

Who Benefits from ‘Public Benefit’?

The long awaited assessments of five independent schools were published by the Charity Commission in July. What does this mean for the sector? Attain asked three Heads, a leading QC and the Chair of the Commission.

AS SCHOOLS FINISHED THEIR SUMMER TERMS AND prepared for the holidays, the Charity Commission published its long awaited assessment of the ‘public benefit’ of 12 charities, including five fee-charging independent schools. Introduced as a result of the Charities Act 2006, the criteria for demonstrating ‘public benefit’ had been the subject of public consultation but remained controversial. Whilst three schools ‘passed’ the assessment, two ‘failed’. Commission Chair, Dame Suzi Leather, commented: ‘Charities do a fantastic amount of good and have a unique place in society, which is why they enjoy such high levels of public trust and confidence. They receive the reputational benefits of being charities, as well as tax breaks, so in return it’s right that they demonstrate how they bring real benefit to the public. The majority of the charities we’ve assessed are already providing public benefit in a variety of ways. The other charities are capable of doing so and remain registered, but they must now agree with us in the next twelve months the changes that are needed.’

As widely predicted, the emphasis on the need to provide means-tested bursaries was at the centre of the assessment criteria. A school ‘must be able to show that there is sufficient opportunity to benefit in a material way that is related to the charity’s aim for those who cannot afford the fees, including those in poverty.’ This is not at the exclusion of partnership schemes however. Community activities – such as allowing neighbouring maintained sector schools to use facilities – have merit in a *material way* and can benefit *those who cannot afford the fees, including those in poverty*. All of the assessed schools provided the Commission with considerable examples of community involvement but in some cases these activities

were not directly *related to the charity’s aim* and were therefore not considered relevant.

The publication of the assessments was met with disappointment by the sector. David Hanson, Chief Executive of IAPS commented: ‘Many of our schools already do a huge amount of work with their communities and we feel the way they are being judged by the Charity Commission is unreasonable. If schools read of the findings and feel they must rush to provide more bursaries, there is a real danger that the many good things they already do could be sacrificed. Acting in this way could risk creating a self-fulfilling prophecy of staff cuts, closures or sell-outs to profit-making chains if schools overstretch themselves or increase their fees to fund free places. It would be a travesty if not-for-profit schools were taken over by profit-making companies to meet these demands. This is why IAPS has already advised our members to continue as usual while we discuss the issue directly with the Charity Commission.’

The most controversial aspect of the assessments is the Commission’s actual interpretation of ‘public benefit’. Matthew Burgess, Deputy Chief Executive of ISC commented: ‘The fundamental question, however, is whether the Commission is right to ignore the real ‘public benefit’ of independent schools, which is the education of children, in favour of an ideological commitment to alleviating poverty’.

Attain has put together the schools’ reaction, a legal opinion and the Commission’s response, in an attempt to try and answer this fundamental question.

The Schools’ Reaction

Attain asked the Heads of three of the assessed schools for their comments on both the process and outcome of inspection:



S. Anselm’s Preparatory School

When we first knew that we were to be amongst the pilot cases for the Charity Commission Review, we felt we were a good school doing a good job, and that we had little to be afraid of. Looking back, the process has been a hugely informative one and one that has benefitted the school in many ways. Despite passing in most areas including the provision of public benefit to the community, we failed on the numerical issue of providing enough bursary places. We found the process a useful one as it provided us with the opportunity to pull together lots of information about the school and what it did in the local community. It did take up a lot of our time.

Deadlines for information were tight, and not sympathetic to the school calendar (one questionnaire arriving during half term), and the Charity Commission have not been good at sticking to their deadlines. However, the process was civil and perfectly pleasant, with the Commission striking up a dialogue with the school. They did visit us in December to ask questions (but previously my Governors had to keep up to four dates available in their diaries for this meeting – not helpful). This lasted for about 2½ hours and was quite bursary orientated. All along they had talked about proportionality and that each individual charity would be assessed on its own merits. Music to our ears, but looking back I wonder how much this has been the case? We also questioned whether it would be better to take a five year average of our income, which might better reflect the small but crucial ups and downs of the Prep School world, as opposed to the snap shot they took of 2007/8. This they declined. They also declined to look around the school, which I felt would have been a good idea if indeed they were to assess each school as an individual case.

We now have three months to accept their findings and a further nine months to put a plan together that will then be approved. We are looking forward to working with the Commission in trying to ascertain just what we have to do. All along they have made it clear that they are loath to publish a benchmark figure that schools have to clear. I can understand their reasons for this if proportionality is their key, but at some point they must tell each institution they have failed what they have to do to pass. If we have to get to approximately 7% of our income going to our bursary scheme then that will require a very different financial plan than if the required goal is 2% or 3%. I should add that we wholeheartedly agree with the sentiments outlined in the Commission review that we should open up our world class education to those that cannot afford it, but there have been a few limiting factors that have prevented us from doing so to the extent that we would have liked. Like many small prep schools we have no endowments to fall back on; we also are in a beautiful but rural setting, which has meant that applications for bursary places has not been what we had hoped for; and finally with young boarders on site 24 hours a day we can not let out our premises to the extent we would like for child protection reasons. These practical issues will need overcoming some how in the months ahead, if we are to fulfil the Charity Commission's requirements as we hope to do.

Simon Northcott, Headmaster.



Pangbourne College

Pangbourne is a medium-sized, co-educational boarding and day school for 405 children aged between 11 and 18, situated in 230 acres of an AONB. The governors' main priorities apart from the quality of education on offer are the cost of maintaining

and improving the considerable number of buildings and plant, which are of variable age and condition, the challenge of recruitment in a highly competitive area, and maintaining the historic provision of bursaries and scholarships. Every school is different and the relative significance of each of these, and especially size, will have a marked bearing on the nature of the public benefit which it can provide – any assessment needs to be sufficiently flexible to take account of these variations.

We did not volunteer for the public benefit assessment but decided early in the process to approach it positively. We were not disappointed: being compelled to articulate the public benefit which we provide was immensely beneficial, reinforcing our sense of purpose and of the value of a Pangbourne education, even before the Report was published in July affirming our public benefit and confirming our charitable status. Having received our response to their questionnaire in November 2008, the Public Benefit Review Team of three commissioners visited us and spent three hours with us. The visit began with a tour by some pupils – coincidentally, and conveniently, all were in receipt of major bursaries, a point noted by the team! More importantly, the tour provided an important opportunity for the team to sense the ethos of the school and its context, and I think it is regrettable that other

schools in the sample were denied the same opportunity. The team was well prepared, courteous and constructive, and were obviously keen to understand the school more deeply.

Predictably, their attention focused on two areas: bursaries and benefits in kind, such as the use of facilities by other schools. In fairness to the team, given the criticism that has been levelled at them, they spent about the same amount of time on each area. On bursaries, whilst they seemed chiefly interested in the availability of large bursaries to ensure that the poor could access the charity's benefits, we argued that any bursary scheme needs to provide small bursaries as well as large ones. There are many families who, whilst relatively affluent, could not afford full fees and so would be excluded unless a smaller bursary was available to them. The team seemed to accept this but their recommendation to us in the Report that the relative number of large bursaries should be increased suggests that they did not embrace it fully. On wider benefits, it seemed to us that the team did not attach much significance to the opportunities provided to children at local independent schools, even if relevant to our objects, but only those in state schools, and this was subsequently confirmed in the Report. Notwithstanding the fact that a number of examples of relevant benefits in kind were acknowledged, it is hard to avoid the conclusion that the provision of bursaries carries disproportionate weight in the assessment of public benefit. If this is so, then the Charity Commission needs to be clearer about what is required.

Looking to the future, I do have some sympathy for the Public Benefit Review Team. They have been given a difficult, even impossible task, as every charity is different and there are so many of them, and they are not resourced to carry it out. In the current financial climate there can be no likelihood of further funding. It should be at least twenty years before they come knocking at our door again!

Thomas Garnier, Headmaster.



The Manchester Grammar School

For all its protestations to the contrary, the judgements of the Charity Commission are politically motivated. The guidance issued by the Commission to independent schools placed great emphasis upon the variety of ways in which public benefit might

be demonstrated. However, the Commission has adopted a blinkered approach, focusing upon means-tested bursaries and seeing little else. It would be pleasant to think that in a new political landscape the Commission might be persuaded to interpret the Charities Act of 2006 in a more charitable manner – so long as we see an end to the timidity of spirit which seems to characterise the opposition's views on education.

In its findings on MGS, the Commission devoted far more space to our means-tested bursary scheme than to all the other ways in which we provide public benefit put together. Although the Commission says that

bursaries provide just one option and that there are no benchmarks for bursaries, its meaning is now clear: working with your wider community is all very well, but ignore bursaries at your peril. In this strange post-new-Labour world, some ways are clearly far more equal than others: these are noted but then damned with the faintest of praise. And, for some schools, such endeavours appear to count for little. The sub-text of this is worrying for many parents: not only are they confronted by taxes for the state educational system as well as by the independent school fees, they are now likely to face some form of surcharge as schools with limited bursary funds attempt to cover their backs.

MGS is fortunate: we have steadily accumulated the funds necessary to ensure that we are able to provide means-tested places for over two hundred pupils from poorer families. Also important for us is the extent to which we have engaged with the wider community in Manchester and beyond. The School's ethos of social diversity and social action goes back several hundred years. But this ethos is under-pinned by our equally long-standing commitments to educational excellence and to academic selection. These elements together define the school. The continuing existence of a group of schools, educating some half a million pupils with conspicuous success, demonstrates the strength of independence – and perhaps provides one reason why Lord Adonis asked the independent sector two years

ago, apparently without irony, to share its DNA with the state-maintained sector which continues (despite the massive increases in resources) to perform with a conspicuous lack of success. But at such times he and others wilfully ignore the fact that the strength of very many independent schools is founded upon academic selection.

The Commission has accepted MGS as a charity without reservation. But the reason why very many of our alumni, parents and friends make donations to our bursary scheme is through their determination to ensure that disadvantaged but able pupils may benefit from our commitment to the educational excellence which academic selection brings. I am glad that the Commission has been brave enough to recognise that MGS deserves its charitable status, knowing that within our DNA is not just a commitment to social diversity but also an equally strong commitment to academically selective education as a proven vehicle of social mobility. Yet I fear that the Commission will not and probably cannot freely admit or accept the implications of its judgements.

Dr Christopher Ray, High Master.

(Two further schools were assessed. Moyles Court School 'passed' but Highfield Priory was considered not to 'meet all aspects of the public benefit requirement'.)

Legal Opinion

Following the publication of the Commission's findings, two QCs wrote separately to *The Times* newspaper to express their concerns about the process. One of the QCs, Leolin Price, outlines his personal opinion:



Leolin Price CBE QC

Charity Commission v. Independent Schools: 'public benefit' inventively mystified and misapplied

1. Independent schools are under attack from the Charity Commission which is pressing them to comply with 'requirements' which, in my opinion and that of other lawyers, it does not have power to impose. The Commission has adopted a mistaken view about the effect of its powers under the Charities Act 2006.

2. Section 2(1) of the 2006 Act requires an independent school, in order to be a charity, to have a charitable purpose which:

- (a) falls within any of the descriptions in section 2(2), where 'the advancement of education' is listed [as, also, is 'the prevention or relief of poverty'], and
- (b) is for the public benefit.

3. Section 3(2) provides that, in determining whether requirement (b) is satisfied, 'it is not to be presumed that [the advancement of education] is for the public benefit' and Section 3(3) provides that 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'

but the Act does not include a new definition of 'public benefit'.

4. What appears, in my opinion clearly, is that the law about what is 'public benefit', and its relevance and impact, have not been changed. The Commission has acknowledged that the provision of education in independent schools is of public benefit but in its campaign of pressure treats this as by itself insufficient or not to be taken into account. There is nothing to that effect in the 2006 Act.

5. Under our law about charities the impact of 'public benefit' was that the advancement of education as a charitable purpose did not include the provision of schooling or educational benefits for persons too narrowly defined to be recognised as a section of the public; for example members of a particular family or children of employees of a particular company. Independent schools educate, and offer to educate, pupils who are not drawn from a category or class too narrowly defined to be so recognised.

6. Other provisions in the 2006 Act do, however, require comment. Section 7 of the 2006 Act, by inserting a new Section 1B into the Charities Act 1993, defines five new 'objectives' for the Commission, including –

‘2. *the public benefit objective*’

defined as –

‘to promote public awareness and understanding of the operation of the public benefit requirement’ –

but that does not provide authority for the Commission to develop and change the law about public benefit!

7. Section 7 also inserted into the 1993 Act a new section 1C defining the Commission’s functions as including –

‘1. Determining whether or not institutions are or are not charities’ -

but that does not give the Commission power to change any part of the law which is relevant to that determination. It does not give the Commission any law-making power.

8. Under Section 4 of the 2006 Act the Commission must –

‘(1) ... issue guidance in pursuance of its public benefit objective’

and for that purpose –

‘(4) ... carry out such public and other consultation as it considers appropriate’

but that does not authorise guidance which purports to change the law about ‘public benefit’ or which is based on a mistaken view about what is the law.

9. Section 4 also provides –

‘(6) The charity trustees of a charity must have regard to any such guidance when exercising powers or duties to which the guidance is relevant’ -

but a school, or its governing body, cannot have any duty to comply with ‘requirements’ which the Commission has no authority to impose.

10. The Commission, after elaborate consultation papers and published ‘guidance’, and after pilot assessments in 12 selected cases (with 2 small schools found wanting), is treating and proposing to treat ‘public benefit’ provided by an independent school as insufficient without

- what the Commission regards as a sufficient sharing of services, facilities and teaching with state-funded schools and/or
- provision of sufficient, or what the Commission regards as sufficient, bursary funds to enable pupils from ‘low-income’ families to have the benefit of education at the school

and its ‘guidance’ does not spell out what is sufficient or provide any standard measure of sharing or provision thus adding uncertainty to what I regard as unauthorised.

11. In oral evidence to the House of Commons Select Committee on 9 October 2008 Dame Suzi Leather (the

Commission Chairman) agreed that those concerned to comply with the guidance, and the effect of the Commission’s (then uncompleted) assessments in the 12 selected cases, would have to ‘work it out for themselves’. Mr Andrew Hind, Chief Executive, added –

‘It is not right, ... in our strong view, to publish a matrix of you need x per cent of this and y per cent of that. Each case needs to be looked at on its merits ...’ -

and Dame Suzi supplemented that with –

‘This is good regulatory practice. This is principle-based regulation, not rule based regulation’.

12. From the point of view of those who are regulated, rules should make it easier to understand what is required. ‘Principle-based regulation’ and ‘guidance’ leave schools and their governing bodies in distracting and expensive disarray. In practical effect the Commission is assuming legislative power to define principles, to insist on its definition of ‘public benefit’, and to enforce its ‘guidance’ as if it were the law.

13. But the law about ‘public benefit’ remains unchanged. Clever analysis of judicial and other learned comment and the outcomes of some cases decided before the 2006 Act apparently persuades the Commission that the content of what is ‘public benefit’ and, indeed, what is ‘charitable’ changes with changed attitudes in society. Clever, but mistaken; and arrogating to the Commission discretions, and legislative power, which the law has not conferred on it.

14. The Commission has adopted as one of its ‘requirements’ that schooling at any school must be available to pupils whose families cannot pay fees. This combines the advancement of education and the relief of poverty; and purports to achieve this by the Commission’s mistaken view of ‘public benefit’. A school is sufficiently compliant with our law of charity if it is established for ‘the advancement of education’ without also providing ‘relief of poverty’. The Commission’s view is mistaken.

15. A school which does not have income from endowments or property or investments to enable it to comply with the Commission’s present ‘requirements’ could only comply by raising the fees charged for educating its current pupils. Parents struggling to pay the fees and faced with having to abandon their choice of independent schooling for their children if fees are raised, or the closure of their chosen school because of the school’s inability to persuade parents to pay extra fees for the school’s ‘public benefit’ provision, will rightly ask whether the new “rules” about ‘public benefit’ are lawful. My answer is that they are not and the Charity Commission is now dangerously engaged in a campaign to establish what, if it is not stopped, will achieve what Parliament and the Law have not authorised.

Leolin Price CBE QC

The Commission's Response

The publication of the assessments posed a number of questions for the sector. *Attain* asked the Commission to respond to some of these points.



Dame Suzi Leather

Attain received written answers to its questions from the Chair of the Commission, Dame Suzi Leather.

The questions are structured around four key topics: Assessment Process & Reports; Bursaries; Fees; and Public Benefit and Future Assessment.

1. Assessment Process & Reports

Editor: For these questions I am principally interested in the process and outcome of the assessment of the five independent sector schools and whether they fulfil the public benefit requirements. I have talked to the Heads of two of the assessed schools, both of whom expressed praise for the process as a very useful means of assessing their schools' activities. They were pleased that the Commission was adopting a policy of assessing each school individually, and on its merits, but there were some criticisms of the process. My questions are therefore:

(a) Now that the assessments have been published, do you feel that the process has gone well and what message do you feel the reports should convey to other schools?

Dame Suzi: 'We are pleased with how the process has gone. However I can understand why some comments in the press may have caused concern to parents, so I would encourage them to read the assessments for themselves. The assessments show in practice how our guidance on public benefit can be applied and that we are forming a judgement based on the circumstances of the charity. As with any first experience, we'll want to learn from it. For other schools, the key message is that the majority of charities that were assessed, including schools, were already meeting their public benefit responsibilities, which is good news. The assessments have shown that contrary to some thinking, small prep schools as well as others are able to meet the requirement, and also show that public benefit is not necessarily all about bursaries and subsidies. One care home met the requirement because it had a planned approach to providing help to older people who couldn't afford the fees and was open about the help available, even though it provided less subsidies than others. I would now encourage schools and parents to read the assessments we have published, as well as the examples and guidance we have produced.'

(b) Why did the Commission focus on a snapshot of a school's financial position when a five year view may have revealed a very different picture?

Dame Suzi: 'I don't think that a five year view would have changed our conclusions - after all, the issue is about whether the charity is currently operating for the public benefit. The Commission looked at the financial position of each charity to ensure that our conclusions and recommendations were appropriate to the circumstances of the charity but of course we looked at everything the

charity did to provide a wider public benefit.'

(c) To gain a full understanding of the ethos and aims of a school, why did the assessment teams not insist on a tour when they visited all of the schools?

Dame Suzi: 'The key point is that the duties relating to public benefit involve both demonstrating public benefit and reporting on it in a charity's annual report, which are available to the public. There shouldn't be any aspect of the charity's public benefit that is not written in the annual report. Whilst looking around some of the charities was interesting, it wasn't something that affected the substance of our conclusions. The main purpose of the visits were for the Commission's assessment team to talk through with key individuals the charity's response to our public benefit questionnaire.'

Editor's Note: The Commission were keen to stress that they did walk around 'both Highfield and Manchester Grammar' and found the process 'both interesting and informative'. A tour was accepted at Pangbourne College but declined at S. Anselms.

2. Bursaries

Editor: Although I fully appreciate that bursaries represent only a part of the public benefit requirements, they are nonetheless a very important aspect.

(a) How should small, rural preparatory schools with no financial endowments ensure they can offer sufficient 100% bursary places?

Dame Suzi: 'We have always said that we will look at charities on a case by case basis, look at what a charity is able to do and give them time to respond with a plan and more time to implement it. It is for a charity's trustees to decide how they will ensure the charity is operating for the public benefit because they have the best understanding of their own charity's circumstances and they are the people who have primary responsibility to ensure that happens. The assessments show various approaches.'

(b) What would be the Commission's view in a case where a school offers sufficient bursaries but cannot find enough pupils to take up this provision? Would this be a problem?

Dame Suzi: 'From the point of view of public benefit, it is providing the opportunity to benefit in a practical and open way that matters. Charities should ensure that people are aware of whatever help is available and that they can access help easily. If take up is low, a charity might need to look at both how they are publicising information and why people may not be taking advantage of it as well as looking at other ways of making their services accessible.'

(c) There is an argument that the provision of bursaries is actually a 'disbenefit' to the wider education system in the UK. Accepting the Commission's limitations in its remit, are you concerned at the weighting which may be deduced from the published reports in favour of bursary provision? Could this lead to an unintended consequence?

Dame Suzi: ‘As we have said very clearly throughout this process, it is not the Commission’s role to comment on wider education policy, but its role is purely with what charities themselves, whatever kind of charity they are, are doing to provide a wider public benefit.’

3. Fees

Editor: Whilst I fully appreciate it would be inappropriate for you to answer specific questions related to the work of your Scottish equivalent body, OSCR, I do have two questions which are of relevance to the Charity Commission. On the 14th July 2009, the Chair and Chief Executive of OSCR issued a statement welcoming the public benefit report issued by the Charity Commission. Jane Ryder, Chief Executive of OSCR said: ‘This will go some way to reassuring the public and charities, particularly those operating across the UK, that there is such common ground in relation to underlying concepts; and in the way in which charity regulators are considering core issues’. Previously, OSCR had undertaken its own assessment of a number of schools, including Regius School, a very small school educating children aged 5-12 years. In their report, OSCR concluded: ‘the school keeps its fees low by keeping costs, and thereby fees, as low as possible. This is an appropriate strategy to enable those on a range of incomes to benefit’.

(a) Highfield Priory School Ltd appears to have a similar strategy to Regius School for keeping fees low. Why is the maintenance of low fees not an appropriate strategy for public benefit?

Dame Suzi: ‘Our assessment of whether the benefits provided by a charity are available to a sufficient section of the public is judged against the principles in our guidance. Although the fees charged by the schools and care homes we looked at varied considerably, they all fell within our definition of ‘high fees’. This meant that they had to show both that the opportunity to benefit was not unreasonably restricted by the ability to pay fees (sub-principle 2b) and that people in poverty were not excluded from the opportunity to benefit (2c). Keeping fees down can help and may be an effective strategy to ensure wider access, but the principles require evidence that restrictions or exclusions do not result in people who cannot afford to pay being unable to have sufficient opportunity to benefit.’

(b) Low fees ensure access to as broad a range of families as possible; extra bursary provision may require a significant rise in fees. Did the Commission model the possibility of unintended consequences caused by this aspect of public benefit?

Dame Suzi: ‘A charity which charges low fees – that is, fees which are affordable by most people – would not have any difficulty with principles 2b and 2c. But the schools and care homes all charged high fees, even though there was a wide range in the fee levels, and therefore had to show what steps they took to meet these principles. It’s up to the governors of a school to decide how to do this. We recognise that some may decide to adopt the bursary route and may decide to finance it by raising fees, but there are other options and we hope that governors will use the reports and the emerging findings guidance

to inform themselves about the options and to decide on what’s best for their school.’

4. Public Benefit and Future Assessment

Editor: I have read in detail the transcript of the hearing of the Public Administration Select Committee on 9th October 2008 and have three questions:

(a) The Chairman asked, in relation to discussion of the 12 assessment reports: ‘The assumption would be there that the rest of the sector in those areas will read this and work it out for themselves’. Both yourself and Andrew Hind replied ‘Yes’. Do you feel, in light of the published reports, that this has been achieved or will more guidance be necessary?

Dame Suzi: ‘The Commission has already produced general guidance, guidance for charities that charge fees and guidance for charities that advance religion, as well as providing fictitious examples of trustee annual reports. We feel that all of this, coupled with the assessments, will help charities see what they should be doing.’

(b) You described the Commission’s work as ‘good regulatory practice. This is principle-based regulation, not rule-based regulation.’ What is ‘principle-based regulation’ and on which principles is it based?

Dame Suzi: ‘What I meant was it is based on the outcome to be achieved – in this case ensuring that people who can’t afford high fees have sufficient opportunity to benefit from the activities of the charity, rather than narrowly focussing on prescribing specific processes to be adopted.’

(c) Two QCs have recently written to The Times newspaper about the legal aspects of the public benefit criteria used by the Commission. Why has the Commission decided not to respond to these points?

Dame Suzi: ‘We have responded to a number of points raised by various people in the press to ensure charities get the right information.’

Attain sought greater clarity to the answer provided above and was provided with a copy of a letter sent to *The Times* on the 23rd July by Andrew Hind, Chief Executive of the Commission:

‘Dear Sir, Mr Brodie (Letters, 21.7.09) is wrong to doubt the Charity Commission’s political independence. The 2006 Charities Act required all charities to operate for the public benefit. The assessments we published last week looking at the public benefit status of charitable care homes, charitable independent schools and religious charities are part of this process. The judgements we have made are based on our assessment of the underlying case law. For 150 years the Commission has made decisions independently, transparently and impartially, based on the legal framework within which we are required to operate. That is exactly what we are doing now and will continue to do.’

Do you wish to comment on this article? See our website at www.attainmagazine.co.uk