

## BOOK REVIEW

John Picton\*

The ‘New’ Public Benefit Requirement: Making Sense of Charity Law?

by Mary Synge

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The charitable status of independent schools is a hot button issue. A fierce legal debate, sparked almost a decade ago by the enactment of the Charities Act 2006,<sup>1</sup> turns on whether or not the legislation negatively affected the charitable status of independent schools.<sup>2</sup> A debate of a different hue, taking place beyond law departments and practitioners’ offices, turns on a political controversy relating to the social impact of independent schools.<sup>3</sup> *The ‘New’ Public Benefit Requirement: Making Sense of Charity Law?*<sup>4</sup> largely eschews the political and takes the legal target in its sights.

Aiming squarely at the Charity Commission, Mary Synge powerfully argues that the executive body went beyond its legitimate regulatory powers during a public benefit

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1 Now replaced by the consolidating Charities Act 2011.

2 Peter Luxton, ‘Opening Pandora’s Box: The Upper Tribunal’s Decision on Public Benefit and Independent Schools’ (2012-13) 15 *Charity Law and Practice Review* 75; Alison Dunn, ‘Using the Wrong Policy Tools: Education, Charity and Public Benefit’ (2012) 39(4) *Journal of Law and Society* 491; Hubert Picarda, ‘Charities Act 2011: Dog’s Breakfast or Dream Come True?’ in Matthew Harding, Ann O’Connell and Miranda Stewart (eds), *Not-For-Profit Law: Theoretical and Comparative Perspectives* (CUP 2014) ch 6.

3 Of many possible examples: Graham Moffat, ‘Independent Schools, Charity and Government’ in Alan Ware (ed), *Charities and Government* (MUP 1989) ch 8; Owen Jones, *Chavs: The Demonisation of the Working Class* (2nd edn Verso 2012) 96, 171; Espinoza, ‘Guilt of Parents Who Choose Private School’ *The Daily Telegraph* (London, 5 September 2015) 13.

4 Mary Synge, *The ‘New’ Public Benefit Requirement: Making Sense of Charity Law?* (Hart 2015).

assessment of charities. That exercise culminated in a 2009 report which apparently ‘failed’ certain independent schools on the basis that they did not meet a required public benefit standard.<sup>5</sup> She then critiques a subsequent Tribunal decision which considered the guidance, *R (Independent Schools Council) v Charity Commission*,<sup>6</sup> as an example of unwarranted judicial creativity.

The argument is carefully developed throughout the book. Early on in chapter 2, Synge presents the view that subsection 3(2) of the Charities Act 2006,<sup>7</sup> (providing that there is in existence no judicial presumption of public benefit for any charitable purpose), in fact had no effect on the pre-existing case law. This claim is made on the basis that there had never been a case law *presumption*<sup>8</sup> (in the strict legal sense of that word) of public benefit in the first place. Instead, it is suggested, there was merely in operation a common sense judicial recognition of certain types of purpose likely to be charitable. The advancement of education was amongst them, and so the legislation had no effect on that non-presumptive judicial practice.<sup>9</sup>

Much follows from the argument that the law relating to public benefit did not substantially change as a result of the Charities Act 2006. In chapter 3, Synge critiques the basis of the Commission’s attempt to review certain independent schools.<sup>10</sup> A twin-pronged attack is set up: first, if the law remained unaltered after the Charities Act 2006, then it can be said by way of the second prong, that the Commission acted without authority during its review of independent schools’ public benefit activities. To this end, Synge points out that the Commission has no express statutory duty permitting the public benefit review of registered charities.<sup>11</sup> The author presents the Commission’s regulatory activities as a rule of law problem.<sup>12</sup> Lambasting the executive body in chapter 6 for both unclear guidance and complex reporting of its assessment activities,<sup>13</sup> Synge describes the Commission as working on the basis of: ‘unwarranted assumptions and unexplained

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5 *Emerging findings for charity trustees from the Charity Commission’s public benefit assessment work: 2008-09* (Charity Commission, July 2009).

6 [2011] UKUT 421 (TCC), [2012] Ch 214.

7 Now subsection 4(2) of the Charities Act 2011.

8 This view is shared elsewhere: Peter Luxton, ‘Public Benefit Under the Charity Commission: A Three Part Invention’ (2009) 11 *Charity Law and Practice Review* 19; *R (Independent Schools Council) v Charity Commission* (n 6) [82] cf. *National Anti-Vivisection Society v IRC* [1941] AC 31, 78.

9 Synge (n 4) 20, 243.

10 Synge (n 4) 75.

11 Synge (n 4) 76 cf Charles Mitchell, ‘Reviewing the Register’, in Charles Mitchell and Susan Moody (eds) *Foundations of Charity* (Hart 2000) ch 7.

12 Synge (n 4) 3.

13 Synge (n 4) 157.

conclusions’.<sup>14</sup> A focus of particular criticism is the Commission’s development of public benefit principles apparently nowhere clearly stated in the case law. Those potentially far-reaching principles both related to resource inequality and access to service provision. They are first, that opportunity to benefit from a charity’s purposes must not be unreasonably restricted by ability to pay fees, and second, that people in poverty must not be excluded from the opportunity to benefit from a charity’s purposes.<sup>15</sup>

Had things been different, the critique of the Commission, its creative interpretation of the law, and its regulatory assessment of independent schools might have marked the end of the book. However, as is well known, the Independent Schools Council challenged the accuracy of the Charity Commission’s guidance in judicial review proceedings, and at the same time, the Attorney General lodged a reference with the Tribunal in pursuit of legal clarification. Chapter 8 critiques the ensuing judgment.<sup>16</sup> The Tribunal decision is found to be strewn with creative interpretation and precedential error.<sup>17</sup> Key amongst the mistakes, in the author’s view,<sup>18</sup> is a finding closely related to the view of the Commission that independent schools have more than a negative duty not to exclude the poor (defined in relative terms). Or stated inversely: trustees have a positive duty to make more than a tokenistic effort to *include* the poor within their service provision.<sup>19</sup> As the Tribunal is a court of record,<sup>20</sup> this leads the author to accept (albeit reluctantly) that: ‘rightly or wrongly, the decision will be taken to represent the law, unless and until it is corrected by a superior court or legislation.’<sup>21</sup> For Synge, this marks an unwarranted vindication of the Commission’s regulatory approach.<sup>22</sup>

Synge presents both a pertinent legal critique and a valuable resource for scholars and practitioners alike. The book is carefully researched, providing a detailed overview of a legal saga taking place across what, with some irony, the author calls: ‘an interesting decade for charity law.’<sup>23</sup> As a rule-of-law lawyer’s response to the

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14 Synge (n 4) 130, 156.

15 Charity Commission for England and Wales, *Charities and Public Benefit*, (January 2008) 2b, 2c.

16 *R (Independent Schools Council) v Charity Commission* (n 6).

17 Synge (n 4) 196.

18 Synge (n 4) 208.

19 *R (Independent Schools Council) v Charity Commission* (n 6) [25].

20 Tribunals, Courts and Enforcement Act 2007, s 3(5).

21 Synge (n 4) 246.

22 Synge (n 4) 245.

23 Synge (n 4) 1.

current legal controversy relating to independent schools, scant criticism can be found. Synge takes a legal aim and hits her legal target.

Nevertheless, extra-legal questions inevitably bubble in the mind of the reader. Lying just beyond the rule of law problem so carefully excised by the author, lurk complex and painful issues relating to access to opportunity and the reproduction of inequality in a class-bound society.<sup>24</sup> Recognition of that controversy is the point at which legal analysis ends and social questions begin. Yet their more direct acknowledgement might add to the book. This is because, in such a controversial area, political debates regarding the social impact of independent schools closely relate to the rule of law questions forming the core analysis. It might be said, for example, that the lack of democratic consensus as to the social impact of independent schools is the root cause of apparently defective legislation relating to a non-existent presumption, as well as the Commission's fudged attempt at regulation, and even in its turn, the strained creativity of the Tribunal. Armed with insight into the destabilising effects of political controversy, it also becomes practically possible to assess the likelihood of a coherent settlement in the future.

*The 'New' Public Benefit Requirement: Making Sense of Charity Law?* is a valuable contribution to the field which is likely to have a lasting scholarly impact. It provides both a useful synthesis of complex materials as well as an interesting and sustained legal critique.

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See Michael Chesterman, *Charities, Trusts and Social Welfare* (Weidenfeld & Nicolson 1979) 409, Mathew Harding, *Charity Law and the Liberal State* (CUP 2014) 121-130.