HOW DOES CHARITY LAW DEVELOP IN THE AGE OF THE TRIBUNAL?

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Introduction

The Charity Tribunal, originally created by the Charities Act 2006,[1] was established to hear appeals from certain specified decisions of the Charity Commission. Some of the appeals now heard in the First-tier Tribunal (Charity) ("the Tribunal") were previously justiciable by a Judge of the Chancery Division of the High Court. Others represent newly-created rights of appeal. The transfer of charity cases to a new specialist Tribunal was expressly stated by the government of the day to be for the purposes of (a) increasing access to justice for charities and (b) stimulating the development of charity law.[2] The Charity Tribunal became operational in 2008 but was fundamentally reformed in 2009 by its integration into the unified tribunals framework established by the Tribunals, Courts and Enforcement Act 2007. Charity cases are now heard at first instance in the First-tier Tribunal (Charity) and on appeal by the Upper Tribunal (Tax and Chancery Chamber), from which there are onward rights of appeal to the Court of Appeal and Supreme Court on a point of law and with permission.

This article looks at the legislative system which was created for achieving the second objective: that of stimulating the development of charity law. If one pauses to think about it, this was quite an unusual objective for a government to have. The oft-heard cry at the time was that there were so few charity cases being heard in the Chancery Division that charity law and regulation had somehow come adrift from the reality of life for the sector, and that the lack of modern case law was inhibiting charities'

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1 The relevant legislation is now the Charities Act 2011, which consolidated the Charities Act 2006, the outstanding provisions of the Charities Act 1993, and various other enactments.

2 See e.g., Cabinet Office, Office of the Third Sector, *Charities Act 2006. What trustees need to know* (Cabinet Office, May 2007) Foreword.

operation. The Strategy Unit Report,[3] which preceded the 2006 Act, referred optimistically to the Charity Commission's review of the register of charities, together with the availability of new rights of appeal to the Tribunal, as presaging a new era of charity law that would be able to keep pace with the role of charities in modern society.

It may be helpful to bear in mind here that one of the most obvious driving forces in the charity sector at that time was the growth of the 'contract culture', whereby charities were increasingly being funded by the State to deliver public services. So, one analysis of the 2006 modernisation agenda is that it sought primarily to render the charity sector 'fit for purpose' to do business with the State. But this was not the only rationale for reform; the importance of a demonstrable 'public benefit', especially in relation to independent schools, dominated the parliamentary debates.

Prior to the establishment of the Tribunal, cases involving a refusal by the Charity Commission to register an institution as a charity were litigated by way of an appeal made to the Chancery Division of the High Court. Such appeals are now heard by the Tribunal. It follows that the judicial system for recognising new charitable purposes is an area of the Tribunal's work which could prove fruitful for the making of a direct comparison between the old and the new systems and for enabling consideration of whether the changes made in the 2006 Act have proved effective in modernising charity law. For that reason, I have concentrated in this article on the development of the law as it relates to charitable status in the age of the Tribunal.

Charities Act 2006

After considerable debate – and a rather bumpy ride through Parliament – the Charities Act 2006 was passed. It did much to turn the Charity Commission into a modern regulator with statutory objectives and functions; it developed a new statutory definition of charity through a list of 'descriptions of charitable purposes' and a public benefit test; and it sought to make the Charity Commission more accountable to its regulated constituency by creating a Tribunal to hear appeals in respect of a range of decisions, directions and orders which was much-expanded from the range which had previously been appealable to the High Court.

In terms of the development of charity law, the 2006 Act sought to strike a balance between, on the one hand, the preservation of the system of case-by-case development of charity law which had shaped it over several hundred years through the process of analogy with previously accepted charitable purposes, and, on the other hand, the injection of various 'stimulatory mechanisms' into that system, designed to encourage charities to litigate and so speed up the organic development of the law. As I say, that was quite a novel thing for a government to do. I am not aware of similar initiatives

3 Cabinet Office, Strategy Unit, *Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector* (Cabinet Office, September 2002).

in other jurisdictional areas. The effectiveness of the new legislative framework was considered and found wanting by the Upper Tribunal in the *Independent Schools Council* ('*ISC*') case,[4] referred to further below.

The Tribunal's Jurisdiction

Following the enactment of the consolidating Charities Act 2011, the Tribunal's jurisdiction is now to be found at section 315 of and schedule 6 to that Act. In summary, there are three distinct types of case which may be heard by the Tribunal: Appeals, Reviews and References. I will explain briefly how the Tribunal's jurisdiction in each type of case is established.

Schedule 6 to the 2011 Act contains a table which sets out in column one which decisions of the Charity Commission can be appealed or reviewed in the Tribunal, in column two who can apply to the Tribunal in respect of each type of decision, and in column three the powers exercisable by the Tribunal if an appeal in respect of that type of decision is upheld.[5] There are 50 or so decisions currently listed in column one, but relatively few of them have featured in the Tribunal's caseload so far. Still fewer have been decided by the Upper Tribunal, where legal precedent is created.

Cases in the First-tier Tribunal proceed as full-merits appeals unless they involve a decision listed in section 322 of the 2011 Act as a 'reviewable' decision. Appeals are *de novo* proceedings, so that the Tribunal at first instance steps into the Charity Commission's shoes and re-takes the decision under appeal. The majority of the First-tier Tribunal's cases so far have been appeals, including appeals against the refusal by the Charity Commission to register an institution as a charity. As the First-tier Tribunal's jurisdiction in such cases is *de novo*, the appellant effectively makes a fresh registration application to the Tribunal, and the Tribunal can consider evidence which was not before the Commission when it made its decision.

In cases involving the refusal by the Charity Commission to register an institution as a charity, the appeal is against a decision made under section 30(1) of the 2011 Act (or section 208 in the case of a Charitable Incorporated Organisation). The appeal may be brought by the putative charity trustees, the institution itself if incorporated, or 'any other person who is or may be affected by the decision'. The respondent to such an appeal is the Charity Commission.

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4 *The Independent Schools Council v The Charity Commission for England and Wales, The National Council for Voluntary Organisations, HM Attorney General and Others* [2011] UKUT 421 (TCC).

5 Additional rights of appeal have recently been added by the Charities (Protection and Social Investment) Act 2016, ss 4(6), 6(5), 7(5), 10(9).

The second type of case the Tribunal can hear is a Review. Review cases require the Tribunal to 'apply the principles which would be applied by the High Court on an application for judicial review',[6] and so involve a form of procedural review, with the power to set aside a decision and remit the matter to the Charity Commission, which will re-take it in accordance with any findings made or direction given by the Tribunal. The most common type of review application heard by the Tribunal so far has involved a decision by the Charity Commission to open a statutory inquiry into a charity.[7] Before the creation of the Tribunal, charities subjected to the opening of a statutory inquiry had no right of appeal against that decision, but they could pursue an application for judicial review and they had a right of appeal against certain decisions consequent upon the opening of an inquiry, for example the removal of a charity trustee from office. This new right to a review has brought before the Tribunal cases involving the consideration of essentially public law (rather than charity law) arguments, and it seems to me that the Charity Commission, in common with other civil regulators, has had to gear itself up in recent years to deal with public law challenges to its work. The increasingly common reliance on human rights and administrative law arguments in the charity law arena[8] is clearly having a marked effect on the development of charity law – quite apart from any of the statutory 'stimulatory mechanisms' to which I shall refer. For understandable reasons, there appears little scope for the review jurisdiction to impact upon the development of the law in charity status cases.

Persons 'Affected'

I have already mentioned Schedule 6 to the 2011 Act. The category of persons listed in column 2 of Schedule 6 and who thus have standing to make an application to the Tribunal is extremely wide, generally being those persons who 'are or may be affected' by the Charity Commission's decision. As we have seen, this wide class of persons may apply to the Tribunal in respect of charity status decisions.

The right to make an application to the Tribunal is not, therefore, always confined to the charity or putative charity which is the subject of the Charity Commission's decision, but may include third parties who disagree with the Charity Commission's decision for a wide range of reasons. For example, where the Charity Commission might make an Order on the application of the trustees in relation to a recreation

6 Charities Act 2011, s 321(4).

7 Under Charities Act 2011, s 46.

8 See e.g. *Watch Tower Bible & Tract Society Of Britain v The Charity Commission* [2016] EWCA Civ 154, which involved a public law challenge to the Charity Commission's jurisdiction.

ground charity, members of the public who live nearby and use that recreation ground might bring an appeal to the Tribunal.[9]

This statutory framework has created a wider class of potential litigants before the Tribunal than the class of persons which was previously entitled to bring proceedings in the Chancery Division. It is arguably wider than the class of persons who might previously have applied for judicial review in the Administrative Court. There is no definitive test for who does and does not fall into the class of persons who 'are or may be affected', and the Upper Tribunal has ruled that a fact-sensitive analysis must be undertaken in every case.[10] It seems to me that this wide pool of potential litigants will have an impact on charity law generally, because it brings into the Tribunal hearing room a proliferation of different considerations inevitably informing the matters the Tribunal must decide. Whether that assists with the development of pure charity law is a moot point.

I have pondered elsewhere[11] the legislative rationale for creating so wide a pool of potential appellants in this jurisdiction, but I have been unable to identify it clearly. I have discerned a trend in more recent legislation, such as the Charities (Protection and Social Investment) Act 2016,[12] to limit rights of appeal to persons who are the direct recipients of the Charity Commission's decisions.

The Charity Status Test

The post-2006 Act statutory framework for registration as a charity, now contained in the 2011 Act, may be summarised as follows. Section 1(1) defines charity as an institution which is (a) established for charitable purposes only and is (b) subject to the control of the High Court in the exercise of its jurisdiction with respect to charities. Section 2(1) defines a charitable purpose as one which falls within the descriptions of purposes contained in section 3(1) and is for the public benefit. Section 3(1) sets out a list at (a) to (l) of 12 descriptions of charitable purposes and at (m) allows for the recognition of new charitable purposes through a process of analogy with the 'old law' (defined in section 3(4) as the law relating to charities in England and Wales as in force immediately before 1 April 2008). A charitable purpose must be for the public benefit. Section 4 provides that there is to be no presumption that a purpose of any particular description is for the public benefit and that any reference to public benefit is a reference to public benefit as that term is understood for the purposes of the law relating to charities in England and Wales.

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9 See e.g. *The Trustees of the Bath Recreation Ground Trust v Jack Sparrow and Others and The Charity Commission for England and Wales* [2015] UKUT 0420 (TCC).

10 *Nicholson v Charity Commission* [2016] UKUT 0198 (TCC).

11 Alison McKenna, 'Applications to the First-Tier Tribunal (Charity) by "Persons Affected" by the Charity Commission's Decision' (2013) 16 CL & PR 147.

12 See e.g. s 6.

As analysed by the Upper Tribunal in *ISC*, the new statutory formula made 'little if any difference to the legal position of the independent schools sector'.[13] There are clear tensions between the features which are aimed at preserving continuity of approach and those which sought to effect change. As the Upper Tribunal commented, '… no doubt many people thought that the legislation which emerged from the debate reflected their own viewpoint'.[14]

Value of Stimulatory Mechanisms

The 'stimulatory mechanisms' to which I have referred were, in my view, directed primarily towards the stated legislative intention of increasing access to justice for charities and making the Charity Commission appropriately and transparently accountable for its regulatory actions. They included: a change to the forum before which first-instance cases were decided, so that they would be heard by a Tribunal which included on the Bench lay people drawn from the sector itself on the understanding that charities would be more willing to litigate questions of charity law in this environment; an alteration to the parties who would be involved in such litigation so that the Charity Commission itself rather than the Attorney General would be the respondent to appeals; the creation of a wider class of persons with standing to bring an appeal; and an expectation that charities would not incur legal costs in Tribunal litigation. In relation to the regulatory environment for charities, one can see how this changed environment might stimulate the development of the law. To an extent, I think it has.

However, in the context of the development of the law of charitable status, it is more difficult to see how such a technical subject would be developed merely by an increase in the Tribunal's first-instance caseload. If that were indeed Parliament's assumption, then the Tribunal's first ten years have failed to substantiate it. The Tribunal has in that period heard more than double the number of charity cases (status appeals and otherwise) decided in the Chancery Division in the years immediately prior to its creation, but the volume is so low that we are still talking about only a handful of appeals in each year, and the early estimates of case volume have failed to materialise. There is, of course, a huge range of factors which may affect the number of appeals lodged: the regulatory behaviour of the Charity Commission; the prohibitive costs of legal representation; the present difficulties with *Beddoe* relief;[15] and the proposed

13 *ISC* (n 4), para 88.

14 ibid.

15 At present, authority to incur litigation costs out of the trust fund can be authorised only by the High Court in a Beddoe Order. The Law Commission proposes that the Tribunal should be empowered to make 'authorised costs orders': see Law Commission, *Technical Issues in Charity Law* (Law Com No 375, 2017) paras 15.28–15.48.

introduction of fees to access the Tribunal.[16] One can never be sure why some charities choose to litigate and others not to litigate.

My own view is that the volume of cases brought to the Tribunal is largely irrelevant to the stimulation of charity law, perhaps especially in status cases, and that it is the careful articulation and examination of the issues raised in even a few cases which best serves that purpose. The developing approach of tribunals under their common procedural rules[17] is to identify 'lead cases' which raise issues of principle and to stay similar 'linked cases' behind them, for later determination in accordance with the principle established. Such an approach recognises the value of adopting a more technical approach to hand-picked cases of importance in developing the law. The First-tier Tribunal does have power to transfer charity cases to the Upper Tribunal for determination at first instance,[18] but this is rarely requested.

It seems to me that the most significant of the new 'stimulatory mechanisms' in the context of charity status cases has been the creation of the Tribunal's jurisdiction to hear References. I consider that *sui generis* jurisdiction further below.

Precedent

In asking whether the stated aim of stimulating the development of charity law has been achieved by the Tribunal (now with the benefit of ten years' experience), I suggest that we should first locate the cases that have been heard in their proper context in the legal framework for the creation of precedent in tribunals under the Tribunals, Courts and Enforcement Act 2007. We will then need to consider how that new system of establishing precedent interacts with the common law system which preceded it.

The Tribunal originally created by the Charities Act 2006 was not itself a Superior Court of Record, so despite the stated legislative intention of modernising charity law, its decisions could not create legal precedent. Onward appeals from its decisions were to the Chancery Division. It can be seen, therefore, that in the initial movement of cases away from the Chancery Division, it was intended that charity law would only actually be developed if cases were appealed from the Tribunal to the High Court and that the first-instance decisions by the Tribunal were intended to do something other than develop charity law in a formal sense, leaving that task, as previously, to High Court Judges.

16 Ministry of Justice, *Court and Tribunal Fees: The Government Response to Consultation on Further Fees Proposals* (Cm 9181, Session 2015/2016).

17 For example, The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

18 ibid rule 19.

That system was then reformed by the Tribunals Courts and Enforcement Act 2007, and the Charity Tribunal became the First-tier Tribunal (Charity), which sits in the General Regulatory Chamber. Onward appeals from its decisions are to the Upper Tribunal (Tax and Chancery Chamber) which is established as a Superior Court of Record under section 3(5) of the 2007 Act. Decisions of the Upper Tribunal have the same authority as those of the High Court, and onward appeal lies – on a point of law and with permission – to the Court of Appeal. There is a hierarchy of decision-making within the Upper Tribunal so that decisions of a three-Judge panel take precedence over those of a single Judge.

High Court Judges from the Chancery Division sit on charity cases in the Upper Tribunal, sometimes with Upper Tribunal judges such as myself, so there has actually been no change to the level of judiciary at which the cases which set precedent are heard. However, as we have seen, there have been some other important changes which affect the route by which the cases are presented to the Judge or Judges, there are different persons who are the litigants in such cases, different rules of evidence and procedure apply, and different powers are exercisable by the Judge when deciding the case. These factors will inevitably influence the development of charity law.

First-tier Tribunal decisions, as we have seen, turn on their own facts and do not set precedent. They cannot therefore be said to develop charity law in a formal sense, although commentators often seem to overlook this fact. I suggest that it is important, when considering the development of a line of charity law on a particular point, to remember that decisions of the First-tier Tribunal are not the direct successors of first-instance decisions of the Chancery Division. It follows that a First-tier decision on a status case does not, unless considered by the Upper Tribunal, interrupt the flow of precedent on any point.

First-tier decisions may perhaps be seen to have another function: that of 'starting off' charity cases below the level of precedent value where the issues in contention are either resolved or are distilled so that the purely legal issues are separated from the factual ones in preparation for an onward appeal to the Upper Tribunal or beyond. It is perhaps significant in this context to note the impact of the cultural shift involved in the creation of a system in which the Charity Commission itself, rather than the Attorney General, is the respondent to appeals. The Charity Commission is inevitably cast into the role of defending its own decision-making and the Judge is deprived of the 'over view' that the Attorney General, as a disinterested party, brought to appeals in the Chancery Division.

My own view is that First-tier cases provide a fascinating snapshot of what is really going on in the sector. They often reveal the regulatory and social pressures that charities are facing, the nature of their relationship with the Charity Commission, the financial forces that sway them and the relationships they have with the individuals who found them, govern them, and volunteer for them and with the beneficiaries who

use their services. From this vignette, there may emerge the issues which will in time serve to develop charity law.

References

The 2006 Act created the Reference procedure, a new form of litigation designed to allow grey areas of charity law to be decided without having to wait for an individual charity to bring a case, because the Attorney General or the Charity Commission could refer a question of charity law to the Tribunal for determination. References are made to the Tribunal by the Attorney General [19] (or, with his consent, the Charity Commission[20]) to clarify matters of 'charity law', as defined in section 331 of the 2011 Act.

This novel procedure is designed to settle questions of general importance to the charity sector without the need for individual charities to litigate them. The Tribunal's jurisdiction in relation to a Reference is declaratory (most closely analogous to an 'advisory opinion' in judicial review proceedings). The Tribunal may be asked to answer questions about a hypothetical charity, and real charities likely to be affected by the Tribunal's decision can apply to be joined as parties to the Reference so that their views may be heard.[21] If they are joined, then they are bound by the answer to the hypothetical questions in respect of their own real circumstances because section 327 of the 2011 Act requires the Charity Commission to give effect to the Tribunal's decision on a Reference when dealing with the particular state of affairs to which the Reference related and, under section 330, no appeal may be made to the Tribunal against a decision of the Commission which is made in accordance with that duty, by a person who was at any stage a party to the Reference. This seems to me to be an attempt to create a form of statutory issue estoppel, so that a charity which had joined the Reference as a party would be prevented from subsequent litigation on that subject. I would anticipate a public law challenge to such a system if it were seen to operate contrary to the interests of a charity in any particular case.

Reference proceedings are non-adversarial, so there is no winner or loser – the Tribunal merely answers the questions put to it and has no power to direct any particular outcome. References are technically made to the First-tier Tribunal, but in the cases heard so far, they have been transferred to the Upper Tribunal for determination at first instance so as to create precedent. Yet this is not mandatory. As we have seen, the parties to the Reference are apparently bound by the Tribunal's answers to the Reference questions by virtue of the statutory provisions, and apparently without regard to whether it is heard in the First-tier or Upper Tribunal.

19 Charities Act 2011, s 326.

20 ibid s 325.

21 ibid ss 325(4)(b), 326(3)(b).

Presumably, everyone else is bound by the Tribunal's decision only if it is decided by the Upper Tribunal, but that is yet to be decided in any case.

There have been only two References to the Tribunal in ten years. These concerned hypothetical independent schools[22] and hypothetical benevolent charities.[23] The question of whether the Charity Commission should have the power to make References to the Tribunal without the prior consent of the Attorney General has recently been considered and consulted upon by the Law Commission.[24] It seems to me that if this is permitted, there may be an increasing use of this procedure to develop charity law, including in the arena of charitable status.

Reference proceedings are novel, but in the first Reference case, the proceedings took an even more unusual form because whilst the Attorney General had referred to the Tribunal a number of questions about the public benefit requirement for a hypothetical independent school, the ISC had also sought judicial review of the Charity Commission's published guidance in relation to the public benefit test under the Charities Act 2006. The ISC's judicial review application was transferred from the Administrative Court to the Upper Tribunal and joined with the Attorney General's Reference so that the two cases could be heard together. The Tribunal's decision therefore had to determine the Reference and give judgment on the judicial review application. This was a jurisdictionally ground-breaking event, and I doubt that the particular format of those proceedings will be repeated.

In the second Reference case, the Attorney General referred to the Tribunal a number of questions about the charitable status of a hypothetical charity established for the relief of poverty and which required its beneficiaries to qualify as such by reference to familial ties, profession or employment, or membership of an unincorporated association. The Tribunal answered the questions and confirmed that such charities meet the public benefit requirement for charities established for the relief of poverty.

What I found most notable about the second Reference was the sheer number of charities who participated, either by becoming formally joined as parties or by seeking permission to 'intervene' and file evidence or make submissions. The Upper Tribunal was, by this process, able to conduct a broad *tour d'horizon* of the benevolent charity sector, and our decision records the evidence before us of the many, various and innovative ways in which these charities were fulfilling the public benefit requirement in respect of their respective beneficiary classes. I suggest that the breadth of evidence before the Upper Tribunal on this point was far greater than would have been the case

22 *The Independent Schools Council v The Charity Commission for England and Wales, The National Council for Voluntary Organisations, HM Attorney General and Others* [2011] UKUT 421 (TCC).

23 *HM Attorney General v The Charity Commission for England and Wales and others* [2012] UKUT 420 (TCC).

24 Law Commission (n 15) paras 15.59–15.68.

if that question had been determined in traditional Chancery Division proceedings, in which the interventions may not have been permitted.

References were intended to create a unique environment for the development of charity law, and one can see that both the process and the outcome of those cases is in marked contrast to the previous system for deciding novel questions of charity law. It seems to me that the key differences are as follows. Firstly, the High Court would not have had jurisdiction to decide a hypothetical case in any event. Secondly, the cases before the High Court were adversarial in nature and were decided on the basis of the evidence and arguments adduced by the parties to the litigation, this in turn governed by strict laws of evidence and procedure. The involvement of the Attorney General as the constitutional protector of charity added a public interest factor into proceedings in the Chancery Division, and this feature has of course been retained in Reference proceedings. It seems to me that a very significant difference between Reference cases in the Tribunal and proceedings in the High Court is that the doors to the Tribunal are thrown open in References, so that a wide range of views may be placed before the Tribunal for it to consider in answering the hypothetical question. Such cases surely have more in common with public interest interventions in the Administrative Court than they do with the type of proceedings traditionally conducted in the Chancery Division? In the Tribunal, the strict rules of evidence do not apply, and an inquisitorial approach to the presentation of the parties' cases is taken. These factors shape the nature of the proceedings in References and must inevitably affect their outcome.

Has Charity Law Developed in the Age of the Tribunal?

Has the new system, intended to develop charity law, done so thus far? I would say it is too early yet to discern the direction of travel for the development of charity law under the auspices of the new system or to identify the emergence of a distinct body of law which has been driven by the new system.

The First-tier Tribunal has begun to make decisions which interpret the descriptions of charitable purposes,[25] but there have been no status cases appealed from the First-tier Tribunal to the Upper Tribunal. Whilst there are, as we have seen, systemic challenges involved in elevating the principles established for consideration at the level of precedent, I think it can be seen that these decisions and the two References

25 *The Human Dignity Trust v The Charity Commission for England and Wales* [2014] UKFTT (Charity) (GRC); *Wilfrid Vernor-Miles and Others v The Charity Commission for England and Wales* [2015] UKFTT (Charity) (GRC); *Cambridgeshire Target Shooting Association v The Charity Commission for England and Wales* [2015] UKFTT (Charity) (GRC).

have nevertheless shaped the approach of the Charity Commission to status cases,[26] particularly the public benefit requirement,[27] in interpreting and offering guidance to the sector about the new statutory provisions.

One must remember that we are comparing a system which has been several hundred years in the making with a system which has been in operation for a decade – these things take time. And yet I have referred to a number of features of the new Tribunal system which seem to me likely to shape future cases and influence the way that charity law develops in the age of the Charity Tribunal.

Perhaps we can return to this question in another ten years?

26 E,g, see letter from the then Chair of the Charity Commission (https://www.theguardian.com/society/2014/jul/11/charity-commission-clarification-human-dignity-trust) welcoming the *Human Dignity Trust* decision: 'We are glad that [the law] is now clarified.'

27 E.g. the Charity Commission revised its public benefit guidance following the *ISC* Reference: Charity Commission, *Parliamentary Briefing. Update on Public Benefit Guidance* (January 2012).