

# THE PUBLIC BENEFIT REQUIREMENT FOR CHARITIES IN ENGLAND AND WALES: A QUALITATIVE STUDY OF ITS IMPACT<sup>1</sup>

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## Abstract

The Charities Act 2006 introduced at least three changes leading to renewed emphasis on the public benefit requirement for charities in England and Wales: changes which have the potential to alter substantially society's understanding of what it means for a body to be a charity. There has been a great deal of technical discussion of the changes, but against that background, this article presents a qualitative assessment of perceptions of the practical impact.

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<sup>1</sup> The study reported in this article was carried out on behalf of the Charity Commission for England & Wales. The authors are grateful for the Commission's permission to publish and discuss the findings here. The conclusions in this paper are drawn from the authors' analysis and do not necessarily reflect the views of the Commission. The authors would also like to acknowledge the helpful comments made in discussion of this paper at the 2012 NCVO/VSSN Researching the Voluntary Sector Conference, as well as those of the CL&PR Reviewers.

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The changes made by the 2006 Act took effect in 2008, and by 2012, four years had elapsed for the impact to settle down. We assessed the perceived impact of the renewed public benefit emphasis, using in depth interviews with a number of major stakeholders and open workshops with charity staff, trustees and advisers.

We found that most study participants valued public benefit as a central concept distinguishing charitable and non-charitable organisations, although for many charities the impact is experienced mainly at the time of registration and when producing their annual reports.

## 1. Introduction

### 1.1 Aims and context of the study

The extent to which changes made by the Charities Act 2006<sup>6</sup> (now consolidated in the Charities Act 2011) have or have not changed the public benefit requirement has been the subject of numerous articles.<sup>7</sup> The issues were directly tested in 2011 by two cases in the Upper Tribunal<sup>8</sup> which have themselves led to extensive debate. However, it is widely accepted that at the very least the changes made by the Act have led to a ‘renewed emphasis’ on the public benefit requirement.

The subject of this paper is not the legal definitions, but the practical impact of the changes to the public benefit requirement arising from the 2006 Act. Understanding the practical impact is central to mapping the distinction between

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<sup>6</sup> Primarily Charities Act 2006, s 3, now consolidated in Charities Act 2011, s 4, although other changes made by the 2006 Act are also relevant. (Given the consolidation of the law, all subsequent citations refer to the 2011 Act, though the changes under discussion all took effect from 2008.)

<sup>7</sup> See, for example, Sanders, A (2007) ‘The mystery of public benefit’ *Charity Law & Practice Review* [CL&PR] 10(2) 33-58; Warburton, J (2008) ‘Charities and public benefit - From confusion to light?’ CL&PR 10(3) 1-26; Luxton, P (2009) ‘A three part invention: Public benefit under the Charity Commission’ CL&PR 11(2) 19-34; Driscoll, L (2010) ‘England and Wales: Pemsel plus’ in McGregor-Lowndes, M & O’Halloran, K (eds) (2010) *Modernising Charity Law: Recent Developments and Future Directions* (Cheltenham: Edward Elgar Publishing); Morris, D (2010) ‘Public benefit: the long and winding road’ in McGregor-Lowndes & O’Halloran (op cit).

<sup>8</sup> *Independent Schools Council v Charity Commission* and others [2011] UKUT 421 (TCC): Decisions 13 Oct 2011 and 2 Dec 2011; *HM Attorney General v Charity Commission* and others - Upper Tribunal (Tax and Chancery) case FTC/84/2011: Decision 20 Feb 2012.

charitable and non-charitable organisations, which is crucial to any wider understanding of the third sector.<sup>9</sup>

This paper discusses the impact of these changes to the public benefit requirement, through the findings of a qualitative study undertaken in 2012 (four years after they took effect<sup>10</sup>). The study sought to explore the extent to which the changes had affected charities, their beneficiaries, and the third sector more generally, drawing on the insights of a selected group of stakeholders with detailed experience of the issues.

The study had two main aims. The first was to explore the overall impact that the renewed emphasis on the public benefit requirement (as a result of the 2006 Act) had had on individual charities and their beneficiaries from the perspective of sector stakeholders and others with detailed experience of these issues. The second aim was to build a picture of how the charity sector as a whole had changed (if at all) and in what ways, as a result of that renewed emphasis.

We focused on three main themes for investigation:

- awareness of the public benefit requirement in the charity sector;
- behavioural changes by charities which may have been prompted by the new emphasis; and,
- implications for the sector as a whole.

The fieldwork reported in this study was undertaken by the authors on behalf of the Charity Commission.<sup>11</sup> The study formed part of a wider programme of Charity Commission research on public benefit issues following the Charities Act 2006; including a study of trustees' awareness and understanding of the public benefit requirement<sup>12</sup> and a study of public benefit reporting in trustees' annual reports.<sup>13</sup>

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<sup>9</sup> For the significance of this distinction in regulatory and accounting perspectives see Garton, J (2009), *The Regulation of Organised Civil Society* (Oxford: Hart Publishing); Morgan, GG (2010), 'The use of charitable status as a basis for regulation of nonprofit accounting' *Voluntary Sector Review* [VSR] 1(2) 209-232.

<sup>10</sup> Sections 1-5 of the Charities Act 2006 were commenced from 1 April 2008.

<sup>11</sup> Baker, L, Harris, M, Moran, R & Morgan GG (2012), *The impact of the public benefit requirement in the Charities Act 2006: perceptions, knowledge and experience*, Ref: RS27 (Liverpool: Charity Commission).

<sup>12</sup> FDS International (2009), *Charities' awareness, understanding and attitudes towards the public benefit requirement*, ref RS22 (Liverpool: Charity Commission.)

<sup>13</sup> Morgan, GG & Fletcher, NJ (2011), *Public benefit reporting by charities*, Ref: RS25 (Liverpool: Charity Commission).

## 1.2 Public benefit: changed requirements arising from the 2006 Act

Two changes to the definition of ‘charity’ were made by the 2006 Act. The former four ‘heads’ of charity established in case law<sup>14</sup> were expanded in the Act<sup>15</sup> into 13 ‘descriptions of purposes’ which could potentially be charitable. This change is *not* explored in the present research. The Act also brought in a renewed emphasis on the public benefit requirement – which forms the focus of this study.

Whilst Parliament declined to give a statutory definition of ‘public benefit’ in the 2006 Act,<sup>16</sup> the Act and associated regulations introduced three main changes to the public benefit requirement:

- the ‘presumption’ of public benefit which was widely understood to apply to the old first three heads of charity (poverty, education, religion) was abolished,<sup>17</sup> thus clarifying beyond doubt that all charities had to be for the public benefit;
- the Charity Commission was required to issue guidance on the public benefit requirement<sup>18</sup> and all charity trustees were required to ‘have regard’ to this guidance<sup>19</sup>; and,
- trustees of registered charities were required in their trustees’ annual reports<sup>20</sup> to report on how the charity is carrying out its purposes for public benefit.<sup>21</sup>

In the following sections, we refer to these three legal changes collectively as ‘the renewed emphasis on the public benefit requirement’.

In considering the impact of the changes, we note that the public benefit requirement as it appears on the face of the 2011 Act relates to the *purposes* of a charity rather than to its *activities* (unlike, for example, the position in Scotland,

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<sup>14</sup> *Commissioners for Special Purposes of the Income Tax v Pemsell* [1891] AC 531.

<sup>15</sup> Now in Charities Act 2011, s.3.

<sup>16</sup> A summary of the debates over a 20 year period is given in Morgan, GG (2012), ‘Public Benefit and Charitable Status: Assessing a 20 year process of reforming the primary legal framework for voluntary activity in the UK’ VSR 3(1) 67-91.

<sup>17</sup> Charities Act 2011, s 4(2).

<sup>18</sup> Charities Act 2011, s 17.

<sup>19</sup> Charities Act 2011, s 17(5).

<sup>20</sup> Charities Act 2011 s 162.

<sup>21</sup> Charities (Accounts and Reports) Regulations 2008, reg 40(2) (SI 2008/629).

where there is explicit consideration of whether a body ‘provides or intends to provide public benefit’<sup>22</sup>). The question of how far the requirement impacts on a charity’s activities thus remains a contested issue, which is one of the aspects explored in this study.

Following a period of consultation in 2008, the Charity Commission issued its statutory guidance on the public benefit requirement<sup>23</sup> which focused on two principles which charity trustees are required to consider. These are divided into seven sub-principles, one of which is further divided, giving eight sub-principles overall, as shown in Table 1.

**Table 1: The Charity Commission’s Principles and Sub-Principles of the Public Benefit Requirement<sup>24</sup>**

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|----|--|
| 1  | <i>There Must Be An Identifiable Benefit Or Benefits</i>   |
| 1a | It must be clear what the benefits are   |
| 1b | The benefits must be related to the aims   |
| 1c | Benefits must be balanced against any detriment or harm  |
| 2  | <i>Benefit Must Be To The Public Or A Section Of The Public</i>  |
| 2a | The beneficiaries must be appropriate to the aims  |
| 2b | Where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted: |
|    | 2b(i) by geographical or other restrictions; <del>or</del>   |
|    | <del>2b(ii) by ability to pay any fees charged<sup>25</sup></del>  |
| 2c | People in poverty must not be excluded from the opportunity to benefit                                       |
| 2d | Any private benefits must be incidental.   |

<sup>22</sup> Charities and Trustee Investment (Scotland) Act 2005, s 8(2).

<sup>23</sup> Under Charities Act 2011, s 17. The most recent version of guidance itself appears in *Charities and Public Benefit: The Charity Commission’s general guidance on public benefit*, ref PB1 amended December 2011 (Liverpool: Charity Commission) although revised draft guidance was published for comment in July 2012.

<sup>24</sup> Source: Charity Commission guidance ref PB1 amended Dec 2011.

<sup>25</sup> Principle 2b(ii) was temporarily deleted in December 2011, pending revision, as a result of the *Independent School Council* case – see n 8. However, it had been applicable under the Commission’s original 2008 guidance from 1 April 2008 until just before the start of the present study so most participants who were aware of the guidance were including the effect of principle 2(b)(ii) in their comments.

## 2. Research methods

In developing a method for tackling our research aims we took into account a number of factors. First, the impact of the renewed emphasis on public benefit is potentially a very broad and wide-ranging issue. Second, the nature of the impacts was likely to be varied and complex. Third, an earlier study<sup>26</sup> had suggested that some charities had experienced much greater impact than others. Fourth, the pool of charities is not static; new charities are regularly being formed<sup>27</sup> and much of the impact of the public benefit requirement was likely to be at the boundary between charitable and non-charitable organisations. So it was important to gain views from those who had experience of setting up new charities and from those advising the voluntary sector more generally on establishing new organisations. Finally, we were aware that there is considerable legal uncertainty around the concept of public benefit (as indicated by the 2011 Upper Tribunal cases<sup>28</sup>) and thus the views of experts and those with experience of engaging with the issues were likely to be useful in providing detailed insights about impact.

In the light of these points, we used a research approach which we expected to capture the views, experiences and opinions of a range of charity sector stakeholders. We sought their perceptions, knowledge and experiences about the impact in practice of the public benefit requirement on charities' governance and activities. A qualitative, two-stage, approach was thus adopted, including semi-structured interviews with key stakeholders and facilitated workshops which were open to charity chief officers, trustees and charity advisers who were interested in attending.

In consultation with the Charity Commission we identified a number of people for possible stakeholder interviews; a purposive sample of people likely to have an informed overview of current trends in the charity sector. Twelve approaches were made. One person declined to be involved and one wished to contribute only informally. One organisation asked two separate people to take part. This gave us eleven interviewees. They included chief officers of sector umbrella organisations and charity sector membership organisations; specialists in charity law; and, others occupying prominent roles within the charity sector. Some had special experience of particular sub-sectors for example education or faith-based organisations.

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<sup>26</sup> Morgan & Fletcher (2011) – see n 13.

<sup>27</sup> In 2011-12, 5,601 charities joined the register of charities (Charity Commission *Annual Report and Accounts 2011-12* Norwich: TSO) – this amounts to 3.5% of the 162,098 charities on the register at 31 March 2012. In addition, excepted and exempt charities are regularly being formed (e.g. new churches under £100,000 income; Academy Trusts).

<sup>28</sup> See n 8.

Although all interviewees agreed to speak ‘on the record’ we undertook that any quotations used in publications would not identify the speaker.

We also facilitated three workshops which were held in Cardiff, London and Sheffield. These half day workshops were advertised via a range of charity infrastructure and professional bodies to ensure that as many different perspectives and organisational types as possible were represented in the discussions. This enabled the research team to assess whether or not the views of interviewees resonated with a wider population of people who were also experienced and interested in the subject matter. The workshops also developed and refined the team’s own understanding of the range of issues involved. A total of 28 people took part in the workshops, including charity chief officers, trustees and professional advisers (several had multiple roles in the sector). The workshop participants took part on the understanding that their comments and opinions could be used for analysis but without attribution to named individuals or organisations.

The researchers considered that using a purposive sample of interviewees and a self-selected sample of workshop participants was the most appropriate approach to capturing rich qualitative data from persons with real interest and experience of the public benefit requirement. Since this was not a random sample survey our intention was not to offer a map of opinions across the charity sector but, rather, to explore in some depth the subtleties and complexities of the practical issues around public benefit arising from the 2006 Act.

The research team took detailed notes which were transcribed and shared across the team. These notes (interviews and workshops) were analysed using iterative and cross-checking methods to identify emergent themes which responded to the initial study questions. The aim was to identify themes and insights rather than absolute numbers sharing particular views and perceptions.

The interviews and workshops took place in February and March 2012 – just before the fourth anniversary of the commencement of the relevant provisions in the 2006 Act (from 1 April 2008). It was felt that by this time some initial concerns and misunderstandings around public benefit would have subsided and that participants would be able to offer some well-formed reflections. However, the researchers were aware at the time of the study that further effects of the renewed emphasis on public benefit were likely to continue to emerge, especially as a result of the two Upper Tribunal cases heard in 2011 – the final decisions of which emerged shortly before the start of the fieldwork in this study. Therefore, the findings that follow reflect the impact of the renewed emphasis on the public benefit requirement at a particular point in time.

Our research approach enabled us to surface a diverse range of views, experiences and opinions; to identify some of the practical impacts of the renewed emphasis on public benefit on different types of charitable organisations; and to begin to consider the current and future implications of that renewed emphasis for charities and their beneficiaries.

### 3. Findings

This section brings together the findings from both the semi-structured interviews and the facilitated workshops. It provides a synthesis of the data in relation to the three broad areas explored in the study: knowledge and awareness, changes in organisational behaviour and implications of the public benefit requirement. We use the term 'study participants' to refer to those who took part in either a semi-structured interview or a facilitated workshop.

#### 3.1 Knowledge and awareness of the renewed emphasis on public benefit

Many study participants felt that there has been an increased need for charities to 'demonstrate their public benefit' as a result of the renewed emphasis in the Charities Act 2006. This perception may not have been based on accurate understanding of the law, but it was widely reported. As one said:

...It [the renewed emphasis on public benefit] has noticeably, and in a significant way, increased the sensitivity of many charities to explain how they benefit the public.

A number of participants felt that this is mainly because of the requirement for charity trustees to report on their public benefit in the Trustees Annual Report (TAR): '...The requirement is most relevant when they [charities] have to write their organisations' public benefit statements.'

Whilst the reporting requirement has helped to raise *awareness* of the public benefit requirement, some study participants questioned the extent to which there is now an increased *understanding* of the essence of the public benefit principles and whether trustees have actually been encouraged to think more deeply about what their organisation is delivering and to whom. One said:

...There are some [charities] who are taking a more cavalier attitude. It strikes you that some people think it [public benefit reporting] is more of a tick box exercise.

Overall, participants reported that knowledge and awareness of the public benefit requirement is varied across the charity sector as a whole. A number of factors were suggested to explain this.



Firstly, it was noted that charities have varied access to, and use of, legal advice and external auditors as a source of professional guidance on public benefit issues. Whilst broadly positive about the Charity Commission guidance on public benefit, study participants noted that the length and content were not always appropriate for charities with limited time and resources to engage with the full complexities of the requirement, and in some cases the guidance was regarded as too generic, not answering the questions that particular charities had about public benefit.

Secondly, the capacity of trustees to prioritise and think about their public benefit amongst other more operational concerns was discussed. The point was made by several study participants that, for many charities, obtaining sufficient funds to continue was their top priority and issues such as public benefit reporting were a low priority. Participants felt that few charities see any link between these issues; no one directly articulated the search for funding as the means to enable a charity to continue its work for the public benefit. Likewise, no one specifically mentioned clarity of public benefit as a boost to fundraising, apart from the general reputational issue of being seen to comply with charity law and some mentions of 'accountability to funders' when discussing public benefit statements in their trustees' report. But overall, the pressures of 'seeking funds' on the one hand and 'complying with charity law/public benefit' were often seen as competing pressures. Organisational size was perceived to be a particularly important factor in this:

...Small charities struggle to keep on top of all the stuff they need to read and to know...they don't know what they don't know...there may not be anyone with an outside perspective to question what they're doing or think through what their responsibilities are in relation to the public benefit requirement.

Thirdly, we found variations in the extent to which charities 'fear' the implications of the public benefit requirement, either through losing their charitable status or through having the organisation's activities questioned.

Some study participants noted that the renewed emphasis on public benefit is just that – renewed. They commented that charities may feel that they are already doing enough to conform to the principles of the public benefit requirement; they do not feel the need to be aware of it in their daily practice. One said:

...For some, public benefit is so obvious, and it is so integral to what they do, that it [the renewed emphasis on public benefit] has really just been a confirmation of that...

On the other hand, participants mentioned confusion and uncertainty about the implications of the public benefit requirement in certain charities, particularly

those that, by their nature, only have a small pool of potential beneficiaries (e.g. a charity established to support persons of specific national origin within a specific locality – the issue of a ‘class within a class’). Participants raising these issues felt it was very hard for trustees of such charities to make informed decisions in relation to the public benefit requirement.

Finally, some participants expressed their dismay and surprise about the judgment that some charities, particularly fee-charging charities, would not lose their charitable status as a result of the renewed emphasis on public benefit in the 2006 Act. This realisation also contributed to some participants’ view that charities do not see the need to comply with the requirement because it lacks ‘teeth’:

...The principle itself is fine...as a prime distinguisher from a charity [and a] business...however it has no teeth.

In summary, when asking study participants about the sector’s knowledge and awareness of the public benefit requirement since the changes in Charities Act 2006 took effect in 2008, a varied picture emerged. Relevant factors were felt to include: the capacity and support for trustees to actively engage with the essence and meaning of public benefit; the perceived relevance of public benefit to individual organisations; and the perceived sanctions for not engaging with the public benefit requirement.

### 3.2 Changes in organisational behaviour

Participants felt that the renewed emphasis on public benefit was mainly affecting charities at two stages: public benefit reporting (as discussed above) and charity registration:

...Registration is becoming more difficult because people are having to explain at the outset what your activities will do for public benefit...this is hard to articulate.

The difficulty involved in demonstrating that a newly established charity would be for public benefit brought to the fore questions such as:

At what stage in an organisation’s development is charity registration appropriate? At what point might alternative, structures e.g. community interest companies [CICs] be appropriate?

Such comments perhaps reflect misunderstandings of the law, but participants suggested that those establishing new voluntary organisations were sometimes pointed in the direction of forming a CIC, even if the purposes were likely to be charitable, because of the perceived difficulty of demonstrating at an early stage in

an organisation's life that the public benefit requirement was met. (The participant commented that such an approach then leads to considerable difficulties if at a later stage a CIC wishes to convert to become a charity.)

Study participants offered examples of how charities have made specific changes to the way they work as a result of the renewed emphasis on public benefit. Some charities had gone through a process of re-examining their charitable objects. For example, we were told of a charity which realised that, in responding to the environmental priorities of local authorities, its work had moved away from its core object, which was to encourage people to enjoy the natural environment. As a result of this process, the charity adjusted its activities to ensure they were more clearly aligned with its stated purposes. Study participants also told us about trustees and charity chief officers who had adjusted the beneficiaries and/or geographical areas they were targeting after assessing the public benefit of their work. For example, a charity whose beneficiary base had shrunk due to changing social needs was able to refocus its services on a larger population of local people who remained in need of the holiday and respite services that the charity was providing. Finally, we were told of charities setting up new services or making changes to existing services after reviewing their public benefit. For example, participants mentioned fee-charging schools that had started, or extended, bursary schemes following the renewed emphasis on public benefit, and/or had opened or expanded the use of their facilities to local people.

Several participants felt that the impact on the majority of charities had been limited so far:

...Given how high up the Charity Commission agenda it was, and the fact that it cut across all areas of the business, I am surprised at how little impact it's had with the charities I work with.

However, several groups of charities were mentioned as potentially being more affected by the requirement than others: religious and faith charities, membership charities and fee-charging schools.

Although the study found the initial concerns expressed by the religious charity sector have subsided, some participants noted a particular concern about how charities in this field can demonstrate conformity with the public benefit requirements, particularly given the number of very small charities in this field who may not have sufficient resources to engage with the complexities of the

public benefit requirement in relation to faith and spiritual issues.<sup>29</sup> Participants also commented that many smaller church charities remain excepted from the requirement to register<sup>30</sup> and had not therefore addressed the issues to the same extent as other charities of the same size.

For membership charities, it was noted that the public benefit requirement raises particular questions about ‘who are their beneficiaries and hence what is the public benefit?’ Study participants thought that there was an important but subtle distinction to be made, for example, between membership charities that support individuals for their own sake and those that support individuals to do a better job for the public. For example, the distinction was drawn between occupational membership charities in fields such as medicine (where the beneficiaries are the wider public receiving improved healthcare) and benevolent funds that directly serve a particular group of professionals (where the beneficiaries are current or former professionals in need of support).

Finally, when discussing the implications of the public benefit requirement on the education sector some participants questioned the degree to which the Charity Commission can determine the means by which a charity fulfils its public benefit obligations:

...They [the Charity Commission] were focussing too much on bursaries, or at least that was the media perception...we felt there were other things independent schools could do [to meet the public benefit requirement] beyond bursaries...

### 3.3 Current and future implications of the renewed emphasis on public benefit

Study participants suggested that when the 2006 Act was passed, the renewed public benefit requirement created fear and anxiety amongst some charities. However, over time, there was a growing awareness that there was little being done to enforce the requirement and some were starting to feel that it did not need

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<sup>29</sup> Since the fieldwork reported in this paper, the public benefit requirement for religious charities has gained considerable further prominence as a result of an appeal to the First Tier Tribunal (Charity) by trustees of the Preston Down Trust (Plymouth Brethen) against a refusal of charity registration (case CA/2012/0003 scheduled to be heard in March 2013). This led to questions in Parliament and a special debate in Westminster Hall on the registration of religious charities (House of Commons Hansard 13 Nov 2012: Column 1WH).

<sup>30</sup> Under the Charities Act 2011, s 30(2), most charities are required to register with the Charity Commission once the annual income exceeds £5,000, but for charities which were formerly excepted – which includes many Christian churches – registration is currently only compulsory if the income exceeds £100,000.

to be taken seriously. We were told that this was particularly the case amongst charities which were aware of the limited capacity of the Charity Commission to enforce the requirements at a time of spending cuts:

...Where is the sense that you could be picked up on it...that the Charity Commission would actually examine some [public benefit] statements, and go public with it...why should anyone comply with anything if you're not going to get picked up on it...

Participants also raised questions more broadly regarding changes to the public benefit requirement over time: one noted that '...Each generation redefines charity influenced by prevailing societal values...'. This echoes a principle in the Act in the *cy près* provisions which apply when charitable property can no longer be applied for its original purpose.<sup>31</sup>

A number of participants commented specifically on nature of the public benefit requirement as the key distinction between charitable and non-charitable organisations:

If the public is happy to be supportive of the privileges of the charity sector – for example the tax breaks – they have to be clear that charities are working for the public benefit in an understandable way...It [the renewed public benefit requirement] has noticeably and in a significant way increased the sensitivity of many charities to explain to the public how they benefit the public.

Although it was thought that the full implications of the renewed emphasis on public benefit would take time to emerge, it was expected to be vital to the future development of the charity sector both in terms of distinguishing charities from other non-charitable forms of organisation (such as Community Interest Companies) and maintaining confidence in the idea of 'charity':

In Deakin and Tumim<sup>32</sup> [the] intent was the long-term trust and confidence in the charity brand. If [the sector] didn't modernise the charity brand and demonstrate that public benefit was behind it, trust and confidence would go...

...They [the Charity Commission] saw it as a milestone in the development of the sector – all part of the long term bargain in terms of the relationships between the [charity] sector and wider society.

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<sup>31</sup> Charities Act 2011, s 62(2).

<sup>32</sup> This was a reference to the Deakin Commission (1996) on the *Future of the Voluntary Sector* and the *Charity Law Review Advisory Group* (2001) chaired by Winifred Tumim – established by the National Council for Voluntary Organisations (NCVO).

In most cases, study participants either explicitly or implicitly agreed that the renewed emphasis on public benefit has gone some way to protecting the 'charity brand'. It was generally felt that the renewed emphasis on public benefit has 'brought to the fore' or 'sharpened thinking' about what it means to be a charity and some participants recognised its role in retaining public trust in charities:

[The renewed emphasis on public benefit] was certainly a change of direction and I don't accept the view that it wasn't necessary.

Study participants also noted that the renewed emphasis on public benefit has drawn attention to three further issues: private benefit (as distinct from public benefit), charity governance and commissioning.

It was suggested that the renewed focus on public benefit has highlighted its converse, private benefit. Participants felt that increased focus on this distinction was a positive impact. Some felt that small charities are less likely than larger charities to understand and manage appropriately questions around private and public benefits to trustees and others:

A lot of charities are quite small when they start and people don't have an understanding of the difficulty of private benefit.

However, other participants suggested that this view is based on an assumption that small charities have 'weaker boards' than large charities; weak governance rather than small organisational size in itself is therefore often the cause of poor handling of private benefit issues.

Study participants suggested that the renewed emphasis on the public benefit requirement is already helping to improve charities' governance and management, especially in small charities. For example, they felt it encourages trustees to address possible mission drift or issues around private benefit. However, the extent to which charity trustees have the time, skills or experience to take on implementation of the public benefit requirement was questioned.

Finally, some study participants perceived a risk that the current commissioning environment could distract charities from public benefit and charitable obligation in favour of contractual compliance:

[In the situation that you are] a subcontractor to another organisation with a different set of objectives, how far does that squeeze you in terms of public benefit...when the benefit is not defined in terms of public interest, but defined in terms of survival in this environment?

This was felt to be the case especially in the current funding climate in which the

drive for organisational survival might override compliance with charity law requirements.

#### **4. Emergent themes**

This study has provided a snapshot as at spring 2012 of the perceived impact of the renewed emphasis on the public benefit requirement for charities in England and Wales as a result of the changes made by the Charities Act 2006. Taking together the findings from the interviews and the workshops, we identified five overall themes.

##### **4.1 The role of the public benefit requirement in defining charitable status**

The findings point to acceptance of the centrality of the public benefit requirement in developing understanding of the distinction between charitable and non-charitable organisations. Whether in relation to tax relief, the charity ‘brand’, or the central duties of trustees, there was agreement amongst study participants that public benefit is fundamental in distinguishing charities from other organisations.

Whilst we found that the impact on individual charities has been limited so far, the renewed requirement is seen positively as part of a move to ‘modernise’ the charity sector and improve its image.

##### **4.2 Understanding the public benefit requirement remains a challenge**

Whilst study participants were broadly positive about the Charity Commission’s guidance, there remains a great deal of misunderstanding about the public benefit requirement, and many trustees are still grappling with what it means for them and their charities in practice. Participants had varying views of how this could be remedied. Some were highly critical of Parliament for not defining the requirement more precisely in the 2006 Act. Others felt it was right for the Act to avoid definitions and to allow the Charity Commission to develop guidance.

##### **4.3 The sub-elements within the overall public benefit requirement**

As explained above, the Commission’s public benefit guidance set out two principles broken into eight sub-principles, which are at the heart of the public benefit requirement (see Table 1). This distinction between the two senses of public benefit (the nature of the benefit and the beneficial class) is widely accepted by scholars and was confirmed by the Upper Tribunal in 2011.<sup>33</sup>

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<sup>33</sup> In the *Independent Schools Council* case – see n 8.

However, even though many of our study participants were charity specialists, the research identified some discrepancies between the understanding of ‘public benefit’ in the charity law sense (dependent on case law) and a more popular understanding of the term. Some would like to see the Charity Commission doing much more to dictate what organisations should be doing to fulfil their public benefit obligations. However, the 2006 Act (now the 2011 Act) simply requires the Commission to promote understanding of the public benefit requirement and to issue guidance. It says nothing about the content of the guidance. Yet this raises a dilemma because if the Commission is to avoid making new law, its guidance has to be based on case law.<sup>34</sup>

Study participants suggested that few people in the sector understood the breadth and complexities of these issues. There was a misunderstanding reported by a number of participants that public benefit was seen by many as really only an issue for fee-charging schools (or at least only for fee-charging charities) and that other charities could largely ignore the issue. There was no doubt that the fee-charging issue (sub-principle 2(b)(ii)) has gained much more prominence than all the other elements in the Commission’s principles.

#### 4.4 Key events for charities and the role of expert advice

The findings suggested that the public benefit requirement only has real impact for many charities at two points:

- at the time of initial charity registration – we heard many stories of organisations which found it hard to demonstrate that a new organisation which was not yet in operation was indeed established for public benefit; and,
- annually in terms of public benefit reporting in the trustees’ annual report.

Participants who were professional advisers suggested that it was mainly these two events that prompted trustees to seek advice on the public benefit requirement. However, a number of participants were concerned at the difficulties for smaller charities in getting specific advice on how the public benefit requirement affects them: even some of the umbrella organisations which normally provide a wide range of advice to smaller charities said that they would not feel confident in advising specific charities on public benefit issues.

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<sup>34</sup> See Luxton, P (2009), *Making Law? Parliament v The Charity Commission* (Politea Policy Series No 64) where the author argues (p 15): ‘It would be a great threat to the rule of law if the Commission were to make new law at the behest of any government. This would mean that the Charity Commission had become merely an arm of government, with grave implications for the charitable and voluntary activities which historically have in the United Kingdom played a central role in shaping the framework of a free society.’



#### 4.5 Factors limiting the impact of the requirement

Many study participants who had followed the Charities Bill, which became the 2006 Act, told us they were expecting the renewed public benefit requirement to have more impact. Some were disappointed that no organisations had actually lost their charitable status as a result of public benefit reviews by the Commission.

Others pointed out that for most existing charities the only real requirement is in public benefit reporting, and that the Commission does not normally have the resources to review charity accounts and reports submitted. Therefore, participants felt that even this requirement might have no real effect on those who do not comply.

Even those who welcomed the parliamentary decision not to define public benefit more precisely in statute were in some cases disappointed by the outcome of the recent Tribunal cases, which they felt had ‘let charities off the hook’. However, this finding should be balanced by those who reported that the public benefit requirement had led to renewed focus on the charity’s purpose and mission, without any need for sanctions.

### 5. Conclusion

The study reported here showed that the renewed emphasis on public benefit has had an impact on the charity sector, albeit a varied impact. Many see it as having achieved the sector’s ambition to protect the status of ‘charity’ and ensure that the public continues to have confidence in the charity brand. However, the extent to which this impact has been symbolic or actual is where opinion begins to diverge.

The study found examples of charities where the renewed emphasis has led to specific organisational changes and showed that it has had implications for trustees’ thinking about their objects and activities, target beneficiaries and appropriate organisational forms. It has also brought to light the complexities in the sector with regards to the appropriate balance between private and public benefit and the impact that new funding arrangements (especially commissioning) could potentially have on the charity sector.

But whilst the participants in this study were all individuals who had engaged at some level with the public benefit requirement, a number were concerned that the impact of the 2006 Act on public benefit considerations has been limited. Many felt that charities are largely affected by the requirement only at the time of registering with the Charity Commission or when reporting on their public benefit in the Trustees’ Annual Report, which, in some cases may be no more than a

tokenistic exercise: they considered that in other cases the requirements are ignored completely. It also seems from our findings that some sub-sectors such as religious and faith-based organisations, membership organisations and fee-charging schools have felt the pressure to engage more than others in debates on public benefit issues.

The study also raises broader issues for further research on the effectiveness of the current system of charity law: is the public benefit requirement a sufficiently robust concept to prevent abuses of charitable status or charitable gifts bearing in mind the difficulties of applying the requirement in a specific charity? This in turn leads to broader public policy questions around the extent to which society grants a special status (with reputational benefits, tax relief and other protections) to certain organisations based on their purpose.

However, we can conclude from the study that public benefit is much more than a theoretical issue in charity law. The changes made by the 2006 Act are having real impact in clarifying the understanding of 'charity' (especially the boundaries between charitable and non-charitable organisations) and in sharpening the focus of existing charities on their objects and beneficiaries. But the precise impact of the public benefit requirement on individual charities remains contested, with divergent view on the extent to which charities need to alter their practices.