and while he and fellow ministers remain willing to consider improvements that would strengthen it without threatening unintended consequences, the new amendment sounds very like the one that failed previously."

Table 7.3.j: Negative evaluations of public benefit test.

Views of the Charity Commission

Most articles referred to the Charity Commission, which has a statutory duty to provide an authoritative interpretation of the case law on public benefit and to issue suitable guidance for trustees. Almost a third also commented on the Charity Commission’s performance: 10.6% lauded the Commission for its work, while 17.6% criticised it. The vast majority made no evaluation one way or another.
15 of the 21 positive evaluations were authored or referred to current or former members of the Charity Commission or members of government. About half (17 out of the 35) negative evaluations, by contrast, were authored by independent schools or the ISC. As with the evaluations of the public benefit test, timing matters: 82.9% of the negative evaluations were published after 2006.

<table>
<thead>
<tr>
<th>Evaluation of Charity Commission</th>
<th>Percentage of Articles</th>
</tr>
</thead>
<tbody>
<tr>
<td>Positive Evaluation</td>
<td>10.6%</td>
</tr>
<tr>
<td>Negative Evaluation</td>
<td>17.6%</td>
</tr>
<tr>
<td>No Evaluation</td>
<td>71.9%</td>
</tr>
</tbody>
</table>

*Table 7.3.k: Evaluation of Charity Commission in Newspapers.*

**Interactions among Variables**

Clearly discernable relationship patterns emerge among the variables considered. Those who reported on the public benefit test as a new creation, for instance, were three times more likely to evaluate the test in a positive light than those who thought of it as an old test. Conversely, those who portrayed the test as having existed prior to the Charities Act 2006 were almost twice as likely to evaluate the test negatively compared to those who thought of it as new. Thus, an allegedly “new” public benefit test received overall more positive reviews compared to a public benefit test perceived to be old news. This makes intuitive sense in that those who wrote about the public benefit test as newly introduced policy also saw it as a policy introduced to achieve more justice within the voluntary sector. Authors who saw the test as old also criticised the “new” interpretation of the test as either less effective than assumed or simply as a wrong representation of the case law. Once again the identity of the author suggests that a legal background is a deciding factor.
A similar though far less pronounced relationship can be shown between views about the origin of the public benefit test and the evaluation of the Charity Commission. Those who wrote about the test as existing pre-2006 were almost twice as likely to criticise the Charity Commission compared to those who thought of the public benefit test as a new invention. This might be attributable to the point of view and background of the authors or sources cited: they had a predominantly legal background. Unlike their non-legal colleagues, these legal authors were in a position to a) understand the status quo of charity law on public benefit before the 2006 Act and b) to criticise the Charity Commission for its interpretation of the case law.

<table>
<thead>
<tr>
<th>Evaluation of PB Test if NEW</th>
<th>Evaluation of PB test if OLD</th>
<th>Evaluation of PB test overall</th>
</tr>
</thead>
<tbody>
<tr>
<td>Positive</td>
<td>47.5%</td>
<td>15.4%</td>
</tr>
<tr>
<td>Negative</td>
<td>23.4%</td>
<td>38.5%</td>
</tr>
<tr>
<td>N/A</td>
<td>29.1%</td>
<td>46.2%</td>
</tr>
</tbody>
</table>

*Table 7.3.1: Evaluation of Public Benefit Test in Newspapers.*

There is also a strong relationship between the evaluation of the public benefit test and the evaluation of the Charity Commission. It is striking that not a single article that criticised the public benefit test also evaluated the Charity Commission in a positive light. In fact, more than half of those who gave negative assessment of the public benefit test also criticised the Charity Commission. That compared to less than 4% of those that lauded the public benefit test.

<table>
<thead>
<tr>
<th>Evaluation of Char Com if NEW</th>
<th>Evaluation of Char Com if OLD</th>
<th>Evaluation of Char Com overall</th>
</tr>
</thead>
<tbody>
<tr>
<td>Positive</td>
<td>12%</td>
<td>7.7%</td>
</tr>
<tr>
<td>Negative</td>
<td>18.4%</td>
<td>30.8%</td>
</tr>
<tr>
<td>N/A</td>
<td>69.6%</td>
<td>61.5%</td>
</tr>
</tbody>
</table>

*Table 7.3.m: Evaluation of Charity Commission according to Attitude towards Public Benefit Test (new or old).*
The Charity Commission was both interpreter of the public benefit test and author of the guidance documents. It is therefore not surprising that views on the Charity Commission would be closely associated with evaluations of the test itself.

<table>
<thead>
<tr>
<th></th>
<th>Evaluation of Char Com if PB positive</th>
<th>Evaluation of Char Com if PB negative</th>
<th>Evaluation of Char Com overall</th>
</tr>
</thead>
<tbody>
<tr>
<td>Positive</td>
<td>20%</td>
<td>0%</td>
<td>10.6%</td>
</tr>
<tr>
<td>Negative</td>
<td>3.75%</td>
<td>55.6%</td>
<td>17.6%</td>
</tr>
<tr>
<td>N/A</td>
<td>77.5%</td>
<td>44.4%</td>
<td>71.9%</td>
</tr>
</tbody>
</table>

*Table 7.3.n: Evaluation of Charity Commission according to Attitude on Public Benefit Test (good or bad).*

The reverse also holds: a positive evaluation of the Charity Commission makes a positive evaluation of the public benefit test far more likely. Indeed, not a single article that evaluated the Charity Commission positively went on to criticise the public benefit test. By contrast, 76.2% of those who praised it also criticised the Charity Commission, compared to 71.4% of articles negatively reported about the public benefit test.

<table>
<thead>
<tr>
<th></th>
<th>Evaluation of PB Test if Char Com Positive</th>
<th>Evaluation of PB test if Char Com Negative</th>
<th>Evaluation of PB test overall</th>
</tr>
</thead>
<tbody>
<tr>
<td>Positive</td>
<td>76.2%</td>
<td>8.6%</td>
<td>37.2%</td>
</tr>
<tr>
<td>Negative</td>
<td>0%</td>
<td>71.4%</td>
<td>22.6%</td>
</tr>
<tr>
<td>N/A</td>
<td>23.8%</td>
<td>20%</td>
<td>40.2%</td>
</tr>
</tbody>
</table>

*Table 7.3.o: Evaluation of Public Benefit Test according to Attitude towards Charity Commission.*

### 7.4 Qualitative Analysis

#### The “So what?” Question

The thesis began with commentary about why the public benefit test was important. But how did the media address this question? Overall, the newspaper accounts suggest that charities matter because of their vital role for civil society. As former Chief Charity Commissioner Richard Fries wrote in 1999:
[t]he essence of charity – the commitment to the public benefit and the independent responsibility of trustees – is still the right basis for a healthy, diverse civil society in which individuals can contribute to the community. But it must be relevant to the modern world; people must have confidence in it. That is the Charity Commission’s aim.939

Stephen Lloyd echoes Fries’s impression upon the passage of the Charities Act 2006, lauding it as

(...) the first major legislative reform to the meaning of charity since 1601 when the Virgin Queen was at death’s door. Of course, there have been statutes on charities in the intervening period but none has dealt with the fundamental question of what it means to be a charity. (...) It’s an important issue because charities play a fundamental part in civil society. They contribute 3 per cent of GDP and at least a million people volunteer to serve as trustees – charities touch every corner of British society.940

Then Home Office minister Fiona Mactaggart was quoted in 2004 as saying that “[t]he UK’s charity laws are in need of urgent modernisation (…). It is important that charities are properly regulated and that the public has confidence in the system. That’s why the Bill establishes that public benefit is the bedrock of charitable status.”941

Discrepancies between the Legal and Public Understanding of Charity

The importance of the subject matter, the fact that they play an important role for civil society, has not fundamentally changed ever since the 1950s. Consequently, this by itself


cannot serve as an explanation for why the reform of public benefit was necessary. One line of argument that seems to dominate the media account is the mismatch between the popular understanding of charity and its technical legal counterpart in charity law, based on the Preamble to the Statute of Elizabeth and Macnaghten’s 19th century rationalisation in Pemsel. NCVO Chief Executive Stuart Etherington bemoaned the complexity of the legal definition and suggested that public benefit is the tool to address this mismatch: “There is evidence that society does not have a clear view on what is and is not charitable. There is public support for using “public benefit” as a measure by which to judge charities. There is overwhelming backing for the changes within the voluntary sector.”³⁴ Etherington also emphasised that this view was endorsed by Charities Bill Coalition in order to “preserv[e] public trust and confidence in the voluntary sector” ³⁵.

The Guardian invited its readers to tackle the mismatch first hand:

Can you spot the odd one out among Amnesty International, Greenpeace and Eton College? Easy: only Eton, the famously exclusive public school for the privileged children of the ultra-wealthy, is a registered charity. If you’re surprised by this, you are not alone. As the government prepares to launch the biggest shake-up of Britain’s charity laws for 400 years, research commissioned by Society Guardian suggests there is a huge gulf between what the public thinks are – and ought to be – charities, and the organisations that actually have charitable status. This mismatch is important because the definition of what can be a charity is at the heart of the draft charities bill, expected next week. The draft bill is supposed to

modernise charity law and, ministers are eager to emphasise, maintain public confidence in charities.\textsuperscript{944}

Comparisons, such as the one presented in the Guardian, figure prominently in the media – albeit often without a clear indication of sources. Particularly popular was the juxtaposition between Amnesty International, which did not qualify as a charity because of its political activism, and the Royal Opera House, which has charitable status as an arts organisation. The Guardian attributed this popular comparison to the Prime Minister’s Strategy Unit:

\textit{Among the shortcomings listed by the unit were the restrictions that the current four categories of charity create, the confusing lack of clarity of the law and the need to modernise the charity commission. Absurdly, the Royal Opera House is a charity, but Amnesty International, the winner of a Nobel peace prize, is not. (Human rights were not on the political agenda in 1601.)}\textsuperscript{945}

However, not everyone believed that that the mismatch between definitions of charity was an issue that needed to be addressed, or the true reason for the reform. Thus, Alice Miles wrote in the Times that

\textit{(…) the Prime Minister’s strategy unit recommended two years ago that a new charities Act should attempt a fresh statutory definition of charity to clear up the confusion; the Bill will be published tomorrow. The review was supposedly prompted by a desire to encourage more charitable donations by coming up with a list of categories that makes sense to the public. I don’t believe that. When have you ever heard a member of the public protesting that animal welfare is not a}

\textsuperscript{944} Shifrin, T. “Benefit trap: Private schools can currently claim the tax breaks of charitable status, yet pressure groups can't. Tash Shifrin reports on whether the forthcoming charities bill will address this imbalance.” \textit{The Guardian}, 19 May 2004.

\textsuperscript{945} The Guardian. “Reform begins at home.” 29 Nov 2003.
specifically listed "charitable purpose", but falls under the catch-all heading of "other purposes beneficial to the public"? Thought not.\textsuperscript{946}

Despite the healthy dose of cynicism, Miles’s doubts do not seem unfounded. As will be discussed in Chapter 8, the interview data also questioned how important it was for lay people to understand the legal definition of charities. The mismatch in definition was certainly widely discussed, in particular among voluntary sector actors such as the NCVO. But there is no clear evidence about whether the discrepancy really was a sufficient impetus to trigger the public benefit reform.

Endogenous Shocks: Scandals

The policy change frameworks PEF and PDF both suggest that shocks do play a role in triggering policy change. For PDF, exogenous shocks are effectively the sole impetus for change. PEF places less emphasis on the influence of such exogenous over endogenous shocks and does not attribute a “make or break” character to them.

The media account introduces several possibilities inducing that exogenous shocks might be at work. Two of them in particular emerged across the narrative: charity scandals (endogenous) and education policy (exogenous). Scandals in the media account were mostly not specified precisely; and the few articles that did refer to scandals never pick up on the same events. One article referred to ITV and its fiddling with TV phone-in statistics for charitable donations\textsuperscript{947} while others were content to mention vaguely “a number of scandals” in Scotland.\textsuperscript{948}

These accounts are put into perspective by Richard Fries, who cautions that “[i]nevitably, serious malpractice attracts most public interest, but I must stress that this does not

\textsuperscript{946} Miles, A. “Beware acts of charity that benefit lawyers” \textit{The Times}, 26 May 2004.

\textsuperscript{947} Brookes, Martin. “Measures of success: We give billions to good causes, but know little about whether our donations make a difference. It's time to start holding charities to account, says Martin Brookes.” \textit{The Guardian}, 21 Nov 2007.

\textsuperscript{948} Macleod, A. “Private schools confident about charity status.” \textit{The Times}, 10\textsuperscript{th} June 2005; Macleod, A. “Schools must be 'open' to keep charity status.” \textit{The Times}, 3\textsuperscript{rd} June 2004.
reflect the balance of what we find among charities and therefore of our work.”
Judging from the low number of reported scandals in relation to public benefit (see preceding section 7.3 Quantitative Analysis), Fries’s view seems the most convincing.

Exogenous Shocks: Independent Schools and Education Policy
Alternatively, the media account provides far more data concerning the role of education policy. There is no question that independent schools and their charitable status dominated the media narrative, much like the parliamentary (and any other debate, for that matter) outside of strictly legal circles. The newspaper articles, however, went one step further. They did not just suggest that the charity law debate had been dominated by the topic of independent schools, Indeed, some articles suggested that charity law policy had been captured by education policy. The implication was that the independent school debate might qualify as an exogenous shock that triggered and shaped the public benefit debate. It was a lightning rod.

The Times’s Alice Miles and Helen Rumbelow quoted Dame Suzi Leather in a portrayal of the then Chief Charity Commissioner:

[The debate on the charitable status of independent schools] is one of the hottest of political potatoes, handed to an unknown and unelected head of a dull-sounding regulator. But if Labour wanted Dame Suzi to wage a class war on its behalf, it may have not quite got what it bargained for. Speaking from her London office, with a view of Parliament in the background, she said: “You can’t drive changes in education policy through charitable status.” That will be news to ministers trying to do just that. “I know lots of people have lots of ambitions for what will be done as a result of the public benefit changes,” Dame Suzi said. “But essentially we are concerned with charity law and charitable status. So in the same way that we are not

---

trying to secularise British society (...) in the same way, nor I think
can we be trying to achieve political changes that rightly belong to
the political arena and ministers and government departments.950

The Financial Times picked up on Leather’s stand and reported that “[s]he also stressed
that the new public benefit test would not be used to browbeat the sector into supporting
the government’s education programmes.”951 This was contrasted with then education
secretary Alan Johnson’s expectations for “private schools to back academies and trust
schools as a quid pro quo for their charitable status”.952 Yet, many articles argued that
“removing charitable status from high fee-charging schools is something that should be
left to parliament, not a quango, in a modern social democracy”.953

Leather recognised that it may well impossible to “take the politics out of the status of
independent schools” while “there is sense in taking the party politics out of it. But
there’s indisputably a political, with a small ‘p’.” It’s a very fine distinction.”954 The
distinction might indeed have been too fine, because the Conservatives eagerly
participated in the debate along party political lines. Richard Garner from the
Independent reported that the Conservatives had pledged that, if elected, “[a] Tory
government would hold immediate talks with the Charity Commission to persuade it to
soften its line on reviewing independent schools’ charitable status”.955

Yet, the press also pointed out the danger that hid in the independent schools’ dominance
of the public benefit debate. The Guardian reported that

950 Miles, A. and H. Rumbelow. “The Dame who'll give private schools a lesson in what charity really
954 Miles, A. and H. Rumbelow. “The Dame who'll give private schools a lesson in what charity really
955 Garner, R. “Tories would let public schools keep charitable status, says Gove.” The Independent, 24 Dec
2009.
Despite the potentially sweeping effect, the debate has been dominated by the effect on one sector: education. For many of those who pay school fees the reason might seem obvious – if charitable tax breaks were withdrawn, fees will go up. But that is also true of opera tickets. What makes independent schools different is that they do not just produce social benefits – in terms of education and exchequer savings – but also social costs.956

Fiona Mactaggart had cautioned against this risk already back in 2004: “To focus on the “very narrow” issue of private schools was to run “the huge risk of missing the point” of the reforms, which addressed “whole parts of our community, social and public services””.957 Similarly, the coverage of the Prime Minister’s Strategy Unit’s first discussion of public benefit hinted to the divisiveness of the independent school question three years earlier: “The PIU is understood to be “struggling” (in the words of one participant) with what to do about private schools which are charities.”958

A struggle it might have been, but the press also pointed out that the independent schools sector bent over backwards to prepare for the new public benefit scrutiny: “schools forked out £207m in bursaries and awards to children from less well-off homes – a 25 per cent increase on the previous year”959 by 2009. And in 2011, the Times referred to the ISC in suggesting that “[s]pending on bursaries in schools represented by the ISC has increased by nearly Pounds 100 million since the Charities Act 2006 which introduced the “public benefit” test”960. Yet, it was also noted that these increases were “still dwarfed by the 699.5m these schools spend on new buildings”961.

957 Frith, M. and N. Morris. “The eccentric world of British philanthropy; Ministers revealed plans yesterday to tidy up 400 years of charity legislation. But they will struggle to iron out the many anomalies still found in the world of British charities.” The Independent, 28 May 2004.
The evidence is not clear and Dame Suzi is the only Charity Commission spokesperson to refer to such a hijacking of the charity law agenda. It should be noted, however, that the timing of the reports only commences at the point of the parliamentary debate; the politicisation around the issue of independent schools might have been foreseen earlier. As will be discussed in Chapter 8, many stakeholders foresaw this development. The evidence shows that the public school debate was a powerful driver. But the politicisation of the technical law reform it ushered did not come to full fruition until 2003/4. Public school policy thus shaped the form and fate of the public benefit reform from the parliamentary stage onwards, but it was not its original source. Rather, the media evidence suggests that public schools kept the charity law reform debate going after it had lost its main momentum in the early 2000s.

Exogenous Influence: New Labour Ideology

Party politics did not just surfaced in the context of independent schools; the newspaper account also addresses the role of New Labour’s ideology after Tony Blair came to power in 1997. Blair is reported to “announce[e] the PIU study of charity law and regulation in July [2001]” because “[c]harity law would need reform if the role of non-profit bodies in providing public and social services expanded”, a key feature of New Labour’s approach that was embodied in the Compact.962

A central figure behind the Compact, Commission Chair Nicholas Deakin, described the shift in Labour’s attitude to charities in an interview with David Brindle from the Guardian:

“When I was a voluntary sector regional chair in the Midlands in the 1980s, the bane of my life was Labour councils that would have nothing to do with voluntary sector bodies, which they associated with Tory ladies in flowery hats and that sort of stuff,” Deakin says. (…)

---

By contrast, Labour’s then spokesman on the sector, Alun Michael, committed his party to the whole package [of charity law reform].”\textsuperscript{963}

Brindle’s interview with Deakin, however, seemed to deny any direct influence of the blossoming New Labour ideology on the report:

*Those were the dying days of Conservative rule and it is easy, in retrospect, to think that change was in the air and the commission was playing sweet music to an appreciative Labour gallery. Not so, insists Deakin. After four straight Tory general election victories, he and his colleagues were counting no unhatched political chickens: the commission went out of its way to write a report directed as much at the then government as at Tony Blair’s opposition.*\textsuperscript{964}

A poorly kept secret, the animosity between Tony Blair and his Chancellor of the Exchequer Gordon Brown was also reported in the press. In a 2006 portrayal of the then newly appointed Charity Minister Ed Miliband, the relationship between Blair and Brown is depicted in the following words:

*Coming from someone seen as being very close to Brown, should we detect a sea change? Miliband is far too canny to be drawn on the continuing Downing Street drama. The prime minister and chancellor have both expressed great enthusiasm for the work of the third sector, he rehearses; their commitment is shared. But there can be no doubt that his words will be subject to close forensic analysis among voluntary and community organisations engaged currently in a*

\textsuperscript{963} Brindle, David, “Change agent: Nicholas Deakin is the architect of voluntary sector modernisation. David Brindle hears how his vision has almost reached fruition - and his concerns over the charities bill”, *The Guardian* [London (UK)] 15 Sep 2004: p.10.

\textsuperscript{964} Brindle (2010).
The newspaper account did not identify the advent of New Labour as a factor that determined the timing and extent of the public benefit reform. There is, however, an overlap between New Labour thinking and prominent New Labour personalities and the charity reform node. From the media account alone, it is not possible to determine how public benefit law reform fit within the overall New Labour agenda beyond its relevance for education policy (and thus the debate on the status of fee-paying schools). This will be revisited in the interview data presented in Chapter 8.

Origins of the Public Benefit Reform

What can the press account tell us about the origins of the idea of reforming public benefit to address the challenges of charity law? The newspapers were quite consistent in their attribution and refer to two sources only: the Deakin report of 1996 and the Prime Minister’s Strategy Unit (PMSU, first called the Performance and Innovation Unit, PIU).

The first articles from 1996 indicate that the Deakin report

(...) calls for a new definition of charity as an organisation providing “public benefit”. It suggests this change of status should be used as a platform for other changes ranging from the structure of charities to their relationship with government and business.”

The report, which made the Times’s front page later that year, was said to “recommen[d] that there should be extensive public debate leading to a redefinition of the term “charity”, based on the concept of public benefit.”

---

965 Brindle, David, “Marking out the territory: Ed Miliband, 'Brownite' third sector minister, insists that the idea of charities being major public service providers has been overplayed. He clarifies Labour's vision to David Brindle.” The Guardian, 20 Sep 2006.

966 Suzman, M. “Radical change to charities proposed”, Financial Times, 09 July 1996.

967 Hobson, R. “The old question: what exactly is a charity?” The Times, 03 Dec 1996.
Almost a decade later, Sir Stuart Etherington referred to the Deakin report as the origin of the public benefit reform in one of his frequent Guardian articles. Etherington traced a direct line from the Deakin report to the Charities Bill:

In 1996, Nicholas Deakin and his commission’s far-sighted report set a series of clear policy objectives that it believed would put the third sector at the heart of our society with a modern legal and fiscal framework. It included proposals that, if implemented, would ensure that voluntary and community organisations were open, accountable and delivering the highest standards. The government and the sector have worked closely together to implement this agenda. Deakin has seen his recommendations gradually being acted upon – from new tax reliefs, to quality standards. The last remaining major recommendation of the commission to be implemented is its belief that public benefit should be at the heart of charity law.\footnote{Etherington, Stuart, “Changes to charity law must not be put at risk by rows over a public benefit test, says Stuart Etherington”, \textit{The Guardian}, 15 Sep 2004: p.11.}

Intriguingly, the first mention of the PMSU report “Private Action, Public Benefit” referred to the Scottish McFadden report, hinting at a possible connection between the Scottish and the English reports. This link is unfortunately not further explored in any other article. It also pointed to the close collaboration with the NCVO already in the early days of the reform process:

\textit{The government is to order a review of charity law in England (...). The review will be undertaken by the Whitehall performance and innovation unit (PIU). It will shortly announce that it is to conduct a six-month scrutiny of the legal and regulatory framework of the charitable sector, following hard on the heels of the McFadden commission in Scotland. The unit’s findings could result in far-reaching legislative changes. Led by Geoff Mulgan, the PIU operates}
out of the Cabinet Office at the behest of the prime minister and the Treasury. Its reports are seen to reflect government policy and often form the basis of a white paper. Margaret Bolton, head of policy at the National Council for Voluntary Organisations (NCVO), is to be seconded to work on the review.969

A few months later in 2001, the Guardian reported on the central tenet of the report, based on

(...) the conclusions of the performance and innovation unit (PIU), a Cabinet Office think tank headed by Geoff Mulgan, who is also the prime minister’s special adviser on strategy. (...) The PIU is set to recommend that charitable status is only accorded organisations that meet a test of “public benefit”. In future a charity would have to deliver benefits to the community at large not just people associated with it.970

After its publication, the PMSU elaborated on its motivations, citing that

[i]ncreasing public trust and confidence in the voluntary sector is at the heart of what is the first review of charity law and regulation for 400 years. The government believes that public support is imperative to secure charitable donations and to help charities play a larger role in delivering public services. “We want the sector to be successful, and a lot depends on public trust and confidence,” says the strategy unit spokesman. As well as tougher regulation of fundraising, the review proposes to achieve this boost to trust and confidence by

---

widening the definition of charity as “an organisation providing public benefit” (...).  

Recall that the content analysis conducted here using data dating back to 1st January 1996. Given the Deakin Commission’s report publication in 1996, it seems reasonable to assume that this was the origin of the public benefit reform. There is no reference to earlier reports in the media. The account of the press was thus that the public benefit reform began with the NCVO sponsored, but independent, Deakin Commission on the Future of the Voluntary Sector and was then carried into legislation by ways of the PMSU under Geoff Mulgan. Both Deakin and Mulgan kindly agreed to be interviewed on the matter and those interviews shed more light on the veracity and completeness of the newspaper account (Chapter 8).

Policy Nodes
Locating the origin of the public benefit reform as a policy issue is one thing; mobilising sufficient support and pushing for actual policy formulation, legislation and implementation is an entirely different beast. PEF suggests that policy issues spread across independent policy nodes, forming a new and overarching node that can successfully push for reform once a critical number has been reached. The media account is consistent with this hypothesis.

Thus, the Guardian reports that “Deakin and [Labour’s Alun] Michael had been meeting from time to time during the commission’s year-long work.” Moreover, Nicholas Deakin’s background and connections were also reported as facilitating the reform process: his

---

971 Benjamin, A. “Trust or bust: Alison Benjamin on a charity law shake-up that aims to reassure the public by promising tough regulation of fundraising.” The Guardian, 02 Oct 2002.
972 Such as for example the minority opinion in the Goodman Commission report of 1952.
973 Brindle, David, “Nicholas Deakin is the architect of voluntary sector modernisation. David Brindle hears how his vision has almost reached fruition - and his concerns over the charities bill.” The Guardian [London (UK)] 15 Sep 2004: p.10.
(...) experience played a key role in preparing the ground so fruitfully for the voluntary sector. For while he was at the time professor of social policy and administration at Birmingham University, and was best known for his academic work on the inner cities and race, he had been a Whitehall civil servant and had led the central policy unit at the former Greater London Council.\footnote{Brindle, David, “Nicholas Deakin is the architect of voluntary sector modernisation. David Brindle hears how his vision has almost reached fruition - and his concerns over the charities bill.” The Guardian [London (UK)] 15 Sep 2004: p.10.}

Describing the policy reform process from the parliamentary stage onwards, the Times’s Stephen Lloyd even suggested that

\[ \text{[i]f ever a piece of legislation should have been an exemplar of parliamentary best practice it is this. There was the equivalent of a White Paper (a strategy unit report); this was then subject to extensive consultation before a Bill was considered by the Joint Scrutiny Committee of the Lords and Commons. The Government responded and issued an amended Bill that was discussed at length in the Lords. After the last election this Bill was reintroduced and subject to further scrutiny in the Lords and then the Commons.} \] \footnote{Lloyd, S. “What does 'charity' mean? No one wants to say...” The Times, 12 Dec 2006.}

Finally, at the stage of implementation, even the Act’s later critic, Jonathan Shepherd, CEO of the ISC, applauded the Charity Commission for having “engaged in “genuine consultation” (...)”.\footnote{Curtis, P. and D. Brindle. “Do more for poorer children or lose your charitable status, private schools are told: Sector must prove it has public benefits: pounds 100m a year in tax breaks at stake in new guidance.” The Guardian, 16 Jan 2008.}

Letters to the editor offered insights into certain interactions that might have escaped the written account of the final documents. Thus, Alistair Cooke, who was General Secretary of the Independent Schools Council from 1997 to 2004, wrote to the Times that
the Charity Commission has made it clear that independent schools will be allowed to prove their public benefit flexibly in a variety of ways rather than being obliged to provide bursaries. This is exactly what I agreed with Tony Blair’s advisers in 2003. Our fear was that Gordon Brown would try to find a way of imposing harsher conditions.977

A slightly more exasperate testament to the widening node over the course of the policy process was given by the NCVO’s Sir Stuart Etherington in the Guardian:

At first glance, [the public benefit reform] seems a relatively simple thing to do. But it has taken us nearly six years, a sector-led commission, two government reports, several consultations, a parliamentary scrutiny committee, the on-going campaigning of more than 40 charities and the support of thousands more just to get us here.978

The newspaper data thus corroborates the written account. There is extensive evidence in the various commissions and reports that the role of policy node spread was crucial for the development of the reform. Jointly, different policy nodes allowed the public benefit issue to gain momentum and make it past the parliamentary hurdle (and the independent schools distraction). The reports by Charity Commission and the Joint Committee on the Charities Bill confirm this conclusion.

Views about the Charity Commission

Much discussion within the press also hinged on the role of the Charity Commission, in particular its then Chief Charity Commissioners Geraldine Peacock who was succeeded in 2006 by Dame Suzi Leather. Defending the Charity Commission against the outburst

of criticism it collected in its unthankful position as implementer of a precarious political compromise, Peacock is quoted by the Guardian to say that

\[
\text{people who want to be mischievous make the presumption that nothing can happen or that the Charity Commission has a fixed view"}, \text{ while the situation has “not been helped by certain parts of submissions the Charity Commission has made being quoted out of context”}.^{979}
\]

Leather in particular was subject to such misquotations and generally received a rather vitriolic treatment by the press due to her proximity to the Labour party and implications of political cronyism. Perhaps this treatment was not entirely because of her involvement in the Charities Act 2006 and her political convictions. Prior to her appointment to the Charity Commission, she acted as chair of the Human Fertilisation and Embryology Authority and was instrumental in legalising IVF treatment for same-sex couples. In a Times portrayal, Dame Suzi was described as “appear[ing] to be lining up (…) to be one of the most unpopular people in England in a year’s time –at least among a vocal constituency of middle-class people struggling to go private” because of the Charity Commission’s ambitious agenda regarding the implementation of public benefit.\(^{980}\)

Despite her controversial position, the Times article points out

\[\text{(...)} \text{a surprising twist on this particularly difficult thing [independent schools and charitable status]}:\text{ she isn’t going to make any of the judgments on individual private schools whether they have passed the public benefit test or not –herself. “The decisions that will be made about independent schools are decisions that I cannot personally take part in.” Why? Because her daughter, the last of her three children}\]

\(^{979}\) Shifrin, T. “A head for heights: Geraldine Peacock says she plans to bring creativity to the Charity Commission and, as its new chair, promises she won't be pushed around by ministers. Tash Shifrin believes her.” \textit{The Guardian}, 07 July 2004.

still in school, goes to a private school near their home in Exeter. “So clearly that’s a conflict of interest.” Is it really? Wouldn’t having a child at a state school be a conflict of interest too? Instead, John Williams, a commissioner on the Charity Commission, will be in charge. For the record, he and all his children went to private schools. But Dame Suzi reckons that, since she is still paying fees, that counts as a financial interest: “We’re very strict on conflicts.”

Leather’s exclusion from the proceedings provides yet another indication of the politicisation that the topic of public benefit had received by the time the Charities Act 2006 was passed. The pressure increased even further during the phase of scrutiny by the Public Administration Select Committee:

Bernard Jenkin had just admitted, parliament had “rather ducked” the thorny issue of defining the public benefit of a charity. But why, asked Dame Suzi Leather, did the Charity Commission not elect to duck it too? Fixing him with a steely glare, she replied: “Because you asked us not to.”

However, Dame Suzie pointed also out that despite the criticism from within and outside Parliament, “public trust and confidence in charities [had been] rising and public recognition of the commission itself [was] up to 55% from 46% in 2005.”

By 2011, the Charity Tribunal had pronounced its ruling on the ISC case, attacking the Charity Commission as having misinterpreted the case law, and striking down parts of its public benefit guidelines for fee-charging charities. The public benefit reform had failed in its implementation. Despite the Commission’s best efforts to make the best of an

981 Miles and Rumbelow (2007).
982 Brindle, D. “Interview Suzi Leather: Standing her ground: As the chair of the Charity Commission prepares to step down, she reflects on the hostility she has encountered.” The Guardian, 11 July 2012.
983 Brindle (2012).
impossible situation, it left the battlefield defeated. The newspaper report confirmed that “[t]he commission has now abandoned further investigations of how private schools discharge their charitable duties and will open inquiries only if alerted to allegations of wrongdoing.”

Government had passed the political hot potato of public benefit on to the Charity Commission, which subsequently saw its budget cut by over 30%. Moreover, the public benefit policy reform left further lasting damages for the Charity Commission. To give but one example, the National Audit Office review\(^\text{985}\) criticised it harshly and questioned its efficacy as an organisations. Similar ideas had already been voiced in 2007, when then Director of Research at the charity consulting firm New Philanthropy Capital Martin Brookes wrote in the Guardian that

\[
[\text{he }\text{believe[d]}\text{ a new institution is needed, to sit alongside the Charity Commission, concerned with assessing and improving the performance of charities. (…)}\text{ The body should be constituted as a non-departmental public body under the auspices of the Cabinet Office, and should report to a House of Commons select committee.}^{986}
\]

The empirical data from the media account does not describe the Charity Commission’s future in a very positive light.

### 7.5 Caveats

The analysis presented in this chapter, it is important to note, relies on assumptions and decisions of research design. In the interests of transparency, these require evaluation.

---


\(^{986}\) Brookes, M. “Measures of success: We give billions to good causes, but know little about whether our donations make a difference. It's time to start holding charities to account, says Martin Brookes.” \textit{The Guardian}, 21 Nov 2007.
For instance, the content analysis focuses specifically on the print media. A recent Ofcom Media Market report states that 78% of the British public receive their news mainly through television; only 40% refer to newspapers as their primary news source. This begs the question whether a newspaper analysis can be an indicative representation of the British media *writ large*. There are several factors that qualify these statistics: the nature of the public benefit debate as a hard rather than a soft issue, the political colour of newspapers, and coding protocols.

### 7.5.1 “Hard Issue” Topic and Focus on Print Media

Most important is the nature of the public benefit reform in the news. Previous chapters have shown that the concept of public benefit and the ensuing charity law reform discussion was complex and shrouded in legalese. The reform process is thus a “hard issue”, i.e. an issue that requires time and a more lengthy treatment to communicate than “soft issues” that can communicate a news story through sound bites. Naturally, hard issues therefore lend themselves to the print media target a narrower and more specific audience that is ready to make the investment in time.

### 7.5.2 Selection of newspapers

Newspapers were strategically chosen for the analysis. As table 7.5.2 illustrates, the sample of four newspapers selected for this study covers 18% of those who consult newspapers as main source of information and 7.2% of the British public. Chosen by writing standard, political outlook, and access to data, the sample contains The Guardian (leftist), The Times (rightist), the Independent (centrist), and the Financial Times (liberal/libertarian). Each paper’s coverage of the public benefit debate will reflect its particular ideological outlook and feature editorials by the respective camps’ pundits.

---


Red top tabloids and free sheets were excluded from the analysis because their reporting style does not allow for in-depth analyses and contextualisation that is required for hard issues.

Finally, feasibility was a further factor in the selection process. Although some newspapers, in particular the Daily Telegraph, would have provided interesting insights, there are no available means of online archival access and content analysis as there is for the four selected newspapers. The added benefit of including the Telegraph did not outweigh the substantial investment in time that different forms of hand-search by only one coder would require. Political views from left to right are still covered by the four chosen newspapers so that no serious selection bias should occur.

Table 7.5.2 summarises the respective readership data and the status of inclusion or exclusion, in the case of exclusion together with the justificatory reasons.

<table>
<thead>
<tr>
<th>Newspaper Title</th>
<th>Total Newspaper Readership (in %)</th>
<th>Reason for Inclusion/Exclusion</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Sun</td>
<td>25%</td>
<td>Red Top Tabloid</td>
</tr>
<tr>
<td>The Daily Mail</td>
<td>19%</td>
<td>Lack of Searchable Archive</td>
</tr>
<tr>
<td>The Daily Mirror</td>
<td>13%</td>
<td>Red Top Tabloid</td>
</tr>
<tr>
<td>The Metro</td>
<td>12%</td>
<td>Free Sheet</td>
</tr>
<tr>
<td>The Times</td>
<td>9%</td>
<td>Included</td>
</tr>
<tr>
<td>The Daily Telegraph</td>
<td>8%</td>
<td>Lack of Searchable Archive</td>
</tr>
<tr>
<td>The Daily Express</td>
<td>6%</td>
<td>Lack of Searchable Archive</td>
</tr>
<tr>
<td>The Guardian</td>
<td>5%</td>
<td>Included</td>
</tr>
<tr>
<td>The Daily Star</td>
<td>5%</td>
<td>Red Top Tabloid</td>
</tr>
<tr>
<td>The Evening Standard</td>
<td>5%</td>
<td>Free Sheet</td>
</tr>
<tr>
<td>The Daily Record</td>
<td>4%</td>
<td>Red Top Tabloid</td>
</tr>
<tr>
<td>The ‘i’</td>
<td>3%</td>
<td>Part of Independent – only in print from 2011 onwards</td>
</tr>
<tr>
<td>The Independent</td>
<td>3%</td>
<td>Included</td>
</tr>
<tr>
<td>The Financial Times</td>
<td>1%</td>
<td>Included</td>
</tr>
</tbody>
</table>

*Table 7.5.2: Readership among those who describe their primary source of news as newspapers.*

---

989 ibid
7.5.3 Single-person coding

Single coding always introduces the possibility of systematic bias and related reliability issues. The approach is a matter of resource limitations. However, the coding criteria were set out as clearly as possible in section 7.2 so that any potential subjective bias can be assessed independently. Furthermore, the coding manual, including all coding remarks, can be accessed from the investigator upon request.

7.6 Conclusions

The empirical evidence generated by the quantitative and qualitative parts of this chapter shed important light on the initial three hypotheses.

_Hypothesis 1:_ The changes to the public benefit test in the Charities Act 2006 mark a radical and sudden policy change after a long period of stability.

- On balance, the results of the content analysis suggest that the media portrayed the changes as a radical and novel policy change. A majority of articles – wrongly – refer to the public benefit test as newly introduced by the Charities Act 2006.
- However, in the case of legally complex issues such as the public benefit reform, it is noteworthy that sources within the legal community (and outside the Charity Commission) do not see the public benefit test as a radical policy change. Rather, they see it as a clarification of an existing policy of accounting for public benefit.

_Hypothesis 2:_ The changes to the public benefit test in the Charities Act 2006 were introduced through endogenous variables.

- The media account is ambiguous: there is hardly any evidence that charity scandals acted as endogenous shocks. However, there is a strong indication that internal actors pushed the reform (in particular the NCVO and the PMSU). Education policy and the fee-paying school debate did not trigger the public
benefit reform in the first place but hijacked the charity law reform process once it had reached the parliamentary stage.

Evidence on the origin of the reform is clearer. It suggests that the origins of the public benefit test are at the door of the Deakin Commission and the Prime Minister’s Strategy Unit under Geoff Mulgan. The media data make no reference to other potential origins of the public benefit reform.

The data portray the mismatch between the popular and the legal definition of “charity” as a trigger for the reform process. That conclusion requires further verification through the interview data (Chapter 8).

The media account indicates the possibility that exogenous issues, such as education policy and the politicisation of the independent school question, were crucial variables that impacted the content of the public benefit policy reform rather than its origin.

**Hypothesis 3: The origin of changes to the public benefit test in the Charities Act 2006 can be traced across policy arenas.**

The media stressed the role of consultation across different policy nodes (for instance government and the third sector). It routinely quoted key stakeholders already discussed in previous chapters in the context of such cross-policy collaboration.

However, the media reports cannot indicate how or when collaboration took place. Nor do they provide evidence concerning the intensity of node collaborations across policy arenas. This question will be revisited in the interviews (Chapter 8).

Clear tracing is thus not possible beyond highlighting the years 2003/2004 as a spike in media attention, which coincides with the advent of legislative work and the Joint Committee on the Charity Bill.
Chapter 8. Individual Accounts – Interview Evidence

8.1 Introduction

8.1.1 Study Design

This chapter delves into the story behind the written account through first-hand interviews. A set of 33 interviewees was selected based on the analysis of the previous chapters and 18 were interviewed. Of those 33 that were initially contacted, 5 declined the interview request because of time constraints, 7 declined because their current occupation did not allow them to comment on the policy making process, and 9 stated that they did not feel in a position to factually comment on the charity reform process because they had not engaged with the matter in over a decade. 12 interviewees agreed to meet for an interview between 45 minutes and 2 hours. A further 6 interviewees were contacted because of personal recommendations from those interviewed during the first round of interviews, bringing the total to 18 interviews.

Interviews were held between January and December 2013 with the 18 stakeholders from various fields within the charity sector across England, Wales and Scotland. All were directly or indirectly involved in the policy-making process of the Charities Act 2006. These individuals include members of the legal community, practicing and academic lawyers, charitable sector body representatives, former members of the charity regulators in England and Scotland, as well as politicians and civil servants. For confidentiality

---

990 Interview invitations and guidelines have full ethics approval and can be requested from the author. All communication with the interviewees prior to the interview were conducted via email.

991 The second round of interviews was thus recruited through what is referred to as “snowballing”.

274
reasons, these actors are identified by their respective affiliation or position, not by name.992

The interviews yielded a combined total of over 20 hours of first-hand accounts from those who led the policy-making process. Some accounts contradicted others. Indeed, the most intriguing stories emerge from competing perspectives on what exactly it is that happened and why it happened, questions that are far from clear even a decade after the events took place.

8.1.2 Semi-Structured Framework

Interviews were conducted in a semi-structured way: All interviewees were asked seven identical questions at some point during the interview, yet the majority of the interview took an explorative format, one that allowed respondents to provide their personal account without restrictions; most questions posed by the principal investigator in this phase mostly sought clarification.

The seven standard questions included:

1. How did you evaluate the status quo of charity law and the voluntary sector prior to the Charities Act 2006?
2. How did you perceive your role in the policy reform process?
3. What were your goals in the reform process?
4. What role do you think independent schools played?
5. Which actors did you interact/communicate with? How would you describe these interactions?
6. Did you consider the role of other fee-charging charities such as private charitable hospitals?

992 The study has full ethics approval from the University of Toronto Ethics Committee; the specific terms and ethics precautions will be disclosed upon request.
7. Did you follow the Scottish reform process? If so, did you have any exchange with those involved in charity reform in Scotland?

The data presented in this chapter are inductive. Inductive research has the dual benefit of a) probing for an independent test for the explanatory variables generated by the written evidence and b) of allowing completely new explanatory variables to arise that did not emerge from the written accounts.

Section 8.3 presents the qualitative evidence that respondents provided on several factors identified throughout the previous Chapters 3 to 7. These include, amongst others, the mismatch between the popular meaning of charity and its legal definition, previous policy documents, and the role of education policy and independent schools. The concluding section will then assess the qualitative evidence regarding confirmation and inconsistencies among respondents, new variables that have hitherto not been identified, and the relative importance of each of these factors in the public benefit reform process.

8.2 The Subjective Account

All interviewees stressed that charities have always played an important role vis-à-vis the state. As a former civil servant remarked, they acted “as interlocutors of government” and were in close contact with the Home Office. Until the 1990s, there does not seem to be any account of any pressure to reform the definition of charitable status.993

One notable exception was brought up by a former Charity Commissioner who mentioned Ben Whittacker’s minority report that had been added to the Goodman Report of 1976. This was identified as

\[
\text{the origin of focusing on public benefit as the way of applying a principled test to what constitutes charity rather than letting it simply grow with all the anomalies and excretions of 400 years of case law.}
\]

993 The written evidence presented in Chapter 5, of course, shows that the Nathan Report of 1952 formulated an agenda to reform the definition of charitable status, mainly removing any references to the preamble of the Statute of Elizabeth and replacing it with a statutory definition of charity. Neither of these recommendations was accepted at the time.
There was no public pressure for reform and so ministers were reportedly eager to avoid a topic that would almost certainly result in controversy over the planned Charity Bill (a suspicion that was proved accurate by the 2006 reforms). At the time, the issue of redefining charitable status was abandoned. A former Home Office civil servant reports that

“as soon as we discovered that ministers didn’t need to worry about this issue becoming controversial and derailing their Charity Bill, we forgot about it ... partly also because the sense that this was much too hot a potato to touch.”

Mismatch of Popular and Legal Definitions of Charity

However, while mismatch of the legal definition of charity and its meaning in popular parlance might have been off the governmental agenda, it was not out of the world. In fact, it is the single most emphasised trigger of reform, mostly associated with the ideals of transparency and accountability that epitomised the sweep of New Public Management in public services at the time. One former legal Charity Commissioner illustrated the problems arising from the gap between the popular and the legal definition of charity as follows:

*I think the professionalization of the sector is one of the real issues facing the sector. (…) There was a big debate about the payment of chief executive. I think those issues ... they are not going to go away. The professionalization and that link in with voluntarism, (…) there is such a gulf between the public perception about what a charity is. I mean if you have a public opinion poll, they sort of think that (…) no way the staff should be paid anything. Particularly the level of understanding for modern charities is so low.*

Public benefit was seen as key component for a reform of the definition of charity. Thus, the 1989 Woodfield report entitled “Charities as a Framework for the Future”, for
instance, picked up on the controversial topics of charities and political activism as well as charities and religion. Yet, as a Home Office civil servant recalled,

the response to the White Paper was negligible, so ministers were deliberately not addressing the issue of charitable status and went ahead with the reforms. Because that subject was neglected there were various forces outside that thought that it needed to be tackled in different ways. (...) There weren’t enough charity law cases because there wasn’t any money so people shied away from actually litigating. That was a tinkering way of addressing the problem but the Deacon Committee in a sense brought together the more principled issue, that we shouldn’t tolerate a situation where there was such a mismatch between what people thought of as charity and what the law covered. And it was quite wrong that the law was just a decretion from the past with things that really didn’t deserve the title charity. That was a fairly radical perspective. (...) But that in a sense highlights the two aspects of this: there was the concern in the charitable sector, the charity law sector in particular, that charity ... the common law of charity is the ideal way to deal with such a complex and sensitive and fluctuating sphere of voluntary action in the public interest. And that to try to legislate for it would be technically very difficult and very constraining and would very quickly get out of date while common law can move with the times, the famous dictum of Lord Wilberforce in one of the cases. It is not just rigidly stuck to the 1600 preamble ... Well, one can get a bit too starry eyed about the glories of the common law of charity and how it doesn’t update with the times. But there was quite rightly a feeling that even if that was the right mechanism, it wasn’t working because the courts weren’t doing their job. So that was one strand of reform, but the other was the continuing political one which was always there and the extent to which its salience varied over time.
This account is echoed by a former voluntary sector leader:

But it was quite clear, and I think this is a general feeling as well as my personal feeling, that the law was intolerably dated at the end of the 20th century, that it had historical roots that didn’t reflect the new reality. That charity law had been tested to its limits by the changes in the voluntary organisation world, the so-called new voluntary sector, and they decided to get going at the issues in a direct way and turn that campaign into policy change and thereby challenge the limits of charity law. And also diversity of proclamation. The big change, physically visible change in post-war Britain, moving from a monoglot, all white society to a polyglot, diverse society, was a very important challenge to the charity law system set up in the Elizabethan period. Social change, cultural change, and also change within the voluntary organisation world, the dynamic of trying to achieve change. (…) And people obviously bring up things like the extraordinary anomalies, the way in which some organisations are charitable and some aren’t and some activities are charitable and some aren’t. There was a case on ground of logic. And there was a case on grounds of how the actors had been administered. I see it described as opaque and bureaucratic (…).

Think tanks active in the civil society sector were also starting to work on the mismatch between legal and popular understandings of charity. One former head of a think tank pointed out that

(…) it’s fair to say that in the ‘90s there was quite a fair bit of discussion about the anachronism of charity law. (…) [T]here was plenty of appetite for addressing (…) the gap between the law and its interpretation and public understanding, etc. (…) Most of our
priorities of those first handful of years were about much more pragmatic things, social enterprise and entrepreneurship and funding, etc. but I wanted to get to grips with the legal stuff. Ministers were against it, I should say (...).

A Demos report addressed the question of charity law in 1995 in its report “The Other Invisible Hand: Remaking Charity for the 21st Century”\textsuperscript{994}. One of the authors suggested that

\(\ldots\) in the Demos report we had advocated essentially making public benefit the primary driver of the law. We went much further than the eventual approach, trying to get back to the purposes of the very institution of charity. Right from the start we did want there to be (\ldots) a public benefit presumption in there.

Nicholas Deakin, head of the Deakin Commission also commented on the appeal of public benefit as a means of making the definition of charity easier to grasp for the layperson on the street:

\begin{quote}
And that was exactly the kind of argument round about our table: people got to understand what’s going on, and people understand I hope, the concept of public benefit is not hard to grasp at a common sense level, the lawyers kept saying that it is terribly complicated in their legal terms, and you’re always going to have anomalies and it’s always going to be controversial, but in common sense terms it was the way in which people could understand simply what the benefit of charitable status would be and how you could justify it.
\end{quote}

The Charity Commission also set its focus on the concept of public benefit early on. A former Charity Commissioner noted that the Charity Commission started this process long before the Charities Act 2006. He stated that the review of the register that resulted from the Charities Act 1993 had been used to

\[
\text{review what was on the register inherited from years back and take principled view whether under modern circumstances, what was on the register ought to be there and produce some sort of systematic approach to new areas that in the modern world are for the public good and ought to therefore be (...) a charity. It was interesting; there was a report we published, and that was novel for the Commission, we published a statement of principles about how we would approach themes rather than simple deal with it case by case. So we did one about community regeneration, employment, etc., where there were issues about the balance between the public good and private interests. A whole range of these things. And I think that was very fruitful. And also important, it was trying to move along, not just simply expanding but repositioning charity law, if you like. The gun clubs case was an important one where we were able to argue that the courts – of course, we had to say – were right in the 1690s to regard, encouraging people to shoot, was in the public interest, citizen militia and all that sort of thing; but by the 1990s, that was quite out of date and should not be part of charities. So we had to deal with that. So that in a sense, paved the ground for statutory reform which obviously in some sense is the only way of dealing adequately with the whole principle, if indeed we come on to the 2006 Act.}
\]

This statement is very significant. It suggests that the Charity Commission had, de facto, already been exercising a new form of the public benefit test that focused more on an organisation’s activity than on its purpose. Recall at this point Peter Luxton’s position in Chapters 3 and 6. It seems that, in the best of intentions and without explicitly meaning
to, the Charity Commission had already changed charity policy in 1993, even though it left the legal definition of charity untouched.

A former member of the Charity Commission policy team doubted, however, whether it would ever be possible to bring the legal definition any closer to what the average person on the street thought:

*There will never be a conjunction between the popular conception of charity and the legal definition. (…) The conception of charities is essentially that they help you when you’re in poverty, need, hardship ... (…) So if people are asked, have you benefitted from a charity, people think, have I had a grant of £300 because I had no food for my children? No, that’s not happened.*

Also at issue was the matter of whether the goal of bridging the gap between legal and popular charity was desirable at all:

*But if I am asked whether the gap between what people think charity is and what it actually is matters – no, I don’t really think it does. The village halls, the recreation grounds, the millennium fields, the social housing, the dog rehoming centre, the scheme to remove waste and toxic stuff from your local canal – does it matter that people don’t know that these things are charities in a legal sense? No, I don’t think that matters. People correctly perceive them as being part of the fabric of society, as having an altruistic or voluntary character. But charity law? It doesn’t matter at all.*
The Deakin Commission

This impetus was then translated into actual policy proposals at the initiative of the NCVO, which created and funded the independent Deakin Commission in 1996. Timing was crucial, as Deakin himself recalls:

(...) they [the NCVO] were in a hurry to do it because of the general election coming up. It was important that the voluntary sector case should be in front of the public when the election we were all expecting to happen in 1997 took place. In those days, the date of the election wasn’t a fixed quantity, but most people thought that the conservative government would go the full term. So it was very important that in 1996, the voluntary sector should have its case prepared.

The Deakin Commission was composed of a group of diverse stakeholders from across the voluntary sector. Professor Deakin emphasised during the interview that upon agreeing to chair the Commission, he asked for it to be an independent inquiry, free to criticise the NCVO if needed, and for the permission to choose his own team. He stated:

And people said ‘you ought to represent various interests’. And I said: ‘I really wanted people I could trust. I don’t mind so much whether they come from as long as we can do business together.’ And people said to me ‘you’ve got to have a lawyer’, and I said ‘I accept that I have got to have a lawyer but I am not going to have a charity lawyer, I am going to have a human rights lawyer’ (...) and that was very helpful to me because he took into what we were thinking about a lawyer’s perspective, but not a narrower charity lawyer’s perspective, that broadened the discussion up a bit. (...) I wanted a team I could work with so I didn’t want anyone who was an outlier who had violently opposed views (...) Compatibility – important. Experience –
very important. That’s what I particularly wanted, people with depth of experience.

The Compact
A former Chief Charity Commissioner remembers that

[t]he government, when [the Deakin Commission] reported in 1996, was the Conservative government and they expressed guarded interest in [the reform of the definition of charity] and encouraged us.

As it turned out, the 1997 Labour government under Tony Blair expressed more than just guarded interest and actively encouraged a closer collaboration between the state and the voluntary sector, as had been advocated by the Deakin Commission. In 1997, Labour published its own report, “Building the Future Together”, as a response to the Deakin Commission. Based on the recommendations contained in both documents, the Compact was created in 1999 as “agreement between Government and the voluntary and community sector in England”995.

The remit of the Compact and the resulting rapprochement between New Labour and the voluntary sector were seen as an important driver in the eventual reform of charity law:

It wasn’t just that, there were a whole lot of issues but it was in particular, I guess the real driver was that Government’s wish to have an active policy in partnership with the voluntary sector and what sort of modernisation of the legal and regulatory framework was necessary to encourage the voluntary sector but to make them partners. I mean, one has to choose one’s words very carefully of course, they generally did not want to co-opt or take over the voluntary sector but of course when government starts using the

voluntary sector, that’s always the danger. The compact was an important, in a sense the major initiative, that Nicholas’s [Deakin] report produced was the Compact, which Labour took up very enthusiastically. But once they were launched into the question of the whole context of the voluntary sector, “what is charity?” was of obviously an important standard.

“For the Public Benefit?” NCVO Report and Removal of Presumption

The NCVO, in turn, reignited the conversation specifically around public benefit, publishing the report “For the Public Benefit?” in 2001. One of the authors of the report recognises it as

really the starting point, which isn’t always acknowledged. But this was very much the starting point for the reform of the public benefit test ... [it] looked at quite radical options: To reform the commission, to really have a totally new statutory definition, and they end up with the recommendation to actually remove the presumption. And this was very much based on Francesca Quint’s opinion. (...) I think the mischief they were trying to address was that there was a gap between public perception of what is a charity and the legal definition. They felt that the gap between the two was actually undermining public trust and confidence so they needed to bring the two into line. (...) It was seen that there were three problem areas: One was independent schools; (...) one was the different definition of public benefit for relief of poverty, so you have the sort of the poor relations and the poor employees charities. And the other was fairly more extreme religious groups.

996 NCVO (2001).
All interviewees recognised the NCVO report as the first to suggest the removal of the presumption of public benefit for the first three heads of charity under *Pemsel* as per the expert opinion of Francesca Quint, QC. A civil servant saw the removal of the presumption as “a fairness issue to level the playing field. (...) And that was the laudable aim of the NCVO report.”

“Private Action, Public Benefit” PMSU Report

As this positive response suggests, the NCVO report fell on fruitful ground at the time and – so the interviewees who were affiliated with either the Charity Commission or the NCVO perceived – eventually triggered the report by the Performance and Innovation Unit, later to become the Prime Minister’s Strategy Unit (PMSU) within the Home Office. Accounts diverge slightly as for the direction of the causal arrow. From the NCVO’s perspective, the PMSU

> was very much sort of adopting the NCVO recommendations and it all seemed very straightforward and the report actually had an example of public benefit (...) test, that an independent school would have to pass.

From the point of view of the PMSU, there is no causal connection between the NCVO report and the PMSU’s report in 2001; rather, both picked up on the larger themes of public sector reform under New Public Management, a popular approach to policy in the 1980s, 1990s and early 2000s that very much focused on the big buzz-words of the time: transparency and accountability. One civil servant who guided the development of the initiative, and later the Charity Bill 2005, cautioned that

> NCVO probably tend to overstate, or over claim credit for the government’s decision to have a review of charity and not-for-profit law in 2001 and in particular the public benefit changes. But [NCVO] was instrumental and it had a material influence.
Alternative Account: New Public Management and New Labour

One member of the PMSU who was a driving force for the publication of the “Private Action, Public Benefit” offered an alternative account:

*I don’t remember that particular trajectory. The mid-90s discussions which I was part of didn’t particularly refer to [the removal of the presumption] as a tool, they were almost asking a more philosophical question of how can you ensure that this sector getting particular privileges, that there is a quid pro quo in terms of public benefit. And it was ... in some ways there was a broader public policy issue there. And as I said, in what we recommended in the Demos report was linking all sort of tax benefits etc. to public benefit demonstration rather than it being done through organisation, so as it were the opposite form to the one which starts with organisations as the unit as opposed to activities. I am sure that there is a ...what they are saying is some of the truth. But of course these things always interweave. (...) there was this broader policy argument going on, partly an indirect effect of neoliberalism and New Public Management, which was just saying everything to do with public money or subsidies should be a bit explicit about what it’s achieving. And I think that’s actually the bigger background to this (...) recommendation. It was a climate of greater precision on impact, public benefit etc. And that’s true for lots of policy areas and it would be a bit parochial for charities to think that it was a unique conversation.*

Indeed, this impression of the general change in the attitude towards charities and their role in the provision of welfare was emphasised by a former Head of Policy at the Charity Commission:
(...) in late 2000, we became aware that the government or the prime ministerial think tank part of the government which was called the performance and innovation unit, it was then renamed into prime minister’s strategy unit, was interested in reform of charity and indeed not-for-profit law generally. And when the Labour government came in in ’97, it perceived quite early on that it’s rather ambitious goals for achieving greater equality, anti-poverty goals in the social welfare area, could not be achieved by governmental action alone and that it had to, if you will, co-opt with the charitable sectors as its partners in the whole enterprise. And there were a number of initiatives that it took, including what it called the Compact, which is an agreement between the government and the voluntary sector. It put the hell of a lot of money into building capacity in the voluntary sector and one of the initiatives was reform of charity and not-for-profit law.

Irrespective of where the impetus lay, the PMSU’s report “Private Action, Public Benefit” contained 61 recommendations for the government that were with few exceptions accepted in the government’s response, submitted by the Home Office. One of the authors involved in drafting both the report and its Home Office response referred to “Private Action, Public Benefit” as

(...) a curious document because it was written by a Cabinet Office think tank reporting to the Prime Minister and yet it was written as a document making recommendations to the government; so [it was] very strange, part of government making recommendations to itself, in effect.

A former Chief Charity Commissioner stressed the importance of the PMSU report; he thought “the ‘For the Public Benefit?’ report probably tipped the balance in the Labour government and they set up the Cabinet Office Review.”
Draft Bill and Controversy

The recommendations were soon translated into a bill that became part of the government’s legislative programme. Famously, the bill was to become one of the longest discussed bills in the history of modern Parliament. The discussion spanned from the preparation of a draft bill in 2003 that was met by a report of a select committee to the Charities Bill 2005, which met its premature demise because of the 2005 General Elections. Reintroduced only a fortnight later, the Bill was finally passed, after much controversy, as the Charities Act 2006.

As the analysis in the previous chapters has indicated, the true controversy did not become very intense until the publication of the draft bill. Beforehand, the reform of the concept based on public benefit “seemed as if it was all very straight-forward”, a then-NCVO lawyer remarked. What followed was a public, and very political, debate that centred not so much on the concept of public benefit in general rather than on the status of independent schools in particular. At what point and how did a debate that was until then described as “technical-legal” by all interviewees turn into one of the most politically charged acts of the early 2000s? Whereas the time period up to 2003 sheds light on the “why” of the reform and its timing, the answer to the question about the turning point of events must lie in the period of parliamentary debate. The time from 2003 onward is thus crucial for an understanding of the apparent paradox that the Charities Act 2006 arguably changed nothing and everything at the same time.

Role of Independent Schools in the Debate

A legal Charity Commissioner described the Commission’s perspective at the time in the following way:

And I mean ... and of course then we have the draft bill which goes into the scrutiny committee, then we have evidence from the independent schools and Nuffield, the chain of private hospitals, and I think the big question there was: whether we needed any statutory
definition of public benefit, whether we were prepared to go down the Scotland route or rely on the case law. And I mean it so much turned on it. And then on public benefit, which really became very much about independent schools. When you read about it, you would think it was only about independent schools although it was a test right across the board. (...) the Commission, and the then board were all very committed to [the public benefit test] because we felt that it was right to really increase (...) public trust and confidence, as statutory objectives. We needed public benefit applied across the board. The trustees should be much more aware of it as an issue and they should think it through and they should be able to demonstrate it, and the reporting on public benefit was seen as crucial. It should be absolutely central to charity trustee’s thinking, you know, “What are we doing for public benefit?” And to us that made a lot of sense. (...) And then it all became political.

This turn to the political seemed to be a surprise for some, whereas others, particularly those interviewees with frequent involvement in party political issues, stated that they were very aware of the danger and tried their best to manoeuvre the draft bill through the high seas of ideological strife unscathed.

Lack of Jurisprudence underlying Charity Law

The Charity Commission’s position was described by former members as most difficult because of a lack of jurisprudence on charity law:

I mean and that was the problem, that we had very little ... I mean we had very little jurisprudence really on charity. And what happens, really, and what the Commission has done, they tend to take dicta, often out of context if you look at the legal underpinning for the public
benefit, I mean (...) it was quite thin, given the underpinning we had we really had to take dicta and stretch it as far as we could. (...) And the problem is because public benefit is different for different purposes, that if you read across the guidance .. I mean, we were working on the legal underpinning. We were trying to make sense of a complex area with quite thin legal authority. I mean I am trying to bring it together, and in a sense that was our objective.

Recall from Chapter 3 that the Australian Privy Council case of Re Resch became the key source for the question of fee-charging charities and their provision of public benefit. Yet, Re Resch is itself far from clear or unanimous in its interpretation on what the case law’s perspective, referred to in the eventual Charities Act 2006, had to say on the matter. A former Chief Charity Commissioner chose Re Resch as an illustration for why a modernisation of charity law through the courts, the traditional common law modus operandi, was not an option in this case. Criticising the case law’s jurisprudential foundation, he stated:

And of course the leading case that we’ve all read is Re Resch. Not a very good basis ... I mean, go figure, in a sense that highlights how threadbare the claim is that by itself the traditional court-based common law mechanism is adequate for modern decisions. The more you feel tied to judgments the more you are creating a speculative modern application, something that of guidance that has grown up at various stages in the past.

Just as the previous reports from committees and sector organisations had suggested, the Charity Commission felt that at least a partial statutory definition was necessary to bring clarity to the matter and help charity trustees in providing more transparency and accountability on the public benefit their charity was providing.
Need for a Statutory Definition

A statutory definition was, as a former member of the Charity Commission remarked, “ruled out at quite an early stage (...) because there could have been no agreement on what it should have been.” The legal community in large parts warned against a statutory codification on the same grounds as during the times of the Nathan report in the 1950s: the need for flexibility to update the law to the changing circumstances of the time.

However, the government also played a role in the rejection of a statutory definition akin to the Scottish approach. One former Charity Commissioner recalled:

(...) at the end of the day, at the Commission we were really in a really difficult position, because we spent hours analysing the case law and we felt that it would benefit from being strengthened not by a full definition, but a partial definition, possibly along the lines of Scotland. (...) But on the other hand, we couldn’t very well go public with that. Because we knew we might still – if we didn’t get a statutory definition, which was beyond our power – have to live with the outcome and end up in the situation we ended up with. So we had to run this sort of dual approach.

Only the government’s clear statutory definition of charitable status and public benefit guidelines would have been an effective tool to address the gap between the legal definition of charity and its popular meaning.

Hijacking Charity Law to Attack Fee-Paying Schools

A statutory definition of public benefit, however, might also have potentially resulted in the loss of charitable status for independent schools. This was perceived as going one step too far for the government:
(...) the government for political reasons wanted to be seen to be doing something about independent schools but not too much because they had two constituencies (...) and were owned by backbenchers in the Labour party. And to understand it you have to realise that for decades the badge of honour for Labour party members was whether you wanted to remove charitable status from independent schools. The government, New Labour, had to, on the one hand keep their backbenchers happy but on the other hand, they were being lobbied by the independent schools, whom they wanted to keep happy as well.

As this statement by a former Charity Commission member suggests, and as some scholars\textsuperscript{997} point out, there is an account of the technical-legal debate being “hijacked” as a means to attack fee-paying schools based on ideological views. More data on the influence of education policy and that status of independent charitable schools will be considered later in section 8.3.

However, this view is not echoed by all respondents. A former Home Office member working on the policy side rejected the idea that charity law had been used to address what Labour failed to do in its education policy:

\begin{quote}
I think the Department for Education was virtually silent in discussions about the charitable status of independent schools. That maybe because the Secretary of State at the time was a strong Blairite and didn’t want to rock the boat but (...) if one had wanted to attack independent schools by another route then it would have come forward by legislation prepared by the Department for Education, which directly impacted independent schools. In a way that would have been (...) politically easier. And it would have been obvious to everyone what the government was doing. And it would have probably
\end{quote}

\textsuperscript{997} Dunn (2012)
succeeded to a greater extent than a surreptitious attack on independent schools by the back door of charity law.

Evaluation of the Public Benefit Reform in the Charities Act 2006

There is a clear distinction between those who were involved in the Charities Act 2006 on a policy side and those who approached the reform from a legal perspective. Policy actors are far more open to the signs of change in the sector and seem to perceive positive effects stemming from the removal of the presumption. Whether or not it changed the law of charities on a jurisprudential level does not matter much to them because their focus is directed to the empirical effects.

Those interviewees with a legal professional background approached the question of evaluating the 2006 Act from a different, more theoretical angle. They saw the Act in a far less positive light, focusing more on the consequences of the Act and the ensuing Tribunal decision for the body of charity law jurisprudence.

This division mirrors the initial puzzle of hailing the Charities Act 2006 as the biggest reform of charity law in more than four centuries while at the same time decrying it as inconsequential. A former Chief Charity Commissioner summed up the sense of disappointment with the effects of the public benefit test reform from a legal point of view:

*Jumping ahead to the 2006 Act, (...) what in effect we got is not the most fundamental modernization for 400 years, but actually accepting the whole structure inherited over 400 years and giving it a statutory structure. That’s all the 2006 Act does in terms of what charity law means. Save this vexed question of “public benefit shall not be presumed”, of course the conventional wisdom was that the four heads of charity as laid down by Macnaghten in the Pemsel judgement: poverty, religion, education, and only the 4th was subject to a positive public benefit test. And we all deluded ourselves that*
equalizing that so that all the strands would be subject to an equivalent public benefit test would be a significant change. Well, that fell apart with the scrutiny committee that examined the draft bill long before it came into Parliament in 2005 or so. And indeed, even before the first day of the new chairman, the new Chair or and Chief Commissioner Geraldine Peacock who appeared with the minister, Fiona Mactaggart it was in those days. And there was a notorious public disagreement about what effect the public benefit test would make.

He elaborated that this result was at least in part foreseeable as the political controversy that ministers had traditionally feared touching this issue [public benefit], surfaced when this proposal [PMSU’s “Private Action, Public Benefit”] was accepted. You might say, going into with your eyes wide open, the Cabinet Office’s report went down this road as though this would be an important systematization that wouldn’t raise drastic questions what traditional charities would be struck off because of the test. Of course, the scrutiny committee started niggling at that and politically that strong strand of Labour supporters, Labour parliamentarians, that actually wanted at least a much more rigorous constriction of the extent to which fee-paying organisations could be charitable.

Generally, the interviewees voiced two forms of retrospective evaluation, one concerning the consequences for the charity sector and one based on their personal viewed the policy-making process. A former legal Charity Commissioner experienced the policy-making process on public benefit as particularly draining:

I never cease to be fascinated. But public benefit … in the end I really do think I did waste 5 years of my life. Because it was actually quite
an arcane subject and people don’t realise. (...) But I think there are so many more interesting areas than public benefit. I mean, public benefit could have been interesting and it could have been more productive if Parliament had treated it in a different way.

In terms of consequences for charities, the evaluation is on the whole negative. Comments addressed a variety of issues with the 2006 Act and its public benefit requirement, e.g. the imposition that the public benefit reporting poses for charity administrators (“So I think they all do struggle, even the larger ones struggled with this reporting and how you actually show the benefit. You know, what difference have you made, and so on.”). They also commented on the lack of awareness among charity trustees that they were required to address public benefit at all after registration, if they were even aware of it at that point in time:

I think probably 99% of charities are entirely unaware or at best very dimly aware that there is an issue around this. Far too few know that there is an expectation or a requirement that they include in their annual report an account on the public benefit they’re seeking to achieve (…).

Overall, the impact of the Charities Act 2006 and its reform of public benefit were seen as largely temporary. In their evaluation, some interviewees remarked that independent schools in particular geared up in preparation of the Act, treating it as an unknown entity and a potential threat:

(...) I don’t think it’s had a huge impact. And the thing is that they started with the momentum and looking at the schools. (...)And I think, some of those actual place reports are quite interesting. (...) And I think, that was the feeling: that it was really going to mean something. And that certainly charities who do charge high fees, and also others, would actually be coming up with these reports on a
regular basis. And then now ... it’s all gone. As soon as they had the application to the Tribunal, everything really stopped. And of course, now [the Charity Commission] haven’t got the resources. (...) So I think looking back one could almost see it as an episode.

The evaluation from the policy side of the reform, either from within government, the sector or the Charity Commission, appeared to be more positive:

So much has happened that was completely unforeseeable in 2006. But with hindsight, I think, if I was marking it out of 10, I’d give it a 7 or an 8. But if I was asked what in the circumstances that existed in 2004/5/6, we would have done differently, there is nothing substantial. I think it was apart from anything else there were no other Acts of Parliament that I knew about that had a provision in requiring a review of the effectiveness of the act 5 years after it had been passed. Governments don’t tend to welcome close examinations as to whether the policy in the way it’s been implemented in an Act of Parliament has actually succeeded. Robin Hodgson’s review of the operation of the act was very fair. And his conclusion was probably also 7 or 8 out of 10. But the public benefit thing was always going to be the most difficult and everyone knew, I knew, the Charity Commission knew, that they were handed an almost impossible public benefit task.

Differences in the evaluation can at least partially be explained by the respondents’ individual perspectives. Those respondents with a legal background tended to be far more concerned with the fact that, legally, there had been no real change on the jurisprudence underlying the public benefit test. Policy-makers, by contrast, were more interested in empirical results within the sector. Intriguingly, a certain sense of pragmatism seemed to accompany the reality of policy-making, leading those with wider policy experience to adopt different benchmarks:
But if I am asked whether the state of charity law at the moment broadly speaking serves charities well, let them get on with their business as a force for good in society: yes! It does.

One area that was highlighted as actually having changed, in legal and policy terms, was the registration of charities that now contained provisions for a statement of public benefit:

(...) [T]he big change since the Act, has really been that following the Act, the Charity Commission has totally changed the registration application form. And now it’s all framed in the context of public benefit. So when you actually apply to be a charity, you have to address how you are going to be for the public benefit. (...) In how far it’s affected the conduct of charity trustees so far, I am not so sure (...).

All respondents, at some point during the interview, pointed out that the Charity Commission was not in the position to effectively address these problems, even less so after it suffered substantial funding cuts over the last decade:

So you might well say, and of course the Commission has never been over-resourced for compliance scrutiny and having now suffered a 30% reduction in its resources, it can’t conceivably apply any test of this sort. So a broad answer would be: no effect whatsoever. Not even, I suspect, on the decisions about registering.

It is difficult to discern an overall judgement on how the Charity Act 2006 was evaluated by the interviewees, especially since it is a retrospective evaluation of events that took place a decade ago. Much of the criticism that surfaced with the 5-year review has the luxury of hindsight. As the key civil servant in the policy-making process summarised:
I think, after the Charities Act 2006 was enacted, the landscape began changing with an extraordinary and unpredictable rapidity. Hence today people saying that it was a missed opportunity or that it doesn’t give the Charity Commission the right regulatory tools to do its job, etc. etc. But I think that that’s the sort of thing that could only be said with hindsight. At the time it was enacted, it was a reasonable piece of legislation although flawed in a number of important respects. And the flaws resulted not from technical or legal difficulties but from the need to make virtually impossible political compromises. Public benefit was one of them.

Despite the mixed verdict, the policy-making side of the government saw the status of charity law and public benefit as settled by the 2006 Act, an impression confirmed by the recent PACS review.998

My hope had been that the legal settlement would actually last quite a long time. Obviously, the original charity law, was it from 1601, it had lasted quite some time until the 19th century reforms, and 3-4 years ago it actually looked like [the reforms] had actually cross-party consensus. But who knows.

Charity Tribunal Case regarding Public Benefit

The consequences of the Charity Tribunal ruling in Attorney General (ISC) v Charity Commission (2011) was not seen as a clarification of the law. On the contrary, a former Charity Commission member feared that

the Tribunal said that it’s just up to trustees to decide whenever there is enough public benefit if there are beneficiaries who can’t afford the

fees. And trustees are really left now without clear guidance about what they should or shouldn’t be doing. I mean as someone said today at the conference, it’s damned if they do, damned if they don’t. (...) I was always taking the view that we shouldn’t be prescriptive. But the trustees were saying: “But we want to be told what we can do.” They wanted certainty. That’s the problem. I mean it’s always been the problem with the definition in the law that trustees actually want certainty. They want to know what to do; and the lawyers are saying, “No, just rely on the case law.”

Echoing this criticism of the ISC ruling, a former Chief Charity Commissioner suggested that the ruling had taken the last tooth out of the public benefit reforms in the Charities Act 2006 since it made the public benefit test effectively what reasonable trustees would think it to be:

But in principle all the 2006 act does is simply codify the inheritance. It specifically says, charity law shall be what it meant on the day this came into force. But nothing has been done to strengthen the decision-making mechanism and in some ways the Charity Tribunal, the Upper Tier Tribunal, or whatever it is called now, has undermined that process with their judgment. (...) But the essence of that is that as with certain other areas of trustee authority, provided the decisions be made by the trustees, [decisions] that reasonable trustees would reach, it is not for the courts or the Commission to impose their own judgement. It’s left very much at the discretion of trustees, which, although not in logic, is accepting Peter Luxton’s contention that in fact the law hasn’t changed; in effect [the Tribunal ruling] does that, or even relaxes [Luxton’s contention] in that the public benefit test is what reasonable trustees would choose to make it. Which goes quite contrary to what the reformers thought they were
8.3 Independent Variables Identified by Public Policy Theory

The radical change frameworks suggest certain independent variables that shed light on the mechanics and nature of policy change. Interviewees have been asked to comment on these and the resulting data are presented below. Section 8.6 will then use the data to test the hypotheses set out in Chapter 2 to see whether the respondents saw change as radical and sudden or not.

Role of the Media

One factor in the politicisation of the debate that was consistently brought up was the role of the print media. Given New Labour’s openness to the *vox populi*, the importance of the media should not be underestimated. Thus, a former civil servant pointed out that “Tony Blair’s government was the most susceptible to policy making by opinion poll. Focus groups and sofa government and what have you”.

One Charity Commissioner stated that:

(...) the press got involved and (...) in the Daily Mail and in the right-wing papers there were headlines about it which is extraordinary because normally charity legislation would go through and no one would be concerned at all. (...) at one point [the Charity Bill] was referred to as the Schools Bill. Because it was so much seen as about independent schools. And it became political (...).

A then member of the Charity Commission further noted that the appointment of Dame Suzie Leather as new Chief Commissioner further spurred the politicisation, due to her alleged proximity to New Labour:
(...) at some point in the process we appointed a new Chief Commissioners, Dame Suzie Leather. And I was actually involved in the appointments process. And everyone outside says that this was a political appointment because she was a Labour party member but I was actually on the panel and it absolutely wasn’t. But when she came in, (...) public benefit was her big thing. She (...) felt that it was absolutely essential. But she really saw it very much in terms of improving the performance of charities: Charities should be forced into thinking, “so what can we do, what difference can we make?” (...) it was very much a performance issue, it would drive more effective performance of charities. But she was vilified (...).

However, the reason for the extensive negative press coverage about Dame Leather might actually have a completely different origin unrelated to the reform of public benefit:

The trouble is, when I look at these things, at the end of the day it is so much about personalities. I often think, if you do web-based research you would think there is underlying policy, which there may be, but it’s so much about personalities. [Dame Suzie Leather] was vilified by the press. And partly because they saw her as a Labour stooge but also, she had been Chair of the Human Fertilisation Authority, and when she was there, she had (...) allowed [IVF] for same sex couples. And you see, a lot of the vilification of Suzie was about what had happened before and she brought that with her and she was a hate figure. I mean there were really unpleasant articles about her in the press. And it all got horribly involved; she was presented as this woman and her mission was to actually make life difficult for independent schools.

The press coverage that ensued was described as a “witch hunt”, culminating in Dame Suzie Leather’s exclusion from all discussions on the status of fee-charging charities and
public benefit due to conflict of interest since one of her children was enrolled in a fee-paying school. Furthermore, all other leading Charity Commission members were questioned regarding their potential affiliation with the independent school sector. A former member remembers the press’s reaction the following way:

_The whole thing got so silly because someone, another chap from the press came to board and as a member of the board I had to say which school I went to right from the age of 5, whether it was private or independent, what school my husband had been from the age of 5, where my children went to, and if I had grandchildren, where my grandchildren went to school. And the charity press, on the front page, they had photos of us all and slashed across it – “Private or State?”. _

A previous Chief Charity Commissioner, no longer in office by the time of the public benefit reforms, attributes an equally strong role to the media and their treatment of the reforms as a political-ideological issue, not a technical-legal reform. He suggested that independent schools had

(...) very effectively created an alliance with a friendly media and got a hearing that was totally distorted. And a portrayal of what the courts were saying and what the politicians were intending. So to that extent, it’s again and example of how the critique of policy, the critique of law, actually is presented and the mediated effect it has on policy and public opinion, and political judgment and so on.

A civil servant involved in the policy-making around the public benefit reform thought that the media too skewed the discussion, at least for a certain stretch of time. In his view

(...) for a period, everything was eclipsed by the public schools question. And the reason was that it was politically incendiary and
the left-wing and right-wing press took a lot of interest. But they didn’t take an interest in the equally important but possibly less urgent questions, such as what role do charities have in delivering public services? That’s not (...) a headline in the Daily Telegraph, whereas “Government Attack Independent Schools” is, for obvious reasons. So there was a time for which everything was eclipsed in the media certainly by the independent schools.

However, some interviewees with either more experience in the party-political process or a role that did not require direct interaction with the media differed in their evaluation of the media. Specifically, they pointed out that, on the whole, media attention was very much restricted to the print media and their online offshoots rather than the more populist broadcasting media:

That was particular bits of the press, my guess would be, and I haven’t done this scientifically, that there would be 3 or 4 newspaper titles, most of whose journalists and their children went to private schools and quite a small part of their readership would be interested, but for those journalists, the people running the paper, this is a hot topic but you wouldn’t get it in the middle market let alone the mass market or broadcasting media. So it was obsessive but for a small bit of the media.

Endogenous Shock: A) Scandal

Interviewees were asked if they thought there was any one trigger for reform in particular, such as a scandal. While most of them could remember a host of scandals, they were mostly described as “white noise” that was happening in the background, yet nothing stood out as a decisive trigger for the reform of the definition of charitable status.
through a refocusing on public benefit. A former Charity Commission policy unit member countered the question whether he recalled any scandals:

"Well, when you said a few moments ago that various people have said law reform was necessary because of scandals, I thought to myself privately, well, what scandals? There weren’t any. (...) It was a deliberate act on the part of the Labour government to change the legal and regulatory arrangements for charities, so that charities would be better able to participate in the government’s policy and service delivery agenda. That is what it was about.

As an alternative account of why the reform process was set in motion, a former Chief Charity Commissioner suggested:

"There was no high-level trigger for government to take it up. So it had to be engineered by the sector, to be addressed. “ A former voluntary sector leader confirmed this account, elaborating that there was “no single breaking scandal or anything like that. It wasn’t scandal driven. It was discontent driven, as I would put it: the notion that it simply wasn’t fit for purpose, it wasn’t fit for the last decade of the 20th century. It was rooted in history, it was rooted in a monoculture, rooted in an all-white society, all these things."

Exogenous Shocks: B) Education Policy

Interviewees were asked specifically for their opinion on the matter of education policy and how the role of independent schools as fee-charging charities might have influenced the public benefit reform process.

One member of the Joint Committee on the Draft Charity Bill, himself a Conservative MP, stated that he “(...) sort of made it clear that I thought Labour was using it as an
attack on fee-paying schools which was a mistake, and that education always has charitable roots to it.” When asked whether public benefit was specifically and precisely about the status of fee-paying schools, he replied that it wasn’t, “but that was the example that had to be addressed.

On the other hand, one actor involved in the broader reform process under Labour noted that the role of independent schools should not be overstated:

*It was just that we welcome stronger moves to require independent schools to prove public benefit. (...) They were part of it but they were not the starting point. The starting point was, believe it or not, was genuinely to modernise charity law and it was the fear that at some point, charity law, all those things would become less legitimate or less trusted if there were lots of organisations claiming to be charitable which weren’t doing what people thought was charitable. It was as simple as that.*

Since independent schools, such as Eton, Harrow or Winchester are exactly those organisations that are referred to, it seems that given the nature of the task that public benefit meant to address, it was inevitable for independent schools to play a dominant role on the agenda. However, this does not amount to an exogenous shock through a policy from the education sector, a hijacking of the charity reform as it was described beforehand in this chapter.

An interviewee who had been member of staff under the Blair government explicitly emphasised that

*(...) it was not a conspiracy by particular ministers, it did not come from the education ministers, there was nothing like that. So (...) it was more that schools became part of the story because you couldn’t avoid them but they were not the starting point. (...) from the other*
end, the Prime Minister’s end, [the reaction] was “well, go in if you must”, that sort of thing, “but make sure you don’t run into a complete storm”. But there was no great pressure to do [the public benefit reform].

He elaborated that the New Labour leadership was well aware of the potential incendiary effect of meddling with a reform that could involve the status of independent schools:

There has been a lot of politics, to be mainly around the private schools, and I don’t think it would be any secret that at the time both the Prime Minister and the Cabinet Secretary were not keen on this exercise being done at all (...). [T]hey wanted to stop it partly because the power of the private school lobby in the UK is immense. Slightly to my surprise we were able to persuade the Eton in particular to get behind this and some of the better private schools actually thought they would do fine from a public benefit test. I don’t know how public any of this is. And that was fairly key to getting some momentum through so that although there were then various attempts by the umbrella body and other to sort of shoot this down and claim this was a classic attack on the independent sector because there were other voices saying the opposite it wasn’t as strong as it could have been.

In preparing the PMSU’s “Private Action, Public Benefit” report, one of its authors described that

(...) we deliberately tried to stop [independent schools] taking centre stage and I thought had largely succeeded. This is again in my memory it had only started kicking up quite a bit later. And though we had largely neutralised it at that point, (...) by having engaged some quite influential forces on the independent school so they (...) were on
our side. And a lot of the private schools genuinely, I think, believed they had a moral duty to provide playing fields, and scholarships and so on, and provide public benefit, which is right.

The Charity Commission also seemed to recognise that the entire question of public benefit was controversial in itself because it uprooted 400 years of existing practice; many organisations had become an ingrained part of the English cultural fabric and challenging their charitable status given the changes in modern society would have resulted in outcry one way or another. Thus, one former Charity Commissioner thought that while the public benefit reform would have proceeded in a more technical-legal tone, religion would have come up as an equally divisive issue.999

So I think that hadn’t it been for independent schools, the debate might have been different, it would have been more about religion. And if you look at other jurisdictions, we have had similar debates in other countries, in Canada for instance. Talking to them, they said that there would have been much more focus on religion.

A former policy leader pointed out that the hijacking of charity law reform by an education policy agenda would have been at best short-sighted, if not against the actual goals of Labour’s education reform. Thus,

(...) the Independent Schools Council put out a paper in I think 2001, the message of which was: “If we lose our tax reliefs, then our members will have to put up their fees by about 4.5%.” And the perverse effect of that would have been (...) that the Etons and Harrows of this world would have put up their fees by 4.5% or possible even more, and that would have affected their intake of pupils not one jot because of all the other factors that parents take into account. But what it would have done would probably have

999 The Preston Down Trust case later confirmed this inkling.
forced the closure of tens, maybe in the low hundreds, of much smaller schools that nobody has ever heard of, independent schools that run on a shoestring, have no endowments, don’t have the status, domestically and in particular internationally, of Eton and the like, where a reduction of tax relief, corporation tax relief, would have been significant in the context of their income and expenditure balance. (...) So if charitable status had been decoupled from all tax reliefs it wouldn’t have had the effect that the likes of Dale Campbell-Savours wanted, which was the going out of existence of Eton. Eton would have sailed on but 100 small rural schools would have folded.

Thus, it seems that there is no clear evidence that government saw charity law reform as a tool to address education policy; the Labour leadership was fully aware of the risk that a loss of charitable status would have for the sector, but also what consequences could – and indeed did – ensue. What this does not rule out is the fact that the Labour government profited to a certain extent from the way the policy reform unfolded: Labour was seen to address the question of independent schools, yet not a single schools lost its status and the independent school sector emerged from the exercise of public benefit reporting with an even stronger claim to their charitable status than before. At the same time, some elements of the Labour education policy, such as facility sharing, were strengthened through the public benefit reform. This might have been only a temporary phenomenon and mostly occurred before the Act was actually passed. A former Charity Commissioner commented that:

[The public benefit test] has actually made one other difference for independent schools in their practice. Because they really got geared up to it before the legislation and I was speaking at conferences just on this, I think just in ... 2004? 2005? And they were all about what they would have to do. Because at that time they were taking the Strategy Unit report model and they were going through what you were going to have to do, provide new bursaries, and they were
actually predicting what the guidance and legislation were going to say. (...) So even before the Act, schools were actually preparing their reports with one eye on public benefit. I think that it has changed their attitude and I think that even before the act they started to work with local schools, exchange teachers, I think the schools paradoxically who have been the ones who have changed most. They changed because they thought they were going to lose charitable status, so they all prodded away. And then they realised from a PR point of view, and other views, it was actually to their benefit. (...)I think that that has been a lasting change, in fact, independent schools do certainly far more in terms of partnerships with local schools and bursaries than they did 10 years ago.

It is also not surprising that from the perspective of the big looser of the reforms, the Charity Commission, the process and the political agenda looked different. Yet, given the “rapid and unpredictable” events that shaped the Charities Act 2006, interviewees saw it as improbable that the particular trajectory of the reform could have been consciously engineered as an education policy tool.

**Interaction among Policy Nodes**

In PEF, one of the most important factors in policy change is the conversion of policy nodes that – once a crucial number has been reached – are strong enough to tip the balance in favour of the issue at hand and in the ensuing period command the national agenda. In order to assess this claim, interviewees were asked whether, and with what frequency, they were interacting with other organisations or governmental entities.

What crystallised is that, generally, policy-level actors were the most open to exchange; they referred to numerous meetings and exchanges that they initiated. They also stressed how essential it was to find “allies” in the policy-making arena in order to push for reform, moving charity law high up on the government’s priority list. Legal actors, it
seems, were equally active in terms of exchange, but most often involved as experts; they
were invited with a clearly mandated role. This focus on a particular technical task might
explain why legal actors stated that they did not have much interaction beyond the
English sector. Policy actors, by contrast, reported interactions, sometimes even frequent
ones, with those involved in the Scottish charity reform process as well as other
stakeholders on a European level.

Former head of the PMSU, Geoff Mulgan, described the interactions as “endless”,
describing a tight network of exchange among sector bodies, individual charities, and
state institutions such as the Home Office, the Cabinet Office and the Charity
Commission. He described the voluntary community in England as

(...) a sector which loves consultation. (...) During the period that I
ran the Strategy Unit, which must have been from 3 or 4 years, we
must have done 50 or 60 different sort of reviews like this. (...) But
this would have been one with a lot of meetings of all kinds and
conferences and open consultation, if I remember rightly, some done
with the Charity Commission, some direct, and some with the
umbrella bodies. It’s a sector which loves talking. So I don’t think
there was a lack of consulting, and as I said there was a lot of active
conversations with the schools world, probably a bit less with health,
there was some discussion with the universities which were obviously
in a different category, and some bodies like parks ... there is a whole
host of organisations which could slightly struggle on a public benefit
definition, let alone a pure charity definition.

Nicholas Deakin, on the other hand, described that especially the newly arising think
thanks were a valuable ally in the push for reform – an imagery that strongly seems to
confirm the PEF theory:
And the think tanks were active; again, in the 90s, the think tanks weren’t quite the power in the land they are now. You have probably heard of the Institute of Public Policy Research and they were interested in sniffing around the possibility of reform. So the think tanks were there to be mobilised if we could do it as support for any recommendations we made.

Deakin also referred to the interaction with the Home and Cabinet Offices where it was possible to pick up support and where the New Labour government provided new allies:

> It brought in Alun Michael who was passionately keen, (...) at that stage a Home Office junior minister, (...) and he had himself done a report for the Labour party and had come not entirely coincidentally to much the same conclusions that we had. So we had an ally in government on a quite senior level but of course there were so many things that needed to be done in ’97. (...) And then there were allies – Geoff Mulgan, as I say, as chief advisor, in the Cabinet Office, who had himself done an inquiry into voluntary action. And he was therefore very well informed and knowledgeable and had spotted this as an issue the government might move on quite early.

There seems to have been significantly less international exchange, a finding that is also consistent with the PEF tenet that policy networks matter because of their political weight in tipping the balance for domestic reform. Scotland, with its parallel development of charity law reform, also with a focus on public benefit, appeared as an ideal candidate, yet all but one interviewees stated that there was very little interaction across the border. Former members of the Charity Commission said that “there weren’t very many discussions on a policy level between us”.

Nicholas Deakin remembers that:
I was North of the border as soon as the Scottish commission was appointed because, Arnold Kemp, its chairman, was a wonderful guy, whom I knew from another context. And it seemed to both of us that it was absolutely ludicrous not to exactly collaborate but to coordinate. And the Scottish commission secretary and our secretary had a exchange of ideas and an exchange of processes and it culminated in me and her, Jane Kershaw, going to Edinburgh and giving evidence to the Scottish commission, saying “This is what we are doing in England, some of it doesn’t fit your circumstances and some does.” And we were cross-examined by the Scottish commission and I thought that it was exactly how it should be. And as a result of that, a bit of flavour of thinking came across from Scotland. Another bit of flavour came from Northern Ireland. (...) I talked to the NICVA and to the Northern Ireland government, the Stormont government (...) and the idea of the Compact actually is the Northern Ireland idea, one I pinched from the Northern Ireland Commission.

Former Strategy Unit head Geoff Mulgan similarly remembers a vivid exchange, including a secondment of a Strategy Unit member to Scotland including a round table in Edinburgh with all the different stakeholders. Much of the interaction with Scotland that he recalled was commissioned by independent bodies such as the Carnegie Commission.

Respondents referred to the European Union and harmonisation as another outside influence. However, they stated that there was very little interaction and virtually no effect on domestic charity law and policy. In light of the differing legal traditions in England and Wales and continental Europe, and the general English cautious scepticism toward the European Union, this is not much of a surprise. A sector leader admitted that

Europe remains in my memory as something we were aware of and we thought about a bit but we hadn’t really formulated any clear line about (...).
Ideology

Another issue playing an important role in policy change is ideology, which can be a factor in the entrenchment of certain policy options over others. Moreover, ideology is also a factor that underlies the debate about a party-political divide over public benefit, in particular on the role of independent schools as the epitome of class warfare in English politics. Independent schools and other elite institutions should, however, be separated from the voluntary sector as such. In ideological terms, the former seems to reflect the classical divide, while the latter demonstrates a general trend of incorporating the voluntary sector more and more into the public provision of welfare.

While the influence of New Labour’s ideology was inevitably linked with public benefit reform, some interviewees also pointed to the continuity in the relationship between the public and the voluntary sector:

So there was a distinctive Labour view of the relationship with the voluntary sector. But not unique in the sense that going right back to Margaret Thatcher, for example, Douglas Hurd, as home secretary had promoted the notion of the active citizen, which is very much a label that Margaret Thatcher adopted. There was another scrutiny review like the Woodfield one, of government funding of voluntary bodies under Margaret Thatcher. It encouraged the whole concept of voluntary action. (...) So in that sense, (...) from certainly 1970, there was a growing sense in government that the voluntary sector was an important part of society that related to government. And each government had its own distinctive way of formulating this. (...) So there was a long-running background to this whole issue.

A voluntary sector leader summarised this distinctive approach by successive government as follows: In the 1950s, the relationship was characterised by a need for dialogue rather than passivity:
There had to be a settlement between the state and the voluntary organisations in which (...) they weren’t simply doing what the government said they should do and did it simply in the way the government said they wanted to. And the difficulty always had been that the government viewed voluntary action as a convenient extra, and not intrinsically part of the policy process and the implementation of policy. (...) The impatience in the ranks of the voluntary sector in the 60s and 70s had been that they weren’t being listened to. They weren’t being consulted on what the policy should be, they came in at the end of the policy to implement it. And the Conservative government, under Thatcher and subsequently under Major, was much more open to the notion that voluntary organisations should have a role but not open to the notion that voluntary organisations should have a voice. Particularly if the voice was critical ... and it often was very critical.

New Labour’s ideology of partnership with the voluntary sector was thus a necessary enabling factor in levelling the playing field for voluntary sector actors, allowing them to become more active in advocating change and shaping policies themselves:

(...) the relationship between (...) the trio – the state, the voluntary sector and business – the boundaries are changing and charity law had to reflect the ways in which that boundary was changing. It had to legitimise voluntary organisations having their voice, and it had to accommodate voluntary organisations having their share in policy making (...).
While governments since World War II have thus found it beneficial to develop their relations with the voluntary sector, the issue of independent schools was seen as touching on a deeper ideological divide between the parties:

There is also something from a right-wing perspective in the thought that these independent schools have been in existence for a very long time and they’re part – conservative politicians and conservative thinkers would say – of the fabric and the heritage of this country. (...) And in the mid- to late 16th century, a lot of schools where founded which still exist today. And if you’re a dyed-in-the-wool conservative you regard an attack on these institutions as being akin to an attack on, say, or the monarchy or the Bank of England, or other things which have become part of the fabric of our heritage. And that’s another factor that makes divisions about independent schools and whether they’re a good thing or socially divisive. It further polarises things.

This can be contrasted with a more traditional “Old Left” Labour line of argument. A former member of the PMSU suggested that Old Labour did not consider independent schools as “part of the fabric of [English] heritage” but rather as institutions that perpetuate a historical elite:

Should elite institutions get special privilege? (...) [C]harity was for the poor. So it wasn’t particularly schools, it was far more general, that charity had been captured by the rich for their artistic enjoyment, their healthcare, their education (...). There is a tension between the underlying Christian tradition of charity and the interpretation by particularly 19th century liberal lawyers who actually took it quite a long way from its Christian roots. But the Christian roots are pretty straight forward. And the legitimacy of charity feeds of that.
This view was brought up by several interviewees from the policy side, in particular when describing the Labour involvement in the reforms:

*Some Labour politicians, and Lord Campbell-Savours is an example, abhor the very existence of independent schools because of their social divisiveness. But on a slightly different level, and putting that aside for one moment, they also think that the presence of independent schools in the sphere of charity disfigures charity. It diminishes it as a concept. So Campbell-Savours, who was a member of the Joint Committee [on the Draft Charity Bill], suggested something which I thought very sensible and thoughtful at the time but not taken up which was a decoupling of charitable status from the right to automatic tax relieves for certain categories of bodies, including independent schools. It was a compromise, really, but he was saying ‘I find it objectionable that tax payer in this country are contributing to the continued existence of Eton College and various other institutions. So while I actually want to see them going out of business because of their social divisiveness, the next best would be that the tax payer does not subsidise them.’ Because the tax payer has got a large number of much better things to spend their money on.*

Yet, the ideological divide along party lines was a well-known factor to the Prime Minister’s Strategy Unit in the early stages of the reform. Aware that it might endanger the reform and its success, the Strategy Unit tried to steer clear of the traditional ideological discussion. A former member stated that the ideological debate was

(...) exactly what we wanted to avoid in the tactics. (...) [W]hen we were working on it which was 2001, 2002, (...) we very much wanted to get it out of that traditional sort of trope, both of the Labour side as well as the Tory side, so hence ... that’s one of the reasons why Tony Blair wasn’t particularly keen on it cause he didn’t want it to be seen
in that lens and why we wanted the Etons and the Winchesters and so on to be backing it and not to let it get into that sort of Sunday Times syndrome which is always polarising in a very traditional ideological way. And I just wonder if the legislation had gone through in 2003, whether that would have worked and it’s just that it has rambled on for so long so that the traditional forces and arguments had time to wind themselves back up.

A former member of Blair’s staff suggested that rather than a question of ideology on the status of independent schools, the reform was driven by “New Left” individual contributors that understood the wider ranging societal issues behind the reform:

But as I said, there were a small number of politicians who kind of got this, who were not very traditional sort of left-Labour, sort of wanted ... they were actually the reformist, the kind of modernisers, who therefore were in principle in favour of the public benefit test, not just on charities but also on the public sector. You should not keep a presumption that a public organisation should keep a roll unless it can demonstrate it was more in the public benefit for it to do so than for a charity to do it or a private company. I mean that’s the kind of background of ideas at the time.

Recalling the short note on Labour in Chapter 4, the interview data seem to confirm that there was a rift between “Old Left” backbenchers and the young “New Left” party elite who had supported Blair and Brown’s internal reforms. Both sides considered the independent schools question important. But the former saw charity reform through an ideological lens of historical elite prerogatives. The latter had a more pragmatic approach: the “New Left” expected independent schools to play their part in the New Labour education reform that focused on quality improvement through independent and state school collaboration.
One former member of the Charity Commission, who was actively involved in the public benefit reform and the Charity Act 2006 rejected any party political drive along traditional ideological lines in the origin of the reform and its final result. In fact, the comment suggests that, far beyond not triggering the reform, New Labour actually prevented what left-wing ideology advocated: a challenge to the charitable status of independent schools.

“This is what certainly the Tories would say ... and a lot of international commentators all say that this was the initiative of New Labour, which it wasn’t at all! I suppose they were happy to go along to a certain extent. But it was New Labour, it was the government, who wouldn’t have a definition would actually have made a difference.

Overall, there certainly is evidence in the individual accounts that ideology did play a strong role, albeit not always in the way one would expect. One civil servant who drove the Charities Bill cautioned that the written evidence presented in previous chapters represents a compromise among different ideologies. He recalled:

At the time the Charities Bill was being drafted, and indeed in the Joint Committee (…), there was a lot of in-fight among party political bases. Alun Milburn who was the Chairman of that Committee was extremely skilful in persuading members of the committee unanimously to sign up to a report on the draft bill. What would have happened, were it not for his skill, would have been that there would have been two joint committee reports. A majority report and a minority report.

Healthcare and Charitable Status
Independent schools might have taken centre-stage in the discussion of public benefit, but there are other charities that charge often high fees. Private hospitals with charitable
status are one such example and given the amount of fees involved, it is surprising that their status did not figure more prominently in the discussion. After all, the leading case that provided the basis for the Charity Commission’s guidance on public benefit and fee-charging charities, Re Resch, itself concerned a private hospital.

A former legal Charity Commissioner confirmed this surprise, stating that

the interesting thing is that there was so little about hospitals, it’s bizarre. And certainly, (...) at the public benefit hearing before the scrutiny committee, there was someone from the ISC and someone from an independent schools and they were bending over backwards to show the public benefit that they provided, partnerships, bursaries, etc. (...) But all these things they were doing, and so they all stood up and were saying “we’re doing this and we’re doing that” and then the chap from Nuffield, the Chief Executive from Nuffield stood up and said “well, we’re not doing anything and I don’t see why we should.” But again, (...) they never became public, but I understand that certainly by 2005/2006, they were also gearing up to do more (...). But that never reached the media, they kept a very low profile. (...) I think they were relying on the fact that quite a lot of NHS patients were actually ... I mean, the NHS were sort of contracting with private health services. (...) Certainly when I was a commissioner, I used to pay visits to a couple of large charities (...). And I can remember going to a care home about 2006, and they were trying to persuade that it was quite different for them.

One possible explanation for the lack of attention paid to charitable hospitals is thus the close integration through Public-Private-Partnerships (PPPs), part of a drive for contracting out that defined the charitable sector since the 1980s.
Another, more apparent explanation is the ideological status of private education versus private healthcare, at least according to the “Old Left” Labour logic. A Charity Commission policy staff member perceived that

there was something unique about the case of independent schools ... dividing people. I did think quite a lot on the question “why are private hospitals not receiving the same vitriolic treatment from left-wing members of the Labour party? What is it uniquely about private schools that gets them going?” And I never had an answer to that.

When asked to consider different alternative explanations, the staff member pointed out that a “factor might be also that Labour politicians who would not dream of sending their children to private schools would use private hospitals”. Specifically, he referred to a television appearance of Labour MP Denis Healey, which illustrated why the public benefit treatment of healthcare differed from that of independent schools.1000

And I remember Denis Healey, and I can’t remember whether he was Chancellor at the time or whether he was out of government at the time. He was still very much in the public eye. He went to Newsnight, or Panorama, or one of those programmes and was asked why his wife Edna had had an operation in a private hospital and Denis Healey, he was a politician of immense stature, was almost weeping on television. The conflict that had arisen with him was that his wife needed a tricky and immediate operation and the NHS at the time, which is in the late 1970s, early 1980s had a massive waiting list for operations of this type. And he as a socialist was faced with the choice between showing socialist solidarity by making his wife wait on the waiting list for 18 months in increasing pain and suffering or

---

1000 The interviewee referred to Healey’s interview with Anne Diamond on TV-AM on 11th of June 1987. The BBC reported: “Denis Healey also suffered at the hands of the Tories when it was revealed his wife had once used private health care. When the subject was raised by television presenter Anne Diamond, Healey simply refused to comment and stormed off the TV-AM set.” BBC Politics 97, accessed online on 13th December 2013 at http://www.bbc.co.uk/news/special/politics97/background/pastelec/ge87.shtml.
paying an amount which would have been beyond the person on average income to have his wife operated on next week in a private hospital. And he chose the latter because his wife was suffering. And it was a deeply personal thing. And the reason why he was close to weeping on television was because, in my view, he couldn’t reconcile the two things: I want to stop my wife suffering yet I don’t believe in the proposition that people should have advanced access to healthcare just because they got as much money as I have. It was … it sticks in my mind from 30 years ago. That sort of thing never happens with independent schools because you don’t have an emergency need for a physics lesson, do you? And in most cases sending your child to an independent school is something that needs a lot of planning. And you make up your mind several years in advance or a year in advance and you’ve got the money and you make sure that you’ve got the money for five years.

Public-Private Partnerships and Contracting Out

At first sight, public-private partnerships might not appear as an obvious independent factor contributing to the timing and scope of the public benefit reforms under the Charities Act 2006. All interviewees, however, described a change in the face of modern charities and the culture pervading the sector that stems from an increasing trend for public authorities to “contract out” a subset of their services to charities. This “Contracting out” culture was a change in the rules of the game, and was perceived as a contributing factor in the call for a redefinition. Once charities carry out a service under the auspices of a public authority, in most cases under statutory duty to provide such services, there will inevitably be more focus on their behaviour and the way that taxpayer money is used by these charities. Along with the New Labour focus on efficiency and New Public Management, transparency and accountability for charities as contractual partners are thus in their own right drivers for a definition closer to the popular understanding of charity.
Nicholas Deakin reported that the role of “contracting out” was very much discussed in the run up to the Compact of 1998:

One of the things that often came up was what was called then and still is called “the contract culture”. (...) There is a point about accountability, too. I mean I remember being more or less shouted at a public meeting: “We’re amateurs here, and that’s our strength, we’re enthusiasts, we don’t want to be professionalised.” To which I answered: “But also, you have a membership and you have donors and you have a responsibility, you are accountable, if you can’t satisfy that accountability there is no use shouting that you’re an amateur so I just ran you down, but it doesn’t matter because I did it with a good heart.

At the same time, the Deakin Commission also recognised that this change in culture would also fundamentally change the nature of the definition of charities vis-à-vis the state, and perhaps even the definition of charity itself:

People said to me – and it was a fair point – if we accept your line that voluntary organisations should make a compact with government in which we define each other’s responsibilities, what’s the guarantee that we won’t be pulled into ways of doing our work that are incompatible with our values? Can we trust government, in other words? (...) [T]he supposed threat wasn’t entirely illusory, the threat was government and its values overriding our values if we go in in a formal sense. My answer to that was that we eventually got to understand that we live in a democratic society and the government represents the elected, it’s accountable to us, and if we can’t trust, well, then we’re in a rather difficult situation in a democracy. A better way of doing it is to make the deal but to make sure that (...
consultation and engagement in the policy process, which is particularly important to me ... that you got to be there in the beginning and not in the end of a policy crisis. (...) Although down the years, all the time the echo comes back to that criticism that “you took us into too close relationship with government.” That we started the process of getting us too close to government.

A voluntary sector leader described this shift of responsibilities and expectations between state and voluntary sector in more detail, in particular how it might open up questions about the definition of the welfare state:

Although there still is a public obligation implied here, the delivery mechanism is not actually a public body. And I think this is quite an interesting philosophical question about the role and function of government and local government. Is it the job of local government to represent the citizens and in doing so to identify core services that need to be delivered and then ensure that those are delivered or is it the job of government to identify the services and deliver them itself? And I as I get older I become more and more to the view that local government fails in its first obligation if it focuses almost entirely on service delivery and is concerned about its own ability to deliver services rather than focusing on its strategic responsibility of what services are delivered, which is rather a different thing. But I still think it is in the realm of the welfare state and I think that’s still where we are.

However, he also pointed out that the change in relationship through contracting out could lead to a scenario close to what Nicholas Deakin described beforehand: the replacement of voluntary sector values and philosophy through the government of the day:
But if we get to the 2015 general election and a majority Conservative government is elected then there is at least a chance that there will be a kind of formal dismantling of the welfare state and the underlying philosophy that sits there and replaces it with something that says it is the job of individuals to look after themselves and churches and charities come to the rescue if they can’t. Brave new world of 1622, I would say.

He also cautioned against the unrealistic expectation directed at charities when under contract by local authorities:

(...) [T]his is an act of faith or sometimes an act of political ideology, this idea that the private sector does it better. The evidence doesn’t support it in most cases at all.

A former Chief Charity Commissioner suggested, on the other hand, that the effects of contracting out shouldn’t be overstated:

And again one can exaggerate that, I think. [Contracting out] has greatly affected particular sections of the charity world, the ones that relate most closely to active government policy. But if you think RNLI [Royal National Lifeboat Institution], which has always prided itself since its mishap in the 19th century of not getting any government money, and a whole lot of other charities of that sort RSPCA [Royal Society for the Prevention of Cruelty to Animals] and so on. A lot of the charitable sector relates to its sources of funding, the public, public donations in a quite different sort of way.

The truth of the matter is that contracting out has indeed changed charities’ sources of income; while 19th and early 20th century charity was predominantly relying on donations and bequests, the arrival of the modern welfare state has set in motion an increased
involvement of government through grants and contracts. A former Charity Commission member commented on this change by describing how the general public remained mostly unaware of these developments:

Sources of charities’ revenue is now more varied and diverse than it has ever been. And another thing that would astonish the public – if you take household name charities like, say Barnado’s, or Mancap to name but two, these are institutions which in the case of Mancap receive 92% and in the case of Barnardo’s about 76% of their money from the government. Yet most people and especially donors and legators to Barnardo’s, Mancap and all the others would still think of them as essentially voluntarily funded organisations. And if they were told that in fact 75% of Barnardo’s money comes from the government, they would be surprised at that. But if they were then asked, do you think this makes Barnardo’s a tool of governmental authorities in some way or a puppet or in any way not an independent operator, not a proper charity, I think they would say no, and it wouldn’t particularly bother them. And that in itself is a curious phenomenon and (...) they would probably answer in that way because they would have some personal knowledge or experience of what Barnardo’s does, and think, hang on, ... Barnardo’s operates in a charitable way, and that’s its ethos, it’s not run like a local authority or a branch of government, even though 75% of its money comes from local authorities. It’s curious. There is a massive disparity between the truth and what people think about charities in a number of areas, but it doesn’t seem to matter.
8.3 Additional Independent Variables Identified Through Interview Data

So far, the focus has been on the independent variables identified by the radical change frameworks PEF and PDF. The interview data have pointed to further factors that both theories overlook. Some could be fruitfully included in these radical change frameworks. Others point towards Thelen and Streeck’s alternative GTF. These additional factors are discussed in the following section.

Error Term

Formal expressions of causal relationships, especially in empirical form, acknowledge “error”. In qualitative research, “error” is less explicitly acknowledged. Yet, a former Charity Commission member vividly recalls just how much hinged on often “accidental” decisions, ones forced by circumstance and time constraints:

But also, you know, the wording of one of the charitable purposes. I remember a meeting at the Charity Commission, and we were sitting there and said, “Well, that doesn’t quite cover what we want it to do.” So I came up with some wording, and I said “Do that!”, and there we are — and it’s now part of the Act. (…) [T]here is less thinking than one might imagine. Somebody says “oh why we don’t do it like this?” and when it comes to it, some things are scrutinised and some are not. I mean, with the Charities Bill, part of the problem was that it was so much to cover and all the debate was on public benefit. So there are other parts that weren’t actually scrutinised and had some problems, technical problems.

In short,

In so far as how legislation happens, it can just be by chance that you get something (...). And of course, in Northern Ireland, their definition of public benefit makes no sense. It just got wrong! They took a bit one of and a bit of the other, no one notices, and it sets everything back for several years.

Contemporary research in economics tries to address this “human touch” through the theory of bounded rationality. Clearly, public policy frameworks stand to benefit a great deal from incorporating the concept of bounded rationality to increase their explanatory power.

**Time as an Independent Variable**
Both PEF and PDF are silent on the issue of timing when it comes to the temporal gap between change and the moment of policy implementation. Those interviewees who had experience in the policy process, in the Charities Act 2006 and otherwise, emphasised that many of the challenges that the policy reform process encountered had to do with a loss of momentum. From their perspective, it simply took too long to translate ideas into policy and policy into primary and secondary legislation.

A former member of the Cabinet Office observed that the politicisation of the reform only set in years after the initial policy idea had been formulated:

> I wonder if that’s the consequence partly because we took so long. Because when we originally did this, the idea was to get this through legislation pretty quickly. And then I can’t remember exactly why it got endlessly delayed.” When asked whether this might be a reason why the Act was now considered a missed opportunity by many, he replied that he thought “it may be that by then, there was no one really driving it. So the ministers who had been engaged with it had probably all gone by then.
Nicholas Deakin confirmed this theory, pointing out that there was a significant pause between the Deakin report and the Compact, the uptake by the Prime Minister’s Strategy Unit and the final passage of the Charities Act 2006:

\[
A \text{ new government that comes in and wants to do things doesn’t spend time and energy on what looks like a very marginal issue when there are major ones that you need to address. So we had in rather a long queue (\ldots). But it got into the queue and then: slowly, slowly, slowly ...}
\]

The Role of Active Lobbying

A further independent variable that was mentioned by several policy actors, from the governmental and the Charity Commission side, is the active pursuit of certain policy features through professional lobbyists:

\[
\text{But if you see now ... the list of charitable purposes. I mean, how it developed. It was all about who was the most effective lobbyist and who had the eye of the government. The government had a list. And in fact, Scotland and England started out with the same lists. And then when they got to Parliament, you had some people say “Hey, we’re not there!” I mean, the army, they said “We’re not there! We want to have our own purpose!” And because the army have a strong voice, we had to add it in, and we now have a separate charitable purpose.}
\]

\[
\text{And then there was the issue (\ldots) of the single issue lobbies. And there were lots of them, and there still are (\ldots) single issue lobbies in the field and they weren’t all – from my biased perspective – they weren’t always the good guys.}
\]
Lobby groups are not specifically addressed in the radical change frameworks although there seems to be evidence for their role in pushing for endogenous change. In addition to easily identifiable network actors, it is also worth looking to lobbying structures and the respective resources that stand behind individual lobby groups to learn more about hierarchies among policy networks.

Role of Leadership

Similarly to the single-issue influence of lobby groups, another factor that both PEF and PDF underspecify is the role of individual leadership. This, however, has been a recurring theme across interviewees from different backgrounds, both in policy making as well as in the legal world, and from within the voluntary sector.

According to respondents, leadership influence took two forms: Firstly, it referred to the infamous and continuous disagreements between the two fathers of New Labour, then Prime Minister Tony Blair and his Chancellor of the Exchequer Gordon Brown. As Richard Heffernan suggested, “The seeds of discord between Prime Minister and Chancellor were set in stone from the first. Blair, rewarding Brown for not running against him in 1994 by the ‘Granita Pact’, granted his Chancellor a prominence which gave him too great an independence.” It seems that their difficult relationship was a major force in shaping the public benefit debate and the Charities Act 2006.

Thus, one of the key drivers from the side of the civil service described the policy making process leading to the Charities Act 2006 as follows:

---


Well, (...) the law on public benefit is in the condition it is today because of the enmity between the Prime Minister and the Chancellor of the Exchequer in 2001, and their respective staff in No. 10 and 11. And that’s the bottom line. And everything else around is a result of people like me trying to make compromises. (...) [T]here were some things which started off as side issues that turned into game changers. And the public benefit question was the main one of those. And the reason that it turned into a game changer was because of severe differences of view between the Prime Minister and his policy unit, and the Chancellor of the Exchequer. And the main difference of view was a political one. The Prime Minister wanting not to lose appeal to middle class, mainly affluent voters, wanted any reformed charity law not to do any harm to, in particular, independent schools, but also other fee-charging charities, such as for example private hospitals. But it was the independent schools that provided the main focus (...). And the Prime Minister and his policy unit were perfectly relaxed about the idea that people who could afford it, should be free to pay, in today’s money, £30,000 a year to educate their children out of the state system. (...) Whereas the Chancellor, if he had a completely blank slate, he would have wanted to move to a position where, at the very least, charitable status was decoupled from the automatic right to tax privileges.

Secondly, leadership was perceived on various levels within the policy arena as a driving force of reform. Key individuals are repeatedly mentioned, such as Francesca Quint, QC, Nicholas Deakin, Geoff Mulgan, Alun Michael, Lady Winifred Tumim of the NCVO and a whole host of other actors from all across the public and voluntary sectors.

One legal interviewee recognised that
I was conscious of (...) a reluctance in government to take on something complex and controversial (...) this is where the Cabinet Office come into play, and particularly Geoff Mulgan, when he was special advisor there. An absolute key figure. I think probably there wouldn’t be legislation without him.

A former Chief Charity Commissioner also stressed the importance of individual leadership by describing the development of New Labour’s perspective on the voluntary sector process thus:

I think the way that I would put that is that there were certain people, Alun Michael being a key player in that, who were highly attuned to charity and the value of charity. That ran quite widely across the New Labour government. (...) Now, the great breakthrough in New Labour thinking that Tony Blair was responsible for was committing Labour to a positive relationship with the voluntary sector and a positive view of voluntary action. Previously, the old sort of trade union attitude being that voluntary action was all very well but it couldn’t encouraged because it would undermine workers’ employment position, it would take away workers’ jobs, it would, if you will, institutionalize doing things through voluntary action rather than paid labour. And he completely changed that and that was back in, possibly, 1995 or 1996.

In fact, the Charity Commission itself was seen as particularly susceptible to the influence of individual leadership:

It’s [the Charity Commission is] small enough to derive its character and ethos from its Chief Commissioner. And it’s because it’s a government department but it doesn’t have a minister so there is no ... it has no political clout in Whitehall. And so it is blown hither and
either by the wind in the way that other government departments are not because they’re ministerial departments with political clout. The Charity Commission has none of that.

Confirming this view, a voluntary sector leader repeatedly – and, as he put it, “untypically – quoted one civil servant who is an extremely sympathetic person, a Charity Commissioner, a reformer who wanted reform to go further, and who wanted to get an outside endorsement for the notion of further change (…)” as a major influence in facilitating the reform process.

However, leadership seems to interact with the temporal dimension. Thus, a former PMSU member stated that “Alun Milburn and people like that, at one point, got on top of the [issues] … understood the issues … and I think David Blunkett did as well. They’d all left”, removing some of the drive behind the original policy reform.

This observation was mirrored by a Charity Commission civil servant who stated that he was advised by the PMSU that

(...) if, as happened in a reasonably high proportion of cases, the whole thing was accepted and then needed primary legislation or some form of implementation, the people who had written the report and who had therefore become knowledgeable about the subject all disappeared to do other jobs and the project was handed over to which ever government department in Whitehall was responsible for the policy area to take forward. And because nobody in the department had been involved in the creation of the original report, half the time, they weren’t interested or didn’t know enough about it, the projects foundered for lack of continuity. And I remember him telling me this and I thought, right I am going to be in this case a thread of continuity and see it through.
Explicitly incorporating individual leadership in the theoretical framework could thus greatly contribute to the accuracy of both PDF and PEF. This will be further explored in Chapter 10.

Gap Between Policy Formulation and Implementation

A further added dimension of policy change that neither of the radical change frameworks address is the different stages of the policy making process. Yet, the process between policy formulation and eventual implementation can often be just as crucial as the initial impetus for reform. In the case of the public benefit reform under the Charities Act 2006, all interviewees remarked that the politicisation of public benefit, and with it, most challenges, arose only halfway through the policy process at the time of the parliamentary scrutiny committee. Subsequently, the Charity Commission received a statutory duty to define and provide guidance on public benefit (based on its interpretation of the case law); as the ISC case demonstrates, this final stage of the policy process received most critical attention, both from within the sector and from the media. The frameworks would thus gain from a more differentiated view on the different stages of policy making. This would require a closer micro-level analysis, a factor that will be revisited in Chapter 10.

The implementing body, the Charity Commission, had to bear the brunt of the criticism directed at the Charities Act 2006 and its public benefit reform. A former member of the PMSU stated that “[a]t the time, the Charity Commission would be a relatively well-staffed, confident body, which could get on a front foot and define in a reasonably crisp way its interpretation of the law and adjust that over time (…) – and obviously that is not what happened at all.”

A Third Sector leader described the disconnect between formulation and implementation with the following analogy:
I don’t like military analogies but I used sometimes to say that we cast the bullets but we had to leave it to others to fire the missile – mixing my metaphor. It wasn’t our job at all to implement. (…) we were always those who had to make the recommendations and after that it had to run on the basis – first of all, if it made good sense or not.

Recognising the Idiosyncrasy of the (Common) Law

Structural factors at the micro-level, such as the independent influence of the legal system, are underspecified in both theories. In this policy context, the law takes on three different roles: courts setting policy through case law, legal interpretation of statutory and case law by the legal profession and judges, and “legalese” as an own form of discourse in the policy making process.

Firstly, where no previous statutory provision exists, it stands for a body of court-determined precedent in case law that anchors the status quo for current policy. Understanding what exactly this status quo stands for and how it evolved is key in understanding how the public benefit reform unfolded.

To start with, grasping the meaning of the common law take on charity is far from easy. It is deeply rooted in history and can only be understood in this context. Since there is no statutory definition of charity or public benefit (the Charities Act 2006 refers to the existing body of case law without defining or interpreting it), grasping this historical context is essential. A former Charity Commissioner acknowledged that this understanding is not intuitive:

So the question of “what is charity?” was clearly a sort of niggle in that because the answer was so absurd and so anachronistic, charity is what’s laid down in the preamble to a long repealed act of the 1601, you just have to say it for it to be totally absurd. I used to get a laugh at a particular overseas gathering of talks by English charities and it was just so mad that so important a part of the texture of
society and government policy should be left to such an absurd mechanism. To which the charity lawyers would of course say: it works very well.

Due to the nature of the common law and the absence of an unequivocal jurisprudential foundation for charity law, even the legal community disagrees on the meaning of charity law:

The legal community had never a single consensual view on anything at all, they still don’t. Even at the time of the Strategy report, not everyone agreed that the law did contain a presumption of public benefit in favour of religion, poverty, and education. (...) The Tribunal seemed to appear to say that never had been a presumption, that it never operated like that. Not all lawyers would agree with that proposition. So there is just no consensus.

This problem became particularly apparent in the case of the Charity Commission’s guidance on public benefit and fee-charging charities:

And the case that attracted most interest when the bill was going through Parliament, from the legal community, was an Australian case from the 1950s, called Re Resch. It was a hospital, nothing to do with independent schools. But it did have some useful things to say, but it wasn’t modern, it wasn’t about independent schools and it was divorced from conditions in England and Wales today. But that’s all there is, really. An inordinate amount of legal thinking was given to the interpretation of the judgment in Re Resch. And there were half a dozen different camps of legal thinking about the real implications and meaning of Re Resch and the whole thing was, it was just lacking in consensus.
Secondly, the law also stands for a particular approach that legal practitioners, from judges to barristers and solicitors, will follow in their interpretation of the current state of affairs as well as in developing the law in the future. A former voluntary sector leader described the legal community and its logic during the reform process thus:

On the other side, charity lawyers [laughs] – I mustn’t be stereotypical but they are a particularly conservative bunch – and they were deeply irritating. We talked to them, we tried to talk to them, but ‘no, no, it’s all organic development, the law had developed organically over the centuries and it can accommodate change in its own way, in its own temper’. They weren’t too happy about [the push for reform] as you will gather from the outcome.

Thirdly, the law also refers to an idiosyncratic form of expression, the proverbial “legalese” of the expert who understands the implications of even subtle changes in wording. This final influence of the law as an independent variable has led to what can best be described as policy getting “lost in translation” amidst an audience in Parliament or the sector, that is not fully fluent in the law’s language.

One former member of the Charity Commission’s legal team described her experience in dealing with a non-legal audience during the policy making process:

I think [charity law is] really difficult. Because it is really difficult! Certainly, the Commission and charity lawyers struggle with this the whole time. (...) [I]n parliament, the debate in the Lords on the whole was very good. But once it got to the Commons it’s just not like that, they did not understand the issues. You sit there, and (...) they don’t understand. It is just so frustrating. And they give you a hard time. It was ... in fact it’s a complex area. Complex legal area, which was subjected to sort of uninformed popular debate. (...) You see most charity law ... this is so different from the 1991 Bill because then
there was nothing about definition, nothing about public benefit. It was seen as a totally technical bill and it just, there wasn’t a single sentence in the press. The only people who took part in the debates and committees were people who were informed and it was seen as a technical-legal bill. And like most of our law commission bills were debated only in the committees because no one really understands it but people go through it. Charity law has always come under this category and all of a sudden we were getting these people who knew nothing about it, who were just voting along party and class lines. And I think you’re absolutely right. I think that was part of the problem. It was trying to talk to them, talk to people who don’t want to hear ... It stopped being addressed as a legal issue.

8.4 Caveats

Interview data allow a unique insight behind the edifice of written evidence. Thus, the personal accounts presented in this chapter uncover important angles that allow for a better, deeper understanding of the policy reform process that lead up to the public benefit reform in the Charities Act 2006. Yet, as any research method, it bears certain weakness; these will be identified and acknowledged in the section to follow.

Subjectivity

All information is based on subjective perception that is shaped by context and point of view. There are certain perceptual biases that can be discerned – such as the marked difference between the account of those with a legal involvement in the policy reform and those with a background in policy. Others are certainly harder to discern. Thus, any account given here will have to be read with an understanding of the often emotionally charged atmosphere that characterised especially the later stages of the policy implementation.

To receive as balanced a view as possible, stakeholders with different backgrounds were selected, from legal practitioners to former Charity Commission members, members of
government and voluntary sector leader. The reality probably lies somewhere in between their individual perceptions and accounts.

Memory

All interviewees prefaced their account with a reference to time; after all, the events under discussion date back more than a decade. Many interviewees had moved on to different areas of employment or activity by the time of the interview in 2013. Wherever possible, facts were verified via independent research and neutral sources, which are indicated in the footnotes. Moreover, individual accounts showed very little to no divergence on facts; they generally seemed to confirm the written evidence, adding further detail rather than contradicting any of the other parts of the analysis.

Anonymity

Rigid ethics protocol was observed in the preparation and execution of the interviews. While every interviewee agreed in writing to be referenced by name, the principal investigator decided to refer to individual accounts by the interviewee’s respective former position that contextualised the relevance of his or her comment. Only in two occasions where the quotation would have identified the interviewee in any case was a personal reference made. The principal investigator feels that there is no loss in the quality of information through this practice while any potential inconvenience to the individual interviewees has thus been kept to an absolute minimum. No “off the record” comments have been used in this chapter.

Semi-Structured Framework

The semi-structured nature of the interview assured that key variables were discussed; however, it also meant that only 75% of each interview were purely inductive in epistemology. Given the natural time limit (the shortest interview lasted 46 minutes, the longest 1 hour and 58 minutes), further issues could have been raised by the interviewees that were not mentioned because of the standard set of questions. All interviewees were presented with transcripts of their interviews as well as the quotation used in this chapter and had the opportunity to add further commentary if they wished.
8.5 Conclusions

The interview data capture the internal diversity of the sector, yet it was possible to discern two groups among the interviewees: those with a predominantly policy-oriented outlook and those with a legal outlook. These two perspectives also explain the alternative accounts that emerged, mostly around the role of agency from the then Labour government. But which of the factors that the respondents considered “important” in forming and executing the public benefit reform and the Charities Act 2006 did matter most? This concluding section is evaluating the accounts in the light of the previous Chapter evidence.

Hypotheses Testing

Referring back to the initial hypotheses that guide this thesis, the interview data provide the following evidence:

Hypothesis 1: The changes to the public benefit test in the Charities Act 2006 mark a radical policy change after a long period of stability.

⇒ The interview data are unanimously disconfirming Hypothesis 1. But they draw attention to the difference between intent and empirical evidence: the intentions behind the public benefit reform were indeed aiming for a radical policy change that would clarify the existing case law and its thin jurisprudential foundation of charity law. The empirical evidence after implementation have been described as almost inconsequential. Any effects that did occur, such as the gearing up of at least some independent schools to prepare for the public benefit test, were described as temporary and on the whole not a dramatic change. The interviewee from one of the independent schools indeed confirmed that his school did not change anything since public benefit has always been a main focus, public benefit test or not.

Hypothesis 2: The changes to the public benefit test in the Charities Act 2006 were introduced through endogenous variables.
The evidence on the question of endogenous or exogenous causation is less clear-cut. It seems, as so often, that there is a combination of factors at play. Even so, these do not, on balance, appear to implicate an overwhelming exogenous factor.

What can be ruled out is exogenous causation through scandal, an account popularised in the media. The interviewees, no matter from what perspective they were involved in the policy making process, did explicitly state that there was no single trigger point that set off the reform process. They reported a standard level of white noise but no single event of scandal that would have tipped the balance.

The status of independent schools and the ideological associations that come with it might be considered an exogenous shock, namely a factor that influenced the development of public benefit that was not necessarily related to charity law at all. This is the narrative of a “hijacking” of the charity law policy agenda, especially on public benefit, replacing its driver and agenda by those of education policy. The interview evidence on this matter, however, is equivocal. As one former member of staff of Tony Blair’s administration suggested, it would have been much easier to achieve a reform of independent schools directly by the means of education policy. On the other hand, the (at least) temporary extension of bursaries and facility sharing that did take place in the run up to the Charities Act 2006 did advance Labour’s halted education policy, as described by Alison Dunn.\(^{1004}\)

On balance, the interview evidence suggests that any overlap of policy agendas between education and charity law were accidental. Thus, education policy can be ruled out as an exogenous shock that triggered and shaped the reform. This does not discount the fact that it did have to deny its effects. A more precise interpretation might be that the intervening variable underlying both education and charity law policy was New Labour’s approach to government based on New Public Management and its emphasis on accountability and evidence-based policy-making.

---

\(^{1004}\) Dunn (2012)
**Hypothesis 3:** The origin of changes to the public benefit test in the Charities Act 2006 can be traced across policy arenas.

The conjunction of different policy arenas emerged throughout the interview data. Other jurisdictions were largely ignored in the process, but within the domestic policy arena, there is clear growth of the issue network. This does not mean that the reform process originated in any one point, but rather that independent opinion leaders across different policy nodes joined forces at crucial, strategic points. One such juncture is the coming into office of the New Labour government in 1997; that opened the gates for reform. The evidence thus seems to confirm Hypothesis 3.

---

1005 Such as for instance the recurring comment that the NCVO report “For the Public Benefit?” triggered the reform process.
Chapter 9. The Scottish Comparison

9.1 Introduction

England was not the only country that seemed to take the 400th anniversary of the Statute of Elizabeth as an opportunity to revisit the collaboration between the state and the charitably sector: Canada, Australia, Ireland and Scotland also contemplated charity law reform around the turn of the millennium. However, only few succeeded. Of these, Scotland offers the most instructive case for comparison. Scotland follows a distinct legal tradition that combines its historic civil tradition, with great similarity to Roman law and centuries of common law influences from South of the border. The differences to the English common law system are particularly pronounced in the case of trusts, the main driver of charity law. Nonetheless, tax exemptions for charities are granted and managed by the HMRC, which uses the English (and Welsh) definition of charity and public benefit that has been discussed in previous chapters.

Charity law reform also occupies a prominent position in the legislative history of the Scottish Parliament, marking one of the first major Acts to be enacted after devolution. The process that led to the Charities and Trustee Investment (Scotland) Act 2005 is thus not only of relevance as a comparative case to the preceding analysis of England and Wales; it is also of relevance for those interested in the formation of devolved policies in Scotland and their evaluation little more than 6 years after devolution.

---

1006 Ireland has adopted a combination of the Scottish and the English policy with rather mixed results; Canada went through a series of round table discussions on several dimensions, yet only few of the resulting recommendations were ultimately adopted; despite similar struggles, Australia passed the Charities Act 2013 (Cth) which will come into force on 1 January 2014.

1007 Although income taxation has become a devolved power, the HMRC is still in charge of charitable tax exemptions under the Scotland Act 2012.

1008 Devolution was made possible through a majority referendum in 1997 and resulted in the Scotland Act 1998; the Scottish Parliament was established and first elections held in 1999.

1009 It is important to note that taxation continues to be a reserved power that remains with Westminster; the Scottish definition of charitable status does not apply for taxation purposes, which is still regulated by the HMRC and the English definition set out through the Charities Act 2006.
This chapter will outline the Scottish reform process, following roughly the same parameters as the English analysis. For the present purpose of comparison, it will suffice to refer to the most important written accounts. Moreover, many interviewees from Chapter 8 were involved in the English as well as the Scottish process; their evidence will provide insights into the channels of communication and interaction that were not recorded in the written evidence.

9.2 Pre-Reform Scottish Charity Law

9.2.1 Legal and Regulatory Situation
Prior to the Charities and Trustee Investment (Scotland) Act 2005, many English commentators did not perceive of much Scottish charity law to speak of. The law of trusts operating in Scotland is English, albeit with a Scottish tune. In contrast, Scottish commentators noted that there is a basis of old case law that would have offered a suitable source of domestic charity law, going back to *Hill v Burns*\(^{1010}\) of 1829, which provided the foundation for a charitable trust in Glasgow. In their view, the Scottish approach to charity law diverged substantially from its English counterpart: a charitable trust is no more than one of many types of public trusts\(^{1011}\), and since neither *Pemsel*\(^{1012}\) nor the Preamble to the Statute of Elizabeth are formally part of Scots common law, Garton concludes that ‘charitable purposes’ lack technical meaning\(^{1013}\), also because of a lack of coherent case law similar to the situation in England and Wales.

The main reason for the lack of a distinctly Scottish perspective on charity law is easy to find: until the foundation of the Office of the Scottish Charity Regulator (OSCR) through

---

1010 (1826) 2 W & S 80
1011 Garton provides an overview of Scottish case law on public trusts, citing *Ross v Heriot’s Hospital* (1843) 5 D 589, 608 (Lord Cunningham) 625 (Lord Cockburn); *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531 (HL) 560 (Lord Watson); *Cobb v Cobb’s Trustees* (1894) 21 R 638 (Ct of Sess); *Blair v Duncan* [1902] AC 37 (HL) 48 (Lord Robertson); see Garton, p. 7 footnote 40.
1012 English cases are only of little if any persuasive use in Scotland.
the 2005 Act, Scottish charities were regulated mainly by HMRC, then still called the Inland Revenue. In addition, the regulatory system for Scottish Charities comprised a rather complicated and decentralised network consisting of the Lord Advocate (representing the Scottish Charities Office), the Court of Session, the Scottish Office and the Scottish Charities Nominee. Since the Inland Revenue followed the guidance of the Charity Commission for England and Wales, it applied the English legal definition in order to determine charitable status for tax purposes. In fact, this arrangement is still in place for the administration of charitable tax exemptions. There was not much incentive for change until devolution opened up a window of opportunity.

Garton argues that Scottish judges seem to have opted against a formalisation of “charity” as a legal definition. Thus, the Court of Session in Baird’s Trustees v Lord Advocate tried to define ‘charitable purpose’ for the UK-wide Income Tax Act 1842 without the use of the case law (both English and Scottish) and chose to derive meaning based on the popular definition of charity. Stating the “ordinary familiar and popular use”, the Court of Session held that: “Charity is relief of poverty, and a charitable act or a charitable purpose consists in relieving poverty, and whatever goes beyond that is not within the meaning of the word ‘charity’ as it occurs in this statute”.

Legal scholars disagree about how Scottish charity law differ from its cousin South of the border. Some argue that the English and the Scottish definition of charity are quasi identical even if they derive from a different jurisprudential basis. Others suggest that the Scottish definition is either narrower or broader than its English counterpart.

---

1015 (1888) 15 R 682 (Ct of Sess)
1017 Baird’s Trustees v Lord Advocate (1888) 15 R 682 (Ct of Sess) 688 (Lord Glencorse)
1018 Garton suggest to consult Magistrates of Dundee v Morris (1858) 3 Macq 134, 154 (Lord Chelmsford); Income Tax Special Purposes Commissioners v Pemsel [1891] AC 531 (HL) 558 (Lord Watson) 582 (Lord Macnaghten); Blair v Duncan [1902] AC 37 (HL) 43 (Lord Davey), see Garton (2013): p.8.
1019 See for instance Lord Halsbury LC in Pemsel, [1891] AC 531 (HL) 550 as well as Grimond v Grimond (1904) 6 F 285 (Ct of Sess) 293 (Lord Montrieff); [1905] AC 124 (HL).
The only thing that all authorities agree on is that, at the end of day, any conclusion has limited practical relevance for Scottish charities because the Inland Revenue firmly applies the English definition for tax purposes anyway.

An alternative account is provided by Patrick Ford of the Charity Law Research Unit at the University of Dundee.\textsuperscript{1021} Ford presents the Scottish charity law system as based on public benefit “in a much wider sense”, namely on the “indigenous Scottish concept of public benefit enshrined in the Scots law of public trusts”\textsuperscript{1022} that does not restrict “the public benefit activities (...) to “uses” derived from the Charitable Uses Act 1601”.\textsuperscript{1023} Because of the mixture of indigenous Scots law and English common and statute law, Ford describes the Scottish public benefit system as “operating at three distinct levels”\textsuperscript{1024}. The “Public Benefit” level, the “Charitable, Benevolent, or Philanthropic” level, and finally the “Charitable” level.\textsuperscript{1025}

Only the third “Charitable” level corresponds with the English provision enforced by the Inland Revenue; the former two levels derive from domestic Scottish foundations. The “Public Benefit” level “is defined by the Scots common law concept of “public benefit” and facilitates and regulates the formation and operation – as trusts and unincorporated associations – of PBOs [Public Benefit Organisations] whose purposes or objects confer benefit on the public in any way”\textsuperscript{1026}; the “Charitable, Benevolent, or Philanthropic” level stems from the “statutory expression\textsuperscript{1027} “charitable, benevolent or philanthropic” and

\textsuperscript{1020}Garton suggests “a trust for ‘charitable and benevolent’ purposes is charitable even if it is construed as being for purposes that are either charitable or benevolent (but not both)” while such a trust would fail in England, citing Hill v Burns (1826) 2 Wils & S 80, 90 (Lord Gifford); Ewen v Bannerman (1830) 2 Dow & Cl 74, 101; 6 ER 657, 667 (Lord Wynford); Miller v Rowan (1837) 5 Cl & Fin 99, 7 ER 341; see Garton (2013): p.8f.
\textsuperscript{1022}Ford refers to Wink's Executors v Tallent [1947] SC 475, per Lord President Cooper, at 476.
\textsuperscript{1025}Ford (1999): pp.190f.
\textsuperscript{1027}Law Reform (Miscellaneous Provisions) (Scotland) Act1992 s.119.
promotes the operation of PBOs by permitting (and regulating) fund-raising from the public for purposes which fall within” the remit of the category.

This alternative presentation of the Scottish situation pre-2005 is relevant to this analysis because of its great reliance on the concept of public benefit. Indeed, if Ford’s account is correct, Scottish law already possessed the primary focus on public benefit that the English reforms sought to create through the Charities Act 2006, albeit covered under layers of English law through the “charitable” level that the Inland Revenue follows up to this day. The Scottish legal definition of public benefit, according to Ford, was “established by the Scottish courts as part of the law of public trusts\textsuperscript{1028}. A public trust is one constituted for the benefit of the public or a section of the public\textsuperscript{1029}.\textsuperscript{1030}

However, Ford’s final conclusion coincides with Garton and other scholars: the first “public benefit” level only facilitates the formation of public benefit organisations, but cannot do anything to promote PBOs since the extension of tax exemptions and other regulatory factors is still in the hands of Westminster through the remaining reserved powers. Thus, only the English category, i.e. the third “charitable” level of Scottish charity law, can fulfil all three duties of charity law that are to facilitate, regulate and promote organisations for the public benefit. The main differences in the Scottish case are thus not of legal nature, but derive from its diverging policy and regulatory approach.

\textsuperscript{1028}“In Scotland the trust is a creature of the common law and does not depend on a distinction between law and equity.” Ford (1999): Footnote 12, p.195.


\textsuperscript{1030}Ford (1999): pp.195f.

At the time of the Kemp report\textsuperscript{1031}, there was very little political interest in charity law and policy in Scotland. This is surprising given the Scottish Council for Voluntary Organisations (SCVO) estimated that in 1997, charities accounted for £2.4 billion (i.e. 4\% of Scottish GDP), and provided work for the equivalent of 34,000 full-time positions and over 700,000 hours volunteering hours per week.\textsuperscript{1032} Much of this apparent apathy can be attributed to the English reign on charity regulation through the Inland Revenue in the absence of an own regulator. In fact, even the impetus for charity reform (pre-devolution) allegedly stems from England and the Woodfield Report, which described it as “imprudent” to continue with the existing Scottish charity law and regulatory framework.\textsuperscript{1033}

Given the situation, the Kemp Commission’s Secretary Caroline Bamford recalls that in 1995 and under the chairmanship of former \textit{The Herald} editor Arnold Kemp, “in the fine tradition of the voluntary sector, it took matters into own hands, and set up a review of public policy options of its own.”\textsuperscript{1034} The report made a set of recommendations, such as the foundation of an independent Scottish charity registrar and an appeals tribunal for charity cases. Most importantly, the Kemp report took a strong view on public benefit: a majority of its members argued in favour of introducing a public benefit test that would prevent schools, universities and hospitals from gaining (or keeping) charitable status.\textsuperscript{1035} As Bamford suggests, “[i]n SCVO’s view, the criteria [for charitable status] should be changed so that only those organisations working for the general public benefit, or for

\textsuperscript{1032} SCVO, reported in Bamford, C. “The Work of the Commission on the Future of the Voluntary Sector in Scotland” \textit{Scottish Affairs} 21 (Autumn 1997). Bamford was Secretary and researcher to the Kemp Commission.
\textsuperscript{1033} Woodfield, P. \textit{Efficiency Scrutiny of the Supervision of Charities}. (Woodfield Report), 1987: paragraph 144.
people suffering from a disadvantage, should qualify.” 1036 Ultimately, the Kemp Commission included this public benefit test in its recommendations but stopped short of defining public benefit to exclude the aforementioned fee-charging organisations, a task that was left to the lawmaker.

Evidently, the Kemp Commission conducted its research and consultation before the change in government and formal devolution. This at first delayed the implementation of its recommendations, but ultimately allowed Scotland a much freer hand in designing its own charity policy.


The Charity Law Research Unit’s government commissioned report largely echoes the Kemp report as regards the definition of charity and the importance of public benefit. Thus, the report notes that the definition of charity – based on the English case law through the Inland Revenue – was too far away from its origins “in which ‘public benefit’ for the local community was the principal guiding force”1037. Referring to both the Kemp and the Deakin Commissions, the Charity Law Review Unit endorsed the adoption of a definition of charity based solely on a public benefit test.1038

It also noted that public dissatisfaction did not just concern the definition of charity but also the modern practice of contracting out: the respondents took issue with modern charities that they thought “to be large organisations providing what were formerly government services”.1039

1039 CLRU (2000): paragraph 5.11.

Beginning where the Kemp Report had left off, the Scottish Charity Law Review Commission first convened in April 2000 chaired by Jean McFadden, a practising and academic lawyer with a background in education.\(^{1040}\) Right from the start, the McFadden Commission entrenched the paramount importance of public benefit in its recommendations; thus recommendation number 1 on the definition of charity reads:

\[
\text{We recommend the following defining principles. A Scottish Charity should be an organisation: whose overriding purpose is for the public benefit; which is non-profit distributing; which is independent; which is non-party political.}^{1041}\]

Public benefit meant, in the view of the Commission, “that a Scottish Charity should have the purpose to relieve need, or sustain or enhance the lives of people in the community. Alternatively, a Scottish Charity could promote animal welfare, or protect or enhance the environment.”\(^{1042}\) The McFadden report made no reference to scandals as a predominant reason for charity reform, but it did address the need for a modernised system in great detail. Thus, it identifies the remit of the charitable sector as invigorating civil society and the “harnessing [of] skills for public benefit”.\(^{1043}\)

9.3 Post-Reform Scottish Charity Law: Charities and Trustee Investment (Scotland) Act 2005

9.3.1 Legislative Process

Written Evidence

The McFadden Commission’s recommendations were duly acknowledged, yet by and

\(^{1040}\) Martyn Evans was the only member that sat on both the Kemp and the McFadden Commissions.


large, nothing happened until 2003 when two major Scottish charities – Moonbeams and Breast Cancer Research (Scotland) – made the headlines because of scandals involving the misappropriation of donations that led the Scottish Charities Office to flag them to the Court of Session and its supervisory powers under the 1990 Act. The Scottish government announced subsequently that it would create a “charity watchdog” as a response to the scandals, together with the implementation of other McFadden Commission recommendations.

Intensive consultation took place, leading to a draft Bill published on 3 June 2004 and – following further twelve weeks of consultation – the Charities and Trustee Investment (Scotland) Bill that was introduced to the Scottish Parliament on 15 November 2004. In an accompanying policy memorandum, the Scottish Executive set out the central goal of the Bill in the light of the preceding public scandals and the spur in public interest on charity regulation:

Acceptance that the operations of charities are for public benefit can lead to easier access to public donations and volunteering, sponsorship etc. There is public interest in ensuring that bodies which are charities and receiving public support and donations are known

---


1045 See the Minister for Communities, Ms Margaret Curran’s remark in the Scottish Parliament “I am sure that members are aware from the press of the case of Breast Cancer Research (Scotland). I share public concern that money that was donated for charitable purposes has not been used as would have been expected. That has the potential of undermining charities in Scotland.” Scottish Parliament, Official Reports, 28 May 2003, paragraph 133.


1048 This phase included a general conference and five public seminar/workshop meetings across Scotland; a total of over 400 delegates took part in the consultation. More than 250 written responses were submitted, and the Executive held further focus group meetings. For more information, see Policy Memorandum (2004): p. 2f.
to be carrying out useful work and providing public benefits. This interest stems both directly from the tax benefits from the public purse which are available to charities, and from the need to safeguard public trust. Robust regulation will ensure that charities are well-organised, and accountable, providing the services which the public expects and expending funding on projects which the public considers charitable.

Like the English Charities Bill 2005, the policy debate focused on transparency and accountability, achievable through the tool of the public benefit test. While constant reference is made to the parallel English charity reform process, the centrality of public benefit as an idea is traced back to the Kemp Commission of 1997. In contrast to the English written evidence, a more specifically regulation-focused tone dominates the Scottish Executive’s account, most likely stemming from the more public experience of two visible scandals and the (at the time) lack of a dedicated Scottish charity regulator that England and Wales already possessed in form of the Charity Commission. Unlike in the English case, there was actual evidence that what Home Office Minister Fiona Mactaggart had called “the charity brand” in Scotland needed protection through intervention.

Moreover, devolution and the creation of the Scottish Parliament were also clearly reflected in the parliamentary discussion: while the need for a complementary framework across Great Britain was recognised, the charity law reform was nonetheless aiming to provide a distinctly Scottish solution. In the final Bill and the ensuing Act, all references to previous sources (whether statutory or case law-based) would be repealed and replaced by “one single, modern framework for charity regulation in Scotland” based on the 2005 Act.

The most important difference from the English debate stems from the fact that taxation remained a reserved power in the Hands of Westminster. Any changes in charity law and policy in Scotland would thus not affect the crucial aspect of tax benefits that were still regulated by HMRC and the English criteria for charitable status.\textsuperscript{1051} In fact, the Policy Memorandum acknowledged that a thorough debate had been conducted on whether it would be better for the charitable sector to simply adopt the English definition;\textsuperscript{1052} thinking about cross-border operating charities, this would have been the easiest solution. Eventually, the Bill and the 2005 Act followed the McFadden recommendation and formulated an independent, yet closely associated definition. Calling this “an essentially political decision”, Stuart Cross refers to the Policy Memorandum’s insistence that “the regulation of charities is specifically devolved to the Scottish Parliament under the Scotland Act and many people would consider it wholly inappropriate for the Parliament to abdicate this responsibility.”\textsuperscript{1053}

After a first preliminary discussion in the Communities Committee,\textsuperscript{1054} the Bill was discussed within the Committee in six open and two private meetings from 8 December 2004 until 23 February 2005.\textsuperscript{1055} Concurrent meetings were held in the Finance Committee (December 2004/January 2005) and the Subordinate Legislation Committee (February 2005). Stage two of the legislative process continued from April to June 2005 and reached the full chamber on 9 June 2005, when it was passed by the Scottish Parliament to receive Royal Assent on 14 July 2005 as the Charities and Trustee Investment (Scotland) Act 2005.

Parliamentary Debate

Much like the English parliamentary discussion, the Communities Minister emphasised...
that public benefit was “the bill’s central keystone”.\textsuperscript{1056} As in the English case, the Scottish MPs’ focused on the role of independent schools with strong party political and ideological reasoning. But there was no discussion about whether the statutory criteria for public benefit were too restrictive and should be replaced with a reference to existing case law as in England.

During the Communities Committee stage, Scott Barrie summarised the Committee’s discontentment with the state of evidence on public benefit provided:

\begin{quote}
We can all accept that the educational aims of the independent and state sectors are the same. However, like other members of the committee, I am struggling—from some of the answers that we have received so far this morning—to establish why it is necessary for the independent sector to have charitable status to achieve those aims, when the state sector seems to be able to do so without that status.\textsuperscript{1057}
\end{quote}

It was not just at the Committee stage that independent schools were the centre of attention. In the first stage plenary discussion before the Scottish Parliament, then Communities Minister Malcolm Chisholm (SLP) highlighted that overall, the public benefit test had been endorsed by the Communities Committee, yet also acknowledged that

\begin{quote}
(…) [m]uch of the discussion has centred on independent schools and a number of views have been expressed on whether such schools should or would lose their charitable status as a result of the bill. The bill does not make judgments about specific types of charity but seeks to provide a robust test against which all charities can be judged. It is a key principle that all charities should have to prove that they
\end{quote}

\begin{itemize}
\item[\textsuperscript{1057}] Official Report, Communities Committee, 12 January 2005, c 1568 and 1573.
\end{itemize}
provide public benefit before they can access the substantial benefits of charitable status.\textsuperscript{1058}

From the point of view of the Executive, fees did not necessarily affect the provision of public benefit:

\textit{Although the fact that a charity charges does not in itself mean that it ceases to provide public benefit, charges will not be able to be “unduly restrictive”—two key words in the public benefit test. (...) By providing broad criteria of what constitutes public benefit, we have created a robust test that encapsulates previous case law but which, importantly, has the flexibility to adapt to changes in the sector and in public perception of what constitutes a charity. Allowing OSCR to judge each case on its merits is the right way to ensure that a fair and reasoned approach is taken to each case.}\textsuperscript{1059}

The ideological debate occurred between the Scottish Socialist (SSP) and Scottish National Parties (SNP), and the Tories. Labour mainly endorsed the Executive’s formulation of the public benefit test. This debate is best illustrated by an exchange between SSP MSP for Glasgow Tommy Sheridan and Mary Scanlon, Conservative MSP for the Highlands and Islands:

Sheridan states:

\textit{However, the nub of today’s debate is the issue of public benefit. Perhaps I should declare an interest in this part of the debate because I consider myself a class warrior on the side of the working class. The class war, which Mr Blair often says is over—although he has not told us who won—is still alive and kicking. It is absolutely pathetic that if an ordinary member of the public is asked to highlight the odd

\textsuperscript{1058} Official Report, Communities Committee, 9 March 2005.
\textsuperscript{1059} Official Report, Communities Committee, 9 March 2005.
one out between Amnesty International, Greenpeace or Fettes College, none would get the answer correct. Of course, two of them are fantastic organisations that work for the improvement of society and humanity; the other is a charity. (…) What I am looking for is absolutely clear—a presumption against fee-paying schools having charitable status. That should be the exception rather the rule.¹⁰⁶⁰

Scanlon retorted:

I declare myself a class warrior for every parent who works hard and makes serious sacrifices to give their children choice, freedom and the best education, as they see fit. (…) Education is a public benefit; it needs no secondary justification. It benefits the pupil, their family and society. I say to Tommy Sheridan that it is a pathway out of poverty and that parents should be able to choose to make sacrifices to pay for their children’s education. If we removed charitable status from independent schools, fewer bursaries would be paid out and fees would have to rise, making those schools more exclusive and beyond the reach of many of the working-class families that he pretends to support.¹⁰⁶¹

Later at the third and final stage of the parliamentary discussion of the Bill, Scanlon expressed her dislike for the public benefit and its threat to fee-charging charities more drastically:

Section 8 challenges the basic tenet of individuals to exercise freedom of choice on how much of their own money they wish to spend and how they wish to spend it—whether it be on their children’s education

¹⁰⁶⁰ Official Report, Communities Committee, 9 March 2005. This view was echoed by Christine Grahame (South of Scotland) (SNP): “The test should be clear and simple. This is no witch hunt against private schools or hospitals and it is not—as a Conservative member said this morning—the politics of envy; it is a call for a simple and clear statement in the bill of the modern purpose and definition of a charity.”

or to pay for treatment in an independent hospital. The inclusion of section 8 brings the politics of envy and not the politics of reason. The end result could be the loss of charitable status for tax purposes. Fees would have to be raised by up to 5 per cent, meaning that there would be less money to pay for bursaries to support those from less well-off families. The result would be elitism and exclusion, not the choice and inclusion that we have at present.  

Several amendments to Section 8 of the 2005 Act were proposed. Those amendments seeking to modify Section 8 to exclude any kind fee-charging organisation from charitable status (and thereby actively addressing the status of independent schools and private hospitals) were finally rejected with 17 to 98 votes in June 2005.

Communities Minister Chisholm also addressed the potential difficulty of operating a Scottish charity test that does not coincide with its English equivalent:

“I cannot speak for the Inland Revenue, obviously, as that is within the provenance of the United Kingdom Government, and so cannot give the guarantee that John Swinney seeks. However, I can say that OSCR, the English charity regulator and the Inland Revenue are seeking to co-operate with one another.”

This optimistic view was not shared by all Members of the Scottish Parliament; thus, Christine Grahame noted on the Inland Revenue:

“I understand that (...) the Inland Revenue will completely ignore the position that OSCR takes on charitable status in that it will treat organisations that have been disarmed of charitable status as if they were charities. I think that that is something to get excited about. It

1063 E.g. Amendment 53 and 54 at the Third Reading of the Bill in the Scottish Parliament on 9 June 2005.
makes me despair when Westminster is prepared to override the will of the Scottish Parliament to do something for Scotland. That is not a constitutional point; it is a fact.1065

Overall, three points about the legislative debate are particularly noteworthy: the debate never reached the same level of aggression as in the English Parliament, even though ideology was a strong driver. Secondly, private hospitals were mentioned on occasion, but they were never independently addressed; the public benefit debate focused exclusively on education. And finally, there also did not seem to be any strong opposition to the eventual form of the new charity test; all parties agreed that it was time to turn the page and depart from the previous charity law basis in case law. Flexibility was set in the hands of the new charity regulator, OSCR, whose position was questioned, but never as hotly debated as the Charity Commission South of the border.

9.3.2 Charity Law Post-2005

In addition to the creation of OSCR1066 and the Scottish Charity Appeals Panel1067, the Scottish definition of charitable status based on the public benefit test is one of the greatest changes to the pre-2005 status quo. In sections 7 to 9,1068 the Act defines charitable status through a two-stage ‘charity test’: Firstly, section 7 (1) stipulates that “[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.”1069

1066 Charities and Trustee Investment (Scotland) Act 2005, Section 1.
1067 Charities and Trustee Investment (Scotland) Act 2005, Sections 71-78.
1068 The charity test consists of Section 7 “The Charity Test”, Section 8 “Public Benefit”, and Section 9 “Guidance on Charity Test”, see Charities and Trustee Investment (Scotland) Act 2005.
1069 Charities and Trustee Investment (Scotland) Act 2005, section 7 (1); note the focus on activities (or intended activities) rather than mere purposes.
There are fifteen charitable purposes\textsuperscript{1070} plus an additional “catch-all” category similar to Macnaghten’s fourth head of charity.\textsuperscript{1071} Furthermore, a charity may not allow for the distribution of its property or profit for purposes other than those indicated as charitable\textsuperscript{1072}; neither may it be politically influenced by a Scottish or Crown Minister\textsuperscript{1073} or in any way pursue party political objectives.\textsuperscript{1074}

In stark contrast to the English Act, the Scottish Act sets out the public benefit test (section 8) together with specific criteria for its operation (8(2)):

1) “No particular purpose is, for the purposes of establishing whether the charity test has been met, to be presumed to be for the public benefit.

2) In determining whether a body provides or intends to provide public benefit, regard must be had to—

   a. how any—

      i. benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and

      ii. disbenefit incurred or likely to be incurred by the public,

\textsuperscript{1070} Section 7 (2); these are:
(a) the prevention or relief of poverty;
(b) the advancement of education;
(c) the advancement of religion;
(d) the advancement of health;
(e) the saving of lives;
(f) the advancement of citizenship or community development;
(g) the advancement of the arts, heritage, culture or science;
(h) the advancement of public participation in sport;
(i) the provision of recreational facilities, or the organization of recreational activities, with the object of improving the conditions of life for the persons for whom the facilities or activities are primarily intended;
(j) the advancement of human rights, conflict resolution or reconciliation;
(k) the promotion of religious or racial harmony;
(l) the promotion of equality and diversity;
(m) the advancement of environmental protection or improvement;
(n) the relief of those in need by reason or age, ill-health, disability, financial hardship or other disadvantage;
(o) the advancement of animal welfare,
(p) any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.

\textsuperscript{1071} See Charities and Trustee Investment (Scotland) Act 2005, section 7(2).

\textsuperscript{1072} Section 7 (4a)

\textsuperscript{1073} Section 7 (4b)

\textsuperscript{1074} Section 7 (4c)
in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and b. where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.”

Finally, section 9 states that “OSCR must, after consulting representatives of the charitable sector and such other persons as it thinks fit, issue guidance on how it determines whether a body meets the charity test.”

Feedback to the 2005 Act has been generally positive although Patrick Ford points out that it fails to develop the civilian character of Scottish law, thereby missing an opportunity to drive further harmonisation in charity law and regulation across the European Union, which is after all composed of purely civilian systems. By following the English common law too closely, the public benefit test was seen by some as too narrow for the specifically Scottish context and the existing charity law jurisprudence based on Scottish case law.

9.4 Perceptions of Change: Interview Data

Interview data were recorded according to the research protocol described in Chapter 8. Interviewees included a wide range of officials, from members of the McFadden Commission to representatives of the SCVO, charity lawyers, accountants, sector leaders, and former employees of OSCR. Many of those involved in the Scottish reform process were also a part of the English charity community at one point in time. Thus, the McFadden Commission for instance recruited former Chief Charity Commissioner Richard Fries. Resulting from this dual perspective, the interviews generated interesting information on comparing the two jurisdictions.

1075 Charities and Trustee Investment (Scotland) Act 2005, Section 8.
1076 Charities and Trustee Investment (Scotland) Act 2005, Section 9.
9.4.1 Origins of Reform

The Scottish interviews showed many similarities but also significant differences to the English policy making process. First, interviewees were asked to identify freely the main challenges that Scottish charities had to face pre-2005 and that the reform process was trying to address.

Charity Law and Policy Report

Almost in parallel to the NCVO commissioned Deakin Commission, the Scottish Kemp commission embarked on their work. Nicholas Deakin recalled that

*The Scottish commission was set up six months after ours because the Scottish Council for Voluntary Organisations wasn’t going to go in on a UK one. They said, quite reasonably, ‘Scottish law is different, Scottish political culture is different, and we are doing a whole separate thing’. And furthermore, the general secretary said “if I find you North of the border without asking me first, you’re going to be in big trouble”.*

Evidently, no such trouble ensued, but unfortunately neither did charity reform. Even the impetus introduced by the New Labour government in England did not take off in Scotland.

This would change completely through devolution, and in 2000, the McFadden Commission set out to continue the work the Kemp Commission had begun. One leading legal academic even stressed the role of the McFadden Commission and report for reform in England and Wales:

*McFadden was really what made the difference in Scotland. And they, of course, took the plunge, moving to the definition of charity. They really opened it up, I would say, not just for Scotland but also for England and Wales. They were bold enough to say that there should*
be change and that age-old case law based on an old definition of
charity should be abandoned or replaced with something new but
essentially abandoned. That, I think, is were the net result in Scotland
comes from that we have now have a statutory definition of charity
which is based on the same principles as the English one but rejects
the use of case law, at least directly. And it was the McFadden report
that took that step.

A former member of the Commission was not quite as confident in the purposeful policy
design of the McFadden Commission; he recalled that “from time to time I was curious
as to whether the civil service had an idea where this should all end before we had done
the work”.

Scandals
In England, interviewees mentioned the mismatch between the popular definition of
charity and its legal counterpart. However, this was more as a side note in Scotland and one interviewee with a legal background put this discrepancy in perspective:

*There wasn’t really any great public outcry about the definition of
what a charity was. I think, in academic circles or professional
circles, of course, there would be lots of discussion about that. In
Scotland, the public only tend to get very galvanised if someone runs
off with a lot of charity money or it turns out that people who are
supposedly running a charity are only using it to milk it for the
financial benefit. There were a couple of high profile cases and that’s
what actually let to the legislation. It wasn’t people on the street
protesting that the charity test wasn’t right or whatever ...*

---

1079 See Chapter 8.
1080 One interviewee who had previously worked for SCVO stated that “(...) the view of most people going
in was “could we get a cleaner definition of a charity that, say, reflected the sort of modern world?” but it
was more complicated than that, of course.”
Rather than definitional mismatch, the Scottish reform seems to have been driven by two external shocks: the very high-profile scandals involving cancer charities in 2003\textsuperscript{1081} and devolution.

There was some slight disagreement about just how important scandals had been\textsuperscript{1082}, but a striking majority of interviewees agreed that without the public scandals, the McFadden suggestions would not have been enacted:

> Interestingly enough, however, after the report went off, I think the intention was to just park it on a shelf somewhere. But there were a couple of very high profile scandals involving Scottish charities. And we were told on the committee that it doesn’t look as if there is going to be legislation based on the recommendations. Suddenly, it was all being dusted off and was turned into a draft bill and that of course went through in 2005 and OSCR came after that.

In more general terms, a former SCVO employee likened the Scottish charity sector to evolution characterised not by “short-term changes” but by “incremental and quite slow change”. Yet, “occasionally, something happens from the outside that kind of gives it a completely different kink”. In his view, “you’d require that kind of external thing to come into the hencoop” to change the status quo. This account seems to support the radical change frameworks PEF and PDF.

A sector leader recalled that the 2003 scandals shook the charity world: charities were complaining about a significant loss in income\textsuperscript{1083} through donations caused by a sharp

\textsuperscript{1081} These were Moonbeam and Breast Cancer Research UK.
\textsuperscript{1082} One sector leader suggested an alternative accounts, stating: “I don’t think there were real scandals. There were a few. There is always a newspaper story somewhere. So there was some of that.” A former SCVO member agreed with his account that the scandals were not the most important factor, but still acknowledged that they did play a role: “I mean there are always charity scandals. They are like earthquakes. They differ in location and severity; sometimes it’s a few small ones. (…) But I don’t think … at least my memory of it was that wasn’t the cause. I think it was a more deep-rooted wish to make sense of this area. But there might be different reasons. As I said, it would be interesting to see what the government thought, as in ‘Hospital scandal! We must reform the NHS!’”
decrease in trust. The Scottish Executive did feel prompted to take up the issue and pursued charity law reform.\textsuperscript{1084}

**Devolution**
However, without devolution nothing much would have happened. Indeed, the basic and haphazard nature of charity regulation before the 2005 Act was commented on by all interviewees. Scotland was described as “lagging so far behind other jurisdictions, England and other places, in having such a poorly developed charity law”. Scottish charity law was clearly not a main concern in Westminster; thus “the only bit of ‘written down’ law was contained in the wonderfully named Law Reform Miscellaneous Provisions Act 1990.”

The 1990 Act had set up the Scottish Charities Office staffed by 3 civil servants, but the Act itself was described as “rag-tag bobtails of different topics just shuffled together”. In short, the regulatory situation in Scotland was what one sector leaders described as “absurd”. He felt that there was frustration in the sector

\((...)\) that the definition of charity turned on a kind of bureaucratic decision about the basis of getting charitable relief. In theory, the Charity Commission didn’t have specific legislative oversight in Scotland. I mean, people paid attention to what it said but it was a pretty unsatisfactory position. And it resulted in a lot of confusion about what was and what was not charitable and about what was not just the legal basis for determining that, but what, in 21st century Scotland, was a proper intellectual underpinning for charity law, as well as a historical background dating back to the poor laws.\textsuperscript{1083}

\textsuperscript{1083} The interviewee recalled a 50\% drop in donations over the Christmas period compared to previous years.

\textsuperscript{1084} This was described by one interview as “in our speak, meant that we perhaps got a sledgehammer to perhaps crack a nut.”
As described in the previous sections, the HMRC was the de facto regulator who “held certainly a sort of list of charities, which was never updated. So nobody ever knew how many there were, a lot of them probably didn’t exist anymore but nobody knew that. So it really was a bit of a mess.”

Charity law was one of the first areas in which it was possible to explore and to test the new powers conferred to the Scottish Parliament through devolution. From the point of view of the McFadden Commission:

The creation of the Scottish Parliament meant that you had time to have a proper debate about a full bill. Legislation on charity might have been debates in a grand committee if you were lucky or would have been an add-on to a bill that would have been written for England and Wales. One of the Miscellaneous Scotland Acts. So it [devolution] did change the context.

And both the McFadden Commission as well as the Scottish Parliament took the opportunity that this newly opened window of opportunity introduced. Scottish identity in terms of social and legal culture did play a significant role and was commented on by almost all interviewees; feeling like “somewhat the tail of the dog”, a charity lawyer suggested that “sociologically and temperamentally we feel things are always a little bit different up here in Scotland”. The previous regime of half-hearted regulation from London was not too popular:

And if you’re being told that the heads of charity are these things that were defined in some Act dating back to Queen Elizabeth and these English cases, then in fact we are going to say we are going to take a fresh look at that and we are going to say what is right for Scotland.

One legal member summarised the McFadden approach to reform against the backdrop of evolution and said:
We wanted Scottish solutions for Scottish situations. We were happy to learn from other people but wouldn’t want to slavishly follow them. I think if we had done that, we would have continued to say “well, what is the English definition of charity?” and we’ll just import that wholesale. And I don’t think we really ever discussed doing that.

The insistence on a Scottish solution separate from the English definition of charity of course also brought potential problems. Stakeholders early on recognised that the liberty of defining a Scottish charity test independent of the English test might lead to undesirable consequences for charities:

And as I said, there was this concern that you might have situation where a Scottish charity couldn’t get tax benefits because it didn’t meet the English charity test. And I think it has certainly been suggested and we had these various discussions about further devolved powers and so on, and in at least one of these, there has been the suggestion that the Scottish charity test would also rule from the point of view of tax benefits. This is a rather artificial situation since we are using somebody else’s definition for that part. (...) But you might say that it has created more problems in theory than it has in practice, and I think there aren’t too many people who have sadly fallen in between two stools. But we spent quite a lot of time in discussing them whether it was wise creating different definitions of what we saw applicable to the needs of Scotland which we saw different from those in England, which might, as I said, have these unintended consequences that you could badge yourself as a Scottish charity but you weren’t going to get much good out of it.
A legal academic voiced a slightly stronger regret that the two systems had not been more streamlined. In his view, further thought should have gone into the decision, especially with an eye to cross-border charities:\footnote{\textsuperscript{1085}}:

\begin{quote}
I think it was a kind of “we’re devolved now, Scotland has its own parliament, we can actually do what we like”. And in a way, you can’t criticise that. It’s the point of devolved power to do what your own MSPs want to do. At the same time, I think it would have been wiser to actually retain the direct link to the English definition and perhaps tried to influence what happened in England and Wales, on the basis that this would affect the tax position in Scotland: “We think you lost your nerve on public benefit, why don’t you do xyz?” so use discussion and suggestions, you know, and I don’t think there was enough of that.
\end{quote}

However, he expected that a redefinition would follow in the near future because of the independence referendum scheduled for September 2014 and further influences from the European Union.

\textbf{Role of Public Benefit}

As described in Patrick Ford’s description of the pre-2005 Scottish charity law system, public benefit was the central theme of the reform and there did not seem to be any discussion on this point. Public benefit was described by members of the McFadden Commission as “the spine” of the reform or “the trunk of a tree” whose branches “justify religion, the advancement of education, the relief of poverty, as examples of public benefit”. Unlike the English situation, public benefit was thus portrayed as the first step rather a condition for organisations that already fell into one of the pre-defined charitable uses categories.

\footnote{\textsuperscript{1085} For more information on the issues created by the diverging definitions, see Barker, C. “The Scottish Charities Act and its Cross-Border Implications”, \textit{Charity Law and Practice Review} 8, no. 3 (2005): pp.1-22.}
Two interviewees offered an alternative view that described charitable status as “a means not an end in itself. But it’s quite a small means, and then I don’t know what’s been happening to make it so big.” On this account:

[The Commission had not] spent an awful lot of time really grappling with what they thought was public benefit. Because they thought actually the number of categories they had laid down which would be automatically charitable would cover 99% of what was there so it actually didn’t matter. So the presumption was that something was going to be a charity rather than it wouldn’t be, which was a reasonable shift in the way of thinking that took place.

Unlike England, Scotland decided to adopt statutory criteria for public benefit. At least according to the interview evidence, this did not seem to be as much of a discussion as South of the border. In England, flexibility to adapt to changing social circumstances was the main argument used to advocate a common law definition.

One Scottish charity lawyer offered an alternative view based on her experience:

We talk about the charitable sector having a mechanism to modernise and to adapt; the definition of charity will change over time as society changes, but I always feel that the members of the public are actually quite conservative when it comes to these sorts of things. It’s the same emotional triggers that apply and animals always do better than people. Well that’s a generalisation but there are still, I gather, quite a lot of donkey sanctuaries.

At the same time, defining public benefit was not an easy task for the Commission. One member suggested that
Public benefit is one of those things where most of us believe that public benefit is something that you recognise when you see it but trying to define it is something of a challenge. We did have quite a lengthy discussion on whether we should define it, or propose that it should be defined in law, or whether we should just assert that that was the test and leave it to the legislators to decide whether they wanted to refine it further, and, if so, what definition they wanted to adopt.

The legislator decided to do just that.

The difficulty was reflected in the final appraisal that a legal member of the Commission provided for the public benefit test in the Charities and Trustee Investment (Scotland) Act 2005:

> But what we were saying was that there should be some kind of statutory definition of public benefit, which did appear in the act. I don't think it's a very good one. The word ‘disbenefit’ isn’t something that the man on the bus talks a lot about. But we thought there should be an attempt to try and provide some sort of statutory definition. And also that there should be a level playing field and that the presumption in favour of certain charitable purposes being a public benefit, it was agreed that it was no longer appropriate to continue that. So that when charities with different purposes were being assessed, it would be the same for everybody.

**Role of Independent Schools in the Debate**

Independent schools and their status had been at the forefront of the debate in England. The parliamentary debate in Scotland already seemed to indicate that the same ideologically charged discussion did not take place up North. The interview data confirms this hypothesis. Of course, independent schools were mentioned and it was
pointed out that they were intrinsically more controversial than most other charities. One leader of a big national charity suggested that this stemmed from the fact that people were able to identify with the independent school question while most other charities were seen in the abstract.\textsuperscript{1086}

At the end of the day, a sense of Scottish pragmatism seemed to prevail. As one member joked, independent schools might be controversial “[b]ut I don’t think it’s the sort of thing that keeps people awake at night, to be honest”. Another McFadden member also referred to this “pragmatic thinking” approach:

\begin{quote}
So it was a pragmatic thing that I was happy to broaden charitable status because I think it gets in people and gives them tax breaks that they deserve in social policy terms. And that’s a better prize than, say, trying to get a bunch of people out because even if you do get them out, they will find another way of getting back in.
\end{quote}

There were two members that did not want to exclude the alternative account that charity law was used as a tool to “have a go at private schools”.\textsuperscript{1087} One sector leader was quite strong in his assessment: he suggested that at the initial stage of the public benefit debate, a separate test was had not been foreseen. Rather, the Commission had been debating a charitable status definition purely by reference to individual charitable categories much like the heads of charity defined by Macnaghten in \textit{Pemsel}. The interviewee described that at first, the list read that either an organisation could be one of the predefined categories \textit{or} for the public benefit. He stated that at the parliamentary stage, this “or”

\textsuperscript{1086} “Schools, of course, were rather a different kettle of fish because people have more personal engagement with them. People have experience of having been to fee-paying schools. Parents didn’t want to pay extra fees. And, in a way, one could easily understand that.”

\textsuperscript{1087} One sector leader for instance stated that “(…) there is a real political dislike in some sections on private schools. I think for a number of reasons. One is, that it’s elitist in that sense and preserving a class-based system, which the Third Sector is against. Actually particularly in Edinburgh which has a high proportion of private schools, way, way bigger than the rest of the country. (…) So the debate is more substantial in different parts of the country, I think. (…) So it’s a sort of class issue.” Another made the stronger assertion that the main discussion was “how they were going to get independent schools. That’s what it was all about.”
had been turned into an “and”, thus creating a public benefit requirement that had to be fulfilled in addition to being in one (or analogous to) the charitable uses categories:

\[T\]he change in the wording was entirely political and the intention was to stop independent schools because they did not believe that the independent schools would be able to demonstrate public benefit. And I think it’s probably been quite good for the schools in some ways.

Referring back to the report and the final Act, it is not quite clear how this could have happened, as the catch-all category described above contains no reference to public benefit.1088 Neither could this incidence be found in the official transcripts of the parliamentary debate, but it might refer to a pre-section 8 draft.

Despite this significant if singular objection, the overall discussion seems to have focused on proportionality for all fee-charging charities rather than schools in particular. A former SCVO member suggested that this lack of politicisation around the issue of independent schools also supported OSCR in its regulatory role – in the absence of appeals similar to the ISC case and the involvement of politicians in the media that could have pushed OSCR in different directions, the regulator was free to build a practice of public benefit review without too much controversy and only “mild gesturing” from the side of parliamentarians.1089

\[1088\] In fact, subsection (p) stated that “any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.”

\[1089\] A legal academic stated that independent schools just weren’t as much of a divisive issue as in England: “And there are public schools in Scotland, in the sort of English mode: Gordonston, Glenarmond, I think of, but there is also in Edinburgh and Glasgow very, very well established fee-paying schools, which are day schools for the most part anyway, and they’re absolutely fundamental for the fabric of Edinburgh and Glasgow. So I think no politician in their right mind would make life too difficult for them. So I think again, this is another difference. And of course, there were positions taken in the Scottish parliament about public benefit or ensuring that fee-charging schools did actually provide public benefit. But it was really, I would say, and it sounds a bit like gesturing, but when it comes down to it the idea was “as long as they show willingness, that will be ok”. And I think actually that OSCR’s reviews have tended to confirm this approach. Gordonston got through with flying colours. Because actually it does a huge amount in the community in addition to … well … education the children of well-off parents. So, I think that this is again a difference between Scotland and England. Labour politicians in Scotland felt like they had to say something about this but actually the teeth are pretty blunt in our public benefit definition.”
While independent schools might not have been the make or break point of the reform\textsuperscript{1090}, the interview data nonetheless pointed to the fact that charity law could very well be used as a policy tool. Thus, one sector consultant suggested:

\begin{quote}
I suppose the first point is that there has always been policy-making in disguise. You know about this – what is charitable status? It’s giving people tax breaks for things that we think of as broadly speaking as socially desirable things. There will always be a policy direction in that. (...) What then happened, I think, has always happened. People look at this and think “oh well, we could use this to achieve B and C”.
\end{quote}

Office of the Scottish Charity Regulator (OSCR)

Unlike the Charity Commission, the Scottish regulator OSCR received very positive evaluations for its role in developing the public benefit test. A former English Chief Charity Officer commented that

\begin{quote}
(...) when the Scottish Act was enacted (...) we were really interested to see how the Scottish definition would operate in practice, and I think it has done so rather well. And (...) OSCR does not seem to have the difficulties that the Charity Commission does in applying it. The concept of benefits having to be weighed against disbenefits is generally speaking one that people can understand and that OSCR seems to be able to apply, not only with consistency but also with fairly little resistance from charities.
\end{quote}

Likewise, a former Home Office official described the situation as “curious” because when OSCR failed four schools in its on-going review, asking them to adjust their public benefit provisions within 18 months, it did so without “any political or indeed media

\textsuperscript{1090} Neither was it churches or private hospitals, for that matter.
controversy”, being “regarded as a perfectly respectable and indeed desirable thing for the Office of the Scottish Charity Regulator to have done”.

From the Scottish side, much was attributed to OSCR’s leadership style under Jane Ryder and now David Robb who over the years had built good personal and institutional relationships with the sector.1091 It was noted that OSCR did not “go on a witch-hunt” or “is not like the Witchfinder General” but operates with “pragmatism and common sense”. This is surprising because OSCR – unlike the Charity Commission – actually did remove charitable status from one organization, the Scottish Catholic adoption agency St Margaret’s Children and Family Care Society; it argued that the agency was not providing benefit because of its restrictive policy that precluded same-sex couples from the adoption process.1092 Although the decision has since been challenged and overturned by the Scottish Charity Appeals Panel1093, there has not been a media backlash comparable to what the Charity Commission faces on a regular basis.

Several times, reference to a “Scottish way of doing things” based on the already mentioned pragmatism was made. The Scottish charity world, according to one interviewee, was just too small to anger individual stakeholders: “there is much more a sense of ‘OK, we’ll negotiate on this’”.1094 Through this and David Robb’s approach of turning to more education and advice rather than regulation,1095 one interviewee saw a move in the opposite direction from the English Charity Commission’s recent approach under William Shawcross.

1091 “And OSCR under Jane Ryder, who was the very first CEO, their PR has been extremely good. You know, their relations with the sector, with practitioners, have been pretty good, and that has continued under present conditions and the new CEO.”
1094 Also: “But certainly, that is part of the Scottish tradition: “we’re all in it together”. It is in a curious way a more democratic society.”
1095 “And I think this is the way that Dave Rob is following. My impression from things that he said quite publicly, so I am not giving away anything that he wouldn’t say himself, I think he sees OSCR as having started by getting all the regulatory things right. Getting the register running well and maximising the sort of compliance on the submission of accounts. I think he sees the next stage as giving more advice and educating more.”
In relation to public benefit, one former SCVO official juxtaposed OSCR and the Charity Commission: OSCR faired better, in his opinion, because it refused to provide concrete guidelines on public benefit and followed an iterative process on a case-by-case basis until enough precedent had been set up in collaboration with the sector. The Charity Commission, of course, was forced to publicise its guidance notes on public benefit already while the Bill was being discussed in Parliament. Generally, the SCVO official saw OSCR’s approach as staying clear of assessing the performance of a charity; instead, it acted as an “enabler” rather than a charity watchdog.

Evaluation of the Public Benefit Reform in the Charities and Trustee Investment (Scotland) Act 2005

The benchmark for charity law reform in Scotland significantly differed from England. In the absence of a domestic regulatory system and regulator, the mere creation of OSCR was a step forward that met with praise. Some expectations were expressed for the post-2005 Act world, and all of them seem to have been met:

- “Greater transparency” was one of the main goals brought up by almost all interviewees. Through OSCR’s register of charities and the continuing public benefit tests, this has been achieved. Interested members of the public can now check OSCR’s register to ascertain whether an organisation was truly a charity.
- Generally, interviewees remarked that because of OSCR’s existence and the 2005 Act, there is now “much more information about the charitable sector in Scotland”, also because charities have an incentive to disclose more information on their own; this can take the form of open accounts as well as further information on the charities’ own websites.
- Complaints are now also being handled by “now quite a big unit” within OSCR, making regulation actually credible.
- This transparency and information influx also helped create “much greater appreciation among charity trustees about what their role and their duties are”, creating a “much more professional sector now than it was before the 2005 Act”.

374
• As before, it was pointed out that legislation was just one ingredient to the reform process; one interviewee quite rightly pointed out that “in a sense it’s about behaviour not about legislation. At the end of the day, you can legislate till your blue in the face. But if the public is determined not to obey the legislation, or the regulator is determined to enforce the legislation in a completely absurd and rigid way, then you just got trouble”.

• The Charity Appeals Panel and OSCR were seen as a great step ahead. OSCR had now “stop[ped] being a creature of the creators and start[ed] becoming a being of its own self. And it develop[ed] its own personality and its own way of doing things. (…) I think that there is a pretty close overlap, if you read the commission report and the legislation.”

• Some missed opportunities were pointed out nonetheless, such as the issue of trustee liability and the slow uptake of the SCIOs.

• One interviewee also thought that too much time had been spent on education and the definition of public benefit although other concerns (such as adequate provisions to insulate trustees from liability) were more important for the everyday practice of charities in Scotland.

9.4.2 Independent Variables: Similarities and Differences to England

Similarities

As in England, the interaction among policy nodes has been an important factor that drove the Scottish reform. Surprisingly, there seems to have been less concern with the English reform, and interviewees recalled very little interaction with their English counterparts, such as the Charity Commission.1096 Within the sector, there is a parallel to England in so far as the SCVO seems to have been one of the main driving forces behind the McFadden Commission and the charity law reform process.

---

1096 One charity lawyer remembered the experience quite vividly: “I have a vague recollection of coming out of a building with an enormous plastic bag because they had insisted on giving us a copy of every single piece of guidance that they had issued. Quite a lot!”
The error term identified in the English interview analysis was brought up several times in the Scottish interviews as well as a reference to “unintended consequences”. One such unintended consequence was that schools now “actually (…) articulate the public benefit they do give. So now it’s much more robust to say that this is the public benefit. (…) it’s a funny unintended consequence because the real consequence that they wanted was that schools couldn’t demonstrate it at all”.

As has been discussed in the previous section, the public benefit test itself was seen by one interviewee as a potential unintended consequence, even though the written and legal evidence suggests otherwise.

Differences
There are a number of important differences that help to shed a different light on the theoretical frameworks and their application to the charity law reform process in Scotland. Unlike in England, the media was portrayed as playing far less of a role; in fact, the only time the media was brought up was in relation to the Moonbeam and Breast Cancer Research Scotland scandals in 2003. Otherwise, interviewees stressed that the press reporting never focused on a single issue, such as independent schools in England and Wales; if there was a discussion, this was about the rolling review in general. OSCR’s former CEO Jane Ryder was mentioned in this connection and much of the balanced press account attributed to her excellent public relations management. There never developed a media witch-hunt of equal proportions as in England.

A number of independent variables that figured prominently in the English analysis did not feature at all in the Scottish interviews: New Public Management and Labour ideology were not brought up. Neither was time as an independent variable because the policy process seems to have progressed quite smoothly, at least once parliament had picked up the McFadden recommendations. Lobbying was not mentioned, and except for OSCR’s role, leadership, be it political or otherwise – was not commented on. The gap between policy formulation and implementation was not addressed either. When prompted for information on healthcare, it was suggested that private healthcare did not
play a role in the Scottish discussion at all since the default assumption for the public was to rely on the NHS, with less of a socio-economic class differentiation in terms of private healthcare access.

One factor that was not explicitly mentioned but that emerged during the interviews concerned the relative absence of a strong influence of charity law practitioners. A leading legal academic confirmed that except for him, there really weren’t more than two other academics that identified as charity experts. Of course, practitioners were involved in the reform process\textsuperscript{1097}, yet there was not the same strong sector influence as exerted by the Charity Law Association in England.

\subsection*{9.4.3 New Variables Identified in Scotland}

The independent variables of exogenous and endogenous shocks have already been discussed in the previous section; unlike in England, the two 2003 scandals actually seem to have been a decisive factor in reinvigorating the reform process. Two further factors emerged in the Scottish interviews: the legal system as well as the attitude toward the state.

In terms of the legal system influence, the legal experts interviewed pointed out “a clash between civilian systems”; much like the continental European jurisdictions, civil law on charities was described as having a stronger focus on public benefit. Of course, such statements must be taken with a grain of salt. After all, the Scottish system is operationally identical with the English system once the all important tax exemptions are taken into account.

More importantly, the public attitude toward the state was a central influence that was brought up as specifically “Scottish” variable. Thus, interviewees – especially those who had professional experience in both jurisdictions – pointed out that in England

\footnote{Most bigger charities have legal staff, and Mr Simon Mackintosh, a member of the McFadden Commission, was repeatedly mentioned as expert practitioner.}
(...) [t]he public narrative, the discourse, has changed from one that it is about a collective responsibility and obligation to each other to one that is about individualism today”. This was not the case in Scotland: “(...) culturally, the context in which charity law operates in Scotland is different to the context that charity law operates here. Thatcherism never took hold in Scotland the way it took hold here. And there is still a default position though it’s not universal – none of these things is ever universal – but there is still a default position, which is communitarian in outlook rather individualist. And that makes quite a difference. You put precisely the same charity law in a culturally different context and you get rather different outcomes.

Similarly, a sector consultant described that England and Scotland had

(...) two very different views of the state. One of which is we pool our collective resources and through the state we are going to decide we are going to do it like this and the other one is we keep our individual resources and we come together as separate citizens to decide whether we like donkeys and that’s all there is to it. And government can but out of it. And I think Scotland is closer to that idea of kind of collectivist view, and I think that is changing now for a whole variety of reasons.¹⁰⁹⁸

¹⁰⁹⁸ He provided a fuller picture of his view: “Scotland has a whole history of what I would call social paternalism, which is the view of local authorities in a sense is charities are there until we in local authorities can do this and then they can stop doing it. So the idea is: charities and the Third Sector start stuff and if it works and it’s a good thing, public services take it on and will continue doing it on behalf of the charities. And the argument is: public authorities are then accountable to the electorate through democracy. Certainly in the Labour Party there is a big strand of thinking that runs like that, that is to say that charities are essentially a temporary phenomenon until the state can learn things. In England, and indeed in Canada and the States, charity law comes from a completely different direction. Nobody would think in say America that’s why you have philanthropy and charities. It starts from the opposite view, which is essentially, “this is my money and I spend it on this and I don’t think it has anything to do with the state whether I spend it on you know cures for cancer or sending disabled kids on riding holidays”. Or indeed donkeys.”
This “social paternalism” combined with “collectivism and social solidarity” in Scotland also led to a different attitude towards charities: he described them as innovators, but with a final responsibility for service provision on the side of the state. Moreover, interviewees pointed out that “the Conservative Party has more or less collapsed in Scotland since the 1950s” and that over the last thirty years, “for a variety of reasons the middle class in Scotland has stayed Labour voting in a way that the middle class in England it has become Conservative”. This may be an interesting factor in explaining why the political debate in the Scottish Parliament was not as strongly ideological as in England.\textsuperscript{1099}

9.5 Scotland’s Charity Policy Reform from an English Vantage Point

The Scottish charity law and policy reform had been closely followed by reformers in England and Wales. As especially Chapter 4 on the state policy node indicated, policy-makers were aware of each other’s approaches and the potential problems that two differing definitions of charitable status would cause for British charities. This section will directly address the views on the Scottish reform from the point of view of English actors, drawing data from written accounts, such as the PMSU report, to oral evidence given before the Joint Committee on the draft Charities Bill and the parliamentary debate in the Commons and the Lords.

9.5.1 Streamlining between England and Scotland

The greatest concern for policy makers in England and Wales was the emergence of a dual charity law system. Marked differences between an English and Scottish charity test would risk putting an additional burden on those charities that operated in both jurisdictions. In a worst-case scenario, they would have to go through two separate processes to gain charitable status.

\textsuperscript{1099} Although an alternative account could posit that given the small Conservative minority, there would have been more pressure on the Scottish Tories to firmly stand their ideological ground.
It is surprising that there seems to have been more attention on streamlining policy in England because Scottish charities would have been most affected: taxation remained a reserved power and thus HMRC would continue to grant tax exemptions based on the guidance it received from the Charity Commission for England and Wales – and thus the English definition of charity.

At an early stage, the Strategy Unit reported that it had consulted with the Scottish Executive, who was implementing a detailed plan to invigorate the voluntary sector in Scotland based on the McFadden report recommendations.1100 During her appearance before the Joint Committee, then Home Office Minister Fiona Mactaggart declared that she was “content with what the Scottish Executive decide for Scotland, it is their job”1101 even though the Earl of Caithness explicitly challenged her that by accepting differences between England and Scotland, the minister was also accepting “all the trouble that is going to cause charities”1102.

The Charity Commission issued a supplementary memorandum on the “Regulation of Charities in England and Wales Compared with Scotland”.1103 In it, the Commission stresses its collaboration with the – at that point – brand new Scottish regulator OSCR1104. Because it was early days and OSCR still a largely unknown entity, the Charity Commission cautioned that it was not possible to make definite statements as for future collaboration.1105 However, both regulators maintained good and close relations and OSCR even had a statutory duty to consult with other regulators as well as the sector.1106 At the time of its submission in 2004, the memorandum found four practical differences between the two regulatory regimes1107:

---

1101 Mactaggart, Evidence before the Joint Committee, Question 1076.
1102 Earl of Caithness, Question 1075.
1103 Supplementary memorandum from the Charity Commission (DCH 299).
1104 OSCR had been established by the Scottish Executive in 2003.
1105 “OSCR’s newly established status, its transition period, and the Inland Revenue's continuing role in recognising charitable status in Scotland pending enactment of the proposed Scottish charity legislation means that it is not possible to make a like-for-like comparison with the Charity Commission's regulatory approach and its resource allocation at this stage.” DCH 299, paragraph 3.
1106 DCH 299, paragraph 4.
1107 Both were at that point still at the Bill stage.
• “No minimum registration threshold in Scotland, compared with England and Wales;

• All charities operating in Scotland will be required to register with OSCR. This means that, unlike in England and Wales, there will be no charities that are “excepted” from the requirement to register nor will there be any “exempt” charities, even those which have another lead regulator (although, as mentioned above, there will be an obligation for OSCR to work closely with other regulators);

• Variations in accounting requirements, with an implicit requirement that small charities operating in Scotland submit accounts and annual reports to OSCR; and

• No proposals for trustee remuneration in Scotland.”1108

It is indicative that the Charity Commission did not point to the differences arising through the public benefit criteria and the Scottish break from the existing case law; both were already part of the Charities and Trustee Investment (Scotland) Bill. Interview data did not provide any more insights on whether the Charity Commission simply did not see Scotland’s statutory public benefit criteria as problematic, or whether it chose to leave the issue out due to the controversial debate that was being held in the Joint Committee and across the charitable sector on the English public benefit test.

During the House of Lords Grand Committee Session of 3rd February 2005, Lord Hodgson put his finger in this wound. He noted that

(...) [w]e understand that the draft legislation on charity in Scotland contains a definition of “public benefit”. That causes complications in several ways. As we have already made clear, we do not wish to see a definition of “public benefit” put into the [English] Bill, but the fact that the Scottish Bill has differing provisions—particularly one concerning such an important issue as the definition of “public

1108 DCH 299, paragraph 6.
“benefit”—must be of concern to us. (...) That drafting on the concept of public benefit is considerably more restrictive than that which exists in English charity law or, indeed, is proposed in the Bill. That, of course, in England leaves definitions to developments in the common law rather than being frozen in statutes. Differing definitions between the two countries will, of course, result in different practices, which will in turn cause conflict, which is undesirable for the sector as a whole.\textsuperscript{1109}

Lord Hodgson particularly pointed to the areas of higher education funding, medical research and practice funding and funding for the armed forces.\textsuperscript{1110}

\textbf{9.5.2 OSCR v Charity Commission}

With all the close scrutiny on the Charity Commission’s role post-reform\textsuperscript{1111}, comparisons between the Commission and the new Office of the Scottish Charity Regulator were inevitable. Labour’s George Foulkes grilled then Chief Charity Commissioner Geraldine Peacock on the matter of increasing bureaucracy. Ignoring the fact that the Charity Commission supervised roughly ten times as many charities in England and Wales than its Scottish counterpart OSCR, Foulkes asked Peacock why she needed “such a large interventionist bureaucracy in England when, in Scotland, they are going to manage quite well with a small organisation, OSCR, and a very light touch? Scotland is not very different from England. Why can you not manage in England with a much lighter touch and a much smaller organisation?”\textsuperscript{1112}

Peacock herself had extensive experience of working in Scotland’s voluntary sector\textsuperscript{1113}. In response, she pointed out that contrary to Foulkes assumption, the Charity

\textsuperscript{1109} Lord Hodgson, 3 Feb 2005: GC2.
\textsuperscript{1110} Lord Hodgson, 3 February 2005: GC2.
\textsuperscript{1111} See Chapter 4
\textsuperscript{1112} Evidence before the Joint Committee, Foulkes, Question 650.
\textsuperscript{1113} Peacock had worked as a social policy lecturer and social worker in Scotland, see “Profile Geraldine Peacock A leading role.” Public Finance, 3rd June 2005, accessed online on 28 January 2014 at http://www.publicfinance.co.uk/features/2005/profile--geraldine-peacock--a-leading-role/.

382
Commission did not seek to expand its bureaucratic reign and was closely following OSCR’s development;\textsuperscript{1114} she did not choose to entertain Foulkes accusations further.

Scottish commentators have been overwhelmingly positive about the creation of OSCR and it’s (at the point of writing, almost) ten years of practical influence on the sector. It seems that OSCR’s partnership approach is valued within the sector. However, the creation of a Scottish regulator should not be taken as a linear progression that necessarily leads to an improved outcome. Clearly, the unqualified registration requirement for all charities has imposed a bureaucratic burden, in particular on small charities. Whether or not OSCR has improved the situation for Scottish charities is a discussion separate from this analysis. It is worth adopting a critical view nonetheless.

\subsection*{9.5.3 Public Benefit Test}

Not surprisingly, the Scottish draft of the public benefit test was of great interest to policymakers in England. Chapter 4 indicated that a strong group of peers around Lord Phillips of Sudbury advocated a statutory list of criteria for the public benefit test similar to that adopted in Scotland.\textsuperscript{1115} This was put first to the Home Office by the Earl of Caithness; in fact, this is the origin of the infamous “dog’s breakfast” comment that made headlines:\textsuperscript{1116}

\begin{center}
\textit{There is a criteria of public benefit in Scotland, there is not in England, therefore any charity in Scotland operating in England has got a different criteria and different bodies. Is that not a dog’s breakfast for charities?}\textsuperscript{1117}
\end{center}

\textsuperscript{1114} Peacock, Question 651.

\textsuperscript{1115} Yet, Lord Phillips cautioned that the Scottish formulation of the criteria was not optimal, especially not for the English context: “Clause 8 of the Scottish Bill does not talk about guidance; it gives a definition of public benefit—admittedly an extraordinarily broad and unhelpful one—which lends credence to what the noble Lord, Lord Hodgson of Astley Abbots, said. In a very different way to Clause 4, it concentrates on the disbenefits of an institution compared with its benefits. That is the way in which they choose to deal with it.” Lord Phillips of Sudbury, 3 Feb 2005 : Column GC6.

\textsuperscript{1116} See Chapter 7.

\textsuperscript{1117} Earl of Caithness, Question 1077.
George Foulkes agreed that a difference on this crucial piece of the legislation in both jurisdictions was highly problematic: “I would not want all private schools to move up to Scotland, for example, or to move down to England, which is probably more likely.”¹¹¹⁸ Home Office minister Fiona Mactaggart rejected these short-term consequences, but did acknowledge that long-term problems might occur.¹¹¹⁹ However, she made it plain that “on those matters which are reserved it is proper for the Scottish Parliament and the Scottish Executive to make their proper decisions, and I do not think it is for the United Kingdom Parliament to decide their business for them.”¹¹²⁰

9.6 Comparative Insights vis-à-vis England and Wales

Despite similar timing, and a by-and-large overlapping sector, the differences between the Scottish charity reform process and outcome and its English equivalent are pronounced. Much has to do with differences in the discourse, but as the preceding analysis has uncovered, the process itself has unfolded in rather different ways, and possibly with different triggers. The factors can be broadly divided into two categories – structure and ideology.

9.6.1 Structural Factors

Devolution and the emergence of the Scottish Parliament with reserved powers remaining in Westminster provided not just a trigger for reform, but also a very different political structure: the state policy node included a reference (and possibly even opposition) to the existing charity law regulatory system emanating from London.

¹¹¹⁸ Foulkes, Question 1078.
¹¹¹⁹ “(…) it probably will not have an enormous change impact on those kinds of cases in the first place, the problem will be in 200 years’ time, frankly, if you have got a frozen definition in one legislation and you have a more flexible arrangement in another. In my view, a definition in the short-term will produce a very similar result across the border but in the longer term will lead to difference and division.” Mactaggart Question 1078.
¹¹²⁰ Mactaggart, Question 1078.
Secondly, Scotland had a clean slate: before the establishment of OSCR, regulation was an English affair, not a specifically Scottish enterprise. Thus, there was at least a perceived regulatory vacuum without any historical “baggage” as in the case of the Charity Commission for England and Wales. In the case of the latter, stakeholders within and outside of the state already had a pre-formed expectation of the Charity Commission’s actions that to a certain extent impeded the development of the Charities Act 2006.

Thirdly, Scotland possesses a different legal system based on a civilian foundation. While it is not clear how strong the legal system’s influence really was, ceteris paribus, the distinct Scottish legal tradition provided at least theoretically a different basis for the reform process.

Finally, there is an argument about sheer size. The Scottish charity sector is less than a tenth of the English sector, thus charity regulation took on an entirely different dimension. Especially the interview data suggested that the “Scottish way” of doing things was predicated on the small size of the sector and the fact that most key stakeholders were bound to know each other and entertain repeated interactions. As Game Theory teaches us\textsuperscript{1121}, this can have strong implications for actor behaviour.

9.6.2 Ideological Factors

Soft factors are intrinsically harder to quantify and discern, which does not mean that they are any less important for the overall analysis; on the contrary. The analysis has been conducted with an eye to a variety of sources and in the hopes of identifying these elusive variables. Throughout the study, ideology has played a prominent role. In England, it was a question of party political outlook, ignited and thus illustrated by the status of independent schools. In Scotland, this party political dimension did not seem to matter, at least not in any meaningful way.

What mattered instead was the ideological outlook of citizens toward the state: their expectations and perception of the state’s responsibilities were reported as different to England and Wales. This citizen-state relationship was not explicitly brought up in England, but it might be a latent factor that shaped the discussion in England as well. In a way, it is what stands behind New Public Management and the shift in New Labour.

Of course, England itself is divided into several distinct regional cultures, and a relationship between ideology and policy making far more complicated than what is described here.

### 9.7 Conclusions

2014 will be a decisive year for Scotland. In September, a popular referendum on Scottish independence will decide on the nation’s status. The educated guess of the interviewees was that Scotland would stay in the Union, but that the referendum would be close enough\(^\text{1122}\) to warrant further devolved powers for the Scottish Parliament. It is quite possible that this will renew the interest in an even more quintessentially Scottish system of charity law and regulation, in particular if some of the taxation powers are devolved to Scotland and the HMRC cut out of the charity law equation.

This will also have consequences for OSCR. At the moment, OSCR might be a regulator, but tax decisions still are a reserved power that rests with Westminster. Was this no longer the case, OSCR’s decision would carry more weight, possibly even for tax exemptions as well. In any case, changes are likely to be profound and to open up exciting opportunities. At the same time, these new opportunities may also open up the policy debate and force Scotland to deal with more contentious issues. Change is in most cases a two-edged sword.

\(^{1122}\) Interestingly, the Scottish interviewees seemed to agree – independently – that there would be a 60-40 outcome against independence.
But what does the Scottish case study reveal about the initial hypothesis and the theoretical framework presented in Chapter 2?

**Hypothesis 1:** The changes to the public benefit test in the Charities and Trustee Investment (Scotland) Act 2006 mark a radical policy change after a long period of stability.

- Institutionally and legally, the 2005 Act marked a clear–ut departure from the past. The creation of OSCR and the removal of any reference to case law for the Scottish charity test was definitively a clear and radical shift – it was the inception of modern Scottish charity law.
- Stability in charity regulation was enforced by the dominance of Westminster over Scottish charity law. Interview data, as well as the written accounts, confirm that the previous changes were incremental and slow as they were enacted through *Miscellaneous* (Scotland) Acts.

**Hypothesis 2:** The changes to the public benefit test in the Charities Act 2006 were introduced through endogenous variables.

- There seem to have been two reform processes: one endogenously induced through the shortcomings of the pre-2005 charity system and carried by the SCVO and other sector actors. This process was “parked” as one interviewee described it, after the McFadden Commission’s report in 2001.
- The second reform process, however, was triggered through endogenous scandals: Moonbeam and Breast Cancer Research Scotland. After a two-year hiatus, this endogenous shock was instrumental in bringing about the Charities and Trustee Investment (Scotland) Act 2005.
- An exogenous shock interacted with the scandal impetus: devolution. In terms of real policy capacity, it was devolution that opened up the opportunity for further reform. Thus, the overall assessment for the Scottish process shifts the focus more on the exogenous than the endogenous change process.
Hypothesis 3: The origin of changes to the public benefit test in the Charities Act 2006 can be traced across policy arenas.

- Because of the two-staged nature of the reform process, the tracing across arenas is less clear-cut than in England.
- However, it must be highlighted that the Scottish case study did not involve the same breadth of data and scope of analysis. The endogenous reform seems to have been driven by the SCVO, much like the NCVO orchestrated much of the change in England. Due to the smaller size of the Scottish charity sector, there might simply not be the same kind of ‘expert’ network as in England, at least not on the same scale.
Chapter 10. Conclusions

10.1 Introduction

The preceding Chapters 4 to 9 have presented empirical data from the perspectives of four different nodes. Three main findings have emerged: First, the evidence confirms that actors across the four nodes had different perceptions of the reform: For some, mostly political actors, the Charities Act 2006 was a radical departure; for others, mostly on the legal side, it was never meant to be more than a statutory clarification of charitable status and public benefit.

In addition to the key actors’ backgrounds, timing is crucial in how the Charities Act 2006 is evaluated. The data differentiate between the policy design stage up to the passage of the 2006 Act and the implementation stage that ensued. There is less and less evidence for radical change as the implementation of the Charities Act 2006 proceeded.

Finally, the empirical accounts also highlight the role of counterfactuals. Changes to the role of the Charity Commission, in particular as regards public benefit, had the potential of being profound. However, lack of funding and a change in government that led to a reorientation of the Commission and its staff cut off this potential for radical change before it could materialise. Matters might have turned out differently under another Labour government and a continuation of the Blair government’s approach to the charitable sector.

This final chapter will discuss the evidence for all three findings and conclude with an overall appraisal of the research questions “why change?”, “why now?” and “why does it matter?".
10.2 Hypotheses Testing

10.2.1 Reconciling Empirical Evidence

Each of the preceding empirical chapters aimed to evaluate specific policy network data and their meaning for the three hypotheses presented in Chapter 2. But how do they add up as a single account?

Hypothesis 1: The changes to the public benefit test in the Charities Act 2006 mark a radical and sudden policy change after a long period of stability.

The overall evidence is mixed; the political actors (mostly on the side of the state) as well as the media seem to have been keener in characterising the reform as radical in plan and outcome. The legal community, by contrast, argued against any form of radical change from the outset. On the other hand, the voluntary sector, and a significant part of the state framework perceived of the initial policy goal as radical change, but confirmed that this desired outcome had not been achieved through the public benefit reform in the Charities Act 2006. Changes seem reversible and somewhat temporal. Many stakeholders anticipated further reform in the not too distant future, but this seems unlikely to materialise. Some effects, such as the initial alertness of the independent school sector and the rolling reviews of the Charity Commission, have already been reversed. Much of the previous status quo has been restored.

Interview data corroborate the initial archival research finding that the increased role of the Charity Commission for England and Wales began with the “Review of the Register” in 1993. Public benefit entered the discussion soon thereafter, mostly through sector reports such as the Deakin Report and NCVO’s For the Public Benefit? as well as the governmental responses they evoked. If its origins date back to 1993 and a previous policy change, can the public benefit reform in the Charities Act 2006 still be described as sudden? Again, the answer much depends on which level of change is considered. From a legal perspective, there appears to be an incremental extension of the Charity Commission’s roles and responsibilities; due to internal funding cuts, these did not
materialise. From a policy perspective, the focus on public benefit showed a willingness to engage with the value-based question of what activities society considers charitable and therefore worthy of the indirect and direct public subsidies that come with this status. This public benefit focus was newly introduced to the policy debate around the turn of the millennium and can be described as sudden in its occurrence and spread across policy nodes. Again, however, these radical intentions did not carry through to the implementation stage.

In Scotland, on the contrary, both the policy reform and the legal reform were described and recognised as radical and sudden departures from the pre-2005 status quo, induced by an endogenous shock (scandals) and an exogenous shock (devolution). This applied at the policy formulation as well as the implementation stage. Note, however, that Scotland started with a clean slate, as interview respondents pointed out. Therefore, the benchmark for radical change is significantly lower compared to England and Wales, where a matured regulatory system provided a more complicated context for the charity policy reform. It remains to be seen how the creation of OSCR as a distinctly Scottish charity regulator will impact the sector. The mere creation of a new regulator is per se not necessarily an improvement for charities. However, ten years into OSCR’s work, the interview data of Chapter 9 suggest an overall positive review.

_Hypothesis 2: The changes to the public benefit test in the Charities Act 2006 were introduced through endogenous variables._

Equally, the data on the question whether the nature of change is endogenous are ambivalent. Some parts of the media and a few state policy node actors identified endogenous shocks, such as scandals. There is, however, little empirical confirmation that such scandals were driving the policy agenda. Only two Scottish charities could be identified.\^1123 Yet, the dramatic effect on the levels of trust in the Scottish charity sector could not be verified empirically.

\^1123 Moonbeam and Breast Cancer Research Scotland.
It emerged that exogenous factors, in particular the change in government and the introduction of New Labour policies post-1997, were crucial to driving the policy reform on public benefit. In the language of the radical change frameworks PEF and PDF, a window of opportunity was opened that allowed other endogenous factors, such as the joint efforts of sector and legal stakeholders, to take the reform one step further.\textsuperscript{1124} New Labour opened this window of opportunity by introducing New Public Management techniques and, crucially in the case of Scotland, opening up the opportunity for devolution.

Neither was there conclusive evidence about the “hijacking” of the charity reform through education policy goals. Some activities that the Charity Commission considered as providing public benefit (e.g. the provision of bursaries and the sharing of school facilities with state schools and the local community) coincided with New Labour’s education policy. However, there is no evidence for a strategic and deliberate use of charity policy by the Ministry of Education or other education reform stakeholders. The public benefit debate on fee-charging schools might at best have been a confounding factor that entered at the stage of policy formulation in Parliament. But education policy did certainly not factor prominently in the development of the Charities Act 2006.

\textit{Hypothesis 3: The origin of change to the public benefit test in the Charities Act 2006 can be traced across policy arenas.}

Finally, the spread of the change agenda across different policy nodes has been confirmed by all data sources except in Scotland where the evidence is mixed but altogether insufficient to draw firm conclusions. Still, it seems safe to conclude that it was a key part of the reform process that the issue “caught fire” and spread across policy arenas, from the sector to the state and the media.

\textsuperscript{1124} All nodes as well as the interview data emphasised the role of the NCVO and key individuals, such as Francesca Quint, Richard Fries, Nicholas Deakin, Geoff Mulgan, Geraldine Peacock and Dame Suzi Leather.
Note two caveats, however: First, it cannot be concluded that the media were the sole driver that allowed the issue to spread across arenas. Exogenous shocks (i.e. the new government and devolution) were far more powerful in aligning arenas. Secondly, the timing of prime media attention almost lags behind the actual developments in the reform process. Instead, the data suggest that the public benefit reform agenda spread across different policy arenas through direct actor interaction and joint deliberation.

10.2 Implications for the Theoretical Framework

10.2.1 Confusing Change: Legal Change versus Political Change

Even a cursory reading of the newspaper articles, parliamentary debates and legal academic articles discussed in this thesis reveals a misunderstanding that seems to be the cause for much confusion: often, ‘policy change’, such as the consequences of the charity law reform, is understood as a one-size-fits all term that covers the entirety of the policy-making process as well as the legal drafting and its application to the common law. An interview participant suggested moreover that if ‘change’ was meant to denote a mere accumulation of printed words on public benefit that Parliament passed in the Charities Act 2006, then change did occur. The point of the matter, however, is that the 2006 Act did not actually change the common law definition of charitable status and public benefit. This simplistic equation of different factors of change introduced much confusion within the legal community whether the public benefit test was a new test introduced by the Charities Act 2006\textsuperscript{1125}, a change to an existing test\textsuperscript{1126}, or whether, in fact, there had been no change at all\textsuperscript{1127}.

Failing to differentiate between different levels of change has several implications: if too narrowly defined, such ‘change’ fails to account for the full set of actors involved and part of the narrative regarding the origins and causal connections leading to the described

\textsuperscript{1125} See Chapter 7 on the media view
\textsuperscript{1126} See Chapter 6, Francesca Quint’s opinion
\textsuperscript{1127} See Chapter 6, Luxton and Picarda
change are lost. Or the net is cast too widely, yielding an unwieldy set of actors across different fields, using different terminologies, and pursuing differing objectives.

Among the various ‘change’ definitions used by charity lawyers, government strategists, civil servants, politicians, practitioners and the press, it is indeed hard to discern what actually happened. What cannot be denied is the empirical evidence of several commission reports on the status of charity law, more or less comprehensive responses from Number 10 and Whitehall, the creation of a Joint Committee, a draft Charities Bill and almost 65 hours of parliamentary debate\footnote{Discussion of the Charities Bill had to be continued beyond the usual expiry time and amounted to a total of 64 hours.} leading to the Charities Act 2006. Clearly, the Charity Commission has received a statutory duty to enforce regular public benefit tests based on the removal of the presumption of public benefit for the first three heads of charity. Can this empirical “change” be reconciled with the assertion by some legal scholars\footnote{Chapter 6, Luxton and Picarda.} that the Charities Act 2006 has not actually changed the law? The empirical evidence presented in the preceding chapters suggests that this is possible by introducing the concept of a bifurcated parallel reform processes: one outcome oriented political reform and a process oriented legal reform. These will be termed “technical legal change” and “contextual political change” respectively.

10.2.2 Technical Legal Change

Technical legal change addresses, firstly, the black letter law, as it were; it represents statutory changes that \textit{de facto} change existing common law principles. It also entails landmark court decisions, especially in common law jurisdictions such as England and Wales, where judicial precedent is an important part of the living body of legal rules and principles. Change thus occurred in legal terms if, in this case, the public benefit test were to be constructed independently of the existing body of case law that guided common practice before the Charities Act 2006, making the Act the single source of reference henceforth required to administer the test. This kind of change can be associated with the
‘major’ and ‘sudden’ change described in radical change frameworks such as PEF and PDF.

However, technical legal change can also result in a change in rules rather than principle. For instance, one can assert that the public benefit test existed already before the introduction of the Charities Act 2006, yet that its focus and application have changed. While not fully constituting a change in principle, one could nonetheless classify this as a change in the rule and its application. Referring back to PEF, this kind of change can be seen as continuous change that leads to the slow evolution of institutions and policies.

What is common to both kinds of legal change is that the locus of the change stems from a clear and indisputable change in the law itself; it is a change internal to the law. Thus, courts will have to refer to the new status quo in their judgments and respect it as setting a new precedent. While technical legal change is by itself not a sufficient condition for full-fledged policy change, it seems to play an important role during the opening of a window for political change.

10.2.3 Contextual Political Change

While the legal framework forms the skeleton on which the public benefit test rests, there is tremendous scope for further causes of change within the remaining body politic. This ‘residual’ change occurs irrespective of the legal status quo, and can be termed ‘contextual political change’. This captures change in the execution and application of existing legal rules and principles and changes to existing conventions. The defining characteristic is that the change originates from an interpretation or use of leeway in implementation or application. Conversely, it can also result in the continuation of old policies even in the aftermath of technical legal change.1130

1130 A well-known candidate for such a scenario is the civil rights movement in the United States; segregation in schools persisted even after the US Supreme Court decided in Brown v Board of Education (1954). Only when contextual policy change, driven by key actors, pushed for the implementation of the verdict did the technical legal changes result in an overall public policy change. For further examples, see Rosenberg, G.N. The Hollow Hope. Chicago: University of Chicago Press, 1991.
Through the prominent role attributed to human agency, contextual political change also opens up the very important aspect of human error. Simply put, policy change can occur because of the actor’s intent, but also because of the actor’s failure to understand, apply, or formulate technical legal change that would lead to the desired outcome. This residual error term also captures other caprices of human judgement that can lead – once institutionalised – to the genuine but often illogical quirks that mark modern day public policy.

Finally, contextual political change also accounts for external circumstances that can affect the execution and implementation of policy change, such as sudden cuts in funding, a change in administration or personnel, or other changes that create externalities, i.e. unforeseen positive or negative knock-on effects.\footnote{1131}{The abolition of the Lord Chancellor and the resulting inability to open Parliament for session is one such example, combining human oversight with policy externalities.}

### 10.2.4 Translating Technical Legal and Contextual Political Change into Policy Change

Real-life policy changes are, of course, not as clear-cut as either of these two concepts suggest. In almost all cases, both kinds of change will play some part in shaping the overall outcome(s). The public benefit test in the Charities Act 2006 is no exception. Yet, the value of defining two separate components of policy change is threefold:

1. It allows for a differentiation between the lawyer’s domain, and that of the political scientist, i.e. between legal and political theories/approaches.
2. It focuses the analysis on the intention pursued by individual actors that drove the change. Since it cannot be assumed that actors driving technical legal change (e.g. lawyers and civil servants) are always identical to those who decide on the contextual political change by using their agenda-setting power (government, executive agencies, etc.) or pressure influence (activists, unions, etc.), the incentives of these two groups are very unlikely to coincide.
3) It makes it possible to analyse policy change through potential gaps, errors or misunderstandings in the translation of contextual political change into technical legal change and vice versa.1132

Where does this bifurcated concept of change together with the two theoretical frameworks lead us? First of all, the dependent variable can be redefined.

1132 This also opens up the opportunity to improve policy making, i.e. to bring outcomes closer to original intentions, by improving on the relationship between both kinds of change.
<table>
<thead>
<tr>
<th>Level of Analysis/Definition</th>
<th>Conceptualisation</th>
<th>Operationalisation</th>
</tr>
</thead>
</table>
| Technical Legal Change      | Change in legal rule or principle underlying public benefit test | • Creation of statutory basis or changes to existing statutory basis  
• Changes in judicial decision-making on public benefit (adjudication)  
• Change in legal understanding of public benefit within community of legal practitioners |
| Contextual Political Change | Change in actor’s (including media’s) agenda on public benefit | • Change to incentives/motivations in dealing with public benefit (actor-specific)  
• Change in media perception  
• Change in public opinion on charities (specifically regarding their public benefit)  
• Change in governmental attitude towards role of public benefit provision by charities |
| Policy Change               | Empirical change in behaviour and practices of actors | • Change in regulatory practices of Charity Commission  
• Changes in reporting practices on public benefit among charities  
• Qualitative awareness of trustees regarding role of public benefit |

*Table 10.2.4: Refined Dependent Variable Taking into Account Legal and Political Change.*

This more precise definition opens up the opportunity to include the temporal dimension of the change process that was mentioned in the interview data: change can occur on all three levels at once or occur on one of the two first levels (technical legal or contextual
political) at any point in time, either in parallel, partially overlapping, or in sequence\textsuperscript{1133}. Thus, the dependent variable can account for potential sequencing in the creation of overall policy change – an important dimension to evaluate the explanatory power of PEF and PDF respectively.

### 10.3 Radical Change versus Gradual Change Frameworks: A Theoretical Appraisal

What do these findings tell us about the usefulness of the Path Dependency and the Punctuated Equilibrium Frameworks as competing theoretical accounts in explaining the public benefit reform in the Charities Act 2006? And how do these two frameworks fare compared to the alternative, the Gradual Change Framework?

#### 10.3.1 Differentiating Change in Radical Change Frameworks

Table 10.3.1 summarises the empirical findings from the preceding chapters for each hypothesis. The legal technical dimension (L) suggests that only incremental change took place: the evidence for radical change (Hypothesis 1), with the exception of the media account, is at best mixed and mostly negative. At the same time, there is an overall confirmation for political contextual change (P) across the different actor nodes. Endogenous variables were confirmed as driving force of the reform by all nodes and within both change dimensions, both legal and political (Hypothesis 2). Finally, there is a unanimous confirmation that the issue of public benefit reform “caught fire” and spread from one policy arena to another until the policy change was introduced to the legislative process (Hypothesis 3).

\textsuperscript{1133} Of course, overlaps can occur; in fact, the particular sequencing structure and interplay of technical-legal change and political contextual change will be of particular interest for this analysis since it can provide important insights on the strategy of actors and the progression of policy change (e.g. occurrence and timing of critical junctures and/or policy windows, etc.).
<table>
<thead>
<tr>
<th>State</th>
<th>Sector</th>
<th>Lawyers</th>
<th>Media</th>
<th>Personal</th>
<th>Scotland</th>
</tr>
</thead>
<tbody>
<tr>
<td>L</td>
<td>P</td>
<td>L</td>
<td>P</td>
<td>L</td>
<td>P</td>
</tr>
<tr>
<td>Mixed</td>
<td>Yes</td>
<td>Mixed</td>
<td>Mixed</td>
<td>No</td>
<td>Mixed</td>
</tr>
<tr>
<td>Yes</td>
<td>Mixed</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Mixed</td>
</tr>
<tr>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

*Note of Hypotheses by actor. “L” denotes legal change, “P” denotes political change.*
On balance, the evidence from all different actor nodes therefore points in the direction of radical and sudden change and the applicability of radical change frameworks. But which of the two theories performs better? Although they have different theoretical foundations, PEF and PDF follow a similar logic of stability and sudden, radical change. They mainly differ on the time scale that is required for these policy changes to occur. In the case of PEF, periods of stability are shorter and more frequently interspersed with bursts of change. PDF, on the other hand, depicts policy reform as periods of prolonged stability with rare, but all the more forceful exogenously induced changes. In the English case, previous reform periods, such as the introduction of a register for charities in 1960, and the “Review of the Register” in 1993, suggest that PEF provides a more accurate framework to explain the public benefit reform process.

The Scottish case study can be better explained by the PDF. There were no previous periods of reform in the area of charity law; 2005 marked a radical departure from all previous policies on charitable status, public benefit, and its regulation. It introduced a charity regulator, a register, and a quasi-statutory definition of public benefit in one step. There are further variables that differentiate the Scottish and the English cases; these have been discussed in Chapter 9. These variables do not just affect the two nations’ policy reform processes; they might also affect the applicability of the two theoretical policy change frameworks.

The empirical data identified two systemic features that differentiate Scotland and England: the legal system and the attitude toward the state. The first variable can be ruled out quickly in this case – despite having civil law foundations, the Scottish legal system is dominated by its common law overlay, and as regards charity law, it was almost entirely based on the English definition as applied by HMRC before 2005. For tax purposes, this still applies at present.

Citizens’ attitudes towards the state potentially provide a better explanation. In the interview and archival data, Scotland was described as more communitarian, whereas
England\textsuperscript{1134} was stylised as more individualistic.\textsuperscript{1135} The characteristics attributed to each country may point towards differing welfare state types:\textsuperscript{1136} The provision of social and welfare services is a prime example of the differences between England and Wales: Most public services are still provided by statutory bodies in the Scottish case, while contracting out and public-private partnerships are common practice in England.

The association of PDF with the provision of public services by statutory bodies, and of PEF with a more privatised provision of public services, is of course speculative and will require further empirical work. But what the data gathered in this thesis can tell us is threefold:

- Coordination among stakeholders maybe not have been as visible as in England\textsuperscript{1137}, but it seems that the Scottish collaboration between the state and the charitable sector was predicated on closer collaboration and innovation sharing rather than an arms-length contractual relationship as in England. This is corroborated by general theories of “small state” polities. Thus there was not the same role for individual leadership to trigger radical endogenous reform; as one interviewee pointed out, an exogenous shock was necessary to induce policy change in the Scottish charity sector.
- It seems that judging from the evidence, the practice of contracting out has flourished more readily South of the border, while there is an alternative account in Scotland. Here, so the data suggest, the state adopts practices and projects it deems valuable, making them part of its own statutory services rather than leaving them in the hands of the charitable sector. This, in turn, relates to the theoretical framework of PEF as contractual relationships are more flexible, involving multiple stakeholders, and thus allow more leverage to individual organisations to push their policy agendas. Conversely, it seems that a strong state that imbibed

\textsuperscript{1134} Wales is a curious case, possessing a distinct identity but being otherwise dominated by the English legal and political system; it thus deserves a separate discussion that is unfortunately beyond the scope of this thesis.
\textsuperscript{1135} For a more detailed analysis, see Chapter 9.
\textsuperscript{1136} See for instance Iversen, T. and D. Soskice, \textit{An Asset Theory of Social Policy Preferences}, (2001)
\textsuperscript{1137} Especially the Compact under New Labour set strong signals of the government’s close interest in the charitable sector, but this – as this thesis shows – was not always followed by action.
successful services would leave less space for individual policy nodes to push for their reform agendas.

- Finally, this may also affect the level of public service innovation: Regular reform\textsuperscript{1138} has been a key feature of charity policy in England coinciding with PEF’s prediction of frequently alternating periods of change and stability. Scotland, on the other hand, exhibits only one major period of change – the policy making process leading to the Charities and Trustee Investment (Scotland) Act 2005, which in turn corresponds better with PDF.

Incorporating the role of welfare state regimes in theories of policy change seems a fruitful route to pursue in future research and will help support the explanatory power of individual theoretical frameworks for policy reform.

10.3.2 GTF: An Alternative Account?

Of course, radical change theories are not a perfect fit for the messy reality of empirical observations and this thesis remains mindful of alternative accounts. This section hence contrasts the two radical change frameworks with the gradual, incremental change process described by GTF. Can the latter provide a better explanation after all?

Recall table 2.2.3.b that listed the different GTF types of incremental yet radical change. The categories included displacement, layering, drift, exhaustion, and conversion. The former four can be ruled out easily. Displacement did not occur because the logic of “public benefit” remained unchanged; neither did layering, as the institutional framework was left intact. Rather than neglecting the role of public benefit and charitable status, as drift would suggest, the policy reform aimed at a change in rules. Exhaustion, finally, does not apply either: there was no breakdown of institutional practices over time.

\textsuperscript{1138} These reforms, most importantly the introduction of the register for charities and the review of this register, were significant but did not address the legal definition of charitable status per se. The 2006 reform thus stands out as at least an attempt to do away with the 400-year old definition provided by the Preamble to the Statute of Elizabeth.
This leaves conversion, which predicts the redeployment of existing institutional practices for new purposes. As Streeck and Thelen explain, conversion entails “gaps between rules and enactment due to:

1. Lack of foresight: limits to (unintended consequences of) institutional design;
2. Intended ambiguity of institutional rules: institutions are compromises;
3. Subversion: rules reinterpreted from below;
4. Time: changing contextual conditions and coalitions open up space for redeployment.”

The preceding discussion indicates that there was indeed a gap between the rules and enactment of the public benefit reform. However, lack of foresight is not its origin: even though judges cannot foresee the future use of the cases they decide, they are forming their decisions in full awareness of the import that precedent has in the common law. To a certain extent, this necessitates a degree of ambiguity. For instance, the Charity Commission was able to influence the definition of charitable status by acknowledging new organisations as charities whose purpose were analogous to an existing charitable purpose. The parliamentary debate also indicated the importance of flexibility in the definition of charitable status so it could retain its relevance in the light of a changing sector; this was the reason that Parliament ultimately decided against a statutory definition of public benefit and charitable status. Arguably, political motivations regarding the role of fee-charging schools may have added to this preference for ambiguity. Finally, time also changed the context in which charities operate.

So can conversion explain the research questions of “why change?”, “why now?” and “why does it matter”? It cannot. The change processes it addresses all occurred after the reform had been initiated. Conversion does not explain the initial impetus for public benefit reform, neither does it explain its timing. These events marked a radical departure that was triggered suddenly; they did not build incrementally through lack of foresight, ambiguity, subversion or the passage of time. Compared to the radical change

1139 Streeck and Thelen (2005): Table 2.
frameworks PEF and PDF, the GTF fares worse at explaining the actual change momentum, but potentially better at explaining the incremental change processes that occurred after the public benefit reform had been formulated. But once the two different dimensions of change, legal-technical and contextual-political, are included, PEF and PDF offer a more complete and satisfactory explanation of why there was a charity law reform focusing on public benefit in England, Wales and Scotland around the turn of the millennium.

10.4 Theoretical Contributions

10.4.1 Additional Variables

In addition to the differentiation between technical-legal and political change, there emerged a number of factors that could easily be incorporated into both PEF and PDF to increase their explanatory power. Three are of particular importance:

Length of Reform
Time needs to be further elaborated to include the duration of the different stages of the policy process as an independent variable. The data show that the politicisation of the reform process had been carefully managed until it lost steam around 2002/3. Even though a Home Office civil servant was appointed to see the reform through Parliament, the Bill almost failed to make its way through both Houses. It seems that it is not just the timing of an initial alliance that is required to push policy change; continuous pressure has to be exerted to allow the reform impetus to turn reach the policy formulation and implementation stages.

Momentum/Drivers
The length of the reform process is closely associated with the question of how momentum can be achieved. Individuals were highlighted as “driving” the reform process until it reached momentum of its own. However, neither of the two radical change frameworks identifies the precise point when such momentum is reached, or how such
“drivers” can be identified a priori among the actors involved. Elaborating the characteristics of leadership as a driver of reform, and specifying further criteria for “tipping points” in policy momentum would greatly add further explanatory power to both PEF and PDF.

Welfare State Type
Most importantly, however, is the already discussed variable indicating a welfare state type. More than that, it embodies the relationship between the citizen and the state as well as their respective expectations and responsibilities. Inspecting the welfare type more closely in its own right might be a way to determine the explanatory power of the respective framework.

10.4.2 Matching Theories of Policy Change and the Policy Process
A further refinement to theories of change that has been generated by this thesis is the need to specify change not just as a concrete variable, but also in terms of its locus within the policy process. It was first suggested in Chapter 3 that the empirical evidence presented in this thesis might allow for such a refinement.

The policy process has been broken down into Jenkin’s seven steps. Table 10.4.2 illustrates how these individual stages match up with the policy node, whether change occurred, based on the empirical evidence on charity law reform presented in Chapters 4 to 9.

<table>
<thead>
<tr>
<th>Policy Stage</th>
<th>Description</th>
<th>Actors</th>
<th>Change?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Initiation</strong></td>
<td>First discussions on reform of charity law around the concept of public benefit</td>
<td>Sector, State, Legal Community</td>
<td>Radical Change envisioned</td>
</tr>
<tr>
<td><strong>Information</strong></td>
<td>Commissions and reports published</td>
<td>Sector, State, Legal Community, Media</td>
<td>Radical Change envisioned</td>
</tr>
<tr>
<td><strong>Consideration</strong></td>
<td>Deliberation in a parliamentary select committee</td>
<td>State, Sector, Legal Community, Media</td>
<td>Radical Change questioned</td>
</tr>
<tr>
<td><strong>Decision</strong></td>
<td>Bill introduced and passed in Parliament</td>
<td>State</td>
<td>Incremental change passed</td>
</tr>
<tr>
<td><strong>Implementation</strong></td>
<td>Charity Commission issues</td>
<td>State, Sector</td>
<td>No change</td>
</tr>
</tbody>
</table>
guidance and conducts reviews of some schools

<table>
<thead>
<tr>
<th>Evaluation</th>
<th>Five-Year evaluations conducted and published (September 2013).</th>
<th>State, Media</th>
<th>No change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Termination</td>
<td>Conservative government announces no further reforms on public benefit will be considered</td>
<td>State</td>
<td>No change</td>
</tr>
</tbody>
</table>

Table 10.4.2: The Different Stages of the Policy Process and Their Change Potential (England and Wales).

<table>
<thead>
<tr>
<th>Policy Stage</th>
<th>Description</th>
<th>Actors</th>
<th>Change?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Initiation</td>
<td>First discussions on reform of charity law around the concept of public benefit</td>
<td>Sector, State, Legal Community</td>
<td>Radical Change envisioned</td>
</tr>
<tr>
<td>Information</td>
<td>Commissions and reports published</td>
<td>Sector, State, Legal Community, (Media)</td>
<td>Radical Change envisioned</td>
</tr>
<tr>
<td>Consideration</td>
<td>Deliberation in a parliamentary select committee</td>
<td>State, Sector, Legal Community, (Media)</td>
<td>Radical Change somewhat moderated</td>
</tr>
<tr>
<td>Decision</td>
<td>Bill introduced and passed in Parliament</td>
<td>State</td>
<td>Radical Change</td>
</tr>
<tr>
<td>Implementation</td>
<td>Foundation of OSCR and Scottish charity register; OSCR issues guidance and conducts reviews of some schools with reprimand</td>
<td>State, Sector</td>
<td>Radical Change</td>
</tr>
<tr>
<td>Evaluation</td>
<td>Ten-Year Evaluation coming up, on-going reviews in high priority sectors (e.g. education)</td>
<td>State, Media</td>
<td>Moderate to radical change (institutional and daily practice)</td>
</tr>
<tr>
<td>Termination</td>
<td>Further devolution after September 2014 referendum currently under discussion in Scottish Parliament/Executive</td>
<td>State</td>
<td>Can expect further change, at least incremental, possibly radical</td>
</tr>
</tbody>
</table>

Table 10.4.2b: The Different Stages of the Policy Process and Their Change Potential (Scotland).

How does this relate to theories of change and the change frameworks analysed in this thesis? Both PEF and PDF do not differentiate between the different stages of the policy.
process. However, the empirical evidence in the case of the Charities Act 2006 in England and Wales and the Charities and Trustee Investment (Scotland) Act 2005 suggests that such a differentiation leads to interesting insights.

Firstly, looking at the individual change elements at each stage of the policy process, it is apparent, in particular in the case of England and Wales, that an overall classification of the charity law reforms leading to the Charities Act 2006 does not capture the full picture. The reform itself can be overall evaluated as at best incremental, at worst no change at all. However, looking at the empirical evidence for the first three stages of policy-making, it is clear that radical change had been envisioned. Only at the stage of parliamentary decision-making did the scope of the reform alter. This answers the initial puzzle how a policy could be retrospectively evaluated by different stakeholders as radical and non-existent at the same time: depending on the policy stage under consideration by each stakeholder, the conclusion will differ.

Secondly, it allows us to pose a more specific question: at what point did the radical change ambition around the concept of public benefit fail? It seems that, as discussed in previous chapters, the narrative was hijacked by education policy and the controversy around the status of fee-charging schools *writ large*; this occurred at the third policy stage, “decision”. Scotland, in contrast, sailed through the decision stage and maintained the radical institutional shift throughout the parliamentary deliberation and decision-making. Again, it should be noted that the Scottish reforms, such as the creation of OSCR, is not evaluated on a normative level. The thesis is concerned with the question of objective policy change; whether this policy change was beneficial, detrimental, or neutral for the charity sector and the general polity is a different matter.

Thirdly and finally, refining the change theories to the level of individual policy stages allows a closer look at the potential causes of policy failure, such as the mix of actors involved at individual stages. Thus, one can speculate whether the more limited influence of the media in Scotland played a causal factor in allowing the reform to proceed as it was originally planned. Further empirical data will be necessary to ascertain this
hypothesis as Scotland started from a different status quo than England (i.e. it had no autonomous charity regulator until 2005) and does therefore not allow for conclusions by comparisons.

10.5 Conclusions and Outlook for further Research

10.5.1 A Case of the Emperor’s Clothes?

There always is a long and a short answer to any question. Through these 10 chapters, the thesis has given the “long” version of the answer why public benefit policy change took place as part of the Charities Act 2006 and what the change it entailed was. The thesis has set out the empirical evidence through the lens of two major public policy theoretical frameworks and with the help of a wide array of methods. On this empirical basis, it has also identified further variables that these theoretical approaches should include to increase their explanatory power. Now it is time for the short answer: What changed, why did it change, and why did it change when it did?

The English account of change largely follows the Punctuated Equilibrium Framework. There was a base-level of incremental change on public benefit ever since the Statute of Elizabeth in 1601, however, this change was based on judicial decisions and precedent; public benefit was not part of any statutory reform. This fits the differentiation between technical-legal change and political change, the latter involving a change in social attitudes triggering an Act of Parliament. Thus, we have radical change in so far as policy intentions for Charities Act 2006 are concerned; however, actual outcomes did not bring about radical change, albeit the Charity Commission holds the power to trigger such radical change.

The English case hence showed indications for endogenous change that was brought about by a coalition of formerly independent stakeholders who built a larger “reform coalition” across the charity policy network. Media attention aided the process along, just as did contextual exogenous factors such as the changed ideological outlook of New
Labour based on New Public Management and increased partnerships with the charitable sector.\textsuperscript{1140} Conversely, this also entails what could be described as a “charitisation” of the public sector: through an increase in Private-Public Partnerships (PPPs), social welfare services are now often delivered by charities and no longer by the state itself. Individual leadership played a strong role in the process, as did the expectation of citizens toward the welfare state.

The timing can be explained through a series of prior reforms, most importantly the “Review of the Register” that the Charity Commission instated over the mid-1990s. Moreover, charity law reform fit the wider policy agenda of the New Labour government. The sector itself had already been campaigning more or less consistently for a reform ever since the Goodman report in the 1970s. It is the convergence of all these factors that can explains the timing rather than the 400\textsuperscript{th} anniversary of the Statute of Elizabeth.

As for what has changed, it seems that the English reform produced incremental change on a technical legal level: the existing body of charity law found a partial statutory clarification and the status quo was enshrined in legislation. This is of mostly symbolic value. There was nothing radical about this legal dimension of change. As the data show, legal change around the public benefit reform was never meant to be radical, at least not from the point of view of the sector and the legal community. It is easy to see that a system, such as the common law, that is predicated on the historical evolution of the law through incremental, case-based change would resist the temptation of anything that can be described as “radical”.

On the contextual political level, change was indeed meant to be radical; some stakeholders clearly wanted to see independent schools lose their charitable status. Public benefit reform was an opportunity to change policy around a new definition of the citizen-state relationship: in the new transaction based relationship, responsibilities could be distributed more evenly between the two spheres. This brought many advantages, such as increased freedom to innovate and choose. At the same time, it also lessened the

\textsuperscript{1140} Barry Knight entitles this a “quangocracy” that turns charities into “GONGOs” (Government NGOs).
responsibility of the state, downgrading it from a provider to a broker of welfare services. Charity law reform is a potential means of retaining control over these independent contractual partners in the form of regulation. In this sense, the contextual political level of the reform certainly was radical rather than incremental.

Finally, technical legal change and political contextual change combined led to a heated debate and a clash of opinion; in the end, the actual policy outcome can probably be described as much ado, not quite about nothing, but about very little. It is true that independent schools and other fee-charging charities geared up in preparation for the Charities Act 2006 and its renewed focus on public benefit. But soon after it emerged that the Charity Commission could not enforce the new public benefit rules, independent schools returned to established patterns of bursary and scholarship provision. Independent schools were probably the biggest winner of the Charities Act 2006 not least of all because they now enjoy an official seal as “public benefit” providers. Little is done to continuously ascertain this fact.

The Charity Commission, in turn, was probably the biggest loser of the reform: it simply does not have the resources to adequately enforce the radical policy vision that was discussed in the early stages of the reform around 2001-2004. With further funding cuts and a marked change in leadership style, the Commission is being transformed from an advisor and partner to a “watchdog”, even if this falls short of what William Shawcross described as “the charity sector’s Stasi”.

However, the Charity Commission’s new role retains the potential for truly radical policy change in terms of outcomes, even after the implementation of the Charities Act 2006. The process of looking at charities’ activities rather than just their purposes (demonstrable public benefit\textsuperscript{1141}) began with the “Review of the Register”. The Charities Act 2006 gave the Charity Commission an explicit statutory obligation to conduct investigations into the activities of certain charities, not just in case of controversy, such as erroneous financial reports or whistle-blower accounts of embezzlement. The

\textsuperscript{1141} See Chapter 3.
Commission is now technically in the position to initiate investigations on its own initiative.

Moreover, the Charity Commission now also has a statutory duty to provide guidance on public benefit. It is thus actively engaged in the formulation of the criteria that are necessary to receive and maintain charitable status and its advantages. Yet, the criteria for charitable status are not a matter of regulation but of values. As Charles Mitchell points out:

*A related but deeper question is whether the Commissioners (and the courts, for that matter) are the appropriate people to take decisions on charitable status at all, given that these decisions have implications for state spending, and so should arguably be taken by an elected body.*\(^{1142}\)

Parliament refused to address this key point of the public benefit reform because of its difficult and controversial nature. In other words, an updated redefinition of charitable status could potentially lead to a drop in popularity and even a loss of votes. Following a trend of the “politicisation of the judiciary”, Parliament instead shifted the burden onto the quasi-judicial Charity Commission, who received a dramatic media backlash as a result. In the light of arguably political Charity Commissioner appointments, such as of Dame Suzi Leather, one may wonder about the Commission’s continued neutrality and independence.

At the end of the day, the aforementioned opportunities for radical change emanating from the Charity Commission developed, at least not for now. Instead, the Commission lost over a third of its budget during the Brown and Cameron governments. This led to a severe shortage in staff, in particular in the legal department. In practice, the Commission can therefore not monitor the activities of charities and impose thorough “character checks” as discussed in the parliamentary debate. The Upper Tribunal decision has

\(^{1142}\) Mitchell in Mitchell and Moody, p. 187
furthermore put at least a temporary end to the legal public benefit debate. And the current Conservative government has expressed no intention of addressing the question of public benefit from a political perspective. However, the potential remains and another change in government might trigger the radical change in outcome that lies dormant in the Charities Act 2006 and the resulting Charities Act 2011.

10.5.2 Facing the “So what?” Question

If there radical change in intention, but not in outcome – what about the contribution of this thesis? Firstly, breaking down the change process into different policy stages allows us to explain the empirical puzzle set out in Chapter 1: evaluations of the charity law reforms in England and Wales ranged from one extreme – no change – to another – radical change. The first three stages of the policy process envisioned radical change, yet such plans were diminished during parliamentary deliberation in the following stages, and the reform was downgraded. Radical change remained a potentiality in the form of the changed role of the Charity Commission. However, this potential never materialised. Thus, there certainly was policy change, yet it failed through the influence of an external shock in the form of education policy influences at the decision stage in Parliament, in particular in the House of Commons.

In the fairy tale that lend its title to this thesis, the fact that the emperor’s new clothes do no exist and he parades naked in front of his people makes for a far more interesting moral lesson than had he actually worn a set of new clothes. Likewise, the fact that radical policy change was not carried through all stages of the policy process in England and Wales is arguably more telling for public policy and political science theories of change than had the reform succeeded, as it did in Scotland. The fact that the policy reform lost momentum along the way helped refine these theories by shifting the level of analysis to the level of individual policy stages. At the same time, this finding also has relevance for practitioners and political actors: it provides them with a more accurate analytical tool to plan their policy activity and potentially make future reforms more likely to succeed by knowing what can go wrong at what stage. Thus, the fact that the
reform left Parliament “naked”, so to say, makes this thesis’s findings more valuable for theoretical and practical lessons.

10.5.3 Benefit for the Public?

Where does this leave public policy? In a nutshell, the reform had substance and ambition, so it was more than just a case of the emperor’s new clothes; the emperor of the public benefit reform was clad in fancy clothes to begin with but they became a fig leaf halfway through the process. As many legal commentators have pointed out, any contextual political reform regarding the status of independent schools was doomed to failure: public benefit by itself is a legal tool and cannot achieve so clearly a political goal.

There is thus a deeper question: rather than charity law reform having failed, is it Parliament that has dodged the bullet? It is not just charities and society that have changed independently – so has their relationship to each other. In the 16th century, the Tudors made an executive decision that enshrined charity in its contemporary manifestations – relief of poverty, education and religion – as an important part of the state, and this relationship has been updated as far as possible through the case law ever since.

But the question of what society actually wants to support as “charity” has never been put to a political vote again. Ultimately, the public benefit reform was used as a tool to answer the question; much like Cervantes’s Don Quixote, means and targets were not commensurate. Thus, one conclusion is that the Charities Act 2006 and its public benefit reform failed to define a new relationship between citizens and charities because the 2006 Act was an indirect means to achieve a goal that no politician wanted to face head on. What we want the relationship between the welfare state, charities, and society to be remains a political question that will need to be addressed sooner or later through the democratic process of parliamentary decision-making.
10.5.2 Outlook and Further Research

Many questions remain unanswered and new ones have been raised. The Scottish case study, for instance, presents a most interesting alternative account: following more of a Path Dependency Framework change process, the Scottish reform was driven through exogenous and endogenous shocks that met a stymied actor-driven change movement. Moreover, the differing attitudes and expectations towards the welfare state also shaped the public benefit reform North of the border, which truly can be described as radical. It is beyond the scope of this thesis to assess the ideological differences between the two jurisdictions, but the author hopes to conduct further research on the connection of the citizen-state relationship, the legal culture, and public policy reform in Scotland and England in the near future.1143

On a theoretical level, further empirical evidence is needed to refine the change theories by a focus on the policy stage level. This thesis has highlighted the usefulness of such a refinement to theories of radical change, such as PEF and PDF. Through the incorporation of policy stages in the theoretical framework, the thesis was able to resolve the empirical puzzle of the Charities Act 2006’s new clothes, reconciling radical change in the beginning and a lack of change at the evaluation stage. It remains to be hoped that future reforms in charity law and beyond will use these insights to make sure they do not leave Parliament naked.

A. Appendices

A.1 Timeline of the Public Benefit Policy Reform and the Charities Act 2006 (England and Wales)

In order to provide the reader with an overview of the main events, the publication of reports, draft bills, and the parliamentary process have been mapped out chronologically.\textsuperscript{1144}

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>Deakin report</td>
</tr>
<tr>
<td>1999</td>
<td>Compact</td>
</tr>
<tr>
<td>2001</td>
<td>NCVO Report</td>
</tr>
<tr>
<td>July 2001</td>
<td>PM commissions report</td>
</tr>
<tr>
<td>September 2002</td>
<td>PMSU “Private Action, Public Benefit”</td>
</tr>
<tr>
<td>November 2002</td>
<td>Charity Commission Response</td>
</tr>
<tr>
<td>July 2003</td>
<td>Government Response</td>
</tr>
<tr>
<td>26 November 2003</td>
<td>Draft Bill announced in Queen’s Speech</td>
</tr>
<tr>
<td>10\textsuperscript{th} May 2004</td>
<td>Joint Committee on the Draft Charity Bill set up</td>
</tr>
<tr>
<td>27\textsuperscript{th} May 2004</td>
<td>Draft Charity Bill published by Home Office</td>
</tr>
<tr>
<td>30 September 2004</td>
<td>Report by the Joint Committee on the Draft Charity Bill</td>
</tr>
<tr>
<td>20 December 2004</td>
<td>First Reading: Bill introduced to the House of Lords</td>
</tr>
<tr>
<td>20 January 2005</td>
<td>Second Reading in House of Lords</td>
</tr>
<tr>
<td>3, 9, 10, 23 February and 8, 14, 16, 21 March 2005</td>
<td>Grand Committee Sessions</td>
</tr>
<tr>
<td>May 2005</td>
<td>General Election</td>
</tr>
<tr>
<td>19 May 2005</td>
<td>Reintroduction of Bill and First Reading</td>
</tr>
<tr>
<td>7 June 2005</td>
<td>Second Reading</td>
</tr>
<tr>
<td>28 June and 12 July 2005</td>
<td>Committee Stage</td>
</tr>
<tr>
<td>12 and 18 October 2005</td>
<td>Report</td>
</tr>
<tr>
<td>8 November 2005</td>
<td>Third Reading</td>
</tr>
<tr>
<td>9 November 2005</td>
<td>First Reading House of Commons</td>
</tr>
<tr>
<td>26 June 2006</td>
<td>Second Reading</td>
</tr>
<tr>
<td>4, 6, 11, 13 July 2006</td>
<td>Committee Stage (House of Commons)</td>
</tr>
<tr>
<td>25 October 2006</td>
<td>Report and Third Reading (Commons)</td>
</tr>
<tr>
<td>7 November 2006</td>
<td>Consideration of Commons Amendments in House of Lords</td>
</tr>
<tr>
<td>8 November 2006</td>
<td>Bill receives Royal Assent as Charities Act 2006</td>
</tr>
</tbody>
</table>

\textsuperscript{1144} This timeline follows the First Report on the Draft Charities Bill published by the Joint Committee on the Draft Charities Bill on 30\textsuperscript{th} September 2004, see Chapter 1 “Overview”, in particular paragraphs 10ff.
A.2 Full Survey Questionnaire

1. Is your organisation located in …
   - England
   - Scotland
   - Wales

2. Is your organisation a(n) …
   - Independent School
   - Healthcare Organisation

3. Has your organisation been providing any new services since the introduction of the Charities Act 2006/the Charities and Trustee Investment (Scotland) Act 2005?

4. What are these new services?

5. Does your organisation provide any services free of charge (to patients or other organisations)?

6. If so, which services do you provide free of charge?

7. Who is eligible for these services?

8. Are there any new free services (that were not free before 2005/6 or that were newly introduced after 2005/6)?

9. If so, which free services were newly introduced or have been provided free of charge after 2006?

10. Do these new free services affect only some or all patients? (Hospitals only)

11. Did you organisation move any services/activities to a trading subsidiary? (Hospitals only)

12. Does your organisation provide access to its facilities to local NHS trusts or other organisations? (Hospitals only)

13. Since when do you provide facility access to other organisations?

14. How do you measure and report public benefit?

15. Has your organisation been providing additional bursaries and/or scholarships since the introduction of the Charities Act 2006/the Charities and Trustee Investment (Scotland) Act 2005? (Schools only)
16. How much (£/annum) are you providing in additional bursaries and/or scholarships since the Charities Act 2006/ the Charities and Trustee Investment (Scotland) Act 2005? *(Schools only)*

17. Were you providing bursaries and/or scholarships before then? *(Schools only)*

18. How much (£/annum) were you providing in bursaries and/or scholarships before the Charities Act 2006/ the Charities and Trustee Investment (Scotland) Act 2005? *(Schools only)*

19. Are these bursaries and/or scholarships … *(Schools only)*
   - bursaries based on financial need?
   - bursaries based on academic merit?
   - scholarships based on financial need?
   - scholarships based on academic merit?

20. Do you share facilities and/or teaching resources with other schools or the local community? *(Schools only)*

21. If so, since when have you been sharing these facilities/teaching resources? *(Schools only)*

22. How do you measure and report public benefit?
   - Number of students with full/partial bursaries and/or scholarships
   - Volume of bursaries and/or scholarships (in monetary terms)
   - Sharing of facilities
   - Teacher training
   - Other form or reporting (please specify)

23. Who is in charge of providing evidence for public benefit in your organisation (e.g. for annual reports, reports to the Charity Commission or OSCR, etc.)? *(Schools only)*
   - Trustees
   - Accountants
   - Administrators
   - Other (please specify)

24. Which of these activities is most important for your organisation? Please rank the following options in order of importance, with 1 as most important and 7 as least important.
   1. Seeking governmental grants
   2. Seeking contracts
   3. Public benefit reporting
   4. Seeking funding
   5. Report to Trustees/Board
   6. Comply with Charity Commission and/or OSCR
   7. Comply with Charity Law
25. What are your organisation’s main sources of income?
   - Government grants
   - Service contracts
   - Tuition/Service Fees
   - Donations
   - Other fundraising events
   - Endowment
   - Other (please specify)
A.3 Glossary

Change
Change is loosely identified as a departure from the previous status quo. Unlike “innovation”, which implies a normative statement as for the quality of content, “change” is value neutral in its evaluation. Two units of change are identified: incremental change and radical change. This thesis identifies incremental change with technical-legal change in the policy process, whereas radical change in the aforementioned definition stands for political change. The difference between technical-legal and political change is not necessarily one of time, but rather of process. Technical-legal change changes the wording, content, and/or scope of a policy without changing the policy’s core values. Political-contextual change, on the other hand, marks a change of the underlying values of a policy and denotes a clear recalibration in the policy’s direction (e.g. the introduction of a new institution, or new powers for an existing institution that allows said institution to alter its range of influence). Thus, legal change is not *per definitionem* slow, neither is political change necessarily fast.

Endogenous
Endogenous in the context of this thesis describes changes whose locus is within the policy network (see definition below). Thus, endogenous change has been generated not only by the actors within the charity law policy network, but also within the context of charity law reform. Charity sector efforts to induce specific charity law changes regarding public benefit are, for instance, one such example of endogenous change. Changes that emanate from one of the stakeholders within the network but that are unrelated in intention and/or implementation to charity law reform are described as exogenous (see definition below).

Exogenous
Triggers that lead to changes to charity that originate from outside the charity law policy network are described as exogenous changes. Alternatively, such exogenous changes may also be triggered by actors from within the network but without any intention to effect changes to charity law. Rather, the action or event that triggered the change was aimed at another policy entirely. For instance, a change in government denotes an exogenous trigger for charity law change, as it did not occur with the specific goal of changing charity law, albeit the state forms part of the charity law policy network.

Policy Network
The policy network under consideration here denotes a network of actors with regular interaction around a shared policy issue (so-called “communities of practice” as defined by Jean Hartley). In this case, it contains the main stakeholders involved in the charity law reform process. They are detailed in Chapter three and entail the charity sector (see below), the state and the legal community. While the media did play an

---

important part, this was more as a tool than an actor in its own right. Therefore, they are per se not part of the policy network under consideration.

Public School
The terminology used in the media and even within the parliamentary debate seems to refer to all fee-paying schools as “public schools”. However, this is not entirely accurate. The reform affected all independent fee-charging schools and therefore a far larger group of schools than the independent fee-paying schools who are members of the Headmasters’ Conference; only the latter are conventionally referred to as “public schools”. Chapter 3.1.4 provides a short historical overview of the charitable status of independent schools in England and Wales.

(Charity) Sector
“Sector” denotes the charity sector, which is itself part of the larger voluntary sector. The charity sector comprises organisations that have charitable status. Over an income of £10,000 a year, they need to register with the Charity Commission in England and Wales, while all Scottish charities need to be registered with the Office of the Scottish Charity Regulator (OSCR), independent of their annual income. Moreover, the sector also includes several notable umbrella organisations, such as the National Council for Voluntary Organisations (NCVO) or the Scottish Council for Voluntary Organisations (SCVO). It is a subpart of the charity policy network.
Bibliography


----------. “Trust or bust: Alison Benjamin on a charity law shake-up that aims to reassure the public by promising tough regulation of fundraising.” The Guardian, 02 Oct 2002.


Bridge, M. “Church that coaxes people into debt received £8 million in public subsidy.” The Times, 2nd April 2011.

--------. “Change agent: Nicholas Deakin is the architect of voluntary sector modernisation. David Brindle hears how his vision has almost reached fruition - and his concerns over the charities bill”, The Guardian, 15 Sep 2004.

--------. “Marking out the territory: Ed Miliband, 'Brownite' third sector minister, insists that the idea of charities being major public service providers has been overplayed. He clarifies Labour's vision to David Brindle.” The Guardian, 20 Sep 2006.

--------. “Interview Suzi Leather: Standing her ground: As the chair of the Charity Commission prepares to step down, she reflects on the hostility she has encountered.” The Guardian, 11 July 2012.


Brookes, Martin. “Measures of success: We give billions to good causes, but know little about whether our donations make a difference. It's time to start holding charities to account, says Martin Brookes.” The Guardian, 21 Nov 2007.


Chamberlain, E. (National Council for Voluntary Organisations, NCVO), ‘The Charity Tribunal: How it works and how you can use it”, accessed online on 4th of December


Curtis, P. and D. Brindle. “Do more for poorer children or lose your charitable status, private schools are told: Sector must prove it has public benefits: pounds 100m a year in tax breaks at stake in new guidance.” *The Guardian*, 16 Jan 2008.


Frith, M. and N. Morris. “The eccentric world of British philanthropy; Ministers revealed plans yesterday to tidy up 400 years of charity legislation. But they will struggle to iron out the many anomalies still found in the world of British charities.” *The Independent*, 28 May 2004.


“Reform begins at home.” 29 Nov 2003.


“Charitable status: Two worlds collide” 17 Jan 2008.


Hobson, R. “The old question: what exactly is a charity?” *The Times*, 03 Dec 1996.


*Huffington Post UK* “Investigate RSPCA’s 'Staggering' Legal Costs For Fox Hunting Trial, Says MPs.” 22nd December 2012.


----------, “Private schools confident about charity status.” *The Times*, 10th June 2005.

----------, “Schools must be ‘open’ to keep charity status.” *The Times*, 3rd June 2004.


nfp Synergy. "Trusted but misunderstood; public and political attitudes to charities, fundraising and regulation", *nfp Synergy Bulletin* (November 2002).

----------. "Disgusted or delighted: What does concern the public about charities?", *nfp Synergy Bulletin* (March 2004).


*Report of the Commissioners Appointed to Inquire into the State of Popular Education,* (C. 2794) 6 vols., 1861.

*Report of the HM Commissioners on ... Certain Schools and Colleges,* (C.3288), 4 vols., 1864.


Seddon, N. “Exercising Caution: Councils have been keen to allow ‘charitable’ trusts to run leisure and culture services, but are some charities in name only?” *The Guardian*, 11th April 2007.


Shifrin, T. “Benefit trap: Private schools can currently claim the tax breaks of charitable status, yet pressure groups can't. Tash Shifrin reports on whether the forthcoming charities bill will address this imbalance.” *The Guardian*, 19 May 2004.

---------, “A head for heights: Geraldine Peacock says she plans to bring creativity to the Charity Commission and, as its new chair, promises she won't be pushed around by ministers. Tash Shifrin believes her.” *The Guardian*, 07 July 2004.


Shawcross, William. Unpublished speech to the Charity Law Association in London on 3rd October 2013; recorded by the author at the event.


Suzman, M. “‘Radical change to charities proposed’, *Financial Times*, 09 July 1996.


List of Legislation

Charitable Trusts Act 1853
Charities Act 1960
Charities Act 1993
Charities Act 2006
Charities Act 2011
Charities and Trustee Investment (Scotland) Act 2005
Education Act 1944 ("Butler Act")
Law reform (Miscellaneous Provisions) (Scotland) Act 1990
Law Reform (Miscellaneous Provisions) (Scotland) Act 1992
Mortmain and Charitable Uses Act 1736
Mortmain and Charitable Uses Act 1888
Recreational Charities Act 1958
Statute of Charitable Uses 1597 (39 Elizabeth I c 6)
Statute of Charitable Uses 1601 (49 Elizabeth I c 4)

List of Cases

*Abbey Malvern Wells Ltd v Ministry of Local Government and Planning* [1951] 1 Ch 728
*A-G v Barnes* (1708), 2 Vern. 597, Prec. Ch 270, Eq. Cas. Abl. 97, pl.7
*A-G v The Earl of Lonsdale*, [1827] 1 Sim 105; 57 ER 518
*A-G v Lady Downing* (1766) Amb 550; (1769) Amb 571
*A-G v Pearce* (1740) 2 Atk 87; 26 ER 454
*A-G v Roper* (1722) 2 P Wms 125; 24 ER 667
*A-G v Whorwood* (1750) 1 Ves Sr 534, 27 ER 1188
*Baird’s Trustees v Lord Advocate* (1888) 15 R 682 (Ct of Sess)
*Bishop of Rochester v AG* (1721) 4 Bro PC 643; 2 ER 438
*Blair v Duncan* [1902] AC 37 (HL)
*Brighton College v Marriott* 10 TC 213, [1925] 1 KB 312, [1926] AC 192
*Case of the Master and Fellows of Magdalen College* (1572-1616) 11 Co Rep 66; 77 ER 1235
*Cobb v Cobb’s Trustees* (1894) 21 R 638 (Ct of Sess)
*Cocks v Manners* (1871) LR 12 Eq 574
*Compton, Re* [1945] 1 Ch 123; [1945] 1 All ER 198
*Delany, Re* [1902] 9 2 Ch 642 (Ch)
*Estlin, Re* [1903] All ER Rep Ext 1060 (Ch)
*Ewen v Bannerman* (1830) 2 Dow & Cl 74, 101; 6 ER 657
*Gilmour v Coats* [1948] Ch 1 (Ch) 14, aff’d [1949] AC 426 (HL)
*Goodman v Saltash Corporation* (1882) 7 App Cas 633 (HL)
*Grimond v Grimond* (1904) 6 F 285 (Ct of Sess); [1905] AC 124 (HL)
*Hill v Burns* (1826) 2 Wils & S 80
*Hoare v Osbourne* (1866) LR 1 Eq 585
Hopkins, Re [1965] Ch 669 (Ch)
Income Tax Special Purposes Commissioners v Pemsel [1891] AC 531 (HL)
IRC v Oldham Training and Enterprise Centre [1996] STC 1218 (Ch)
Jenner v Harper (1714). 1 P. Wms. 247
Jones v Williams (1767) Amb 651; 27 ER 422
Macduff, Re [1896] 2 Ch 451 (CA)
Magistrates of Dundee v Morris (1858) 3 Macq 134
McGovern v A-G [1982] Ch 321
Miller v Rowan (1837) 5 Cl & Fin 99; 7 ER 341
Morice v Bishop of Durham (1804) 9 Ves Jr 399; 32 ER 656, aff’d [1805] 10 Ves Jr 522;
32 ER 947
National Anti-Vivisection Society Ltd v IRC [1948] AC 31 (HL); [1946] KB 185 (CA)
Ommaney v Butcher [1823] Turn & R 260; 37 ER 1098
Oppenheim v Tobacco Securities Trust Co Ltd [1951] AC 297 (HL)
Perpetual Trustee Co, (Ltd,) v, St. Luke's Hospital and others 39 S.R. (N.S.W.) 408
R (Independent Schools Council) v Charity Commission for England and Wales [2011]
UKUT 421 (TCC); [2012] Ch 214
Resch’s Will Trusts, Re [1969] 1 AC 514 (PC)
Ross v Heriot’s Hospital (1843) 5 D 589
Shaw (deceased), Re [1957] 1 WLR 729 (Ch)
Stewart v Green (1870) IR 5 Eq 470
Townley v Bedwell (1801) 6 Ves Jr 194; 31 ER 1008
Turner v Ogden (1787) 1 Cox Eq Cas 316; 29 ER 1183
Vancouver Regional FreeNet Association v Minister of National Revenue [1996] 3 FC 880
Waldo v Caley (1809) 16 Ves Jr 206; 33 ER 962
Wink’s Executors v Tallent [1947] SC 470 (Ct of Sess)

List of Guidance Documents and Memoranda

Charity Commission for England and Wales
Memorandum from the Charity Commission (DCH 13) Ev 190.
Further memorandum from the Charity Commission (DCH 14) Ev 195.
Further memorandum from the Charity Commission (DCH 71) Ev 196.
Further memorandum from the Charity Commission (DCH 192) Ev 198.
Supplementary memorandum from the Home Office and the Charity Commission (DCH 356) Ev 197.
Supplementary memorandum from the Charity Commission (DCH 357) Ev 198.
Supplementary memorandum from the Charity Commission (DCH 299) Ev 223.
Supplementary memorandum from the Charity Commission (DCH 300) Ev 224.
Supplementary memorandum from the Charity Commission (DCH 301) Ev 227.
Supplementary memorandum from the Charity Commission (DCH 302) Ev 229.

Guidance on Public Benefit

Home Office
Memorandum from The Home Office (DCH 15) Ev 283, “Public Views and Perceptions of Charities”.
Further memorandum from the Home Office (DCH 16) Ev 284.
Further memorandum from the Home Office (DCH 17) Ev 287.
Further memorandum from the Home Office (DCH 18) Ev 291.
Further memorandum from the Home Office (DCH 20) Ev 296.
Further memorandum from the Home Office (DCH 26) Ev 297.
Supplementary memorandum from the Home Office (DCH 350).
Supplementary memorandum from the Home Office (DCH 351).
Supplementary memorandum from the Home Office (DCH 352).
Supplementary memorandum from the Home Office (DCH 353).
Supplementary memorandum from the Home Office and the Charity Commission (DCH 356).
Supplementary memorandum from the Home Office (DCH 358).

Third Sector
Memorandum from the NCVO, (DCH 2) Ev 1.
Memorandum from Association of Chief Executives of Voluntary Organisations (ACEVO) (DCH 3).
Supplementary memorandum from Volunteering England (DCH 228).
Supplementary memorandum from Governance Works (DCH 239).
Memorandum from the Independent Schools Council (DCH 9).
Further memorandum from the Independent Schools Council (DCH 47).
Supplementary memorandum from the Independent Schools Council (DCH 277);
Supplementary memorandum from the Independent Schools Council (DCH 278).
Supplementary memorandum from the Church Schools Company (DCH 324).
Memorandum from Nuffield Hospitals (Charity No 205533) (DCH 81).
Supplementary memorandum from Nuffield Hospitals (DCH 333).

Others
Memorandum from Peter Luxton, Professor of Property Law at the University of Sheffield (DCH 270).
Memorandum from Hubert Picarda QC (DCH 297).
Websites

*Charity Commission for England and Wales*


*Office of the Scottish Charity Regulator*

*Independent Schools Council*
Independent Schools Council Website: [www.isc.co.uk](http://www.isc.co.uk), accessed online on 4th August 2013.


*Government*
Office for Civil Society:  

Parliamentary Secretary Minister for Civil Society:  

Scottish Parliament:  

Others  
“The Compact” Website: at  

Demos Website, http://demos.co.uk/about, accessed online on 24th September 2013.

