



## **Independent schools and charity status: the speculation continues!**

The hot potato of the charitable status of independent schools hit the front page of The Times during August following an interview with Dame Suzi Leather, chair woman of the Charity Commission.

It is helpful to step back from the headlines and recap the legal position in England and Wales:

- for centuries, a charitable organisation has had to have exclusively charitable purposes (as determined by the courts and, in recent decades, the Charity Commission) and be established for the benefit of the public. Charities established for the advancement of education or religion or to relieve poverty were presumed to provide a public benefit unless there was evidence to the contrary. In practice, this meant that the public benefit test was not rigorously applied to many charities
- The Charities Act 2006 sets out a list of charitable purposes and revokes the presumption of public benefit. However, unlike in Scotland, no definition of public benefit is given and the existing law continues to apply
- unhappily the existing law relating to fee-charging charities is not clear and has led to considerable debate amongst charity lawyers, civil servants and politicians. The Government has rejected the argument that independent schools provide public benefit indirectly by taking pupils out of the state system and therefore saving public funds
- The Charity Commission have a new objective to promote awareness and understanding of the public benefit requirement and to publish guidance on the requirement. Trustees must have regard to this guidance when exercising their powers or duties
- the intention is to provide a level playing field where all charities have to demonstrate that they provide a public benefit (the so-called 'public benefit test')
- applicants for charity status will need to satisfy the public benefit test during the registration process
- the current proposal is that existing charities will be required to report on their public benefit credentials and trustees will confirm that they have paid due regard to the Commission's public benefit guidance in their annual report
- The Commission's draft guidance on public benefit sets out four public benefit principles:
  - there must be an identifiable benefit;

- benefit must be to the public, or a section of the public;
  - people on low incomes must be able to benefit; and
  - any private benefit must be incidental.
- the guidance recognises that charities can charge for their services but provides doubt as to whether a charity whose charges are so high that they effectively exclude people on low incomes from benefiting, either because they cannot afford, or do not have access to other funding, to pay the fees will meet the public benefit test
  - the new definition of charity and the public benefit requirement are due to come into force early in 2008

## Removal of charitable status?

Removing the presumption of public benefit is not designed to remove charitable status from independent schools. In fact, as the law currently stands it is not possible for a school to 'lose' charitable status or for a school to voluntarily 'de-register' as a charity. The Charity Commission should intervene in a school which is not able or unwilling to meet the public benefit requirements to ensure that it does so. For example, the Commission is able to remove and replace trustees and ultimately, to dissolve a school and distribute its assets to other charities.

## Where next?

The Charity Commission was due to publish its high level public benefit guidance in final form during October 2007, the timetable for this has now slipped due to the large number of responses received by the Commission and is expected during November 2007. This will be followed by consultation on draft sub-sector guidance including on charities for the advancement of education, fee-charging charities and charities for the prevention and relief of poverty. The Commission aims to publish final sub-sector guidance in June 2008 (although we now expect that this timetable will slip).

For the vast majority of independent schools and other charities which charge fees, meeting the public benefit test will not be an issue; only charities which seek to maintain an exclusive 'ivory tower' culture or provide token gestures are likely to become unstuck. For example, schools which provide means-tested bursaries, scholarships and other awards and share facilities with state schools will have good evidence of public benefit. The onus is on all charities to get to grips with the guidance and to take every opportunity to display their public benefit credentials.

Jonathan Shephard, head of the Independent Schools Council, has neatly summarised the position:

*"The presumption has sheltered lazy charities because they did not have to demonstrate public benefit.....The new Charity Commission checks will not allow charities to get away with being lazy or disengaged from society."*<sup>1</sup>

## Contact

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<sup>1</sup> Evidence given to the Joint Committee of the Houses of Parliament on the Draft Charities Bill on 25 October 2006.

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