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To cite this article: Tilly Clough (2024) The unearned privilege of charity law: how the law maintains elite education, Discourse: Studies in the Cultural Politics of Education, 45:3, 416-431, DOI: 10.1080/01596306.2024.2335007

To link to this article: https://doi.org/10.1080/01596306.2024.2335007
The unearned privilege of charity law: how the law maintains elite education

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ABSTRACT
In England and Wales, fee-charging independent schools can be legally classified as charities and, therefore, receive associated benefits, the most obvious being taxation advantages. The high fees charged by many of these schools create financial exclusivity, which, it will be seen, confers significant social and cultural capital to those who can meet the economic barrier to entry. High fees lead to increased wealth for the schools, which is augmented by their charitable fiscal benefits. In exchange for receiving these charitable benefits, one might expect charity law to place significant social contribution requirements on these schools. However, this paper will argue that this is not the case: the law, in fact, requires very little from charitable independent schools. In practice, charity law cannot mitigate inequalities within elite education nor justify their taxation advantages.

KEYWORDS
Private schools; elite education; charity law; public benefit; tax advantages; charitable oversight

1. Introduction
A significant body of research on elite schooling focuses on their role in reproducing privilege and their consequential social impact. Within this field, little sustained focus has been placed on the fact that 50% of English and Welsh fee-charging independent schools hold charitable status (Department for Education, 2016a). This leaves the impact of charitable status on these elite schools unexamined. Research in this area is crucial as being charitable affords these schools many benefits, the most significant being an estimated £3 billion in tax concessions due to their status as charities (Boden, 2023; Boden, Kenway, & James, 2020). Many of the most prestigious schools fall into this charitable category. For example, all the ‘Great Schools’, comprising Eton, Charterhouse, Harrow, Rugby, Shrewsbury, Westminster, Winchester, St Paul’s and Merchant Taylors, are charities.1 This means that despite their already vast wealth (Lavin & Overton, 2021), accumulated from high fees, up to £50,550 annually (Harrow School, 2023), they still receive significant fiscal benefits due to their charitable status.

This special issue concentrates on ‘elite’ schools, a definition of which describes schools of ‘very high rank’ that are ‘highly selective’ – both financially in the form of high fees and
sometimes academically in the form of entrance exams (Kenway & Koh, 2015). This paper examines the intersection of schools regarded as ‘elite’ in sociological terms, but which are legally categorised as charities.²

Elite schools tend to be wealthy and confer significant social and cultural capital on the students whose families can afford the cost of attendance (James, Boden, & Kenway, 2022). Statistically, these students are more likely to achieve power and influence in the future (Kynaston & Green, 2019). The so-called Great Schools have widely been considered the ‘chief nurseries’ of the British elite, with their alumni being ‘94 times more likely to reach the British elite than those who attended any other school’ (Reeves, Friedman, Rahal, & Flemmen, 2017, p. 1139). Yet charity law places a specific legal requirement on charities to benefit the ‘public’, not just the wealthy elite who can afford private education (Charities Act, 2011, sec.4).

This begs the question of whether charity law might be able to mitigate these schools’ privilege, making them less ‘elite’, through this legal public benefit requirement. This requirement obliges independent schools to offer bursaries and scholarships alongside widening access to charitable resources via collaborations with state schools (Charity Commission, 2013b). This requirement could, therefore, make elite education more accessible by reducing financial barriers to entry. It could do so by offering the ‘benefits’ of education and conferred capital to the ‘public’ outside of those who would typically be able to attend these schools.

However, this paper argues that the legal public benefit requirement is too weak, discretionary, and insufficiently regulated to mitigate elite schools’ reproduction of privilege. It will be concluded that the state is conferring significant tax advantages on elite schools to benefit the few without seeking concomitant returns for the wider ‘public’ through the legal public benefit requirement. Given the equity issues between those who benefit and those who do not, this can be seen as problematic in policy terms.

2. Power, wealth, and privilege in elite education

A key characteristic of English elite charitable schools is their ability to charge high fees, which are not restricted by charity law (Re Resch’s Will Trusts, [1969]). Not all independent schools match Eton College’s £49,998 annual fees (Eton College, 2023) or the average boarding school fees of £39,006 annually (ISC, 2023). However, even the average annual fees for day schools of £16,656 are economically prohibitive for most families (ISC, 2023, p. 19). These fees continue to rise annually, with a 5.6% increase reported from 2022 to 2023 (ISC, 2023, p. 19). Although this may seem in line with expected inflation, Green, Anders, Henderson, and Henseke (2017, p. 18) state that private school fees have tripled in real terms since 1980. Although this has risen alongside incomes, they report that the average fee for one child has increased from 20% to 50% of median income. Alongside The Telegraph (Clarence-Smith & Butcher, 2023) reporting that fees are only likely to rise further, with a 22% increase for boarders expected in the next academic year to 2024, these statistics mark a significant decrease in the affordability (and therefore accessibility) of elite education. When the average household income in 2022 was £31,400, it is hard to believe that independent schools are for anyone but the affluent (Office for National Statistics, 2022).
Accordingly, families accessing private education are concentrated among the wealthy. Looking at the income ladder, at the 99th percentile (families with incomes upwards of £300,000), 60% are privately educated (Kynaston & Green, 2019, p. 2) – compared to 6% in the whole population. Income is not necessarily a direct correlation to social class (Bourdieu, 1977; Thompson, 2013), yet these fee levels undoubtedly mean those from higher social classes are more able to participate (Friedman, 2020). This is an example of economic privilege, which Howard (2010) argues is an advantage granted ‘not because of what one has done, but because of the social category (or categories) to which one belongs’ (p. 72). This privilege stems from the benefits of an individual’s ‘social, cultural and economic positions’ (McIntosh, 1988), which affords them the ability to meet the ‘economic barrier’ to attend these schools (Courtois, 2017).

Therefore, the children of these affluent families derive privilege from an elite education (Reay, 2006). Elite schools can help pupils translate capital into ‘usable resources and powers’ (Bourdieu, 2010, p. 114). Kenway and Koh (2015) refer to this capital as the ‘advancement practices of the rich and powerful’ (p. 1). As such, elite schools can be seen as maintaining the reproduction of privilege by offering families who can afford these high fees more opportunities and a path of progression.

Khan (2010) describes the benefits of an elite education as akin to ‘belonging to an elite club, where membership resulted in a lifetime of educational, financial and social privilege’ (p. 86). The nature of advantages of attending an elite school fit within the Bourdieu-Sian theory of reproduction (Bourdieu & Passeron, 1979) alongside the effectively maintained inequality hypothesis (Wakeling & Savage, 2015). These theories identify a self-perpetuating system of class advantage and renewal, through which private education can maintain socioeconomic inequalities (Marks, 2013). This accurately signifies the cyclical reproduction of privilege: being able to afford this education makes one statistically more likely to go to an ‘elite’ (Russell Group) university and achieve high-ranking jobs (Sutton Trust, 2019). Kynaston and Green (2019) refer to this as the ‘gilded path’ (p. 4) from prestigious independent schools to power and influence. This is sometimes called a ‘private school premium’ (Green et al., 2017).

Elite education, therefore, encourages the reproduction of class inequality through affording privilege (and thus more significant amounts of economic, social, and cultural capital) to only those who can afford to attend the schools. Economic capital can be utilised to pay fees, which is then converted into social and cultural capital (Bourdieu & Wacquant, 1998). This reproduction connotes a cyclical structure and shows that class divides are maintained by the systems that create them. Privilege is produced and reproduced in elite schools, thereby preserving class inequalities.

The legal status of these schools as charities exacerbates the cyclical reproduction of privilege. Charity law offers independent schools a tax-advantaged business model, which is of considerable fiscal benefit to them (Sibieta, 2023). Tax advantages create a ‘circular advantage’ for schools, lowering the cost of their business model and thereby enabling schools to invest in both staffing and facilities. In turn, they are able to market themselves to fee-paying pupils as providing a high-end education with excellent resources and amenities (Boden et al., 2020; James et al., 2022). Thus, the tax benefits accorded to schools mark a clear example of the law ‘reproducing broader economic and social privilege and inequalities’ (McDonald, Pini, & Mayes, 2012, p. 1).
It will be seen that the charity law framework cannot mitigate the reproduction of privilege evident in elite education. The law is unable to do so for two key reasons. First, the law does not require charities to provide more than a ‘token’ provision of public benefit (*Independent Schools Council v the Charity Commission and Others, [2011]*) and it affords charitable trustees significant discretion regarding how to meet these (already minimal) legal requirements. Second, there is a lack of oversight of public benefit provision by the charity regulator, the Charity Commission for England and Wales. Hence, independent schools’ provision of public benefit is varied and often minimal. This means that elite schools remain privileged institutions, not having to provide high levels of fee assistance or ‘open up’ their facilities for individuals who would otherwise not be able to afford elite education (Courtois, 2017).

3. The limitations of the charitable public benefit requirement

Taking into account their significant tax benefits, it is perhaps reasonable to expect charity law to impose substantial requirements on charities. All charities must be established for charitable purposes, which must be considered to be for the ‘public benefit’ (Charities Act, 2011, sec.4). Whereas a recognised list of charitable purposes can be found in statute (Charities Act, 2011, sec.3(1)), there is no statutory definition of ‘public benefit’. Rather, the concept has been developed throughout centuries of case law.

However, the legal public benefit requirement was strictly enforced only for a brief period following the Charities Act 2006, when the Charity Commission aimed to increase the amount of public benefit provided by fee-charging charities. This paper examines this period and discusses how this strict enforcement was short-lived. Since 2011, charity trustees have had extensive discretion in fulfilling the legal requirement to provide public benefit, with minimal oversight from the Charity Commission.

3.1. Public benefit: a weak legal requirement

The level of public benefit required to meet the legal threshold was never historically exacting. As the concept developed through case law, the courts tended to split the ‘public’ and ‘benefit’ (Morris, 1996). Crucially for fee-charging charities, ‘public’ was interpreted in case law as meaning that at least a ‘sufficient section’ of the public should be able to ‘benefit’ from its charitable purposes (*Verge v Somerville, (1924)*, p. 499). Charities were allowed to charge fees as long as they did not unreasonably restrict the previously defined ‘sufficient section’ of the public from benefiting (*Re Resch’s Will Trusts, (1969)* or exclude the poor (*Re MacDuff, (1896)*). This meant that independent schools with charitable status could not only benefit high-fee-paying individuals, but were also required to open up their institutions to meet the legal public benefit requirement.

However, there was no specified ‘level’ of public benefit that independent schools needed to provide (Morris, 1996). Rather, the law gave wide discretion to charity trustees to decide how they would meet their obligations (Picton, 2021). Trustees could meet the legal requirement however they wished, as long as they provided some ‘benefit’ to a ‘sufficient section’ of the public (*Verge v Somerville, (1924)*). Arguably, the only limitations to this trustee discretion were broad trustee duties, which require trustees to, for example, act in good faith and with skill and care (*Bristol & West Building Society v Mothew, (1998)*).
Although these duties limited trustee discretion, these were not specific to the public benefit requirement. As a result of differing interpretations among trustees on how to fulfil the public benefit requirement, there was a varying provision of public benefit in fee-charging charities.

In 2008, the Charity Commission altered its guidance on public benefit to increase how much public benefit charities had to provide. This came in response to the Charities Act 2006, which had been, in part, a response to the New Labour government’s focus on the charitable status of independent schools (Dunn, 2012). As such, it had a specific focus on fee-charging charities, such as schools (Charity Commission, 2008a; Synge, 2015). The guidance departed from extant understanding of public benefit developed from the case law. In doing so, it intended to reduce trustee discretion and increase the public benefit provided by each independent school (Charity Commission, 2008a, 2008b).

The guidance stated that people in poverty, referred to as the ‘poor’, must not be excluded from the opportunity to benefit; independent schools could not simply offer a ‘token’ benefit to those unable to afford fees (Charity Commission, 2008a, p. 26). Although the lexis ‘poor’ has broad meaning, the Charity Commission defined the term as being ‘persons destitute’ (Charity Commission, 2008a, p. 26). In this way, the Charity Commission’s definition of ‘poor’ made it more likely for charities to fail the public benefit test if they charged high fees (which had previously been allowed in law – see Re Resch’s Will Trusts, (1969)). This, unsurprisingly, had a marked effect on fee-charging elite schools.

The Charity Commission’s guidance suggested a proportionate model – the higher the fees charged, the more public benefit the independent school should provide. In introducing this prescriptive guidance, the Commission reduced trustee discretion, intending to bring consistency to public benefit provision and raising the level of public benefit required of fee-charging charities. This guidance encouraged independent schools to offer fee assistance, resources and facilities to those who could not otherwise afford such fees (Charity Commission, 2008b).

This attempted reform was welcomed by many who believed the Charities Act 2006 could encourage social mobility (gov.uk, 2004). However, the Independent Schools Council (hereafter ‘ISC’, the umbrella body representing 1,395 fee-charging independent schools in England and Wales) argued that too much public benefit was being demanded of independent schools at the expense of their trustees’ discretion. It sought legal clarification in the tribunal system. In Independent Schools Council v the Charity Commission and Others (2011) (hereafter ‘ISC case’), the Upper Tribunal found against the Charity Commission and their ‘overly prescriptive’ guidance, stating that it was legally incorrect and should be amended (para. 224). The Upper Tribunal held that the Charity Commission had exceeded its legal powers under the Charities Act 2006.

The judgement in the ISC case afforded more discretion to trustees, finding that charities only had to provide a ‘de minimis’ or ‘more than token’ provision of public benefit for the ‘poor’ (paras. 215-218). Crucially, the Upper Tribunal defined the ‘poor’ broadly. In contrast to the Charity Commission, which had defined ‘poor’ as those ‘destitute’, the Tribunal stated that the ‘poor’ included persons who were ‘quite well off’ (para. 179). This decisively changed the meaning of ‘charities must not exclude the poor’ (Re MacDuff, (1896)). As a result, Synge (2011; 2015) argues that charities can, in fact, exclude the poor as long as their terms do not explicitly state they do so.
The impact of this case is, regardless, significant for independent schools. There is now a less exacting standard for trustees to follow. Instead of the Charity Commission’s interpretation that those who are ‘destitute’ must not be excluded from a charity due to fees (thereby requiring high levels of alternative public benefit provision from these schools), the ISC case means that independent schools need now only demonstrate a ‘more than token’ or ‘de minimis’ provision for those ‘quite well off’ (paras. 179, 215-218). This means the legal requirement charities have to meet is extremely low.

In addition to the ISC case inhibiting the Charity Commission’s attempted reform and reducing the legal requirement for public benefit, it also confirmed the longstanding position that charity trustees have very broad discretion over how they provide public benefit. Now, a charity’s trustees ‘must decide what provision (above what would be minimal or token provision) to make to enable the poor to benefit from the charity’ (Fairbairn, 2023, p. 6). The charity sector is diverse, and different charities will approach the legal requirements differently, but the consequences of this affirmation, alongside the weakening public benefit requirement, are profound.

The Commission currently provides recommendations for independent schools specifically as part of their broader public benefit guidance. However, this is non-binding (Charity Commission, 2013a, p. 18). As such, even though the Commission recommends that independent schools offer fee assistance and partnerships with local state schools to meet this legal requirement, trustees have complete discretion on whether they wish to follow this guidance. The provision of public benefit by individual schools can, therefore, vary greatly, the issues of which can be viewed in the broader context of protecting and perpetuating independent schools and, thus, the interests of elites.

### 3.2. The lack of oversight in the charitable sector

In addition to the public benefit requirement being both minimal and discretionary, the Charity Commission also fails to effectively monitor charities’ compliance with this legal requirement. This paper will now explore how even the limited amount of public benefit independent schools must legally provide is completely unchecked.

Alongside publishing its aforementioned guidance in 2008, the Charity Commission established an oversight system aimed at improving the consistency of providing public benefit. Two types of oversight were implemented. The Commission introduced a Public Benefit Reporting requirement within Trustees’ Annual Reports and created a programme of Public Benefit Assessments. The Commission intended for these policies to work in tandem, increasing accountability and ensuring that charities meet legal public benefit requirements.

Whereas the public benefit reporting requirement merely altered existing law surrounding trustee reporting duties, the public benefit assessments marked a novel development in the oversight of charities. These assessments were intended to be more ‘detailed assessments of individual charities’ (Charity Commission, 2008a, p. 33). This included the Commission looking at the levels of public benefit provided by individual charities, with specific regard to any fees charged. This regulatory approach encouraged schools to carefully consider their fee levels and link their public benefit provision to the prices charged. By implementing oversight and monitoring, the process was intended to ensure consistent provision of public benefit across the independent school sector.
These assessments ran from 2008–11 and took the form of an audit of 20 registered charities, explicitly focusing on fee-charging charities to meet the ‘high level of public interest’ (Charity Commission, 2009, p. 4). Public benefit provision of five independent schools were evaluated among these 20 charities (Charity Commission, 2009, 2011). These assessments were thorough and consisted of a desk-based evaluation, a telephone interview, and an on-site visit to the charity. The Commission assessed whether each charity successfully provided public benefit by splitting areas of ‘benefit’ and ‘public’ into sub-principles. Particularly relevant for fee-charging charities were principles 2b and 2c: beneficiaries cannot be unreasonably restricted (2b), and those in poverty should not be excluded from the opportunity to benefit (principle 2c; see Charity Commission, 2009). As such, the Commission assessed whether means-tested assistance, including targeted bursaries, was being provided at each audited school to ensure the school had not excluded those in poverty from benefiting. This held these schools to a high standard, as in the guidance, the Charity Commission had defined those in poverty as being ‘destitute’ (Charity Commission, 2008a).

At the close of the first round of assessments, the Charity Commission reported that, in its judgement, two of the five schools had failed to satisfy the public benefit requirement, falling short of the sub-principles of 2b and 2c (Charity Commission, 2009). Despite this, the Commission did not remove them from the register but intended to work with them individually to produce improvement (Charity Commission, 2008a). Consequently, both schools created plans to offer ‘new or additional bursary assistance’ alongside ‘other educational benefits they provide in the local community’ (Charity Commission, 2009, p. 30).

Despite positive feedback that these audits ‘[levelled the] playing field for everyone’ (Verkaik, 2018, p. 114), the process lasted only for a short period. Only five independent schools were assessed on whether they were meeting their legal public benefit requirement. The Charity Commission cited insufficient resources as the reason for halting the audit process (Wiggins, 2010). Despite this, following the ISC case, it must be thought unlikely that the audits will return (Synge, 2015). This is even more unlikely as the Charity Commission guidance of 2008–09 was subsequently redacted.

Since 2011, the Charity Commission has only assessed the public benefit provision of one charity it deemed ‘controversial’ – a charity offering alternative medicine (Charity Commission, 2022). Since the last five formal assessments, there has been no specific evaluation of independent schools’ public benefit provision. Thus, the only remaining explicit method of public benefit oversight is the requirement for public benefit reporting in Trustees’ Annual Reports.8

The public benefit reporting requirement was introduced in the aftermath of the Charities Act 2006, adding to the existing requirement of charitable reporting in Trustees’ Annual Reports (Charities (Accounts and Reports) Regulations 2008). Charitable trustees must now explicitly report how their charities meet the legal public benefit requirement. Although the Commission likely never intended to check the public benefit of every charity, the hope was they would ‘raise public awareness of … [a] charity’s public benefit’ (Charity Commission, 2008a, p. 29). The Commission argues that the public availability of these statements means that it will ‘not … be the only ones judging how a charity carries out its aims for the public benefit’ (Charity Commission, 2008a, p. 29, emphasis author’s own).
However, this reporting requirement was only ever intended to be the ‘first step’ in public benefit oversight (Charity Commission, 2008a, p. 33). The Commission had intended for this reporting requirement to be used alongside the more rigorous public benefit assessments. Given this context, it is not surprising that the current oversight is ineffective. The reporting requirement was not intended to be the sole method through which oversight was achieved. Therefore, it does not impose a significant regulatory obligation on them to disclose public benefit information to the Charity Commission.9

Moreover, despite this requirement ‘not [being] … a cumbersome compliance burden on charity trustees’ (Harding & Decker, 2014, p. 325), even the limited obligations placed upon charities by the reporting requirement have limited compliance. In 2018, the Charity Commission reported that only half of charities’ annual reports (from a random sample of 105) demonstrated a ‘clear understanding’ of the public benefit reporting requirement (Charity Commission, 2018). Despite half of charities failing to meet reporting requirements, the Commission has not attempted to increase compliance.

The lack of active checking of public benefit provision by the Charity Commission has a significant impact. This is because schools are not held accountable or subject to any real oversight requirements. In the short period in which there was a more rigorous audit process, two out of five charitable schools failed to reach the desired benchmark. It is, therefore, reasonable to conclude that schools escape any significant accountability or reporting requirements with regard to their public benefit obligation.

4. The variation in independent schools’ public benefit provision

This paper has established that the legal requirement of public benefit for independent schools has developed to be a ‘minimal’ requirement. Trustees are also afforded vast discretion in deciding how to meet this legal requirement. This is only compounded by the lack of oversight by the Charity Commission. Unsurprisingly, this regulatory environment appears to have led to highly varied public benefit provision in two principal areas: fee assistance and partnerships with state-funded schools. It is essential to establish this variation since it explains the limited effect on the reproduction of privilege and the lack of justification of tax advantages for elite schools. The variation in fee assistance and partnerships will be discussed in turn.

4.1. Variation in fee assistance

Independent schools often provide scholarships and bursaries to meet the public benefit requirement, following the Charity Commission guidance issued in 2013 (Charity Commission, 2013b). Bursaries are explicitly offered to students who require financial support and are typically means-tested. Scholarships are awarded based on academic, musical, or athletic excellence rather than financial need. They are typically smaller awards.

Statistical difficulties should be noted here. It is often difficult to ascertain what fee assistance schools offer, as there is no overriding report on how all charitable independent schools are meeting the public benefit requirement.10 Here, data from the ISC will be used, although it is important to recognise that only 70% of ISC schools are charities.11
In its 2023 reports, the ISC stated that 183,434 pupils received fee reductions worth £1.2 billion (ISC, 2023, p. 20). This equates to about 33% of pupils receiving some reduction. This is a significant number, yet it is critical to analyse what this fee assistance looks like in practice. There is no doubt that there are examples of well-funded assistance targeted at people who cannot afford fees. For example, Christ’s Hospital provides fee assistance to more than 70% of pupils, costing over £18 million each year (ISC, 2021, p. 24).

Yet Christ’s Hospital is not typical. Generally, fees are more likely to be reduced than written off entirely. This is in line with the ruling in the ISC case, which states the requirement to include the ‘poor’ is satisfied even where provision is made to the relatively affluent. Only 1.6% of all bursaries and scholarships cover full fees (ISC, 2022). Thus, the pattern is for schools to subsidise fees rather than allow pupils to attend without paying fees. Kynaston and Green (2019) report that ‘while 16 per cent of [independent] school children from families in the bottom half of the income ladder received … a bursary or a scholarship, so too did 14 per cent of those from the richest families on the top ten rungs of the ladder’ (p. 127).

Therefore, the fact that 33% of pupils receive fee reduction could be constituted a ‘large number trick’ (Henry, 2018). In reality, very few pupils at these institutions are educated for free. At the same time, schools might skew towards less meaningful fee assistance in the form of minor scholarships. In 2018, for example, more funds were spent by independent schools on non-means-tested discounts than on means-tested bursaries (Henry, 2018).

At the same time, a large proportion of fee assistance (primarily in the form of scholarships) is given to the ‘school family’; in 2017, 61,957 independent school teachers’ children, children of alumni and siblings of existing or past students received £205 million in (primarily) non-means-tested scholarships (Verkaik, 2018). Where this is the case, school trustees ‘walk the line’ between providing a public benefit and providing a perk to their own staff.

When the sector is seen in an overview, the provision of bursaries and scholarships has not led to a significant increase in disadvantaged students attending independent schools (Van Zanten, 2015). There is no pattern of improvement or increasing inclusivity. Green et al. (2017) found ‘no evidence of any diminution in the social exclusivity of [independent] schools compared with pre-2001 years, nor of any change during the twenty-first century’(p. 37). From the perspective of the role that charity law might play in mitigating the reproduction of privilege, it appears that fee assistance is not making a practical difference over time.

4.2. Limitations of school partnerships

In addition to scholarships and bursaries, partnerships with state-funded schools may also be used to meet the legal public benefit requirement by contributing to educational provision in the local community (Charity Commission, 2013b). They are seen by the ISC as something mutually beneficial for pupils and teachers from both sectors, bringing people together across the class divide (ISC, 2021). However, as with fee assistance, the efficacy of these partnerships may be lessened by the significant discretion trustees enjoy in meeting an already minimal legal requirement.
The nature of partnerships varies from school to school. The ISC (2017) states that 892 schools 'play sporting fixtures with or against state schools' (p. 10) and 450 independent schools invite pupils to music lessons or performances. A small number of schools (156) seconded teaching staff, whilst 102 sponsored a state-funded school financially (ISC, 2018). One of the best-known partnerships is between Eton and Holyport College – where Eton’s role is said to include 'curriculum and pastoral support, sharing facilities, mentoring and combined professional development sessions' (ISC, 2017, p. 6). This could be argued to be a consistent, well-rounded partnership.

Some partnerships appear less substantial in nature. For example, Charterhouse has partnered with local state school Kensington Aldridge Academy to support teaching physics (Charterhouse, 2022), whilst Marlborough collaborates with Swindon Academy to offer Latin lessons (Marlborough College, 2022). Rugby has launched homework and mentoring clubs in local primary schools (ISC, 2021, p. 11). Although these activities may benefit the individuals involved in some ways, these are unlikely to provide a substantive public benefit for partnered state schools. Yet, due to a discretionary standard existing for public benefit, and the extent of trustee discretion, these examples could be the only provision of public benefit offered by schools and probably still meet the 'more than token' legal requirement.

Moreover, the provision of partnerships with state schools has reduced in recent years. In 2017, 86% of independent schools were in partnerships (ISC, 2017). By 2022 this had reduced to 67% (ISC, 2022, p. 20). This reduction was especially significant during the COVID-19 pandemic, which exacerbated the attainment gap between educational institutions (Clough, 2020).

Arguably, these partnerships may also struggle to mitigate elite schools’ reproduction of privilege because they do not diminish economic privilege and class reproduction at these exclusive institutions. In addition, the mere fact that there are unequal numbers of state and independent schools reduces the possibility of every state school benefiting.

Edkins and Seldon (2002) argue that the difficulties with partnerships can stem from suspicion from the state sector and resistance from independent schools. This limited provision comes even after direct government funding (Allen-Kinross, 2019). Moreover, as James et al. (2022) argue, one of the benefits of independent schooling is membership of an exclusive club – these networks are not reproduced through partnerships, and thus do not offer 'membership result[ing] in a lifetime of educational, financial and social privilege' (Khan, 2010, p. 86).

As such, partnerships appear ineffective in mitigating elite schools’ reproduction of privilege because the communities they intend to benefit remain largely unchanged. Looking forward, it is likely that 'the sector will remain, as a whole, as socially exclusive in the foreseeable future as it is now' (Verkaik, 2018, p. 228). Perhaps this is summed up by one state head teacher: 'There is a cultural chasm between us and them which won’t be breached by offering up their heated swimming pool on a Monday night’ (Verkaik, 2018, p. 237).

In practice, the reality of the public benefit delivered by these schools appears incommensurate with the significant and continuing tax benefits yielded by the state. This public benefit is de jure adequate in that it is 'more than token', but de facto it appears to offer little by way of beneficial return to the general public. The provision of public
benefit does not appear to mitigate the privilege perpetuated by the elite education system.

5. Conclusion: the limitations of charity law

This paper has assessed the relationship between charity, the law and elite schools. It has been argued that the state facilitates fee-charging independent schools through taxation advantages, with charity law requiring little from them in return.

Although, in principle, the legal public benefit requirement could help decrease inequality, the current legal framework does not mitigate elite schools’ reproduction of privilege. This paper has argued that these failures are a result of the public benefit requirement, which only legally requires these schools to provide a ‘more than token’ benefit to the ‘poor’, which is broadly defined as encompassing those ‘quite well off’ (ISC case, para 179). This is compounded by the extensive discretion charity trustees have in their delivery of public benefit, which remains largely unchecked by the Charity Commission.

Although not the primary focus of this paper, it is important to briefly consider the limitations of charity law reform as a method of improving the current regulatory system. A natural response to this article’s discussion of the inefficiencies of public benefit may be: could it be improved? However, the limitations of charity law’s flexibility, alongside previous failed attempts to increase this public benefit requirement, make this unlikely.

It could be argued that increasing the amount of public benefit that independent schools must provide would be effective at mitigating the ‘economic barrier’ to elite education (Courtois, 2017, p. 8). As the New Labour government intended, this would use the public benefit requirement to force these schools to benefit the wider public meaningfully. Indeed, this has previously been a suggested reform option by the Conservative Party (Department for Education, 2016b, p. 16). However, the feasibility of such reform is questionable. As this paper has discussed, the Charity Commission’s attempt to use the public benefit requirement as a tool to increase independent schools’ public benefit provision was previously unsuccessful (Charity Commission, 2008a; ISC case). This was despite public opinion supporting elite education reform at the time (gov.uk, 2004). In attempting to increase the amount of public benefit fee-charging charities provided, the Charity Commission came under scrutiny for minimising trustee discretion. As discretion is a central tenet of charity law, it seems unlikely that future reform could succeed where the Commission previously could not.

Moreover, returning to a system of public benefit assessments, although legally plausible, would likely have limited impact. This is because it is probable that these assessments could only determine whether the legal public benefit requirement is being complied with so as not to limit trustee discretion (Picton, 2021). As this paper has established, the legal requirement is incredibly limited due to the ISC case. As such, it would be unlikely to make a significant difference to independent schools’ provision of public benefit and, thus, to elite schools’ reproduction of privilege.

Unless significant changes are made to charity law or sustained pressure is applied by the government, reforming elite schools through the public benefit requirement appears to be ineffective. Perhaps the most effective reform would be the removal of charitable
tax advantages from independent schools. It is legally possible to remove certain tax advantages, as demonstrated in Scotland, where independent schools had their relief from business rates tax removed (Ford, 2020). Although these schools would still run as they are, the estimated £3 billion in tax breaks for elite schools would remove the ‘circular advantage’ of fiscal privileges for these schools, thereby mitigating inequality (Boden et al., 2020).

This reform option would concentrate on the removal of charitable benefits rather than taking away charitable status from these schools entirely. Despite being a popular reform policy (The Labour Party, 2019; Wood, 2023), the process of revoking the charitable status of elite schools would be ‘fraught with legal difficulties’ (Sloan, 2012). It would be far simpler, under law, to remove these advantages rather than remove elite school’s charitable status as a whole. This policy would halt the clear example of the law ‘reproducing broader economic and social privilege and inequalities’ (McDonald et al., 2012, p. 1) by affording taxation benefits to these schools. However, this would not be a revolutionary reform that would stop the generation of significant social and cultural capital for those who can meet the ‘economic barrier’ to entry (Courtois, 2017). It is unlikely that any reform within charity law could effectively mitigate the reproduction of privilege by elite schools to such a large extent.

The material basis for elite education and the associated elite-making processes are grounded in the materiality of capital that has endured for generations. As such, it is unsurprising that charity law has not mitigated the inequalities of these elite schools. The generation of privilege is maintained, and a persistent correlation between social class background and achievement still exists. Furthermore, not only does charity law fail to help or mitigate the situation, but it also enables these schools to accumulate more wealth through their relationship with the state via tax advantages. This only exacerbates these inequalities, allowing, as Persell and Cookson (1985) state, ‘relationships of power and privilege [to be] reproduced from one generation to the next’ (p. 114).

**Notes**

1. Seven of the nine schools are boarding schools. Whereas all of the schools were historically male-only, three (a third) of the schools are now co-educational, with a further two schools having co-educational options in the Sixth Form.
2. Unless otherwise specified, this paper will use the term ‘independent schools’ to refer to charitable fee-charging independent schools.
3. Charities are subject to additional regulatory oversight by the Charity Commission. When charitable, these schools may be subject to regulatory oversight by the Charity Commission, such as statutory inquiries and official warnings. These often occur after mismanagement by the trustees in relation to their duties, although they can legally be used to address a specific issue of public benefit provision (Charities Act, 2011, secs75A, 46).
4. The list of available charitable purposes includes ‘advancement of education’, which is the purpose that independent schools fall under (Charities Act, 2011, sec.3(1)(b)).
5. This legal requirement always intended to allow trustee flexibility (Lord Hodgson, 2012).
6. This requirement to benefit the ‘poor’ developed initially in case law (Re MacDuff, (1896)).
7. The limitation, as ever, being their general trustee duties. See Picton (2021).
8. It’s important to note that the Charity Commission has the authority to assess public benefit provision of charities as part of their broader power of statutory inquiry or after receiving a complaint from a member of the public. See footnote number 3.
9. Indeed, comparatively there are other jurisdictions that require more extensive monitoring of public benefit, such as OSCR in Scotland (Synge, 2015).
10. These statistics could be found on individual school websites or within the school’s Trustee Annual Reports on the Charity Commission website. However, no research has consolidated these reforms to give overall sector statistics.
11. Not only does this create complexities with the public benefit requirement as it appears non-charitable schools are also seemingly meeting this standard, but it also means some charitable schools do not fall in this statistic.
12. After all, the reason for removing these assessments was a lack of resources rather than the impact of the ISC case (Wiggins, 2010).

Disclosure statement
No potential conflict of interest was reported by the author(s).

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